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International Arbitration 2024

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Gary Born
Wilmer Cutler Pickering Hale and Dorr LLP

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Global Practice Guides

International Arbitration

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Gary Born

Wilmer Cutler Pickering Hale and Dorr

2024

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INTRODUCTION

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Wilmer Cutler Pickering Hale and Dorr LLP offers one of the world's largest and most experienced international arbitration and dispute resolution practices. The international arbitration group has been involved in more than 650 proceedings in recent years. Lawyers have successfully represented clients in a number of the largest institutional arbitrations and several of the most significant ad hoc arbitrations to arise in the past decade. The multinational team consists of nearly 70 lawyers, all of whom principally practise international dispute resolution. In addition to representing clients as counsel, many lawyers regularly sit as arbitrators in international arbitrations. The practice covers commercial and investment arbitration under the rules of all leading arbitral institutions and ad hoc arbitrations seated in a wide range of jurisdictions. It has represented individuals, companies, states and state entities. Lawyers have recently handled or are currently handling disputes under a wide range of international arbitration centres, and also have extensive experience with more specialised forms of institutional arbitration and ad hoc arbitrations.

Contributing Editor

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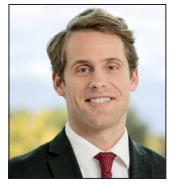

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Global Overview – International Arbitration 2024

The international arbitration landscape continues to be dominated by macroeconomic and geopolitical factors. Global inflationary pressures have proven to be more persistent than originally anticipated, borrowing costs have remained high and many major global economies are close to, or have already fallen into, recession. Macroeconomic instability has combined with geopolitical events including the use of sanctions against Russia, intensifying concerns about conflicts in the Middle East and a global supply chain crisis to present serious challenges for businesses across the globe.

This has led to a proliferation of disputes across a wide range of sectors. The areas that are seeing the most disputes are construction, mining, transport and energy; ones in which arbitration has historically been the preferred dispute resolution mechanism. Against this backdrop, it is unsurprising that most leading arbitral institutions reported a record – or close-to-record – caseload over the past year.

Russian Invasion of Ukraine

As the world began to emerge from the pandemic, the Russian invasion of Ukraine on 24 February 2022 triggered another large-scale humanitarian crisis. The war in Ukraine, which has continued into 2024, has caused a massive upheaval in people's lives and businesses across the globe.

The effect of Russia's invasion of Ukraine on the arbitration landscape has changed over time. Initially, in 2022, there was a sharp decline in the number of Russia-related arbitrations as reported by the London Court of International Arbitration (LCIA) and other major institutions. The ensuing disruptions, however, have triggered a large number of Russia-related disputes. This is because, since the invasion, many businesses have been forced to cease operations in Russia or have seen their operations taken over by the Russian government.

In 2024, several large companies including Carlsberg, Fortum and Uniper either commenced, or confirmed that they intend to commence, treaty claims against Russia for expropriation. The Russia-Ukraine conflict has also triggered a large number of commercial arbitrations, espe-

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cially in the mining, commodities and energy sectors as Russia's invasion of Ukraine and the ensuing sanctions has made the performance of numerous existing commercial contracts more difficult and, in some cases, impossible. This has resulted in a wave of commercial arbitrations as parties seek to suspend or terminate Russia-related contracts.

Technology and Generative AI

Investment in technology and AI continues to boom as companies have invested heavily, especially in the use of generative AI. This is having obvious and profound effects on the arbitration landscape.

Many major arbitral institutions are either already using AI, or considering it, for services including vetting and conflict checks, transcription and award scrutiny. There have not yet been any reports of tribunals using generative AI to assist with drafting awards, or preparing case summaries and the extent to which tribunals may rely on AI remains controversial.

A number of initiatives have emerged to address the use of AI in international arbitration. The most notable are the Guidelines on the Use of AI in Arbitration published by the Silicon Valley Arbitration and Mediation Center in late 2023, and the JAMS AI Rules published in April 2024. Another key, related development is the EU's AI Act, which is the world's first comprehensive AI law and provides for EU-wide rules on data quality, transparency, human oversight and accountability.

Together with an increased use of AI in the arbitral process, there has been a rise in technology and AI-related arbitrations. The International Centre for Settlement of Disputes (ICSID) has reported a significant increase in information and communication-related technology disputes. One such dispute that has been widely reported is Chinese telecoms giant Huawei's treaty claim against the government of Sweden over its exclusion from the 5G network. Investor-state technology disputes of this nature are likely to raise a host of new and topical issues including whether digital assets, blockchain, AI or decentralised assets qualify as investments.

Caseload of Arbitral Institutions

Arbitration continues to remain a preferred method of dispute resolution for many international businesses. A number of arbitral institutions recorded high numbers of new case filings. The International Chamber of Commerce (ICC) registered 890 new arbitrations in 2023, the third highest number in its history. Singapore International Arbitration Centre (SIAC) recorded 663 new case filings. Other institutions also recorded sizeable numbers with 377 new cases for the LCIA and 500 for the Hong Kong International Arbitration Centre (HKIAC).

The five most preferred arbitral institutions are the ICC, SIAC, HKIAC, LCIA and China International Economic and Trade Arbitration Commission (CIETAC). Each of these institutions continues to dominate the Queen Mary University of London and White & Case International Arbitration Survey, a recurring feature of the arbitration landscape that the industry has now grown used to seeing as a periodic barometer of its progress. In the most recent survey, the most preferred arbitral seat is London, with users citing the stability of its commercial law and highly regarded judiciary. Singapore was the second most popular seat, with users noting that it is receiving a larger share of Asian disputes as many US and Western companies have relocated out of Hong Kong.

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The Reform of the Arbitration Act (England and Wales)

In the UK, the process of reform of the Arbitration Act 1996 is nearing its conclusion as the new UK government has confirmed its intention to proceed with the reform. In September 2023, the Law Commission published its final consultation paper proposing reforms to the Arbitration Act 1996 focusing on confidentiality, independence of arbitration, discrimination, powers of arbitrators to adopt summary dismissal procedures and arbitrator immunity.

By far and above the most significant proposed reform, however, is to introduce a new statutory rule that, in the absence of an express choice from the parties of the governing law of the arbitration agreement, the applicable law will be the law of the seat. This reform, if implemented, would overturn the effects of Enka v Chubb, a Supreme Court decision of October 2020 that decided the vexed question of how to determine the law applicable to an arbitration agreement. In Enka v Chubb, the Supreme Court held that the default choice is the law of the contract. The Law Commission's report highlights complications arising from Enka and advocates a new statutory rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat.

New Arbitral Rules

In 2024, the HKIAC approved a new set of rules. These rules are noteworthy for the additional powers and duties they confer on the HKIAC. Under the 2024 Rules, the HKIAC may "take any measure necessary to preserve the efficiency or integrity of the arbitration". This includes powers to suspend or cease administration of the arbitration and, in exceptional circumstances, to revoke an arbitrator's appointment if the HKIAC concludes that an arbitrator has failed to fulfil their function. The new HKIAC Rules also contain new provisions addressing information security, the environmental impact of legal proceedings, multi-contract scenarios and additional powers for emergency arbitrators. These new provisions all improve the time and cost-efficiency of HKIAC arbitration.

The Saudi Center for Commercial Arbitration (SCCA) issued a new set of updated rules in 2023. Importantly, the 2023 Rules provide for the establishment of an SCCA court to perform an administrative role to support arbitrations that are administrated under the SCCA rules. The SCCA also provides for an online dispute resolution system for the resolution of low-value disputes as well as an electronic filing system. The 2023 Rules are some of the most advanced rules in terms of embracing the use of modern technology to improve the efficiency of the dispute resolution process. The Kingdom of Saudi Arabia followed up by issuing an updated Investment Law in 2024 that facilitates the establishment of foreign investments in Saudi Arabia. Together these measures are intended to provide an attractive investment climate for foreign investors.

The Shanghai International Economic and Trade Arbitration Commission (SHIAC), a leading arbitral institutions in the PRC, introduced new arbitration rules with effect from 1 January 2024. The 2024 Rules provide for emergency arbitration and interim relief, expanded provisions on joinder and consolidation, online arbitration using SHIAC's e-platform, and for the publication of awards with party consent.

The Development of Arbitral Jurisprudence

National apex courts have recently delivered several judgments that have had a meaningful impact on the development of arbitral jurispru-

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dence. Perhaps the most prominent of these that captivated the attention of the arbitration community were rendered by the UK and US Supreme Courts.

ZF UniCredit Bank GmbH v RusChemAlliance

The UK Supreme Court confirmed that English courts have the discretion to issue anti-suit injunctions to support foreign seated arbitrations where English law governs the arbitration agreement. Prior to this decision, the circumstances in which English courts would grant injunctive relief to support foreign-seated arbitrations were uncertain. This decision is important as it confirms that parties can request an anti-suit injunction from the English courts to enforce an arbitration agreement, even where the arbitration is not seated in England and Wales.

Smith v Spizziri

The US Supreme Court held that federal courts must stay, rather than dismiss, claims that are governed by an arbitration agreement. The decision is important as while a party can immediately appeal an order dismissing an action, there is no immediate right of appeal from an order staying the proceedings. The decision resolves a circuit split over whether Federal Arbitration Act, 9 U.S.C. § 3 requires a court to stay proceedings after compelling arbitration. The Supreme Court's pro-arbitration decision reasoned that staying, instead of dismissing, lawsuits subject to an arbitration agreement is consistent with the supervisory role that the Federal Arbitration Act envisions for the courts and allows parties to seek relief related to the arbitration without filing a new case.

Morgan v Sundance

Morgan v Sundance addressed the important question of the standard for determining whether a party has waived its right to arbitrate a dispute by first engaging in litigation. Overruling decisions in nine circuits, the Supreme Court unanimously held that there is no requirement for an adverse party to show that it suffered prejudice as a result of the litigation proceedings for a waiver of a right to arbitrate to arise. The decision is important, and may have wider ramifications because the Supreme Court reasoned that arbitration-specific procedural rules – such as a prejudice requirement – are incompatible with the FAA, even when those rules purport to support the pro-arbitration policies underlying the FAA.

ANDORRA

Law and Practice

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CASES & LACAMBRA

1. General

1.1 Prevalence of Arbitration

Andorra has embraced arbitration as an alternative dispute resolution mechanism relatively recently. While the Act on Arbitration in the Principality of Andorra (AAA), 47/2014, was adopted on 18 December 2014, it was not until 2018 that the Arbitral Tribunal of the Principality of Andorra (ATPA) was established through the 13/2018 Act.

In Andorra, there is a concerted effort to champion arbitration as the dominant dispute resolution method. Many Andorran businesses and key figures are gravitating towards arbitration due to its efficiency, its specialisation and the advantages it offers. Indeed, long before the approval of the AAA and the creation of the ATPA, arbitration in equity was already used as an alternative dispute resolution method in Andorra. Arbitration clauses have been included in many documents governing relationships between private parties, such as shareholders' agreements, prenuptial agreements, homeowners' association bylaws and employment agreements, among others. Likewise, the Andorran courts have consistently enforced arbitration clauses.

Further, since the approval of the new Civil Procedure Code, which entered into force on 1 May 2021, arbitral awards are automatically enforceable before the Andorran courts, resulting in quicker and easier enforcement of awards.

All these efforts to promote arbitration in Andorra have been recently reinforced by the collaboration agreement signed between the ATPA and the Madrid International Arbitration Center – Ibero-American Arbitration Center (CIAM – CIAR) to promote and develop alternative dispute resolution mechanisms. The agreement will enable co-operation between both institutions to elaborate and promote programmes, classes and seminars on arbitration, as well as to share knowledge and best practices and to encourage the relationship between professionals of both organisations.

1.2 Key Industries

To date, it is difficult to assess which industries are experiencing significant international arbitration activity.

1.3 Arbitration Institutions

The institution used for international arbitration is the ATPA, which was created by Act 13/2018

of 31 May 2018. No other arbitration institutions have been created since.

1.4 National Courts

In the Principality of Andorra there are no specific courts designated to hear disputes related to international arbitration. Nevertheless, the Andorran Superior Court is specifically competent for the recognition and enforcement of foreign arbitral awards as well as hearing motions to set aside an arbitral award.

2. Governing Legislation

2.1 Governing Law

In Andorra, both local and international arbitration are governed by the AAA.

The AAA is not based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law but was inspired by it, based on the need to promote commercial relationships and to have a faster and more specialised alternative dispute resolution mechanism.

2.2 Changes to National Law

There have been no significant changes to the AAA in the past year, nor is there pending legislation that may change the arbitration landscape in Andorra.

3. The Arbitration Agreement

3.1 Enforceability

International arbitration is a flexible process to resolve disputes, and the parties are free to agree on the law that will apply and the procedure to be followed by the arbitral tribunal.

An arbitration agreement will be valid and the dispute will be subject to arbitration as long as the requirements agreed upon by the parties to govern the arbitration agreement or, in their absence, the requirements set forth by Andorran law are met.

The legal requirements for an arbitration agreement to be enforceable are set out in Article 10 of the AAA. Pursuant to this article, the requirements are as follows:

- the arbitration agreement must express the parties' will to submit their disputes to arbitration, whether contractual or non-contractual;
- the arbitration agreement must designate the arbitration board or determine the procedure for its designation;
- the arbitration agreement may take the form of a clause in a contract or a separate document containing the express will of the parties to submit a specific dispute to arbitration;
- regardless of the chosen method, the arbitration agreement must be in writing;
- the arbitration agreement must be signed by all the parties concerned; and
- the arbitration agreement will be valid if it is contained in letters, telegrams or other means of telecommunication provided that the method used ensures its recording.

3.2 Arbitrability

An arbitration agreement will be valid and the dispute subject to arbitration when the rules and requirements agreed upon by the parties to govern the arbitration agreement and the applicable requirements set forth by the AAA are met.

The AAA stipulates that any issues freely decided upon by the parties can be subject to arbitration, with the explicit exception of labour and consumer matters.

3.3 National Courts' Approach

To date, there is no case law in Andorra on the law governing arbitration agreements or on the enforcement of arbitration agreements.

3.4 Validity

According to Andorran law, an arbitration clause is valid even when the contract containing such clause is declared invalid. Thus, its validity is not linked to the effectiveness of the rest of the contract.

Indeed, the independent nature of the arbitration clause with respect to the contract containing it is expressly provided for in Article 10.8 of the AAA: "The arbitration agreement is independent of the contract of which it forms part, or to which it refers, and a decision by the arbitral tribunal to declare the contract void shall not void ipso jure the arbitration agreement."

Therefore, Andorran law applies the rule of separability to arbitration clauses contained in invalid agreements.

4. The Arbitral Tribunal

4.1 Limits on Selection

The AAA allows the parties either to directly appoint the arbitrator(s) or to agree on the procedure to appoint them.

However, there are limits on the parties' autonomy to select arbitrators, set forth in Article 14 of the AAA:

- only individuals can act as arbitrators;
- the number of arbitrators on the arbitration board must always be an odd number;
- in the case of arbitration with a sole arbitrator, the arbitrator must be a lawyer; and
- in the case of arbitration with three or more arbitrators, at least one of them must be a lawyer.

In the absence of an agreement as to the number of arbitrators, a sole arbitrator will be appointed.

4.2 Default Procedures

If the method chosen by the parties for the selection of arbitrators fails, Andorran law provides for the following procedures.

- In an arbitration with a sole arbitrator, the arbitration institution indicated by the parties shall appoint the arbitrator. Failing this, the court shall appoint the arbitrator within a maximum period of one month.
- In an arbitration with three arbitrators, both parties shall nominate one arbitrator, and the two arbitrators thus appointed shall nominate a third arbitrator.

If the parties fail to reach an agreement, or the appointed arbitrators fail to appoint a third arbitrator within the legally prescribed period of time, the appointment shall be made by the arbitral institution designated by the parties.

If no arbitration institution has been appointed by the parties, the court shall appoint the arbitrator upon the request of any of the parties.

If the parties cannot agree on the number of arbitrators, the arbitration tribunal shall be composed of one arbitrator.

4.3 Court Intervention

According to the AAA, the court may intervene in the selection of arbitrators. The court will list three names for each arbitrator to be elected. It must bear in mind the requirements set forth by the parties or, in the absence thereof, the

requirements foreseen in the law, undertaking all means to ensure the independence and impartiality of the arbitrators.

The court's decision on the appointment of an arbitrator cannot be appealed except when the court rejects the request to appoint an arbitrator because the non-existence or invalidity of the arbitration agreement can be inferred from the documentation.

4.4 Challenge and Removal of Arbitrators

Under Andorran law, an arbitrator may be challenged only when circumstances arise that might cast doubt on the arbitrator's impartiality or independence.

Arbitrators may also be challenged when the conditions agreed by the parties or set forth by law are not met.

The parties may agree on the procedure to challenge arbitrators. Alternatively, they must follow the procedure set forth in the AAA.

An arbitrator appointed by a party can only be removed by that party for reasons of which it became aware after the appointment.

Arbitrators may also be removed if they are prevented from exercising their duties or if their duties are exercised with undue delay, and whenever the parties agree to it.

4.5 Arbitrator Requirements

Arbitrators appointed by the parties must remain independent and impartial during arbitration and therefore cannot have any personal, professional or commercial relationship with any of the parties.

An arbitrator must disclose any circumstances that prevent them from being impartial or independent. Prior to the acceptance of the appointment, the arbitrator must reveal all facts and circumstances that may cast doubts regarding their independence and impartiality before accepting their appointment.

The arbitrator must not have previously acted as mediator in respect of the same dispute, unless the parties agree otherwise.

A party may request the arbitrator's removal when the requirements of independence or impartiality are not met, or if the arbitrator does not comply with their duty of confidentiality.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

Article 3.1 of the AAA stipulates that any issues freely decided upon by the parties can be subject to arbitration, with the explicit exception of labour and consumer matters.

5.2 Challenges to Jurisdiction

Article 27 of the AAA expressly recognises the principle of competence-competence, which provides for the power of the arbitral tribunal to decide on its own jurisdiction, as well as on the following matters:

- the existence and validity of the arbitration agreement;
- the appointment of arbitrators;
- the arbitrability of the dispute; and
- any other plea which may prevent the review of the dispute.

5.3 Circumstances for Court Intervention

Should a judicial procedure be initiated in violation of an arbitration agreement, the Andorran courts can rule on the jurisdiction of an arbitral tribunal. If the existence and validity of an arbitration agreement are established, the courts will declare that they do not have competence over the matter.

Arbitral awards will only be reviewed by the courts if an action for annulment is brought against the award as set forth in Article 56 of the AAA, or when an appeal is lodged.

5.4 Timing of Challenge

The parties have the right to challenge the jurisdiction of the arbitral tribunal in court once the decision on jurisdiction is rendered.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

For questions on admissibility and jurisdiction, the court will accede to a deferential review.

5.6 Breach of Arbitration Agreement

Under the AAA, when a party commences court proceedings in breach of an arbitration agreement, the court may declare that it does not have competence and will uphold the arbitration agreement, unless it finds the arbitration agreement to be invalid. One of the parties must request the court to uphold the arbitration agreement, at the latest when filing their plea.

5.7 Jurisdiction Over Third Parties

Andorran law does not allow an arbitral tribunal to assume jurisdiction over third parties.

To date, there is no specific case law in Andorra on this matter.

6. Preliminary and Interim Relief

6.1 Types of Relief

Unless otherwise agreed by the parties, the arbitral tribunal may grant the interim relief it deems necessary as per any of the parties' request. In this sense, the arbitral tribunal may order one of the parties to:

- maintain or re-establish the status quo pending the resolution of a dispute;
- adopt or refrain from taking certain actions to prevent damage or interference in the arbitral proceedings;
- provide means of preserving assets to enable the proper enforcement of an arbitral award; and/or
- preserve evidence that may be relevant or pertinent to the resolution of the dispute.

The applicant for interim measures must prove the following before the arbitral tribunal:

- not adopting the interim measure will result in damages; and
- there is a reasonable chance that the applicant's claim on the merits of the dispute will be upheld; in any case, this decision does not prejudge the subsequent decisions of the arbitral tribunal.

The arbitral tribunal cannot impose interim measures on third parties who are not parties to the arbitral proceedings.

6.2 Role of Courts

Under the AAA, the existence of an arbitration agreement does not prevent the parties from requesting that the courts adopt interim measures, either before or during the arbitration proceedings. Neither the petition for nor the adop-

tion of such measures has an impact on the validity of the arbitration agreement.

Any interim relief adopted by the arbitral tribunal is binding and must be immediately executed.

The power of the courts to grant interim measures in arbitral proceedings is not affected by the country in which the arbitral proceedings are taking place. The court proceeds according to its own procedures.

Under the Andorran Code of Civil Procedure, interim measures include but are not limited to freezing orders, deposits, inventory and comments in public records.

6.3 Security for Costs

The arbitral tribunal may require the party requesting an interim measure to provide adequate security for the measure requested in order to prevent possible damages that may be caused by the adoption of the measure.

7. Procedure

7.1 Governing Rules

The procedure of arbitration in Andorra is governed by the AAA.

However, the parties are free to establish the procedure applicable to their agreement, the parties and the other participants in the arbitration proceedings.

In any case, the procedure established by the parties must respect the fundamental principles of due process, equality, rebuttal and the right to be heard.

7.2 Procedural Steps

The parties have full discretion to determine the procedure to be followed by the arbitral tribunal, the parties and all other participants in the procedure. If the parties do not agree on a specific procedure, the arbitral tribunal may stipulate the rules that will govern the arbitration procedure in the manner it deems the most appropriate. This includes the power to decide on the admissibility, relevance and usefulness of evidence.

7.3 Powers and Duties of Arbitrators

The Andorran legal framework does not determine the powers and duties of arbitrators in an exhaustive manner. However, from a detailed reading of the AAA, it can be concluded that the most relevant powers and duties of arbitrators include the following.

- Duties:
  - (a) to respect the duty of confidentiality;
  - (b) to act in accordance with the procedure previously established by the parties or by the law;
  - (c) to remain independent and impartial during the arbitration process;
  - (d) to recuse themselves if they cannot be impartial and independent;
  - (e) to act in accordance with the principles of due process, equality and rebuttal; and
  - (f) to render an award within six months from the date of the rebuttal plea, unless otherwise agreed by the parties.
- Powers:
  - (a) they may rule on their own competence;
  - (b) they may grant interim measures, if requested by one of the parties;
  - (c) they may appoint experts; and
  - (d) they may decide on the appropriateness and utility of the evidence presented.

7.4 Legal Representatives

There are no specific requirements or qualifications for the intervention of legal representatives within an arbitration process in Andorra. However, they must prove they are fully empowered to act on behalf of any of the parties.

8. Evidence

8.1 Collection and Submission of Evidence

Regarding the collection and submission of evidence, the parties' freedom to determine the procedure includes the power to set the applicable rules of evidence, which are subject to the principles of equality, review and rebuttal, at any stage of the procedure.

8.2 Rules of Evidence

Articles 44 and 45 of the AAA set forth the rules of evidence. The parties must provide, alongside their pleadings, all documents they deem appropriate, as well as any other means of evidence they wish to provide.

Unless otherwise agreed by the parties, the arbitral tribunal decides whether to hold hearings to present pleadings, evidence or oral conclusions, or whether the proceedings are to be conducted on the basis of documents and other written evidence without the need for a hearing.

The arbitral tribunal will summon the parties in advance to hold hearings and meetings to examine goods and documents. The parties may intervene personally or through their representatives and the hearing must always be documented.

Videoconferencing is permissible, provided the parties agree and the arbitral tribunal grants its approval.

A copy of all documents, expert reports and other information or evidence must be given to the parties. If a party possesses evidence, the arbitral tribunal may request the party to produce it.

8.3 Powers of Compulsion

Arbitrators are invested with the power to request any of the parties to produce the evidence they may have in their possession.

The arbitral tribunal, or any of the parties with the prior approval of the arbitral tribunal, may request the assistance of the Andorran courts to execute any means of evidence admitted by the tribunal.

Judicial assistance may consist of:

- executing means of evidence before the court and under its exclusive direction; and
- adopting the measures deemed necessary to execute the evidence requested by the parties before the arbitral tribunal.

The responsibility of assisting in evidence execution falls to the civil section of the court.

9. Confidentiality

9.1 Extent of Confidentiality

Confidentiality is one of the main principles of the arbitration procedure. However, with regard to international arbitration, the law provides that the parties must expressly agree for it to be confidential.

10. The Award

10.1 Legal Requirements

Pursuant to Article 52 of the AAA, unless otherwise agreed by the parties, an arbitral award must:

- be in writing and signed by the arbitrators composing the arbitral tribunal;
- be rendered within six months (extendable by reasoned decision for an additional period of two months) from the date of the submission of the statement of defence or from the expiration of the deadline for submitting the statement of defence;
- contain the date, the names and addresses of the parties, the names of the lawyers and arbitrators, the place of arbitration, a brief statement of the parties' claims, the evidence, and the decision;
- rule on costs, except when the parties agree otherwise;
- be motivated; and
- be duly notified to the parties once it has been issued, in the manner and within the timeline agreed by the parties.

10.2 Types of Remedies

The arbitral tribunal may award compensatory damages, rectification and injunctions. Punitive damages are not allowed.

10.3 Recovering Interest and Legal Costs

The AAA does not expressly provide for the possibility of recovering costs arising from the arbitration proceedings. The arbitral award must set the costs to be borne by each party, unless the parties have previously agreed otherwise.

The arbitral tribunal may order the defeated party to pay the costs of the arbitration proceedings. The costs include the fees and expenses of the arbitrators, as well as the fees and expenses of the parties' defence or representatives and any other expenses incurred in the arbitral proceedings.

11. Review of an Award

11.1 Grounds for Appeal

Article 55 of the AAA foresees the res judicata effect of the arbitral award.

An arbitration award may only be set aside by the Civil Chamber of the High Court of Justice in the following cases:

- when one of the parties proves that:
  - (a) the arbitration agreement by which the parties submitted to arbitration was not valid because of the incapacity of one of the parties or for any other reason;
  - (b) the appointment of the arbitrators composing the arbitral tribunal and the proceedings carried out by the arbitrators have not been properly notified;
  - (c) the arbitral award resolves a dispute not provided for in the arbitration agreement or exceeds the terms of the arbitration agreement; or
  - (d) the composition of the arbitral tribunal or the arbitral proceedings have not been in accordance with the parties' agreement or, in the absence of an agreement, with the law; or
- when the High Court, ex officio or at the request of the Public Prosecutor's Office, establishes that:
  - (a) the subject matter of the dispute is not arbitrable; or
  - (b) the arbitral award is contrary to international public policy.

The motion to set aside an arbitral award must be brought within two months of the date of notification of the award.

All documents certifying the adequacy of the claim must be attached to the petition as well as all means of evidence considered necessary. The decision of the Superior Court of Justice is binding and cannot be challenged on appeal.

11.2 Excluding/Expanding the Scope of Appeal

The AAA does not expressly foresee the possibility of excluding or expanding the scope of the appeal brought against the arbitral award. Grounds for appeal are numerus clausus.

11.3 Standard of Judicial Review

The standard of review is deferential. The Andorran courts may review any challenges set forth by law but cannot review the merits of the case.

12. Enforcement of an Award

12.1 New York Convention

On 19 June 2015, the Principality of Andorra ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards without any reservations.

12.2 Enforcement Procedure

The procedures and standards for enforcing an award are set forth in the AAA as well as in the Civil Procedure Act.

The arbitral decision is enforceable even if a petition to set it aside has been filed. However, the executed party may request the suspension of the execution as long as a bond or guarantee is offered.

Once the petition to set aside a decision is dismissed, the court will enforce the decision. At that time, the executor may request compensation for the damages caused by any delay in execution.

12.3 Approach of the Courts

The arbitration award is enforceable even when a motion to set it aside has been filed. However, the award may be suspended if the party seeking to suspend the award offers sufficient security.

On many occasions, the Andorran courts have acknowledged their inability to analyse the essence of the dispute submitted to arbitration. Regarding the enforceability of an arbitration award, the court must limit its duties to those attributed by law and can only justify denial of the enforceability of an award for the reasons legally foreseen.

Therefore, the execution of an arbitral award can only be rejected when any of the conditions set forth in Article 56 of the AAA are met. This same article empowers the court to set aside ex officio an arbitral award and deny its execution:

- when the subject matter of the controversy is not arbitrable; or
- when it is contrary to public policy.

13. Miscellaneous

13.1 Class Action or Group Arbitration

There is currently no legislation in Andorra that expressly provides for class actions or group arbitration.

13.2 Ethical Codes

There is no specific ethical code that is directly applicable to counsel or to the members of the arbitration tribunal.

In this sense, according to Article 39 of the AAA, any arbitration procedure shall respect the principles of equality, hearing, confidentiality and contradiction.

Additionally, arbitrators are expected to act with independence and impartiality. Failure to comply with any of these requirements may lead to the arbitrators being challenged or removed.

13.3 Third-Party Funding

To date, there are no provisions or restrictions on third-party funders.

13.4 Consolidation

There are no specific provisions on consolidation of arbitration proceedings. However, the parties may agree to the consolidation of separate proceedings.

13.5 Binding of Third Parties

The scope of the award is limited only to the parties who were involved in the negotiation and the arbitration process.

As such, the consequences of the arbitration proceedings cannot be extended to third parties outside the arbitration proceedings.

Furthermore, Article 29.3 of the AAA prohibits the extension of interim measures to third parties.

AUSTRALIA

Trends and Developments

Contributed by:
Jonathon Redwood SC, Boxun Yin, Brendan Hord and Lucas Bastin KC
Banco Chambers

Banco Chambers is based in Sydney, Australia and is a widely acknowledged for advocacy and advisory services that are effective, commercial and client focused. The Chambers has 65 barristers, including some of the country's top silks. The Chambers operates across a wide range of areas but has a market-leading reputation in commercial litigation, international law, competition and antitrust, class actions, and public law litigation. Many of Australia's most significant or landmark cases in these areas from recent years have involved appearance work from Banco barristers. Although based in Sydney, Banco Chambers barristers practice nationally and internationally. Members of its international law practice group appear in arbitrations seated throughout Australia, South East Asia and London, as well as in enforcement and recognition proceedings before Australian courts. Recent cases include Banco counsel appearing for the Republic of India and the Kingdom of Spain in recognition and enforcement actions in the Federal Court of Australia.

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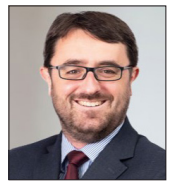

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Introduction

Australia has continued to mature in recent years as a forum for international arbitration. There has been steady growth in Australia as a seat and venue for arbitrations with an international element.

Australian courts, including the High Court of Australia, continue to be supportive and protective of arbitration as a consent-based forum for dispute resolution and generally act with great restraint, intervening only minimally and where necessary to protect the integrity of the arbitral process. The general trend in more recent times is for most proceedings relating to international arbitration, in the first instance, to be heard and determined by the specialist arbitration judges in the Federal Court of Australia.

The decisions of Australian courts on arbitration-related issues are frequently noted and generally respected by the global arbitration community. For example, the approach of the Federal Court of Australia on whether a matter is capable of settlement by arbitration was considered and expressly adopted in the recent twin decisions of the Privy Council in FamilyMart China Holding v Ting Chuan [2023] UKPC 33 and the Supreme Court in Republic of Mozambique v Credit Suisse International [2023] UKSC 32. Additionally, former eminent Australian judges sit on the Singapore International Commercial Court and Hong Kong Court of Final Appeal and continue to deliver arbitration-related judgments of international significance in that capacity. Likewise, Australian courts frequently refer to and draw upon the decisions of courts in other leading arbitral jurisdictions, as noted below in the two recent significant decisions of the High Court of Australia.

This article summarises some recent trends and developments in Australia's arbitration landscape. The first section addresses two significant recent decisions of the High Court of Australia concerning international commercial arbitration and the UNCITRAL Model Law, the second addresses recent and forthcoming court decisions regarding investor state arbitration, and the third addresses possible areas for reform and trends.

International Commercial Arbitration

August 2024 saw two major judgments of the High Court of Australia. Each decision has significant implications for arbitration in Australia and both decisions contain several important statements of principle of wider international significance.

Tesseract International Pty Ltd v Pascale Construction Pty Ltd [2024] HCA 24

The background to this dispute was that legislatures in Australia had passed proportionate liability statutes that limited a respondent wrongdoer's liability to an amount which "the Court" considers just having regard to the extent of the wrongdoer's responsibility for the loss. Those statutes also enabled the respondent wrongdoer to join a third-party, alleged concurrent wrongdoer to the proceedings such that each of the alleged wrongdoers are bound by the determination made as to proportionate liability in a single proceeding. The question was whether proportionate liability statutes applied to arbitration, notwithstanding that third-party wrongdoers could not be forced to join an arbitration, with the consequence that a plaintiff would need to separately institute proceedings in a court against other wrongdoers to achieve full recovery of its loss.

The High Court held by a five to two majority that proportionate liability statutes were capable of applying in arbitration through the parties' choice of substantive law under Article 28 of the Model Law. However, the majority Justices took subtly divergent pathways to that conclusion, reflecting the difficulty and complexity of the issue.

Ultimately, the majority largely analysed the question through the analytical framework of party autonomy embodied in the Model Law as advanced by the Australian Centre for International Commercial Arbitration (ACICA) in its written submissions intervening as amicus curiae.

First, the critical question of proper characterisation of the relevant statute served as the starting point for analysis, since it would only be caught by any choice of substantive law under Article 28 if it were substantive. It was common ground that the parties had made a choice of the substantive law of South Australia under Article 28, whereas they had not chosen any rules of procedure under Article 19. Effectively, a plurality (Gageler CJ at [58]-[64], and Jagot and Beech-Jones JJ at [364]) considered that that meant that the substantive aspects of the proportionate liability statutes applied as a matter of party choice (subject only to considerations of arbitrability and public policy), whereas the procedural aspects did not apply since there had been no such choice.

Second, on the premise that the proportionate liability laws were relevantly substantive, the question arose as to how the statutory language could be "moulded" to enable it to be applied to an arbitration, in circumstances where it was expressed to apply to a "Court". The plurality concluded that the central provisions of the proportionate liability statutes were capable of being applied as substantive laws of South Australia in a sufficiently similar way to a court. They took the view that the joinder provisions of the proportionate liability statutes were not critical to the operation of the central operative provisions dealing with the rights and liabilities of the parties. Gordon and Gleeson JJ (at [99]-[100]) concluded that whether a substantive law is capable of application depends on whether it can be adapted to the arbitral context without altering its effect, such that what is applied can still be described as the substantive law chosen by the parties. They also did not regard the provisions directed to joinder as integral to the operation of the proportionate liability laws.

Third, the choice of curial law (lex arbitri) dictates the extent to which notions of arbitrability and public policy affected the jurisdictional capacity of the tribunal to apply the substantive law otherwise required by Article 28. To that extent, notions of arbitrability and public policy are logically anterior to the question of applicable substantive law and do not simply arise at the level of recognition or enforcement. Rather, because the tribunal could only apply the substantive law if it had jurisdiction to do so, it is incumbent on the tribunal (as part of its duty to render an enforceable award within jurisdiction) to have regard to these considerations: Gageler CJ at [45]-[48], Gordon and Gleeson JJ at [139]-[140], Jagot and Beech-Jones JJ at [290], [337]-[339].

The implications of this are potentially far-reaching. There may now be a need for tribunals in arbitrations seated in Australia to raise issues of arbitrability and public policy proactively to ensure they are properly addressed in the award.

Fourth, neither arbitrability nor public policy deprived the arbitral tribunal of jurisdiction to

apply the substantive law as contained in the proportionate liability statutes.

As to arbitrability, Gageler CJ at [70]-[71], Gordon and Gleeson JJ at [106] and [140] and Jagot and Beech-Jones JJ at [341] held that the subject matter of the dispute was arbitrable. Gageler CJ said that the question of non-arbitrability reduces to a single question of statutory interpretation: does anything in the statutory text or structure or subject matter or purpose evince a legislative intention to exclude arbitration of the statutory rights or liabilities in issue in the arbitration? The proportionate liability laws do not evince any such legislative intention as they are concerned with the determination of substantive rights between private parties.

As to public policy, only Gageler CJ at [74]-[75] and Jagot and Beech-Jones JJ at [342]-[346] and [356]ff considered the question, holding that applying the statute in an arbitration did not contravene public policy. Gageler CJ recognised that the modern trend is to construe public policy narrowly and it is informed by the statutory objectives to encourage the use of arbitration in international trade and commerce and to facilitate the fair and impartial resolution of commercial disputes without undue delay and expense.

There were strong dissents from Edelman and Steward JJ. Edelman J (at [149]) concluded that the substantive aspects of the proportionate liability laws were inextricably intertwined with its procedural aspects (which could not be applied in arbitrations) such that the parties should be taken to have excluded those laws from their implied choice of South Australian substantive law. Steward J held that by severing the joinder provisions of the proportionate liability laws their essential meaning was altered leaving a substantially different law. His Honour found that absent express party choice to apply such a modified regime, the proportionate liability laws could not be applied to arbitration in that "distorted" and incomplete way.

Implications

Many of the above points were not fully argued before the High Court or in the Court of Appeal below. However, it is clear that the High Court's decision has far wider implications beyond the immediate outcome, which was that proportionate liability statutes applied in arbitration where those statutes form part of the system of substantive law expressly or impliedly chosen by the parties to resolve their arbitration under Article 28.

More than anything, the various judgments also emphasise the need to carefully distinguish between, and properly ascertain, the substantive, procedural and curial law, since the choice of each had distinct consequences: see esp Gageler CJ at [19]-[29], Jagot and Beech-Jones JJ at [311], Edelman J at [158]. That is so even in a case, such as this, where all connecting factors appeared to point to the same jurisdiction.

However, having identified the need to distinguish properly between the substantive, procedural and curial law, the Court differed both as to how that was to be done, and additionally as to the role and content of inferences and implications that may be drawn from the choice of one or the other.

Gageler CJ at [19]-[29] considered that a choice of substantive law (under Article 28) or a choice of curial law did not dictate the choice of the rules of procedure (under Article 19). Jagot and Beech-Jones JJ at [372]-[381] did not consider that the choice of arbitration through an arbitration agreement and the choice of substantive

law involved any contractual intention to modify the substantive law that had been chosen, or any contractual intention that the dispute should only be resolved in the courts. In so doing, each of Gageler CJ at [53] and Jagot and Beech-Jones JJ at [381] rejected the proposition that the Fiona Trust presumption (that rational actors will be presumed to have intended that all disputes arising between them will be decided by the same court or tribunal) could operate to support an inference of mutual contractual intention to exclude the proportionate liability law.

Edelman J disagreed strongly, seeing at [151] significance in focusing on the scope of the implied choice of substantive law, the absence of any choice of procedural rules by the parties, and in the legislative background to the development of the proportionate liability statutes. In so holding, his Honour developed the Fiona Trust presumption to conclude at [213]-[223] that the parties were not to be taken as incorporating substantive and procedural rules of law in a manner which would have required a combination of arbitration and litigation to resolve the dispute finally.

Steward J considered at [274] that where the parties had only impliedly chosen the applicable substantive law, the principle of party autonomy was "largely irrelevant".

Importantly, the reasoning of all the Justices appears to accept that the parties can expressly opt-out of the operation of the proportionate liability statutes in their selection of the content of the substantive law to be applied under Article 28 of the Model Law (although where the substantive law itself excludes the possibility of such an opt-out – eg, Section 7(3) of the Civil Liability Act 2003 (Qld) – did not arise and was not addressed). In that sense, as Edelman J noted (at [153]), the conclusion of the majority only represents a default rule. Consistently with party autonomy, parties that wish to exclude proportionate liability laws from their arbitration should (subject to the above) be able to do so by an express exclusion in their arbitration agreement. This will naturally require a good degree of forward planning when drafting the underlying transaction documents and arbitration agreement alongside the choice of a particular Australian jurisdiction as a seat.

CBI Constructors v Chevron Australia [2024] HCA 28

In this decision, the High Court considered the implications of bifurcating an arbitration and the extent of a supervisory court's role in reviewing a tribunal's finding that it was not functus officio, in the context of the ground for setting aside an arbitral award in Article 34(2)(a)(iii) of the Model Law.

A tribunal had bifurcated the arbitration generally between liability and quantum. It had issued a first award on certain liability issues. When the claimants sought to agitate additional liability issues, the respondent objected on the basis that the claimants were precluded by preclusive estoppel from agitating those issues, and that the tribunal was functus officio in respect of liability issues more generally. The tribunal overruled that objection, holding in a second award that the claimants were not so precluded and that the tribunal was not functus officio.

The respondent applied to set aside the second award on the basis that the tribunal's finding that it was not functus officio was a jurisdictional question which the Court could and indeed must reconsider de novo.

The majority (Gageler CJ, Gordon, Edelman, Steward and Gleeson JJ) at [26] upheld the principle that an arbitrator was functus officio in relation to the issues to which an interim award relates, relying upon Fidelitas Shipping [1966] 1 QB 630 at 644 and its subsequent positive international treatment including in leading commentaries, and that this served to inform the meaning of Article 34(2) of the Model Law. Their Honours continued at [34], [38] and [39] that the question of whether a tribunal was functus officio was one that went to an arbitral tribunal's jurisdiction, and that that was so even if the tribunal had made findings within jurisdiction which also underpinned its findings as to its jurisdiction. That is because "[w]hether an arbitral tribunal has exhausted its authority precedes, and is separate from, any preclusion by way of an estoppel": at [36]. In reviewing the question of jurisdiction, the majority emphasised the need to identify the jurisdictional question narrowly so as not to stray into the merits: at [41]. Nonetheless, the standard of review to be applied on a jurisdictional question is de novo, rather than substantial or absolute deference: at [43]. That is so even though the basis on which the jurisdictional question was to be decided was one of interpretation of the tribunal's own procedural orders: at [47]. (On this, the dissentients were in agreement: at [92]).

In dissent, Jagot and Beech-Jones JJ held that there was nothing in the Model Law or in the parties' agreement which justified curial intervention in relation to an interim award. As to the former, their Honours held at [74] that the tribunal's mandate had not been exhausted under Article 32 of the Model Law, since there was no final award, and that the reasoning in Fidelitas Shipping did not survive the Model Law: at [80]-[81]. As to the latter, and in reliance upon the Hong Kong Court of Final Appeal in C v D (2023) 26 HKCFAR 216 at [47] per Ribeiro PJ, the parties were not lightly to be taken as having agreed to curial intervention. Moreover, there was no dispute that the substantive dispute fell within the tribunal's jurisdiction; instead, what was contended was that there was a procedural jurisdictional limitation on the submission to jurisdiction. Here, no such intention could be imputed to the parties, since by their arbitration agreement they had opted to submit their disputes "exclusively and finally" to "binding" arbitration: at [84]-[88].

Implications

This decision will have great practical significance for the common practice of bifurcating hearings. Tribunals would be well advised to expressly reserve their jurisdiction to consider matters addressed in interim awards. They should in any event draft bifurcation orders with great care, since it is now clear that they are liable to be parsed through closely by a supervisory court with a view to deciding, on a de novo basis, whether the tribunal's authority has relevantly been exhausted such that it is functus officio.

Investment Arbitration

Investment arbitrations – Australian investors as claimants

Australian investors continue to be important users of investment arbitration as claimants. There are at least four pending investment arbitrations brought by Australian claimants, all in the mining industry. And in late July 2024, Indo Gold Pty Ltd, a subsidiary of Panthera Resources plc, announced that it had issued a notice of arbitration against India under the Australia-India Bilateral Investment Treaty.

One important recent decision is that of Nachingwea UK Limited v Tanzania, International Centre for Settlement of Investment Disputes

(ICSID) Case No. ARB/20/38, brought by UK subsidiaries of Indiana Resources, an Australian miner. Here, Tanzania had sought annulment of a USD77 million ICSID award. The claimants then sought summary dismissal under ICSID Rule 41(5), on the basis that the grounds for annulment were "manifestly without legal merit". In February 2024, an ICSID ad hoc annulment committee ordered summary dismissal of most grounds for annulment advanced, permitting only 2 out of 21 such grounds to proceed.

Investment arbitrations – Australia as respondent

Australia is currently facing a number of investment arbitration claims, all filed or threatened to be filed by Zeph Investment Pte Ltd, a Singaporean company affiliated with the Australian businessman and former politician, Clive Palmer. Together, the claims by Zeph are in the hundreds of billions of dollars.

All remain in their preliminary stages. The most progressed claim is that under the ASEAN-Australia-New Zealand Free Trade Agreement, in relation to the impact of extraordinary legislation passed by Western Australia targeting Zeph's Australian subsidiary, Mineralogy Pty Ltd. One consequence of that legislation was to obliterate Mineralogy's rights to pursue claims against Western Australia, and to declare two existing arbitral awards (and the arbitration agreements underlying them) invalid and of no effect. It also entitled Western Australia to claim very wide-ranging indemnities to the extent proceedings were ever brought by Zeph or Mineralogy in any way challenging the legislation destroying their adjudicated entitlements under various mining leases. In November 2023, the Geneva-seated UNCITRAL tribunal declined to issue interim measures, largely in light of written undertakings given by the Attorney-General of Western Australia. It also declined to issue interim measures to restrain criminal proceedings, recognising the State's sovereign prerogatives.

Two other claims by Zeph in respect of investments in Queensland have yet to lead to any publicly available decisions or awards on any substantive issues, but have been reported widely in the press.

It remains to be seen whether Australia's attitude to the desirability of the investment treaty regime will be affected by these disputes. To date, however, with results like those in White Industries v India and Nachingwea UK Limited v Tanzania, investment arbitration could be viewed as having generated a net financial benefit to Australia.

Court judgments

Recent investment arbitration-related decisions from the courts have focused on the aftermath of the landmark judgment Kingdom of Spain v Infrastructure Services Luxembourg sàrl (2023) 275 CLR 292. In that case, the High Court held that Spain's entry into the ICSID Convention (and in particular Arts 53–55 thereof) constituted a waiver of foreign State immunity from the jurisdiction of the Australian courts to recognise and enforce (but not to execute) a binding ICSID arbitral award.

Three sets of proceedings – each ongoing – are worth noting.

First, the investors in Infrastructure Services have since sought to execute that award, and relevantly obtained orders ex parte requiring Spanish consular officers in Australia to attend court to be examined for the purpose of identifying what assets Spain has in Australia against which execution might be pursued. The Federal Court held that ordering Spain to furnish security

for costs did not infringe against Spain's consular immunity or privilege: [2024] FCA 236. That decision is on appeal but has yet to be heard. Notably, Australia's Foreign States Immunities Act 1985 (Cth) does not have the prohibition against foreign State defendants being subject to orders for injunctive relief found in Section 13(2) of the UK's State Immunity Act 1978 and its analogues.

Second, investors from EU member states have continued to pursue recognition and enforcement against Spain. In May 2024, the Federal Court of Australia heard oral argument in proceedings against Spain to recognise and enforce the awards in 9Ren, NextEra, RReef Infrastructure and Watkins. Spain has sought to resist enforcement including by application of the conflicts rule of primacy, or alternatively on the basis that the otherwise binding nature of the award under Article 53 of the ICSID Convention has been modified inter se as a matter of customary international law or by operation of Article 30 of the Vienna Convention on the Law of Treaties. Additionally, two of these proceedings raise the question of whether a purported assignee of an ICSID award has standing to seek recognition and enforcement. Parallel recognition and enforcement proceedings are underway in other jurisdictions; the interaction of these judgments as between the various enforcement jurisdictions will be very interesting.

Third, in CCDM Holdings v India (No 3) [2023] FCA 1266, the Federal Court of Australia held that India had waived its immunity by agreement and thereby submitted to the jurisdiction of the Australian courts by ratifying the New York Convention. The Court held that by doing so, India had submitted to jurisdiction "by way of clear and unmistakeable necessary implication", since the obligation of all contracting states to recognise arbitral awards as binding and to enforce them was a promise made by each contracting state to every other contracting state, such that to oppose recognition and enforcement on State immunity grounds would be inconsistent with that promise. In so doing, the Court took the High Court's judgment in Kingdom of Spain one step further and applied it to the New York Convention.

Additionally, the Court held that at the stage of considering waiver of immunity, it was not necessary to determine whether the arbitration agreement was valid or applicable; instead, all that was required was that there appeared to be an arbitration agreement on its face. The validity or applicability of that arbitration agreement was instead to be dealt with at the later stage of considering whether the relevant ground for resisting recognition and enforcement under the New York Convention was made out.

The appeal in respect of this judgment was heard by the Full Federal Court in May 2024, and judgment remains reserved.

Reform and Trends

Several trends can be observed and are expected to continue. First, the number of international arbitrations in Australia will continue to increase in the next decade. The Australian arbitration legal community is much larger and more sophisticated than ten years ago. The continuing return of many Australian arbitration practitioners from arbitration hubs such as London, New York and Hong Kong will accelerate this trend. The desirability, in appropriate cases, of arbitration is now much better understood by the Australian legal disputes community than 10-20 years ago.

It is also expected that the relative composition of arbitrations in Australia will change. Histori-

cally, arbitrations in Australia have been heavily concentrated in construction. This will remain a large proportion of arbitration disputes but disputes in other areas, including arising from renewables and climate change issues, are likely to increase. This coincides with the Australian government's ambition to make Australia a renewables global powerhouse.

Second, Australia will continue to be a reliable jurisdiction for judgment creditors to seek recognition and enforcement of foreign arbitral awards, and related relief, and to test difficult legal issues in this area. The accumulation of jurisprudence and expertise in this area will continue to develop and grow. Notably, this vein of decisions by Australian courts has been considered abroad – eg, in Infrastructure Services v Spain [2023] EWHC 1226 (Comm) and Border Timbers v Zimbabwe [2024] EWHC 58 (Comm), both of which have been appealed to the Court of Appeal.

Third, the pool of arbitrators available from Australia for arbitrations in Australia and in the Asia-Pacific will continue to expand in size, quality and diversity. The demand for reputable Australian arbitrators in major commercial arbitrations across the Asia-Pacific will continue to increase.

In terms of reform, if Australia is to continue to mature as a viable arbitration venue it would benefit from regular legislative reform, as in other leading arbitral jurisdictions. There are several areas where legislative reform would be desirable to reflect international best practice. Australia might also benefit from having all international arbitral issues arising under the Model Law (even if only on appeal) dealt with by a single intermediate commercial court with specialism in international matters. As arbitration further matures and grows in Australia, Australia would also likely benefit from a state-of-the-art arbitral centre supported by the Commonwealth and the State governments, the business and legal community and the Australian Centre for International Commercial Arbitration.

AUSTRIA

Law and Practice

Contributed by:
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KNOETZL

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KNOETZL is Austria's premier dispute resolution powerhouse, which has successfully developed into Austria's largest dispute resolution team. The arbitration practice encompasses international commercial arbitration, investment protection, and arbitration-related court proceedings. Key industries include construction and engineering, energy, banking, automotive, aviation, IT and telecommunications, life sciences, healthcare and pharmaceuticals. Members of the arbitration team have successfully acted as counsel in some of the largest and most complex disputes in the CEE region in recent decades, under all the major arbitration rules. KNOETZL lawyers act as arbitrators in a wide array of industries. Members of the firm are recognised as leading arbitration specialists and hold roles in major arbitral institutions and associations.

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KNOETZL

1. General

1.1 Prevalence of Arbitration

Austria has long been established as a European hub for international arbitration and Vienna – in particular, as the capital city – is a preferred venue for arbitrations related to the SEE and CEE regions. The legal community boasts a number of arbitration specialists providing high-end counsel and arbitration services. The Vienna International Arbitral Centre of the Federal Economic Chamber (VIAC) provides excellent administration of international arbitrations. The relevance of Austria as a seat for arbitrations is reflected by the opening of a regional office of the Permanent Court of Arbitration (PCA) in Vienna. This development is set to further boost the importance of Vienna as a significant arbitration hub.

1.2 Key Industries

There has been a notable increase in arbitration activity in domestic disputes, particularly concerning energy-related disputes, as well as in construction and engineering. In the international context, energy-related disputes are on the rise in Austria, owing to the changing dynamics in the European energy market affected by the Russia–Ukraine war. The financial services and banking sector is also increasingly turning to arbitration for dispute resolution. This increase is primarily due to the higher perception of arbitration as a suitable form of dispute resolution for complex disputes but also disputes in the finance market.

1.3 Arbitration Institutions

The majority of international arbitrations in Austria are administered either by the VIAC under the Vienna Rules or by the International Court of Arbitration of the International Chamber of Commerce (ICC) under the ICC Rules of Arbitration.

A particular point of note is that VIAC issued as the first European arbitral institution a specific set of Investment Arbitration and Mediation Rules, in force since 1 July 2021, and thus expanded its institutional competence to investment arbitration cases.

A number of arbitrations with seat in Austria are also conducted under the rules of other renowned arbitral institutions, such as the German Arbitration Institute (*Deutsche Institution für Schiedsgerichtsbarkeit*, or DIS), the LCIA, and the Swiss Arbitration Centre. Austria is often also the chosen place of arbitration in ad hoc proceedings conducted under, for example, the UNCITRAL Arbitration Rules.

1.4 National Courts

Austrian law provides for direct recourse to a specialised chamber of the Austrian Supreme Court (*Oberster Gerichtshof*, or OGH) as the first and final instance in proceedings to nominate or challenge arbitrators and to set aside an arbitral award. Practice in setting-aside proceedings has shown that well-reasoned decisions are generally rendered expeditiously (six to eight months, on average).

As regards enforcement proceedings, the competence for the recognition and enforcement of foreign arbitral awards remains with the district courts, generally at the place where the debtor or the assets are located.

2. Governing Legislation

2.1 Governing Law

If the seat of the arbitration is in Austria, the arbitration proceedings will be governed by Austrian arbitration law. This is contained in the Fourth

Chapter of the Austrian Code of Civil Procedure (CCP) (Sections 577-618 of the CCP).

Since 2006, the legislation governing arbitration in Austria has been largely based on the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law"), with only a few minor deviations. Significantly, Austrian arbitration law does not differentiate between domestic and international arbitration.

2.2 Changes to National Law

There have been no changes to Austrian arbitration law in the past year, nor are there any changes planned in the immediate future. Any discussions regarding possible legislative changes are limited to clarifications (eg, regarding the delimitation of consumer and corporate disputes) and reinforcing Austria as an arbitration-friendly jurisdiction.

3. The Arbitration Agreement

3.1 Enforceability

Austrian law requires that the arbitration agreement must identify the parties and the dispute or a defined legal relationship that are subject to the arbitration clause. Furthermore, the arbitration agreement must be in writing, either as part of a document signed by the parties or as an exchange of letters, telefax, emails or any other means of communication that provides a record of the arbitration agreement. As regards the exchange of documents, the Austrian Supreme Court has clarified that "exchanged documents" do not need to be signed, regardless of the means of communication used. Additional form requirements must be met if consumers or employees are parties to the arbitration agreements.

3.2 Arbitrability

The definition of arbitrability is broad. The general rule is that pecuniary claims are usually arbitrable, whereas non-pecuniary claims are arbitrable if the parties have the capacity to enter into a settlement agreement with regard to the specific claim at issue. Disputes that fall under the competence of the administrative authorities are not arbitrable.

Family law matters and all claims based on contracts that are – even only partly – subject to the Tenancy Act (*Mietrechtsgesetz*) or the Non-Profit Housing Act (*Wohnungsgemeinnützigkeitsgesetz*) cannot be made subject to an arbitration agreement, nor can claims concerning condominium property. In addition, certain (collective) labour and social security matters are not arbitrable.

Disputes involving consumers or employees may only be submitted to arbitration (with additional form requirements) after the dispute has arisen. The additional form requirements are extensive and lead to a very high threshold for validly concluding an arbitration agreement with consumers or employees, rendering arbitration agreements in these areas impracticable. In 2021, the Austrian Supreme Court clarified that beneficiaries of a private foundation (*Privatstiftung*) are not subject to these restrictions in the event of a dispute between the beneficiaries and the foundation (OGH 18 OCg 1/21b).

In 2024, the Austrian Supreme Court addressed the objective arbitrability of disputes concerning shareholder resolutions in private limited partnerships if only some but not all shareholders are parties to the arbitration. The Austrian Supreme Court ruled that the arbitration must ensure the inclusion of all shareholders. In the absence of a mechanism that includes all shareholders and

ensures legal effect on all shareholders, such shareholder disputes are objectively not arbitrable (OGH 18 OCg 3/22y).

3.3 National Courts' Approach

Austrian arbitration law does not provide rules to determine the law applicable to the arbitration agreement. The Austrian Supreme Court applies the conflict-of-laws rule contained in Article V (1) lit a of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention") in order to determine the law applicable to the arbitration agreement outside the context of enforcement proceedings. Accordingly, the Austrian Supreme Court applies the law selected by party agreement. Such choice of law may also be agreed implicitly. A choice-of-law clause in the main contract may also extend to the arbitration agreement.

At the same time, the Austrian Supreme Court has recognised the separate legal nature of an arbitration agreement and has emphasised that it is appropriate to determine the law applicable to an arbitration agreement on a case-by-case basis (see, for example, OGH 18 OCg 1/15v). In the absence of a choice of law, the law of the seat of the arbitration governs the arbitration agreement (see, for example, OGH 3 Ob 153/18y).

Austrian legislation and the courts are arbitration-friendly in terms of enforcing arbitration agreements. In practice, courts apply the principle of "in favorem validitatis" – ie, when in doubt, the courts will interpret the intended scope of an agreement to favour arbitration (see, for example, OGH 18 OCg 6/20m).

3.4 Validity

Although legislation governing arbitration in Austria is based on the UNCITRAL Model Law, the specific wording of Article 16 (1) of the UNCITRAL Model Law concerning separability was not adopted. However, the doctrine of separability is recognised by the courts, which evaluate the question of the validity of an arbitration clause contained in an invalid contract on a case-by-case basis by interpreting the intention of the parties (see, for example, OGH 18 OCg 1/15v). In practice, this will usually lead to the determination that the parties' intent was that the arbitration agreement remains valid if the contract is null and void or terminated. Where the main contract is terminated by consent, the courts have held that the arbitration clause contained in the contract may also be considered terminated if the parties' intention was to terminate the entire contractual relationship.

4. The Arbitral Tribunal

4.1 Limits on Selection

The parties are free to agree on a procedure to select the arbitrators. The only limitation under Austrian arbitration law is that an arbitral tribunal must not consist of an even number of arbitrators and that sitting Austrian judges are prohibited by law from accepting arbitrator mandates.

4.2 Default Procedures

Austrian law provides for a default procedure if the parties have failed to designate a method for selecting arbitrators or if the chosen selection procedure fails. However, in most cases, the parties will have chosen a set of institutional arbitration rules that deal with this issue.

As a default, Austrian law provides that there shall be three arbitrators. In principle, each party

shall nominate the same number of arbitrators. However, Austrian law does allow for the joint appointment of one arbitrator by several parties – for example, in the case of multiparty arbitrations.

If the parties have not determined a procedure for the appointment of the arbitrators, a sole arbitrator will be jointly appointed by agreement of the parties. A panel of arbitrators will be appointed by each party appointing one arbitrator and then these two party-appointed arbitrators will appoint the president of the arbitral tribunal. If a party fails to appoint an arbitrator or if no agreement can be found regarding the appointment of a sole arbitrator or the president of the arbitral tribunal or in multiparty arbitrations, a party may apply to the Austrian Supreme Court to make the default appointment.

4.3 Court Intervention

Courts are only involved in the appointment of arbitrators upon the application of (one of) the parties to support the arbitral process. If there is no default procedure agreed upon by the parties, a party can request the court to appoint an arbitrator if the other party fails to do so, or if no agreement can be reached regarding the appointment of an arbitrator, or in multiparty arbitrations. The Austrian Supreme Court will give due regard to the requirements provided for in the parties' agreement if such agreement exists (see, for example, OGH 18 ONc 1/22z). Unless the parties have provided otherwise, the courts may also be called upon to decide on the application to remove an arbitrator (eg, owing to lack of independence or impartiality).

4.4 Challenge and Removal of Arbitrators

Austrian law provides for a default procedure if the parties have failed to agree on a challenge procedure (eg, by reference to institutional rules). The challenging party must submit a written statement of the reasons for the challenge to the arbitral tribunal, which gives the challenged arbitrator the opportunity to resign from office, or the other party may agree that the challenged arbitrator will be removed. If the challenged arbitrator does not resign or is not removed upon mutual agreement of the parties, the arbitral tribunal (including the challenged arbitrator) must decide on the challenge. If the challenge is unsuccessful before the arbitral tribunal, the challenging party may within four weeks apply to the Austrian Supreme Court as the court of first and last instance to decide on the challenge.

If a challenge pursuant to an agreed challenge procedure (eg, contained in institutional rules) is not successful, the challenging party may then apply to the Austrian Supreme Court for a review of the challenge decision within four weeks of receiving the decision. The option to appeal to the Austrian Supreme Court in these cases is mandatory and may not be waived.

The legal standard for the challenge of an arbitrator is:

- justifiable doubts concerning their impartiality or independence; or
- the failure of an arbitrator to meet specific requirements set out in the parties' agreement.

The Austrian Supreme Court routinely applies the International Bar Association Guidelines on Conflicts of Interest in International Arbitration as non-binding guidelines. The mere fact that an arbitrator has not disclosed circumstances that may give rise to doubts concerning their impartiality or independence alone is not per se a ground for a challenge.

4.5 Arbitrator Requirements

Arbitrators are required to be independent and impartial. Prior to accepting an appointment, the prospective arbitrator must disclose any circumstances that are likely to give rise to doubts concerning their impartiality or independence. The obligation to disclose such circumstances is ongoing throughout the arbitral proceedings.

According to decisions of the Austrian Supreme Court, the test is whether the circumstances of the case objectively lead to justifiable doubts regarding the arbitrator's independence and impartiality (see most recently, for example, OGH 18 OCg5/20i).

5. Jurisdiction

5.1 Matters Excluded From Arbitration

Disputes that fall into the competence of the administrative authorities are not arbitrable; the same applies to certain (collective) labour and social security matters, and to family law matters and claims based on contracts that are – even only partly – subject to the Tenancy Act or the Non-Profit Housing Act, as well as claims concerning condominium property. Please see **3.2 Arbitrability** for further details.

5.2 Challenges to Jurisdiction

Austrian arbitration law recognises the principle of "competence-competence". The arbitral tribunal may rule on a party's challenge to its own jurisdiction.

Lack of jurisdiction of the arbitral tribunal may also be raised as a ground to set aside an arbitral award, including a partial award on jurisdiction. If the place of arbitration is Austria and such proceedings are initiated, the question of jurisdiction will be reviewed and ultimately decided by the Austrian Supreme Court.

5.3 Circumstances for Court Intervention

Under Austrian law, the courts may only address matters concerning arbitration in limited cases and upon the request of a party.

The rules on jurisdiction generally favour arbitration over court proceedings. Therefore, if a court action involving a matter that is subject to an arbitration agreement is initiated, the court must dismiss the claim – unless either:

- the other party enters into the merits of the dispute without raising a jurisdictional objection; or
- after an objection has been raised, the court finds that the arbitration agreement does not exist or is incapable of being performed.

If an action is brought before a court while arbitral proceedings are already pending, the court must dismiss the action, unless a party has already challenged the jurisdiction of the arbitral tribunal in the arbitration proceedings and – exceptionally – if the arbitral tribunal is not expected to reach a decision within a reasonable period of time. The initiation of court proceedings does not prevent an arbitration from being initiated or continued, nor an award from being rendered.

Ultimately, the issue of whether (or not) an arbitral tribunal has jurisdiction may also be raised as a ground for setting aside an arbitral award, including an award on jurisdiction.

5.4 Timing of Challenge

The plea that the arbitral tribunal does not have jurisdiction must be raised no later than the first pleading on the substance of the dispute. A party is not precluded from raising such plea by the

fact that it has appointed an arbitrator. The plea that the arbitral tribunal is exceeding the scope of its jurisdiction must be raised as soon as the claim beyond the arbitral tribunal's jurisdiction is made. A belated objection to the tribunal's jurisdiction may be considered by the arbitral tribunal if it considers the delay sufficiently excused.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

In setting-aside proceedings, the Austrian Supreme Court may assess questions of jurisdiction without being bound to the findings of the arbitral tribunal. In practice, there is a discernible bias in favour of upholding arbitral jurisdiction in review proceedings.

5.6 Breach of Arbitration Agreement

As mentioned in **5.3 Circumstances for Court Intervention**, the approach of Austrian courts towards a party who commences court proceedings in breach of an arbitration agreement will be to dismiss the action, unless the other party pleads on the merits of the dispute without raising a jurisdictional objection or if – after an objection has been raised – the court finds that the arbitration agreement does not exist or is incapable of being performed. The courts are generally arbitration-friendly and will observe an arbitration agreement.

5.7 Jurisdiction Over Third Parties

Austrian law does not contain provisions allowing an arbitral tribunal to assume jurisdiction over individuals or entities that are neither party to an arbitration agreement nor signatories to the contract containing the arbitration agreement. However, case law has established that both single and universal legal successors, assignees of a claim or contract, and third-party beneficiaries of contracts are bound by an arbitration agreement even if they are not signatories to the contract (see, for example, OGH 4 Ob 43/21h).

6. Preliminary and Interim Relief

6.1 Types of Relief

Unless otherwise agreed by the parties, arbitral tribunals may award preliminary or interim relief. Such relief may only be awarded by the arbitral tribunal after the other party has been given an opportunity to be heard. A further requirement is that the enforcement of a claim would otherwise be frustrated or that there is a danger that one of the parties may suffer irreparable harm. The relief granted is binding and is enforceable in Austria if it is ordered in writing, signed and served on the parties. Enforcement of interim relief will only be refused if the order suffers from a defect that would allow it to be set aside (if the seat of arbitration is in Austria) or to be refused recognition or enforcement (if the seat of the arbitration is outside Austria).

If an arbitral tribunal grants preliminary or interim relief that contains a remedy unknown to Austrian law, Austrian arbitration law provides that the enforcing court will look at the purpose to be achieved by the remedy and – by means of interpretation, reformulation or even modification of the remedy granted by the arbitral tribunal – grant an equivalent remedy available under Austrian law.

6.2 Role of Courts

Under Austrian arbitration law, parties may turn to the courts or the arbitral tribunal to grant interim relief while arbitration proceedings are pending. There are no provisions on emergency arbitrations.

Although the parties may by agreement exclude the arbitral tribunal's power to grant interim relief, the courts can always be called upon to grant interim relief upon the application of a party both before and after the constitution of the arbitral tribunal. Interim relief granted by a court can only be lifted by the courts and cannot be reversed by an arbitral tribunal. Only the courts have the power to enforce preliminary or interim relief awarded by an arbitral tribunal.

Courts may refuse to enforce measures that would be incompatible with:

- an Austrian court measure that was either requested or issued previously; or
- a foreign court measure that was issued previously and must be recognised.

6.3 Security for Costs

Austrian arbitration law does not contain a provision explicitly granting arbitral tribunals the power to order security for costs. However, this power is understood to be implied in the competence of an arbitral tribunal to award preliminary or interim relief and in the fact that Austrian courts may order security for costs if the enforcement of the cost decision is seriously impaired (ie, due to the lack of enforceability of a judgment abroad).

The Vienna Rules contain a provision granting an arbitral tribunal the power to order security for costs.

7. Procedure

7.1 Governing Rules

Austrian arbitration law grants the parties extensive autonomy in determining the conduct of the arbitration, with only a few mandatory legal provisions that cannot be waived by agreement of the parties. It also provides a framework of default rules that govern the arbitral procedure if the parties have failed to provide for (institutional or other) rules to govern their arbitration proceedings.

7.2 Procedural Steps

The parties are largely free to agree on the manner in which arbitration proceedings are to be conducted. In the absence of an agreement (which may also be a reference to institutional rules), Austrian arbitration law applies as a default rule, and it is otherwise at the discretion of the arbitral tribunal to determine the procedure. Under the Vienna Rules, the arbitrators are free to conduct the proceedings at their discretion (without being required to apply the Austrian non-mandatory arbitration rules), subject to mandatory law and if the parties have not agreed otherwise.

As a mandatory requirement, the arbitrators must observe the parties' right to fair treatment and each party's right to be heard.

7.3 Powers and Duties of Arbitrators

The arbitral tribunal has, inter alia, powers to decide on:

- its own jurisdiction as well as the merits of the case;
- the conduct of the proceedings, where there is no agreement of the parties on the procedure; and
- the admissibility of evidence, and to determine its relevance, materiality and weight.

The arbitral tribunal may also grant preliminary or interim relief. It has the duty to treat the parties fairly and must ensure that each party's right to be heard is observed. Every arbitrator has

the duty to remain independent and impartial throughout the arbitration and has an ongoing obligation to disclose any circumstances that may call their independence or impartiality into question.

7.4 Legal Representatives

There are no particular qualifications or other requirements for legal representatives in arbitration proceedings. Notably, there are no restrictions as to the nationality and/or qualification of counsel.

In proceedings to set aside an arbitral award, there is an obligation to be represented by a lawyer who is admitted to the Bar in Austria.

8. Evidence

8.1 Collection and Submission of Evidence

Austrian arbitration law does not contain any explicit provisions regarding the collection and submission of evidence. In practice, most arbitrators adopt a hybrid approach and will take both civil- and common-law rules on evidence into consideration. By way of example, extensive discovery is rare in international arbitrations conducted in Austria, whereas document production, the use of written witness statements, and extensive cross-examination are standard features of arbitral proceedings in Austria.

Although the client-attorney relationship is privileged under Austrian law, the scope and rules regarding legal privilege are regulated according to the civil law tradition and thus differ from the common-law concept of privilege.

8.2 Rules of Evidence

Austrian law does not contain rules of evidence that apply specifically to arbitral proceedings. The general principle is the free evaluation of evidence. The International Bar Association Rules on the Taking of Evidence in International Arbitration are frequently referred to as guidelines.

8.3 Powers of Compulsion

In general, arbitral tribunals do not have any powers of compulsion but may instead request court assistance regarding the collection of evidence or the interrogation of a witness who does not appear voluntarily. Arbitral tribunals have no power to force a witness to testify or to enjoin a refusing party to produce a document.

An arbitral tribunal that has its seat in Austria may turn to Austrian and foreign courts for legal assistance and may by these means obtain the testimony of a reluctant witness or the production of a document. There is no difference between the witness testimony of parties and unrelated witnesses.

9. Confidentiality

9.1 Extent of Confidentiality

Austrian arbitration law does not contain any explicit provisions on the confidentiality of arbitral proceedings. While arbitral proceedings are private, there is no provision in Austrian law obliging the parties to keep the arbitral proceedings confidential (including pleadings, documents, and the award). If confidentiality is desired, the parties are advised to agree on confidentiality in the arbitration agreement or elsewhere, such as in the terms of reference or a similar document.

The Vienna Rules 2021 contain provisions binding the arbitral institution and arbitrators to con-

fidentiality, but not the parties. Austrian arbitration law does provide that the public may be excluded from setting-aside proceedings if this is requested by one of the parties.

10. The Award

10.1 Legal Requirements

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of the arbitrators, including any arbitral award. The parties may, however, agree otherwise and require a unanimous decision to be rendered. The further requirements for an arbitral award are that it must be made in writing, state the date on which it was rendered and the seat of the arbitration, and be signed by the arbitrator(s). Unless the parties have agreed otherwise, the award must also state the reasons on which it is based.

The making of an award is not subject to any time limits, unless a time limit is agreed by the parties. The revised Vienna Rules 2021 set a time limit for the issuance of an award – ie, an award shall be rendered no later than three months after the last hearing concerning matters to be decided in the award or the filing of the last authorised submission, whichever is later. This time period may be extended by the VIAC's Secretary General upon reasoned request or on their own initiative.

10.2 Types of Remedies

Austrian arbitration law does not contain any express provisions on the types of remedies that an arbitral tribunal may award. Generally, the available remedies – as well as any limits thereto or prescription periods – must be determined by reference to the law applicable to the merits.

The remedy of punitive damages is not known under Austrian law. In principle, the concept of punitive damages is considered contrary to Austrian public policy.

10.3 Recovering Interest and Legal Costs

Austrian arbitration law does not contain any express provisions on whether the parties are entitled to recover interest. In most cases, this will depend on the law applicable to the merits.

Unless the parties have agreed otherwise, they are entitled to recover legal costs (encompassing the reasonable costs of legal representation, the fees of the arbitrators, and – where applicable – the administrative costs charged by the institution). Both Austrian law and the Vienna Rules provide that the arbitral tribunal must render a decision on costs upon termination of the proceedings, including in cases where the arbitral tribunal ultimately finds it has no jurisdiction.

The general practice with regard to allocating costs between the parties is to take into account all circumstances of the case, with a particular focus on the outcome of the proceedings. The Austrian Supreme Court has held (in OGH 18 OCg 5/21s) that it is not a violation of the right to be heard if a party is not granted the opportunity to comment on the other party's cost submission.

Under the Vienna Rules 2021, the arbitral tribunal may – at any stage of the arbitral proceedings and at the request of a party – make a decision on legal costs (ie, excluding the administrative and arbitrator's fees) and order payment. This is primarily intended to apply in cases with separate phases (eg, in the case of bifurcation between jurisdiction and merits).

11. Review of an Award

11.1 Grounds for Appeal

Within three months of the notification of the arbitral award, a party is entitled to initiate a setting-aside action based on one or more of the following grounds:

- a valid arbitration agreement does not exist, or the arbitral tribunal has denied its jurisdiction despite the existence of a valid arbitration agreement, or a party was lacked the capacity to conclude a valid arbitration agreement under the law governing its personal status;
- a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was unable to present its case for other reasons;
- the award deals with a dispute not covered by the arbitration agreement, or contains decisions on matters beyond the scope of the arbitration agreement or the pleas of the parties – if the default concerns only a part of the award that can be separated, only that part of the award shall be set aside;
- the composition or constitution of the arbitral tribunal was not in accordance with a provision of the arbitration law or with a permissible agreement of the parties;
- the arbitral proceedings were conducted in a manner that conflicts with the fundamental values of the Austrian legal system (ordre public);
- the requirements according to which a court judgment can be appealed by an action for revision under Section 530, paragraph 1, numbers 1–5 of the CCP have been met (note that these grounds for revision relate to the scenario in which the decision was based on a fraudulent action or a forged document – or a criminal verdict that has since been reversed – and that the three-month time period to file the action for setting aside does not apply in this circumstance);
- the subject matter of the dispute is not arbitrable under Austrian law; or
- the arbitral award conflicts with the fundamental values of the Austrian legal system (ordre public).

There are additional grounds to set aside an arbitral award rendered in arbitral proceedings in which either a consumer or an employee was involved.

The action to set aside an award is to be filed with the Austrian Supreme Court, which will decide as first and last instance – ie, without the possibility of a further appeal. Practice has shown that a well-reasoned decision will usually be rendered within six to eight months.

11.2 Excluding/Expanding the Scope of Appeal

Under Austrian law, parties cannot agree to exclude or expand the scope of an appeal or challenge.

11.3 Standard of Judicial Review

It is firmly established in the case law of the Austrian Supreme Court that there is no *révision au fond* of the merits of the case (OGH 5 Ob 272/07x). This principle is strictly applied and the Austrian Supreme Court has consistently refused to entertain a review of the merits of the arbitral decision when claimants in setting-aside proceedings have requested this in the guise of annulment grounds.

12. Enforcement of an Award

12.1 New York Convention

Austria has ratified the New York Convention without reservation. Austria is also a contracting state to several other multilateral conventions on the recognition and enforcement of arbitral awards, including the 1961 European Convention on International Commercial Arbitration and the Geneva Convention on the Execution of Foreign Arbitral Awards (1927), as well as a number of bilateral agreements governing the reciprocal recognition and enforcement of arbitral awards. Moreover, Austria has ratified the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, as well as numerous bilateral investment treaties.

12.2 Enforcement Procedure

Arbitral awards are deemed to be equivalent to judgments of state courts and thus will be enforced in the same way – ie, by means of an application to the district court (*bezirksgericht*) of the district where the respondent has its seat or where the object, asset or third-party debtor that will serve to satisfy the claimant's request for enforcement is registered or located.

An authenticated original or a duly certified copy of the arbitral award must be submitted together with the application for enforcement. The original or a certified copy of the arbitration agreement need only be presented upon a request from the court.

If the arbitration was seated outside Austria, the award must first be formally recognised and declared enforceable (pursuant to the New York Convention or other multilateral or bilateral treaties) by the district court that is competent for enforcement. The application for recognition can be made together with the request for enforcement and the courts will decide simultaneously on both requests. After being declared enforceable, the foreign award is treated as a domestic arbitral award – ie, equivalent to the judgment of an Austrian court.

There is no automatic suspension of the enforcement of an arbitral award if setting-aside proceedings have been initiated. However, upon the application of a party (usually the award debtor), the court may – but is not obliged to – stay enforcement proceedings until a final decision is rendered in the setting-aside proceedings. A pragmatic solution employed by Austrian courts in this situation is to make continuation of the enforcement subject to the posting of security by the award creditor.

If the arbitral award is set aside, the effects thereof depend on the applicable law and the international treaty governing its recognition and enforcement. An arbitral award that has been set aside by the Austrian courts will not be enforced in Austria. As regards foreign awards, the Austrian courts do not normally enforce arbitral awards that have been set aside under the regime of the New York Convention. However, the Austrian Supreme Court has held (in OGH 3 Ob 2/21x) that it is a precondition that the (foreign) setting-aside proceedings do not violate Austrian public policy. Under the regime of the European Convention, the Austrian courts have also previously recognised and enforced a foreign arbitral award that had been set aside.

At the enforcement stage, a state or state entity may attempt to raise the defence of sovereign immunity. However, Austrian courts will only consider sovereign immunity in connection with sovereign acts, but not if the state or state entity acted in a private capacity. The burden of proof

for these circumstances lies with the state or state entity invoking immunity.

12.3 Approach of the Courts

The general approach of the courts towards the recognition and enforcement of arbitral awards is pragmatic and the grounds listed in the applicable conventions are interpreted restrictively. Although the opposing party will be granted the opportunity to raise grounds based on which it believes the recognition and enforcement of the award will be refused, these grounds are interpreted narrowly. This applies to public policy, in particular – where a high threshold must be reached in order to be considered a sufficient reason to refuse recognition and enforcement.

13. Miscellaneous

13.1 Class Action or Group Arbitration

In 2020, the EU Directive on Representative Actions for the Protection of the Collective Interests of Consumers (EU 2020/1828) came into force. Austria is currently in the process of implementing this directive, which provides for collective redress for consumers before state courts. In addition, various rules that apply to multiparty proceedings before state courts are used as the basis for group actions.

The Austrian Arbitration Act does not contain provisions regarding class action or group arbitration. Provided there is a valid arbitration agreement in place, there is no reason to assume that the same cannot apply to group arbitrations, given the fact that Austrian arbitration law contains rules regarding the appointment of arbitrators in multiparty arbitrations. However, specifically with regard to class-action arbitrations that involve consumers, the limitations of Section 617 of the CCP would pose a hurdle. Please see **3.2 Arbitrability** for further details on consumers.

13.2 Ethical Codes

The conduct of the legal profession in Austria is subject to the Code of Professional Conduct for Lawyers (*Rechtsanwaltsordnung*), as well as to numerous EU regulations. Although none of these expressly refer to international arbitration, it is common practice to apply them also in arbitral proceedings. Lawyers must not make allegations they know to be false. However, there is no obligation to verify the truthfulness of the information given by a client or a witness. Foreign lawyers acting in arbitrations seated in Austria are not bound by Austrian professional ethics rules but are generally understood to be bound by the ethics rules of their respective home jurisdiction.

13.3 Third-Party Funding

The Austrian market shows that third-party funding is a well-established practice in litigation and arbitration. This is also evident from the increasing number of third-party funders active in the Austrian market.

The Vienna Rules 2021 have sought to bring more transparency to the process by requiring parties to disclose the existence of any third-party funding and the identity of the third-party funder (as defined in Article 6 of the Vienna Rules 2021). This shall ensure the independence and impartiality of the arbitrators through appropriate disclosure.

Otherwise, there are no express provisions on third-party funding under Austrian law – although there are two rules that could be understood to limit it, as follows.

- First, Austrian law requires the claim to be made (litigated) by the person who owns it – ie, it is not permissible for a claim to be made in one person's name but on behalf of another person.
- Second, it is forbidden for attorneys to enter into contingency fee arrangements (quota litis).

13.4 Consolidation

While Austrian arbitration law does not provide for rules regarding the consolidation of separate arbitral proceedings, it is considered permissible.

The Vienna Rules 2021 allow for the consolidation of separate arbitral proceedings – for example, if the seat of arbitration in all of the arbitration agreements is the same and the parties agree to the consolidation or if the same arbitrators were nominated for all proceedings concerned.

13.5 Binding of Third Parties

As a general rule in Austria, only the signatories to an arbitration agreement are bound by it – although there are exceptions. Notably, it has been established by case law of the Austrian Supreme Court that legal successors and third-party beneficiaries are bound by the arbitration agreement. Please see **5.7 Jurisdiction Over Third Parties** for further details.

Trends and Developments

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KNOETZL

KNOETZL is Austria's premier dispute resolution powerhouse, which has successfully developed into Austria's largest dispute resolution team. The arbitration practice encompasses international commercial arbitration, investment protection, and arbitration-related court proceedings. Key industries include construction and engineering, energy, banking, automotive, aviation, IT and telecommunications, life sciences, healthcare and pharmaceuticals. Members of the arbitration team have successfully acted as counsel in some of the largest and most complex disputes in the CEE region in recent decades, under all the major arbitration rules. KNOETZL lawyers act as arbitrators in a wide array of industries. Members of the firm are recognised as leading arbitration specialists and hold roles in major arbitral institutions and associations.

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Introduction

Austria, with its capital city of Vienna, has a long-standing history as a hub for settling international disputes and is known to be a reliable and hospitable seat for arbitrations. Austria offers a modern and arbitration-friendly legal environment and Vienna's excellent infrastructure in which to hold large arbitration hearings. Often said to be the gateway to Eastern Europe, Vienna is frequently selected as the seat of arbitration by parties from the CEE and SEE regions. However, its ever-growing arbitration landscape and professionalism attract parties from around the world, who choose Austria as the seat of arbitration.

This development is also reflected by the number of international organisations seated in Vienna. The newest prominent addition is the Permanent Court of Arbitration (PCA). The PCA, which has its main seat in The Hague, opened its regional office in Vienna in April 2022 – making Vienna its fourth regional office, after Singapore, Mauritius and Buenos Aires. The PCA's opening of a regional office was triggered by a growth in demand for its services in Europe, including the administration of arbitration hearings.

In addition to an internationally recognised professional arbitration community, it is also the high quality of the courts that make Austria recommendable as a seat for arbitrations. The Austrian Supreme Court – with its exclusive jurisdiction at first and last instance to decide applications to set aside awards rendered within its jurisdiction – has shown efficiency and consistency in its judgments, which reflect a deep understanding of the subject matter and a clear pro-arbitration stance.

Energy Sector

During the past two years, the energy crisis has become a pressing European and global issue, prompting companies and also countries to reassess their energy sources and develop sustainable solutions. Austria, with its strategic location in Central Europe, plays a vital role in the European energy market. Vienna is the seat for important international organisations in the energy sector, such as the Energy Community and the Organization of the Petroleum Exporting Countries, and the location for conferences concerning energy (eg, the European Gas Conference).

The energy crisis has also resulted in a surge in energy-related disputes as a consequence of the limited supply and rising energy prices. The disputes mainly arise from non-deliveries and necessary changes in the supply chains. International arbitration, often with the seat in Austria, serves as a key instrument in resolving these conflicts in the upstream markets or between major customers and energy providers over reduced or suspended deliveries or the adjustment of prices. Austria is frequently chosen as place of arbitration in such disputes, as it offers a stable environment for international arbitration with efficient, foreseeable and pro-arbitration decisions by the Austrian Supreme Court. Additionally, it boasts numerous practitioners with extensive experience in the energy sector.

Impact of Environmental, Social and Corporate Governance

ESG considerations have gained significant importance in recent years, with stakeholders and even the general public demanding sustainable and socially responsible practices. This has increased the pressure on states – in many cases, creating a tension between existing con-

tracts, the law, and politically or policy-driven decisions. This has also led to an international increase in investment disputes – with Vattenfall AB and others v Federal Republic of Germany (ICSID Case No ARB/12/12) being one of the most prominent in the DACH region (ie, Germany, Austria and Switzerland). Further investment arbitration cases are to be expected as a result of this development.

Commercial disputes regarding ESG are also projected to increase in the wake of the Corporate Sustainability Due Diligence Directive formally adopted by the Council of the European Union in May 2024. The implementation of this directive will have an impact on existing and future contracts, as the new responsibilities and obligations that companies will have to comply with will lead to reassessment of international supply chains. It seems likely that the adjustment process will give rise to disputes. Arbitration, offering a bespoke and confidential procedural framework with great flexibility to accommodate the needs of businesses acting in a globalised environment, is ideally suited for resolving often sensitive ESG-related disputes. Consequently, the expectation is that ESG-related arbitrations will soon emerge as a dominant trend.

Outer Space Disputes Increasingly Submitted to Arbitration

The commercial use of outer space has grown exponentially. The heavy traffic both in terms of satellites as well as use of bandwidths have turned orbits and frequencies into scarce resources. Austria not only has a strong industry in this sector but is also home to the European Space Agency (ESA) Policy Institute. Perhaps due to this sector specific knowledge, there appears to be a rise in arbitrations in this field. Further, the choice of Austria as a seat of arbitration for outer space disputes may also be driven by the fact that Austria is a neutral country – a factor that is relevant to the increasing PPPs and related disputes in the sector.

Impact of Sanctions Against Russia on Arbitration Proceedings

Arbitration proceedings involving sanctioned parties have been confirmed to constitute an exception to the prohibition on directly or indirectly engaging in any transaction with Russian organisations listed in Annex XIX to Article 5aa of Council Regulation (EU) No 833/2014, concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

To uphold the fundamental principle of access to justice, including via arbitral proceedings with sanctioned parties, Article 5aa, paragraph 3 (g) of Council Regulation (EU) No 833/2014 contains an exception for "transactions which are strictly necessary to ensure access to judicial, administrative or arbitral proceedings in a Member State, as well as for the recognition or enforcement of a judgment or an arbitration award rendered in a Member State and if such transactions are consistent with the objectives of this Regulation and Regulation (EU) No 269/2014".

Arbitration proceedings have also been confirmed to constitute an exception to the prohibition on providing legal advisory services to legal persons, entities or bodies established in Russia as set out Article 5n, paragraph 2 of Council Regulation (EU) No 833/2014. According to Article 5n, paragraph 6, these prohibitions "shall not apply to the provision of services which are strictly necessary to ensure access to judicial, administrative or arbitral proceedings in a Member State, as well as for the recognition or enforcement of a judgment or an arbitration award rendered in a Member State, provided

that such provision of services is consistent with the objectives of this Regulation and Regulation (EU) No 269/2014".

On 20 June 2024, the exemption expired that previously applied to legal persons, entities or bodies established in Russia that are owned by, or solely or jointly controlled by, a legal person, entity or body that is incorporated or constituted under the law of an EU member state, a country member of the European Economic Area, Switzerland, or a partner country as listed in Annex VIII of Council Regulation (EU) No 833/2014. It has been replaced by a new authorisation requirement pursuant to Article 5n, paragraph 10 (h) of Council Regulation (EU) No 833/2014. In Austria, the Ministry of Justice's Public Procurement Law Unit is responsible for granting such authorisations, which include authorisation for the provision of legal advisory services by lawyers. A separate mailbox has been set up for the submission of applications for the granting of an authorisation. However, there remains a certain grey area as to the definition of "legal services" in this context. It has not yet been clarified at EU level which services related to an arbitration qualify as legal services. This is particularly relevant when it comes to legal advice rendered before a dispute has arisen or becomes pending.

Overall, these exceptions and the authorisation procedure will allow arbitral proceedings and the enforcement of awards to continue in disputes involving parties from Russia.

Also, the introduction of several amendments to the Russian Arbitrazh Procedural Code (commonly referred to as the "Lugovoy Law") in 2020 has affected the conduct of arbitration proceedings involving Russian parties. The Lugovoy Law grants Russian commercial courts exclusive jurisdiction over disputes involving sanctioned entities. This exclusive jurisdiction is protected by the competence of the Russian courts to, upon request of a party, issue anti-suit injunctions directed against arbitration proceedings. These anti-arbitration injunctions have already been frequently requested by Russian parties and have been granted by Russian courts. As a response thereto, arbitral proceedings with Russian parties are now increasingly involving interim measures and counter-measures. The location of assets and the interim securing of assets has also become more prevalent.

Increase of Insolvency-Related Arbitrations

As in many countries, Austria is currently experiencing a spike in insolvency cases. The increase is driven by companies that were supported by public subsidies or the suspension of tax and accounting obligations in the context of the COVID-19 pandemic but are now unable to cope with exploding global energy and resource costs, high inflation and rising interest rates.

The development of the field of insolvency-related arbitrations builds upon a 2018 decision of the Austrian Supreme Court, which confirmed that claim verification proceedings do not fall within the exclusive competence of the (insolvency) courts but can be conducted before arbitral tribunals – provided the arbitration proceedings were already pending at the time of the opening of the insolvency proceedings.

These two factors combined have recently led to a cascade of arbitration proceedings that deal with the effects of insolvency. A significant case is the insolvency of Signa Holding and affiliated companies – the largest insolvency in Austrian history – with debts of more than EUR14 billion affecting not only Austria, but also large-scale projects in Germany and Switzerland.

Bespoke VIAC Investment Arbitration Rules

The Vienna International Arbitral Centre (VIAC), one of the leading European arbitral institutions, has issued the first European arbitral institution-specific investment arbitration rules. The VIAC Rules of Investment Arbitration and Mediation 2021 (the "VIAC Investment Arbitration Rules") are particularly suited for states and state-related entities, as well as investors coming from the CEE/Commonwealth of Independent States (CIS) region. They also generally provide an affordable alternative for smaller investments, as the new rules aim at providing significant cost and time advantages – the two major concerns for conducting investment disputes effectively.

The VIAC Investment Arbitration Rules are a standalone set of rules based on the VIAC Rules of Arbitration and Mediation (the "Vienna Rules"), the VIAC's commercial arbitration rules. However, they feature a number of innovations and modifications that recognise the fundamental differences between commercial and investment arbitration and respond to specific needs that have arisen in practice. By way of example, the VIAC Investment Arbitration Rules do not restrict their implementation by means of any objective jurisdictional requirements regarding the parties and the nature of the dispute. Notably, there is intentionally no definition of an investment. Pursuant to Article 1(1), the agreement can be contained in a contract, treaty, statute or other instrument involving a state, state-controlled entity or intergovernmental organisation. With the aim of reducing jurisdictional disputes, the VIAC Investment Arbitration Rules thus leave it up to the parties to decide whether the rules are suitable for the resolution of their dispute and avoid any particular requirements for the submission of the dispute to VIAC investment arbitration.

The VIAC has placed special emphasis on promoting efficiency and enabling a swift resolution of investment disputes. This can be seen from the incorporation of an early dismissal mechanism for claims and defences that are manifestly outside the jurisdiction of the tribunal, inadmissible, or without legal merit (Article 24a). Frivolous claims can be dismissed at an early stage, thereby avoiding unnecessary costs being incurred by the other party. Moreover, the arbitral tribunal shall render the award within six months after the oral hearing or the last authorised submission (Article 32).

The VIAC's costs are a competitive option compared to other arbitral institutions. Importantly, the VIAC Investment Arbitration Rules explicitly provide the tribunal with the power to order security for costs. They also encompass provisions for the mediation of investment disputes, allowing parties to employ mediation independently from – or in conjunction with – arbitration. If the arbitration is followed by mediation or vice versa, the VIAC's administration fees are charged only once.

To prevent conflicts of interest, the Vienna Investment Arbitration Rules (as well as the Vienna Rules) require the parties to disclose third-party funding at an early stage in the statement of claim or the answer thereto. Third-party funding is defined in a broad manner, covering any kind of direct or indirect financial support that is dependent upon the outcome of the proceedings.

Pragmatic and Pro-arbitration Jurisprudence of the Austrian Courts

The Austrian Supreme Court, in deciding on applications to set aside awards, has maintained a consistent arbitration-friendly approach in its judgments. This may also inform why only four

applications have been filed since June 2023 – the following of which are noteworthy.

- Formal requirements – while the Austrian Supreme Court takes a pro-arbitration stance, it remains strict on the fulfilment of formal requirements. One such formal requirement is that an application for setting aside an award must be submitted by a lawyer who is entitled to appear before the Austrian Supreme Court (ie, is admitted to the Austrian Bar) (Cf OGH 18 OCg 1/23f dated 14 September 2023).
- Shareholder disputes – in 2024, the Austrian Supreme Court also dealt in detail with the objective arbitrability of disputes over shareholder resolutions in private limited partnerships. In that case, some (but not all) shareholders had relied on an arbitration clause between the partnership and the shareholders to file a challenge against a shareholder resolution before an arbitral tribunal. The request for arbitration (and, consequently, the arbitral award) was directed against the company but not against the other shareholders. The company filed an application to set aside the arbitral award by which the shareholder resolution had been nullified. The application was based on the argument that the arbitration proceedings had not included the other shareholders. The Austrian Supreme Court ruled that, even though private limited partnerships – like corporations – may include arbitration clauses in their articles of association, it is not possible to conduct the arbitration proceedings only between some shareholders and the company; rather, the arbitration must ensure the inclusion of all shareholders. Failing a mechanism that includes all shareholders and ensures legal effect on all shareholders, such shareholder disputes are objectively not arbitrable. Therefore, to ensure that such disputes are in fact objectively arbitrable, the participation and intervention rights of all shareholders must be set out ex ante in the arbitration agreement (Cf OGH 18 OCg 3/22y dated 3 April 2024).
- Impartiality – when deciding on challenges to arbitrators, the Austrian Supreme Court will frequently also consider the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, which were updated in 2024. However, in two recent decisions, the question of impartiality was raised in a different context: the question of the impartiality of judges in connection with arbitration proceedings.

In the first case, the Austrian Supreme Court had appointed one of the three arbitrators at the request of one of the parties. After the arbitral tribunal had issued the arbitration award, the claimant sought to set aside the award. In the annulment proceedings before the Austrian Supreme Court, the claimant challenged three of the five Supreme Court judges based on the argument that they had previously been called upon to appoint one of the arbitrators whose award is now being challenged. A separate Senate of the Austrian Supreme Court decided the challenge and held that the appointment of an arbitrator by the court (following default of one party to do so) does not impact the impartiality of a judge in a later action for annulment regarding the arbitral award rendered by the court-appointed arbitrator (Cf OGH 2 Nc 60/23f dated 16 August 2023).

In the second case, the question was whether the impartiality of judges of the specialised Senate of the Austrian Supreme Court dealing with arbitration might be impaired when they are also members of the VIAC board. The Austrian Supreme Court carefully examined:

(a) the duties of the members of the VIAC board; and
(b) the actual dispute before the courts, which related to the claim of invalidity of an arbitration agreement.

The Austrian Supreme Court found that there was not sufficient overlap between the duties of a VIAC board member and the actual subject matter to give rise to even the appearance of bias (Cf OGH 2 Nc 13/24w dated 26 March 2024).

It is rare that the Austrian Constitutional Court deals with matters related to arbitration. It recently had the opportunity when an action was filed requesting that Section 607 of the Austrian Civil Procedure Code, which grants an arbitral award the same effect as a court judgment, be declared unconstitutional and void. The Austrian Constitutional Court declined to accept the action and specifically held that there are no constitutional objections to the fundamental admissibility of private arbitration established on a private autonomous basis (in conjunction with the relevant statutory provisions). Firstly, the relevant provisions provide (sufficient) options for the parties to bring an action to set aside the award. Secondly, the grounds to set aside awards also provide sufficient guarantees that:

- an award that contradicts the fundamental values of the Austrian legal system (ordre public) can be challenged; and
- courts and administrative authorities may ex officio not take an award that contradicts the fundamental values of the Austrian legal system into account.

In view of the legal framework and the safeguards it provides, the application has no reasonable prospect of success (Cf VfGH G 49/2024-7 dated 10 June 2024).

Final Note

Austria continues to be a stable, modern and welcoming place for arbitral proceedings. Staying on top of developments and even leading the latest trends, Austria has maintained its position as an attractive place for commercial and investment arbitration.

BANGLADESH

Law and Practice

Contributed by:
Sharif Bhuiyan
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Dr Kamal Hossain & Associates was established in 1980 and is one of the largest law firms in Bangladesh specialising in commercial law. It provides a comprehensive range of legal services for both local and international clients. Arbitration is one of its key practice areas and it has been involved in both domestic and international arbitration. Its members have acted as arbitrator, counsel and legal expert in ICC, ICSID, UNCITRAL, PCA, SIAC and ad hoc arbitrations. In addition to participating in arbitrations, its members advise on a wide range of arbitration issues, including arbitration clauses and submission agreements, choice of forum and rules of arbitration, enforceability of awards and the role of national courts during arbitration proceedings. It has been involved in litigation for enforcing arbitration awards, staying court proceedings initiated in violation of arbitration clauses and obtaining interim relief in support of pending arbitration proceedings.

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1. General

1.1 Prevalence of Arbitration

International arbitration is used as a method of resolving disputes in Bangladesh. Domestic parties can resort to the use of international arbitration instead of litigation in local courts. International arbitration can be chosen by domestic parties in contracts as the method of dispute resolution. Local and international parties can have recourse to local courts in support of domestic as well as international arbitrations. This recourse may be made during the pendency of the arbitration to obtain interim protective measures and following the conclusion of the arbitration for the enforcement of the arbitration award including a foreign award.

The Arbitration Act, 2001 (the "Act") governs arbitration in Bangladesh. It replaced the earlier Arbitration Act, 1940. "Arbitration" is defined in Section 2(m) of the Act as "any arbitration whether or not administered by a permanent arbitration institution." The Act deals with both domestic and international arbitration. The term "domestic arbitration" is not defined in the Act.

"International commercial arbitration" is defined in Section 2(c) of the 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: (a) an individual who is a national of, or habitually resident in, any country other than Bangladesh; (b) a body corporate which is incorporated in any country other than Bangladesh; (c) a company or an association or a body of individuals whose central management and control is exercised in any country other than Bangladesh; or (d) the government of a foreign country."

A "foreign arbitral award" is defined in Section 2(k) as "an award, in pursuance of an arbitration agreement, made in the territory of any state other than Bangladesh, but does not include an award made in the territory of a Specified State." The Act does not define the expression "foreign arbitration". The High Court Division (the "HCD") of the Supreme Court of Bangladesh in Southern Solar Power v Bangladesh Power Development Board 2019 (2) 16 ALR (HCD) held that an international commercial arbitration, the seat of which is outside Bangladesh, is a foreign arbitration.

According to Section 3 of the Act the provisions of the Act (except Sections 45 to 47) are not applicable to an arbitration if the place of that arbitration is outside Bangladesh. Sections 45 to 47 of the Act provide for recognition and enforcement of "foreign arbitral awards".

In Accom Travels and Tours Limited v Oman Air S.A.O.C. 27 BLC (2022) 596 (the "Accom Travels" case) the HCD held that the provisions of the Act, except Sections 45, 46 and 47, are not applicable in respect of foreign arbitrations. Section 7Ka cannot therefore be invoked for obtaining interim measures before or during the continuance of foreign arbitration proceedings. However, this section can be invoked at the stage of enforcement in Bangladesh of a foreign arbitration award. The HCD further held that Section 10 on suspension of court proceedings initiated in violation of an arbitration clause is not applicable regarding foreign arbitration clauses. However, the court should nonetheless suspend local court proceedings under the court's inherent power provided in Section 151 of the Code of Civil Procedure 1908 (the "CPC").

1.2 Key Industries

The construction, energy and infrastructure industries have experienced notable arbitration activity in recent years. The reasons for recourse to arbitration include delays in completing projects, contractor claims for extensions of time, contractor claims relating to price escalations, non-compliance with design, imposition of tax and VAT expenses on contractors, unforeseen ground conditions, occurrences of force majeure events including delays caused by COVID-19, non-acceptance of projects by the employer on different grounds, issues between joint venture partners and disputes regarding gas and electricity prices.

1.3 Arbitration Institutions

Parties are free to choose any arbitral institution for international arbitration with a seat in Bangladesh or outside Bangladesh.

The Bangladesh International Arbitration Centre (BIAC) established in 2011 is one of the local international arbitration institutions. There are other local arbitration institutions established by various chambers of commerce.

The International Chamber of Commerce (ICC), International Centre for Settlement of Investment Disputes (ICSID) and the Singapore International Arbitration Centre (SIAC) are commonly chosen by Bangladeshi parties. For ad hoc arbitrations it is common to agree to UNCITRAL Rules.

1.4 National Courts

Under the Act, the HCD has jurisdiction to deal with disputes concerning international commercial arbitration and the District Judge's Court (the "District Court") has jurisdiction to deal with disputes regarding other arbitrations.

The District Court or the HCD, as appropriate, can:

- pass interim orders for preservation of the subject matter of the dispute in arbitration, among others (Section 7Ka);
- refer the dispute to the arbitration tribunal and stay the court proceedings (Section 10);
- appoint an arbitrator where a party, or in appropriate circumstances the appointed arbitrators, fail to appoint an arbitrator (Section 12):
- decide an appeal submitted by a party aggrieved by the decision of the arbitral tribunal on the challenge of an arbitrator (Section 14(4), (5));
- decide on termination of mandate of an arbitrator where the arbitrator becomes unable to perform his functions or fails to act without undue delay (Section 15(2));
- decide the jurisdiction of the arbitral tribunal on the application of any of the parties to an arbitration agreement (Section 20);
- enforce an interim order of an arbitration tribunal requiring a party to take any interim protective measures in respect of the subject matter of the dispute (Section 21(4));
- issue summons upon any necessary person on application of the arbitral tribunal or a party to the arbitration proceedings with the approval of the arbitration tribunal (Section 33);
- set aside an arbitration award made in an arbitration held in Bangladesh (Section 42);
- enforce an arbitration award made in an arbitration held in Bangladesh (Section 44);
- enforce an arbitration award made in a foreign arbitration (Section 45);
- hear and decide appeals against an order of a district judge and additional district judge (Section 48):

(a) setting aside or refusing to set aside an arbitration award under Section 42;
(b) refusing to enforce an arbitration award under Section 44; or
(c) refusing to recognise or enforce any foreign arbitral award under Section 45; and

- decide the arbitrators' remuneration or costs (Section 50).

2. Governing Legislation

2.1 Governing Law

The Act governs international arbitration in Bangladesh and is substantially based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 (the "Model Law"). However, the Act does not incorporate the 2006 amendments to the Model Law as the Act was passed in 2001 and amendments were made to the Act in 2004. The major deviations from the Model Law are summarised below.

- In defining "international commercial arbitration", the Act determines the internationality of arbitration in terms of nationality of the parties, whereas the Model Law determines internationality in terms of location of business of the parties or of the subject matter of the dispute. This means that a commercial dispute between two Bangladeshi nationals may not, unlike under the Model Law, fall within the scope of "international commercial arbitration", even if their places of business are outside Bangladesh.
- Unlike the Model Law, the Act allows the parties to an arbitration agreement to exclude or modify jurisdiction of an arbitration tribunal to determine the validity of an arbitration agreement and competence/jurisdiction of the tribunal in relation to a dispute referred to it.
- In the context of challenge of an arbitrator, the Act deviates from the Model Law in that the Act provides that the concerned arbitral tribunal, in case of such a challenge, has to wait until the challenge is finally disposed of. It is only when a challenge or an appeal against the decision of the arbitral tribunal is unsuccessful, that the arbitral tribunal can continue the arbitral proceedings and make an award. The Model Law allows the concerned arbitral tribunal, including the challenged arbitrator, to continue the arbitral proceedings and to make an award despite the fact that a request on challenge may be pending before a court.
- Under the Model Law, the grounds for setting aside an arbitral award and the grounds for non-recognition of a foreign arbitral award include a ground that the arbitration agreement concerned was not valid under the law to which the parties subjected it. The relevant provisions of the Act on these matters are based on the Model Law (and also the New York Convention). However, in drafting the provisions of the Act, the English language text of the Model Law has been mistranslated into Bangla. As a result, instead of invalidity of the arbitration agreement, invalidity of the governing law of the arbitration agreement ("the law under which the parties entered into arbitration agreement was not a valid law") has become a ground for setting aside and non-recognition.

According to STX Corporation Ltd. v Meghna Group of Industries Ltd. 64 DLR (2012) 550 and 32 BLD (2012) 400, only those provisions of the UNCITRAL Model Law, which have been enacted in the Act, are binding on Bangladesh courts. Where the Act has deviated from the Model Law, the courts are bound to give effect to such deviation.

2.2 Changes to National Law

The Act was enacted in 2001 and was amended in 2004 to add Section 7Ka conferring powers on the HCD and the District Court to make interim orders in support of an arbitration. There is no pending legislation that may change the arbitration landscape in Bangladesh.

3. The Arbitration Agreement

3.1 Enforceability

According to Section 2 of the Act, "arbitration agreement" means an agreement by the parties to submit all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, to arbitration.

Section 9(1) of the Act states that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

Section 9(2) of the Act sets out the legal requirements of an enforceable arbitration agreement. An arbitration agreement must be in "writing" and is deemed to be in writing if it is:

- part of a document signed by the parties;
- contained in exchange of letters, telex, telegrams, fax, e-mail or other means of correspondence; or
- contained in an exchange of a statement of claim and a defence in which the existence of the agreement is alleged by one party and not denied by the other.

The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

In K.A. Latif v Olam International Ltd. 13 BLC (2008) (HCD) 457 it was observed that the court has discretion to determine, from the overall circumstances, including documents or evidence, the existence of an arbitration agreement between the parties.

Section 89B of the CPC provides that when parties to a lawsuit apply to the court for withdrawal of the lawsuit on the ground that they will refer the dispute to arbitration, the application is deemed to be an arbitration agreement under Section 9 of the Act.

3.2 Arbitrability

Section 3(3) of the Act provides that, for the time being, the Act will not affect any other law in force that bars certain disputes from being submitted to arbitration.

Section 43(1)(b)(i) of the Act provides that an arbitral award may be set aside and Section 46(1)(b)(i) of the Act provides that enforcement of a foreign arbitral award may be refused if the court finds that the subject matter of the arbitration award is not capable of settlement by arbitration under the law of Bangladesh. Accordingly, the concept of arbitrability is recognised in the Act. However, the Act does not set out a list of subject matters that are not capable of settlement by arbitration. Usually, in conformity with the practice in various jurisdictions, matters concerning criminal law, competition law, etc, will be regarded as not capable of settlement by arbitration.

Section 40 of the Bangladesh Energy Regulatory Commission Act, 2003 requires any dispute between licensees, or licensees and consumers,

to be referred to the Bangladesh Energy Regulatory Commission (BERC), which is a statutory body regulating the energy sector, for settlement under the Bangladesh Energy Regulatory Commission Dispute Settlement Regulations, 2014.

3.3 National Courts' Approach

There is no judicial decision in Bangladesh regarding determination of the law governing the arbitration agreement.

If the parties choose a governing law of the arbitration agreement, the courts in Bangladesh will give effect to the choice. In the absence of the parties' choice of governing law, if the contract in which the arbitration agreement is set out contains a governing law clause for the contract, the courts in Bangladesh would accept the governing law of the contract as the governing law of the arbitration agreement. If there is neither a governing law for the contract nor a governing law for the arbitration agreement, it is likely that the law of the seat of the arbitration will be the governing law of the arbitration agreement.

Arbitration agreements are usually enforced by courts in Bangladesh.

3.4 Validity

Section 18 of the Act contains provisions regarding severability of an arbitration agreement. Section 18 states that "An arbitration agreement which forms part of another agreement shall be deemed to constitute a separate agreement when ruling upon the validity of that arbitration agreement for the purpose of determining the jurisdiction of the arbitral tribunal."

The Supreme Court of Pakistan in Manzoor Hussain v Wali Mohamad 17 DLR (SC) (1965), 369 (Bangladesh was a part of Pakistan in 1965) discussed the enforceability of an arbitration clause contained in a void contract and observed that if the principal contract was one which was clearly ab initio void or came within mischief under Section 23 of the Contract Act, then the arbitration clause contained in it would be unenforceable and the award would be invalid (para 25).

In Bangladesh Jute Mills Corporation v Maico Jute and Bag Corporation 56 DLR (HCD) (2004) 224, the HCD observed that if the contract itself is void, illegal or fraudulent, then the entire contract along with the arbitration clause would be voidable (para 9).

In Ferdous Alam v PVH Far East Limited 74 DLR (2022) 598, the HCD held that although the arbitration clause is a part of the underlying contract, it has, in a series of decisions, been treated as independent of the other clauses, and the invalidation of the underlying agreement will not invalidate the arbitration clause (paras 17 and 18).

4. The Arbitral Tribunal

4.1 Limits on Selection

There is no limit on the parties' autonomy to select arbitrators in Bangladesh. Section 11 of the Act allows parties to determine the number of arbitrators. If the parties fail to determine the number, the default number is three. Unless otherwise agreed by the parties, if parties appoint an even number of arbitrators, the appointed arbitrators are required to appoint an additional arbitrator who acts as a chairman of the tribunal.

Section 12(1) of the Act allows the parties to agree on a procedure for appointing the arbitrator or arbitrators. Parties themselves may agree on the qualifications, nationality and other requirements of the arbitrators.

4.2 Default Procedures

If the parties' chosen method for selecting arbitrators fails, there is a default procedure in Section 12(7) of the Act.

Where, under an appointment procedure agreed upon by the parties:

- a party fails to act as required under such procedure;
- the parties, or the arbitrators, fail to reach an agreement under the same procedure; or
- a person or any third party fails to perform any function assigned to him under that procedure,

unless the agreement on the appointment procedure provides other means to take the necessary measure for securing the appointment, upon an application of a party, the HCD in case of international commercial arbitration, and the relevant District Court in other cases can appoint the arbitrator or the chairman of the tribunal.

4.3 Court Intervention

Under Section 12(1) of the Act, the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. In the absence of such an agreement:

- in an arbitration tribunal with a sole arbitrator, if the parties fail to agree on the arbitrator within 30 days from receipt of a request made by one party, upon an application of a party, the appointment can be made by the relevant District Court in case of an arbitration other than an international commercial arbitration (Section 12(3)(a)(i)), and by the HCD in case of international commercial arbitration (Section 12(3)(a)(ii)); or
- in an arbitration with three arbitrators, if a party fails to appoint an arbitrator within 30 days of the receipt of a request to do so from the other party or if the party-appointed arbitrators fail to agree on the third arbitrator within 30 days of their appointment, upon an application of a party, the appointment can be made by the HCD in case of international commercial arbitration (Section 12(4)) and by the District Court in other cases.

4.4 Challenge and Removal of Arbitrators

Section 13 of the Act contains grounds for the challenge of an arbitrator. Under Section 13(3) of the Act, an arbitrator may only be challenged if there are circumstances giving rise to justifiable doubts as to his impartiality or independence, or if he does not possess the qualifications agreed to by the parties. According to Section 13(4) of the Act a party may challenge an arbitrator appointed by him, or in whose appointment he has consented, only for reasons of which the party becomes aware after the appointment has been made.

Section 14 sets out the procedure for challenging an arbitrator. The parties are free to agree on a procedure for challenging an arbitrator (Section 14(1)). Where there is no agreement as to the procedure for challenging an arbitrator, a party who intends to challenge an arbitrator is required to, within 30 days after becoming aware of the circumstances referred to in Section 13(3), send a written statement stating the reasons for the challenge to the arbitral tribunal (Section 14(2)). Section 14(3) provides that unless the arbitrator challenged under Section 14(2) withdraws from his office or the other party agrees or, in case of multiple parties, the other parties agree, to the challenge, the arbitral tribunal will decide on the challenge within 30 days from the date of filing the written statement referred to in Section 14(2).

Any party aggrieved by the decision of the tribunal under the procedure above, may file an appeal to the HCD within 30 days from the date of the decision (Section 14(4)). The HCD is required to decide on the appeal within 90 days from the date on which the appeal is filed (Section 14(5)). If a challenge under any procedure agreed upon by the parties or the procedure set out in Section 14(3) or the appeal preferred under Section 16(4) of the Act is not successful, the arbitral tribunal will continue the arbitral proceedings and make an award (Section 16(6)).

4.5 Arbitrator Requirements

When a person is requested to accept appointment as an arbitrator, he is under an obligation to disclose any circumstances likely to give rise to justifiable doubts as to his independence or impartiality (Section 13(1)). Additionally, every arbitrator is required to, from the time of his appointment and throughout the arbitral proceedings, disclose to the parties and all other arbitrators without delay any circumstances giving rise to doubts about his independence unless they are already aware of such circumstances (Section 13(2)).

5. Jurisdiction

5.1 Matters Excluded From Arbitration

Apart from Section 3(3), the Act does not contain any list of subject matters that may not be referred to arbitration. In terms of Section 3(3) of the Act, see **3.2 Arbitrability**.

5.2 Challenges to Jurisdiction

An arbitral tribunal may rule on a party's challenge to the tribunal's jurisdiction (ie, the principle of competence-competence is applicable in Bangladesh).

Section 17 of the Act provides that unless parties agree otherwise, the arbitral tribunal may rule on its own jurisdiction on any questions including the following:

- whether a valid arbitration agreement exists;
- whether the arbitral tribunal is properly constituted;
- whether the arbitration agreement is against public policy;
- whether the arbitration agreement is incapable of being performed; and
- what matters have been submitted to arbitration in accordance with the arbitration agreement.

Any objection regarding the tribunal's jurisdiction has to be raised before or at the time of the submission of the statement of defence (Section 19(1)). The tribunal may admit a later plea if it considers the delay justified (Section 19(2)). Where the arbitral tribunal takes a decision rejecting the plea, it can continue with the arbitral proceedings and make an arbitral award (Section 19(3)).

5.3 Circumstances for Court Intervention

Section 20 of the Act empowers the HCD to determine the jurisdiction of an arbitral tribunal. The HCD's jurisdiction to entertain an objection to the jurisdiction of the tribunal is separate to the tribunal's own jurisdiction to entertain the objection.

The HCD may, on the application of any of the parties to the arbitration agreement, after serving notice upon all other parties, determine any question as to the jurisdiction of the arbitral tribunal (Section 20(1)).

The HCD must not consider such an application unless it is satisfied that:

- the determination of the question is likely to produce substantial savings in costs;
- the application was submitted without any delay; and
- there is good reason why the matter should be decided by the HCD (Section 20(2)).

The application must state the reasons why the matter should be decided by the HCD (Section 20(3)). Unless the parties agreed otherwise, where an application under this provision is pending before the HCD, the arbitral tribunal can continue with the arbitration proceedings and make an arbitral award (Section 20(4)).

In Bangladesh Power Development Board (BPDB) v Summit Industrial and Mercantile Corporation (Pvt) 19 BLC (2014) 284, the HCD found that the parties to the arbitration agreement excluded in writing the scope of approaching the HCD for determining the jurisdiction of the arbitral tribunal. The HCD accordingly refrained from deciding jurisdiction of the arbitral tribunal.

5.4 Timing of Challenge

Section 20 of the Act does not set out a specific timeframe within which a party must go to the HCD to challenge the jurisdiction of the arbitral tribunal. However, the application must be submitted without any delay. A party can usually go to court to challenge the jurisdiction of the arbitral tribunal at any time before submitting the statement of defence.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The Act does not contain any express provision on the standard of judicial review (eg, deferential or de novo) for questions of admissibility and jurisdiction.

5.6 Breach of Arbitration Agreement

Courts in Bangladesh stay any proceedings commenced in breach of an arbitration agreement.

Section 7 of the Act provides that where a party to an arbitration agreement files any legal proceedings in a court against the other party in respect of any matter agreed to be submitted to arbitration, the court will not have jurisdiction in respect of such legal proceedings except insofar as provided by the Act.

Section 10 of the Act allows a party to an arbitration agreement to make an application to the court at any time before filing a written statement (ie, statement of defence) to stay the court proceedings commenced in breach of an arbitration agreement and to refer the parties to arbitration.

Upon receiving an application, the court, if satisfied that an arbitration agreement exists, refers the parties to arbitration and stays the proceedings, unless the court finds that the arbitration agreement is void, inoperative or concerns a matter incapable of determination by arbitration (Section 10(2)).

In Maico Jute and Bag Corporation v Bangladesh Jute Mills Corporation 8 MLR (2003) (AD) 4, it was observed that if an arbitration clause is contained in a contract, the court under Section 10 of the Act does nothing wrong if it stays, either on its own motion or on an application by a party, further lawsuit proceedings and refers the matter to the arbitrator for settlement.

Sections 7 and 10 of the Act should be read together to construe the duty conferred upon the courts to refer matters to arbitration.

According to the Accom Travels case, an application under Section 10 can be made by a party to an arbitration clause for arbitration in Bangladesh. In case of foreign arbitration, where a party initiates local court proceedings in Bangladesh, the other party, who cannot file an application under Section 10, may file an application under Section 151 of the CPC seeking a stay of the local court proceedings and a direction for referring the matter to foreign arbitration.

5.7 Jurisdiction Over Third Parties

The Act does not contain any provision on circumstances in which an arbitral tribunal may assume jurisdiction over individuals or entities that are neither party to an arbitration agreement nor signatories to the contract containing the arbitration agreement.

6. Preliminary and Interim Relief

6.1 Types of Relief

Section 21 of the Act empowers an arbitral tribunal to award preliminary or interim relief. Section 21 states that, unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute, and no appeal would lie against such order.

An interim order passed by an arbitral tribunal is binding and may be enforced by the court on an application by the party requesting the taking of such interim measures (Section 21(4)). An application filed under Section 21(4) cannot be deemed to be incompatible with the arbitration agreement nor a waiver of the agreement (Section 21(5)).

6.2 Role of Courts

Section 7Ka of the Act empowers the court to pass appropriate interim orders before and after arbitration proceedings or until enforcement of the award. Section 7Ka provides that, unless the parties agree otherwise, upon application of a party to an arbitration agreement, before or during the continuance of arbitration proceedings, or until enforcement of an award, the HCD in the case of international commercial arbitration and the District Court in case of other arbitrations may pass orders in the following matters:

- appointment of guardian for a minor or a person of unsound mind to conduct arbitral proceedings on his/her behalf;
- interim custody of or sale of or other protective measures in respect of goods or property included as the subject matter of an arbitration agreement;
- injunction against transfer or relocation of property with a view to obstructing enforcement of an arbitral award;
- empowering any person to seize, preserve, inspect, take video of, take photograph of, take custody of, collect information and specimen of, observe, examine, take evidence of, any goods or property included as the subject matter of an arbitration agreement, and for that purpose, to enter into the land or building of which a party is in possession;
- ad interim injunction;
- appointment of receiver; and
- any other interim protective measures, which appear reasonable or appropriate to the court.

The court can also cancel, alter or amend an order passed under Section 7Ka.

The HCD observed in Drilltec-Maxwell Joint Venture v Gas Transmission Company Limited 21

BLC (2016) 122 that when a party applies under Section 7Ka of the Act for interim measures, the court will first have to be satisfied that a valid arbitration agreement exists and the applicant intends to take the dispute to arbitration. Once it is so satisfied, the court will have the jurisdiction to pass orders under Section 7Ka.

According to the Accom Travels case, courts in Bangladesh cannot grant interim relief under Section 7Ka before or during continuance of foreign arbitration proceedings. However, at the stage of enforcement of foreign awards interim relief may be granted.

The Act does not contain any provisions on the use of emergency arbitrators.

6.3 Security for Costs

The District Court or the HCD while passing an interim order may pass an order requiring the applicant to give security for cost of the opposite party (Section 7Ka(2) read with Order 25 of the CPC).

Under Section 21(2) of the Act the arbitral tribunal also has the power to require a party to provide appropriate security in connection with an interim measure ordered under Section 21(1) of the Act.

7. Procedure

7.1 Governing Rules

Parties are free to agree on any rules to govern the procedure of arbitration (Section 25(1)). Some of the rules the parties usually agree on are the ICC Rules of Arbitration, UNCITRAL Arbitration Rules and SIAC Rules. In the absence of any agreement as to the procedure, the arbitral tribunal is required to decide procedural and evidential matters in conducting its proceedings (Section 25(2)).

7.2 Procedural Steps

Section 27 states that unless otherwise agreed by the parties, the arbitration proceedings will be deemed to have commenced if:

- any dispute arises where an arbitration agreement is applicable; and
- any party to the agreement:
  - (a) has received from another party to the agreement a notice requiring that party to refer, or to concur in the reference of, the dispute to arbitration; or
  - (b) has received from another party to the agreement a notice requiring that party to appoint an arbitral tribunal or to join or concur in, or approve the appointment of, an arbitral tribunal in relation to the dispute.

7.3 Powers and Duties of Arbitrators

Under the Act, the arbitral tribunal has, among others, the following powers and duties:

- make interim orders (Section 21(1));
- order a party to provide appropriate security in connection with an interim order (Section 21(2));
- appoint experts or legal advisers to report to it on specific issues (Section 32(1));
- appoint assessors to assist the tribunal on technical matters (Section 32(1));
- require a party to give the expert, legal adviser or the assessor, as the case may be, any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his/her inspection (Section 32(1));

- terminate the proceeding where the claimant fails to communicate his statement of claim (Section 35(2));
- continue the proceeding ex parte where the respondent fails to communicate his statement of defence (Section 35(2));
- make an award dismissing the claim of the claimant, where the arbitral tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim and that the delay gives rise to or is likely to give rise to a real risk of there being no fair resolution of the dispute, or has caused, or is likely to cause, serious prejudice to the respondent (Section 35(3));
- if, after receiving notice in this regard a party without sufficient cause fails to attend or be represented at an oral hearing, or fails to submit written evidence or make written submissions, the tribunal may continue the proceedings in the absence of that party or, as the case may be, without any written evidence or submissions on his behalf, and may make an award on the basis of the evidence before it (Section 35(4));
- if without showing sufficient cause a party fails to comply with any order or direction issued by the tribunal, the tribunal may make an order requiring compliance with such order or direction within such time as it may deem fit (Section 35(5));
- if a claimant fails to comply with an order of the tribunal requiring a deposit or security for costs, the tribunal may make an award dismissing the claim (Section 35(6)); or
- if a party fails to comply with any other kind of order, then the arbitral tribunal may:
  (a) direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order;
  (b) draw such adverse inferences against the defaulting party from the act of non-compliance as the circumstances justify;
  (c) proceed to passing an award on the basis of such materials as have been properly provided to it; or
  (d) make such order, as it thinks fit, as to the payment of costs incurred in consequence of the non-compliance (Section 35(7)).

7.4 Legal Representatives

Under Section 31 of the Act, unless otherwise agreed by the parties, a party to an arbitration may be represented in the proceedings by a lawyer or other person chosen by him. There are no requirements under the law for the representative to be a lawyer. If a lawyer represents a party in an arbitration, there is also no requirement for the lawyer to be admitted to the local Bar. This applies to both international commercial arbitration and domestic arbitration.

8. Evidence

8.1 Collection and Submission of Evidence

Section 34 of the Act provides that, unless otherwise agreed by the parties:

- evidence may be given before the arbitral tribunal orally or in writing or by affidavit; or
- the arbitral tribunal may administer oath or affirmation to a witness, subject to his consent.

There is no other specific provision in the Act regarding discovery, disclosure, privilege, use of witness statements and cross-examination. These issues can be covered by agreement between the parties or terms of reference or by procedural orders issued by the tribunal.

8.2 Rules of Evidence

Section 24 of the Act states that the arbitral tribunal is not bound to follow the Evidence Act 1872 of Bangladesh in disposing of a dispute under the Act.

Parties may agree on the rules of evidence to be applied in the arbitral proceeding. In the absence of parties' agreement, the tribunal may make an appropriate order upon consultation with the parties.

8.3 Powers of Compulsion

Section 33 of the Act permits either the tribunal or a party, if permitted by the tribunal, to apply to the court for issuing summons upon any necessary person for examination, or for the production of goods or for appearing before the tribunal for both purposes. However, this person cannot be compelled to answer any question or produce any document, which cannot be compelled in trial before the court. Wilful default to comply with such summons or refusal to perform constitutes contempt of the tribunal and is punishable by the court upon a complaint from the tribunal as if the offence is committed in relation to proceedings before a court.

9. Confidentiality

9.1 Extent of Confidentiality

The Act is silent on the confidentiality of the arbitral proceedings and the award. The parties are free to agree on the confidentiality. Arbitration proceedings and award can also be confidential pursuant to the arbitration rules chosen by the parties. Terms of reference or procedural orders may contain provisions on the confidentiality of the proceedings including pleadings, documents and the award.

10. The Award

10.1 Legal Requirements

In terms of the form and contents of the arbitral award, Section 38(1) of the Act provides that an arbitral award is required to be made in writing and must be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator under Section 38(2), the signatures of a majority of all the members of the arbitral tribunal will be sufficient and the reason for any omitted signature will have to be stated in the award. No reasons would have to be provided by the arbitral tribunal where the parties have agreed to that effect, or the award is an arbitral award on agreed terms under Section 22 (Section 38(3)). The arbitral award must state the date and place of arbitration and the award will be deemed to have been made at that place (Section 38(4)).

After the arbitral award is made, a copy signed by the arbitrator or arbitrators has to be delivered to each party (Section 38(5)).

Section 40 of the Act allows any clerical, computational, typographical or similar errors to be corrected on application of either party or on the tribunal's own initiative.

There are no time limits specified in the Act for making an arbitral award.

10.2 Types of Remedies

The Act does not contain any limits on the types of remedies that an arbitral tribunal may award.

10.3 Recovering Interest and Legal Costs

Parties are entitled to recover interest and legal costs. Section 38(6)(a) of the Act provides that unless otherwise agreed by the parties, where and insofar as an arbitral award is for the pay-

ment of money, the arbitral tribunal may include interest in respect of the sum for which the award is made. The interest may be awarded at such rate as the tribunal deems reasonable, either on the whole or on any part of the sum, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

Section 38(6)(b) of the Act provides that unless the award otherwise directs, the interest rate applicable to an arbitration award will be 2% above the interest rate determined by the Central Bank of Bangladesh from time to time.

Under Section 38(7) of the Act, unless the parties agree otherwise, the arbitration tribunal is required to fix the costs of arbitration. With regard to costs, the arbitral tribunal is required to specify the following in an arbitration award:

- the party entitled to costs;
- the party who will pay the costs;
- the amount of costs or method of determining that amount; and
- the manner in which the costs will be paid.

"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.

11. Review of an Award

11.1 Grounds for Appeal

Under Section 39 of the Act, an arbitral award is final and binding. Therefore, there is no right of appeal against an arbitral award. A party wishing to challenge an arbitral award may submit an application for setting aside the award under Section 42 of the Act.

Section 43(1) of the Act lays down the following grounds for setting aside an arbitral award:

- a party to the arbitration agreement was under some incapacity;
- the law under which the parties entered into the arbitration agreement is not a valid law;
- the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable due to some reasonable cause to present his case;
- the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains a decision on matters beyond the scope of the submission to arbitrators, 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;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or, in the absence of such agreement, was not in accordance with the provisions of the Act;
- the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force in Bangladesh;
- the arbitral award is prima facie opposed to the law for the time being in force in Bangladesh;
- the arbitral award is opposed to the public policy of Bangladesh; or
- the arbitral award is induced or influenced by fraud or corruption.

The Appellate Division of the Supreme Court of Bangladesh in Saudi Arabian Airlines Corporation v Saudi Bangladesh Services Company Ltd. 73 DLR (AD) (2021) 277 interpreted the term "public policy" in Section 43(1)(b)(iii) of the Act as follows:

"The words "public policy" used in Section 43(b)(iii) connote some matters, which concern public good and the public interest. "Public policy" is to be understood in the context of each and every case. The term "public policy" is not defined in the Arbitration Act and it is difficult to derive a straightjacket formula to define and determine the scope of public policy. […] An award would be contrary to public policy if it were "patent illegal". Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. [An] award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the [c]ourt. Such award is opposed to public policy and is required to be adjudged void."

Under Section 42 of the Act, an application for setting aside an award may be made to the court by a party within 60 days from the receipt of the award. The District Court may set aside the arbitral award in an arbitration other than an international commercial arbitration. The HCD may set aside an arbitral award made in an international commercial arbitration held in Bangladesh.

11.2 Excluding/Expanding the Scope of Appeal

The Act does not contain any provision allowing parties to agree to exclude or expand the scope of challenge against an award.

11.3 Standard of Judicial Review

Under the Act arbitral awards cannot be reviewed on the merits. The award can only be set aside on the grounds set out in Section 43 of the Act.

In Bangladesh Power Development Board v M/s Arab Contractors (BD) Limited 15 MLR (2010) (HCD) 185 it was held that the award can only be set aside on the grounds set out in Section 43 of the Act.

In Bangladesh Railway v Pamkaya (M) SDN BHD 2 CLR (2014) (HCD) 114, and Jalalabad Gas Transmission and Distribution System Limited v Lafarge Surma Cement Limited 23 BLC (2018) (HCD) 775, the HCD refused to set aside arbitral awards on grounds arising out of the substance of the awards. However, in Gas Transmission Company Limited v Drilltec-Maxwell Joint Venture LEX/BDHC/0039/2021, the HCD departed from the above decisions, re-examined the substance of an arbitration award and eventually set it aside in view of the findings made by the HCD. An appeal against the judgment in this case is currently pending.

12. Enforcement of an Award

12.1 New York Convention

Bangladesh is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Bangladesh acceded to the New York Convention on 6 May 1992. The Act has incorporated the principle of recognition and enforcement of foreign arbitral awards, as contained in the New York Convention. The Act does not make a distinction in relation to the recognition and enforcement of a foreign arbitral award between a New York Convention state and a non-New York Convention state.

Sections 45 to 47 of the Act provide for recognition and enforcement of foreign arbitration awards.

12.2 Enforcement Procedure

Enforcement of Arbitration Award Made in Arbitration Held in Bangladesh

An arbitration award made in an arbitration held in Bangladesh is enforceable under Section 44 of the Act in the same manner as if it were a decree of the court. Section 44 states that where the time for making an application to set aside an arbitration award under Section 42 of the Act has expired, or such application having been made has been refused, the award will be enforced by the court under the CPC in the same manner as if it were a decree of that court. The expression "court" refers to the District Court within the local limits of whose jurisdiction the arbitration award has been finally made and signed.

Enforcement of Foreign Arbitral Award

A foreign arbitral award is enforceable under Section 45 of the Act. Section 45(1)(a) of the Act states that a foreign arbitral award is binding for all purposes on the persons as 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) of the Act states that a foreign arbitral award must, on an application made by any party to it, be enforced by execution by the District Court, Dhaka under the CPC, in the same manner as if it were a decree of a court in Bangladesh.

Section 45(2) of the Act provides that application for the execution has to be accompanied by the original arbitration award or an authenticated copy of the award, original or authenticated copy of the agreement for arbitration and any other evidence proving that the award is a foreign award.

According to Section 45(3) of the Act if the foreign arbitral award to be enforced or the arbitration agreement to be produced is in a language other than English or Bangla, the applicant is required to produce a translation in English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in Bangladesh.

Section 46(1) of the Act lays down the grounds for refusing recognition or execution of foreign arbitral awards. The grounds are identical to those set out in Section 43(1) for setting aside a domestic arbitral award.

Under Section 46(1)(a)(vi), an award that has been set aside by a court in the seat of the arbitration will not be recognised and enforced in Bangladesh.

When an award is subject to ongoing set aside proceedings at the seat, the courts in Bangladesh may stay enforcement proceedings pending a resolution of the proceedings at the seat.

The Act does not contain any provision allowing the state of Bangladesh or a state entity to raise a defence of sovereign immunity at the enforcement stage.

12.3 Approach of the Courts

Courts may refuse enforcement of arbitration awards including foreign awards on the limited grounds set out in Sections 44 and 46 of the Act.

Section 46(1)(b)(ii) of the Act states that recognition or enforcement of an arbitral award may be refused on the ground that recognition and execution of the award would be in conflict with the "public policy of Bangladesh". On Bangladesh courts' approach towards public policy, see **11.1 Grounds for Appeal**.

13. Miscellaneous

13.1 Class Action or Group Arbitration

The Act does not contain any provisions on class action arbitration or group arbitration.

13.2 Ethical Codes

If the counsel or arbitrators are qualified lawyers in Bangladesh, the Bangladesh Bar Council Canons of Professional Conduct and Etiquette will be applicable.

13.3 Third-Party Funding

There are no rules or restrictions on third-party funders.

13.4 Consolidation

In relation to consolidation of proceedings and concurrent hearings, Section 28 of the Act provides that parties to an arbitration agreement will be free to agree to the consolidation of arbitration proceedings with any other arbitral proceeding, as well as hold concurrent hearings on agreed terms. The arbitral tribunal does not have the power to consolidate the proceedings or hold concurrent hearings unless the parties agree to confer such power on the tribunal.

13.5 Binding of Third Parties

The Act does not contain any provisions on binding third parties. Third parties cannot be bound by an arbitration agreement or award. Courts are also unlikely to hold third parties to an arbitration agreement or award.

Trends and Developments

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Rahman's Chambers is a leading international arbitration law firm with a global reach. With a strong focus on shipping, infrastructure construction, energy, aviation, and international trade, it provides comprehensive legal counsel and representation to clients worldwide. Its expertise extends beyond traditional cross-border disputes, encompassing both institutional and ad hoc arbitration matters in jurisdictions outside Bangladesh. Its team comprises of seasoned international arbitration practitioners and distinguished arbitrators, providing deep expertise in complex legal frameworks and procedures. The firm boasts extensive experience in shipping, international trade, and energy disputes, handling complex matters under various arbitration rules including LMAA, GMAA, SIAC, ICC, BIAC and ICA. Beyond representing clients in international forums, it provides comprehensive support in Bangladesh, including enforcing foreign awards and securing interim relief.

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Introduction

Bangladesh is experiencing rapid economic growth fuelled by sectors like garments, remittances and agriculture. Investments in infrastructure and the rise of the digital economy are transforming the business landscape. The country's young population presents both opportunities and challenges, with urbanisation and a growing middle class shaping consumer trends. Despite persistent challenges of climate change vulnerability and income inequality, Bangladesh has achieved robust economic growth and increasingly participates in regional and global cooperation.

Bangladesh has made significant strides in establishing itself as a favourable jurisdiction for international commercial arbitration. The enactment of the Arbitration Act, 2001 (the "Act") aligned with the United Nations Commission on International Trade Law (UNCITRAL) Model Law, marked a pivotal moment in the country's legal landscape. This legislation introduced modern arbitration principles, promoting party autonomy, minimal judicial intervention, and efficient dispute resolution.

While the Act provides a solid foundation, the international arbitration landscape in Bangladesh is dynamic and evolving. This contribution explores the key trends, challenges, and opportunities shaping the country's arbitration landscape.

Regulatory Regime

Bangladesh's regulatory framework for international commercial arbitration is primarily governed by the Act aligned with the UNCITRAL Model Law. The Act provides the overarching legal framework for arbitral proceedings, emphasising party autonomy, minimal judicial intervention, and efficient dispute resolution.

The High Court Division of the Supreme Court is the primary judicial authority overseeing arbitration in Bangladesh. A dedicated single bench handles a wide range of arbitration-related matters to support the arbitration process, including determining the arbitrability of disputes, resolving jurisdictional issues, appointing or replacing arbitrators, addressing fee disputes, granting interim relief and annulling awards. In contrast, the District Courts are responsible for enforcing final arbitral awards.

Ad Hoc Arbitration

Ad hoc arbitration in Bangladesh is governed by the Act. It offers flexibility as parties control the process and select arbitrators and procedures. While cost-effective, some delays may arise from High Court intervention in arbitrator appointment. The UNCITRAL Rules are commonly adopted, with the Permanent Court of Arbitration (PCA) the default appointing authority. Parties can also designate alternative authorities, such as the Bangladesh International Arbitration Centre (BIAC) for the purpose of appointing arbitrators, if needed.

Statutory Arbitration

Bangladesh law mandates arbitration in both the real estate and power and energy sectors. While the Act governs the former, the Bangladesh Energy Regulatory Commission (BERC) oversees the latter. This dual regulatory framework has led to uncertainties about the precedence of contractual arbitration clauses over statutory mandates.

A recent landmark case clarified this issue in the context of the power sector. The Supreme Court decisively ruled that a contractually agreed-upon arbitration clause under the International Chamber of Commerce (ICC) rules superseded BERC's jurisdiction. This decision established a

crucial precedent, affirming the primacy of contractual arbitration agreements over statutory mandates.

Institutional Arbitration

International contracts commonly incorporate arbitration clauses referencing established institutions like ICC, the Singapore International Arbitration Centre (SIAC), UNCITRAL or the International Centre for Settlement of Investment Disputes (ICSID). By selecting these institutions, parties prioritise predictability and minimise procedural delays often associated with ad hoc arbitration.

Government contracts often impose rigid dispute resolution mechanisms, typically mandating arbitration through predetermined channels such as ICC, SIAC, UNCITRAL or ICSID. Unlike commercial agreements, which allow for greater flexibility in selecting dispute resolution methods, including multi-tiered approaches like mediation or dispute resolution boards (DRBs), few government contracts prioritise standardised processes. This rigidity is often attributed to public interest, risk management and policy considerations.

Multi-tiered dispute resolution mechanisms, such as DRBs followed by arbitration, or mediation proceeding arbitration, are increasingly common.

Arbitration Under Treaty

Bangladesh is demonstrating growing sophistication in navigating international frameworks. A noteworthy example is the UN Convention on the Law of the Sea (UNCLOS). This comprehensive legal framework for ocean governance includes provisions for dispute resolution through the International Tribunal for the Law of the Sea. Bangladesh has successfully utilised this mechanism to resolve maritime boundary disputes with both India and Myanmar. The arbitration with India was conducted under the auspices of the PCA, while the dispute with Myanmar was adjudicated by the International Tribunal for the Law of the Sea itself. These cases highlight Bangladesh's strategic use of UNCLOS and its dispute resolution mechanisms for managing complex maritime issues.

Bangladesh has concluded numerous bilateral investment treaties (BITs) and is a party to multilateral investment agreements containing investor-state dispute settlement (ISDS) provisions. ISDS provisions allow foreign investors to initiate arbitration against the host state for alleged treaty violations. ICSID is a primary forum for these cases.

A notable example involves a dispute arising from an energy sector project where an investor initiated an ICC arbitration. Faced with enforcement challenges, the investor turned to ICSID, alleging expropriation due to the host state's interference. The ICSID tribunal upheld the investor's claim, emphasising the importance of ISDS in protecting foreign investments.

Regional cooperation and dispute resolution mechanisms are increasingly integrated into multilateral investment treaties (MITs). Examples include the South Asian Association for Regional Cooperation (SAARC) Development Fund (SDF) and the Energy Charter Treaty (ECT), both of which mandate the SAARC Arbitration Council for dispute resolution among member states, including Bangladesh. These regional frameworks aim to facilitate cooperation while providing effective dispute resolution channels.

Bangladesh's graduation from least developed country (LDC) status is likely to increase its

engagement with the World Trade Organisation (WTO). As a more active participant in global trade, Bangladesh can expect a rise in trade-related disputes. The WTO's dispute settlement mechanism, which involves consultations, panel rulings, and potential appeals, will become increasingly important for resolving these trade disagreements.

International Arbitrators and Professionals

Bangladesh has cultivated a burgeoning pool of arbitration talent. Several prominent local legal experts have distinguished themselves on the international stage, serving as arbitrators for prestigious institutions like the PCA. This growing cadre of arbitrators, coupled with a cohort of internationally qualified legal practitioners based in Bangladesh, has significantly enhanced the country's arbitration landscape.

These professionals, many affiliated with renowned arbitration institutions, are not only equipped to handle domestic disputes but also actively participate in international arbitration cases unrelated to Bangladesh. Their involvement has not only elevated the country's arbitration profile but also positioned Bangladesh as a potential hub for international dispute resolution. As the country continues to integrate into the global economy, its arbitration sector is poised for further growth and recognition.

Physical Location and Virtual Arbitration

The arbitration landscape in Bangladesh has evolved to accommodate both domestic and international disputes through hybrid and online proceedings. While most arbitrations seated in Bangladesh incorporate a blend of physical and virtual hearings, the trend extends to foreign-seated arbitrations as well.

Many international arbitration cases involving Bangladeshi parties or interests are conducted in a hybrid format, leveraging technology to facilitate efficient dispute resolution. While crucial stages such as witness examinations and final arguments typically occur in-person, preliminary matters and procedural hearings are often conducted virtually. This hybrid approach allows for remote participation, reducing costs and logistical challenges. However, for crucial stages such as witness testimony or final arguments, parties often opt for in-person proceedings.

The popular physical locations for these in-person sessions include BIAC-provided arbitration rooms, law firm conference rooms, chambers of commerce meeting spaces and even Supreme Court arbitration rooms. This flexibility in venue selection has contributed to the growth of arbitration in Bangladesh.

Popular Institutions

International contracts commonly feature arbitration clauses referencing established institutions like ICC, SIAC, and occasionally ad hoc UNCITRAL rules, prioritising efficiency and predictability. In contrast, domestic disputes, especially those involving foreign investment companies operating in Bangladesh, often utilise BIAC or opt for ad hoc arbitration under the Act. This divergence reflects the evolving legal landscape and the specific needs of different contractual arrangements.

Popular Industry

Dispute resolution through arbitration is increasingly prevalent in Bangladesh's dynamic business landscape. Key sectors witnessing a surge in arbitration cases include aviation, capital goods/engineering, construction/building products, oil and gas, power and energy, real estate, services, shipping, telecom and textiles. These

industries' complex transactions and potential for disagreements often necessitate efficient dispute resolution mechanisms like arbitration.

Interim Relief

Bangladesh has grappled with inconsistent court rulings regarding jurisdiction over foreign-seated arbitrations. Courts were initially divided on granting interim relief for disputes seated outside the country. Cases like HRC Shipping Ltd. v MV X-Press Manaslu and Others and STX Corporation Ltd. v Meghna Group of Industries Limited highlighted the conflicting views on granting interim relief for disputes seated outside the country. This inconsistency hindered the development of arbitration as a preferred dispute resolution method in Bangladesh.

A larger bench of the High Court later clarified the Act's scope, emphasising its primary application to arbitrations seated in Bangladesh. However, a recent landmark decision in Italian Thai Development Public Company Ltd. v The Export-Import Bank of China and others significantly altered the landscape. The Appellate Division ruled that Bangladeshi courts possess the authority to grant interim measures for both domestic and foreign-seated arbitrations. This decision brings much-needed clarity and aligns Bangladesh with international arbitration standards, fostering a more conducive environment for businesses operating in the country.

Appointment and Removal of Arbitrator

The Act provides a framework for arbitrator appointment, allowing for both institutional and ad hoc arbitration. The arbitration institutions offer a structured process for arbitrator selection, while ad hoc proceedings rely on contractual agreements or court intervention. Cases such as Genesis System Ltd. v Clapp & Mayne Inc. highlight the importance of adhering to contractual pre-arbitration procedures to ensure a valid appointment. In Industrialisation Fund for Developing Countries (IFU) v Northern Corporation Limited, the court addressed a dispute over the applicable arbitration clause, determining the correct procedure for arbitrator appointment.

The case of Bangladesh Power Development Board (BPDB) v Summit Industrial and Mercantile Corporation (Pvt) Ltd. provides a valuable illustration of the challenges that can arise in the appointment of arbitrators in Bangladesh. In this case, the dispute centred on the formation of the arbitral tribunal. BPDB challenged the appointment of the sole arbitrator on the grounds of potential bias due to the arbitrator's shareholding in the respondent's holding company.

This case underscores the importance of ensuring arbitrator independence and impartiality. The court's decision to remove the arbitrator due to a perceived conflict of interest highlights the critical role that impartiality plays in the arbitral process. This case serves as a stark reminder of the potential pitfalls that can occur when there are doubts about an arbitrator's neutrality. It emphasises the need for careful consideration when selecting arbitrators to avoid delays, disputes, and ultimately, the need for court intervention.

Despite these challenges, the growing number of international commercial arbitrations seated in Bangladesh indicates a maturing arbitration landscape, with parties increasingly opting for both institutional and ad hoc arbitration mechanisms.

Court Intervention and Support

Writ jurisdiction

The case involving Energis Power Corporation Ltd. and Bangladesh Power Development Board (BPDB) illustrates a limited instance of court

intervention in an arbitration proceeding. While the initial dispute was resolved through arbitration conducted by BERC, the High Court intervened due to a specific issue: the lack of clarity in the arbitral award regarding the calculation of the amount payable by the petitioner.

In another writ petition, the High Court Division dismissed the writ petitions on the ground that they were not maintainable. The court held that the petitioner had agreed to arbitration by signing the contracts and was bound to raise any dispute for arbitration. The court also observed that the existence of an effective alternative remedy, such as arbitration, was a good ground for the court to decline to exercise its extraordinary jurisdiction under Article 102 of the Constitution.

This approach reflects a cautious and limited interference in the arbitral process, aiming to uphold the integrity of the arbitration while addressing a specific procedural deficiency.

Parallel proceedings

The interplay between courts and arbitration in Bangladesh is complex. However, in Green Town LP Gas Ltd. v FMC Group (Bangladesh) Ltd, the court declined to stay criminal proceedings despite the existence of an arbitration clause, emphasising the distinct nature of criminal matters. Therefore, the court allowed both arbitration and criminal proceedings to continue in parallel.

The case of Maico Jute and Bag Corporation v Bangladesh Jute Mills Corporation underscores the court's role in enforcing arbitration agreements. The court stayed a parallel money suit in favour of arbitration, affirming the principle of party autonomy.

These cases highlight the evolving role of courts in arbitration. While courts are generally reluctant to interfere, they may intervene in specific circumstances. However, the boundaries of judicial intervention remain subject to interpretation, and the interplay between arbitration and litigation continues to shape the Bangladeshi legal landscape.

Civil appeal and revision

Appeal or revision against court orders arising from arbitration in Bangladesh is generally limited and can significantly delay dispute resolution. While the principle of finality of arbitral awards is paramount, the Code of Civil Procedure (CPC) provides some avenues for challenging execution orders and arbitrator appointment decisions. However, judicial intervention is typically restricted to procedural irregularities and not the merits of the award. This approach aligns with the international trend, as exemplified by the UNCITRAL Model Law, which emphasises finality and limits judicial review. Despite these limitations, the availability of appeals and revisions can prolong arbitration proceedings, undermining the efficiency and cost-effectiveness of the process. Such delays have detrimental impacts on businesses and parties involved, highlighting the need for careful consideration before pursuing these remedies.

Award

Enforcement

Under Section 45 of the Act, a foreign arbitral award, can be executed in the same manner as a court decree. The specific procedure is outlined in the Act. Generally, the trend towards enforcing arbitral awards in Bangladesh is positive. Courts have shown increasing recognition of the finality of arbitral awards and have generally been supportive of their enforcement.

The case of Smith Co-Generation (Bangladesh) Private Limited v Bangladesh Power Develop-

ment Board (BPDB) is a significant precedent in the enforcement of ICC arbitration awards in Bangladesh. This case underscores the judiciary's supportive stance towards upholding the finality of arbitral awards, even when the opposing party is a government entity.

The successful enforcement of the ICC award in favour of Smith Co-Generation against the BPDB is a testament to the growing recognition of arbitration as a viable dispute resolution mechanism in the country. The court's rejection of the BPDB's dilatory tactics through pending title suits reinforces the principle of finality in arbitration and discourages parties from employing such strategies to delay or avoid fulfilling their obligations under an arbitral award.

Moreover, the court's clarification on the correct legal channel for challenging arbitral awards, directing parties to Section 46 of the Act, provides much-needed clarity and contributes to the efficient enforcement process. This case serves as a positive development in the enforcement landscape of ICC awards in Bangladesh, encouraging confidence in the arbitral process and promoting its use as a preferred dispute resolution mechanism.

The Roads and Highways Department (RHD) ICC arbitration is another notable case and involved a dispute over additional costs incurred during road maintenance projects. The RHD's unsuccessful attempt to challenge the award due to a missed deadline underscores the significance of adhering to procedural timeframes in arbitration. The court's decision to uphold the award reinforces the finality principle and the importance of substantive grounds for challenging arbitral decisions.

Furthermore, the case of Ferdous Alam v Warnaco Global Sourcing Limited showcases the enforceability of arbitration clauses in commercial leases. The court's decision to uphold the arbitral award despite challenges related to the Premises Rent Control Act reinforces the autonomy of parties to agree to arbitration and the broad scope of arbitrable disputes.

However, the case of Louis Dreyfus Commodities Suisse SA v Php Spinning Mills Limited exemplifies the challenges that can arise in this process. Despite securing a favourable award from the International Cotton Association tribunal, the appellant faced obstacles in enforcing the award in Bangladesh due to the expiration of the statutory limitation period. This case underscores the importance of timely enforcement and potential hurdles in executing foreign awards within the country's legal framework.

Annulment

Section 42 of the Act outlines the procedure for applying to set aside or correct an award. The application must be made to the High Court Division within 60 days of the receipt of the award.

An arbitral award can be set aside if a party can prove incapacity or invalidity of the arbitration agreement, improper notice, exceeding the scope of the arbitration, procedural irregularities, or if the award conflicts with applicable law, public policy, or was tainted by fraud or corruption.

In Cottonex Anstalt v Comilla Spinning Mills Ltd, a dispute arose from a cotton sale contract containing an arbitration clause under the International Cotton Association (ICA). The ICA arbitral tribunal issued an award in favour of Cottonex. However, when Cottonex sought to enforce the award in Bangladesh, Comilla successfully challenged its enforceability. The court determined

that the award violated public policy by disregarding a domestic court injunction and potentially facilitating over-invoicing in contravention of the import policy order.

This case underscores the challenges of enforcing foreign arbitral awards and the importance of considering local laws and public policy when conducting international arbitration.

Conclusion

Bangladesh has made notable strides in establishing itself as a preferred venue for arbitration. The enactment of the Act provided a robust legal framework and subsequent case law has contributed to a growing recognition of arbitration as an efficient dispute resolution mechanism. The increasing willingness of domestic courts to enforce arbitral awards, as demonstrated in cases like Smith Co-Generation (Bangladesh) Private Limited v Bangladesh Power Development Board (BPDB), and Italian Thai Development Public Company Ltd. v The Export-Import Bank of China and others is a positive development.

Parties engaged in international arbitration in Bangladesh should prioritise careful contract drafting, including well-defined arbitration clauses. Selecting a reputable arbitral institution and understanding local laws are crucial. During the arbitration, strong legal representation, procedural compliance, and effective evidence presentation are essential. Post-award, prompt enforcement action, familiarity with local procedures, and anticipation of potential challenges, as exemplified by the case of Cottonex Anstalt v Comilla Spinning Mills Ltd, are vital.

CANADA

Law and Practice

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Lawson Lundell LLP differentiates itself as one of the largest and most experienced law firms in Western Canada. It is a leading, full-service business law firm, with over 200 lawyers located in offices in Vancouver, Calgary, Kelowna and Yellowknife. The litigation and dispute resolution group has over 70 lawyers across its offices and specialises in arbitration, both domestic and international. The firm's experience includes Aboriginal, administrative, constitutional and public law; alternative dispute resolution; appellate advocacy; class action; commercial litigation; competition and antitrust; construction and engineering; corporate governance; defamation and media; environmental; healthcare; insolvency and restructuring; insurance; natural resources; pensions, benefits and trusts; privacy and freedom of information; product liability; public utility and regulatory; real estate; research and opinions; securities; taxation; technology; and transportation. The firm's lawyers are leaders in ADR processes and approaches, including having completed formal training through ADR societies.

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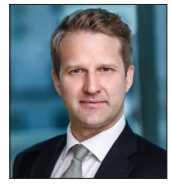

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1. General

1.1 Prevalence of Arbitration

Arbitration is widely used in Canada as an alternative to court litigation.

Historically, Canadian governments and courts have adopted a pro-arbitration stance in line with modern international practices. In 1986, Canada became the first jurisdiction to adopt the UNCITRAL Model Law on International Commercial Arbitration. Canadian courts have since issued over 200 written decisions under arbitration legislation based on the Model Law.

Every province and territory, with the exception of Quebec, has a separate statute for domestic and international arbitration. In Quebec, arbitration legislation is set out in the Civil Code of Quebec and the Code of Civil Procedure, which are generally consistent with the Model Law.

There are also many arbitration institutions and facilities in Canada which support both domestic and international proceedings.

Unless stated otherwise, the sections below address international arbitration matters.

1.2 Key Industries

In Canada, international arbitration is commonly used in the following industries: mining, oil and gas, construction, information technology, forestry and shareholder disputes.

All industries are experiencing an increased demand for arbitration, which was accelerated by the pandemic. Arbitration proceedings proceeded without interruption during the pandemic, while the courts in Canada had various limits or closures that made them less accessible to litigants.

1.3 Arbitration Institutions

There are many arbitration institutions in Canada, including the ADR Institute of Canada Inc (ADRIC), the Vancouver International Arbitration Centre (VanIAC, formerly BCICAC), the Canadian International Internet Dispute Resolution Centre (CIIDRC, a division of VanIAC), the Canadian Arbitration Association (CAA) and the International Centre for Dispute Resolution of Canada (ICDR – Canada).

Effective 1 July 2022, VanIAC has introduced new International Commercial Arbitration Rules of Procedure (the "VanIAC Rules"), which include International Expedited Procedures in Appendix A. In 2020, VanIAC amended its domestic arbitration rules (in conjunction with the province of British Columbia's new domestic Arbitration Act, SBC 2020, c 2).

1.4 National Courts

There are no specialised courts in Canada designated to hear arbitration-related disputes. These matters are typically heard by the provincial superior courts, in accordance with their rules of civil procedure.

Canadian courts are accustomed to dealing with domestic and international arbitration matters, and have issued over 200 written decisions under the Model Law.

2. Governing Legislation

2.1 Governing Law

Each of the provinces and territories, except Quebec, has enacted an International Commercial Arbitration Act based on the Model Law.

Alberta, Saskatchewan, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, New-

foundland, Yukon, Nunavut and Northwest Territories (pursuant to Nunavut's legislation) have adopted the 1985 version of the Model Law, while British Columbia and Ontario adopted the Model Law with amendments as adopted in 2006.

British Columbia has enacted a reworked version of the Model Law, while the other provinces and territories attach it as a schedule with small variations to their International Commercial Arbitration Act.

In Quebec, the Model Law has not been incorporated. Arbitration in the province is governed by the Civil Code of Quebec and the Code of Civil Procedure, which are generally consistent with the Model Law.

The Commercial Arbitration Act, RSC 1985, c 17 (2nd Supplement) is a federal statute based on the 1985 version of the Model Law. This statute applies only: (i) where at least one of the parties to the arbitration is the Crown, a federal departmental corporation or a Crown corporation; or (ii) in relation to a maritime or admiralty matter.

2.2 Changes to National Law

There have been no significant changes to the international arbitration statutes in Canada in the past year.

On 1 September 2020, a new domestic Arbitration Act, SBC 2020, c 2, came into force in British Columbia.

3. The Arbitration Agreement

3.1 Enforceability

Arbitration agreements are governed by statute. With the exceptions of Ontario, British Columbia and Quebec, the requirements for an international arbitration agreement are those contained in the 1985 version of the Model Law. Ontario and British Columbia have adopted the requirements set out in the 2006 version of the Model Law.

All the international arbitration statutes in Canada require that an arbitration agreement is in writing.

3.2 Arbitrability

With some limited exceptions, all commercial disputes can be resolved by arbitration, provided that the parties agreed to do so.

Legislatures and courts have decided, however, that certain matters are not arbitrable in Canada. These include:

- certain types of disputes under British Columbia's Business Practices and Consumer Protection Act (Seidel v Telus Communications Inc, 2011 SCC 15), Ontario's Consumer Protection Act, 2002, SO 2002, c 30, Sch A, s 7(2), and Quebec's Consumer Protection Act, CQLR, c P-401, s 11; and
- disputes over the status and capacity of persons, family matters or other matters of public policy (Quebec Civil Code, CQLR c CCQ-1991, s 2639).

3.3 National Courts' Approach

Generally speaking, Canadian courts take a pro-enforcement stance with respect to arbitration agreements.

Consistent with the Model Law, Canadian courts will typically enforce an arbitration agreement unless it is void, inoperative, or incapable of being enforced (Uber Technologies v Heller, 2020 SCC 16).

3.4 Validity

In accordance with Section 16(2) of the Model Law, Canadian courts enforce the rule of separability and treat an arbitration clause as an agreement independent of the other terms of the contract (Peace River Hydro Partners v Petrowest Corp, 2022 SCC 41).

4. The Arbitral Tribunal

4.1 Limits on Selection

There are no statutory limitations on the selection of arbitrators in Canada. Arbitrators are not required to be legally qualified.

The parties have broad autonomy with respect to the selection of arbitrators, including the procedure to be followed, the number of arbitrators and any specific qualifications required.

4.2 Default Procedures

Under the international arbitration laws in each province and territory, the default procedures for selecting an arbitrator are consistent with Article 11 of the Model Law.

However, these provisions only apply if the parties did not agree to a procedure in the contract or in a set of arbitral rules.

4.3 Court Intervention

Canadian courts will only intervene in the selection of an arbitrator if a party makes a request to the court in accordance with Article 11 of the Model Law.

4.4 Challenge and Removal of Arbitrators

The challenge or removal of an arbitrator is governed by the Model Law, or the procedure agreed to by the parties or contained in the applicable arbitral institution's rules.

In most Canadian jurisdictions, parties will make a request to challenge or remove an arbitrator in the first instance to the arbitral panel, and if unsuccessful, an application could be made to the provincial superior court (the trial-level court).

4.5 Arbitrator Requirements

In accordance with Article 12 of the Model Law, an arbitrator must disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence. That obligation applies throughout the arbitration proceedings.

The parties may also agree to additional requirements with respect to an arbitrator's independence, or use a set of arbitral rules that do so.

For example, the VanIAC Rules contain provisions requiring: (i) a written declaration that arbitrators must sign regarding their independence and impartiality; and (ii) limits on the parties' communication about the disputes with any arbitrator or any candidate for appointment as an arbitrator.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

See **3.2 Arbitrability**.

5.2 Challenges to Jurisdiction

The principle of competence-competence is recognised by courts across Canada.

Under Canadian arbitration legislation, an arbitral tribunal can rule on its own jurisdiction as a preliminary matter or in a final award. A party may apply to a superior court for a review of the tribunal's ruling, whether the arbitration proceedings have concluded or not.

In 2020, the Supreme Court of Canada established a new exception to the competence-competence principle based on access to justice considerations (Uber Technologies Inc v Heller, 2020 SCC 16).

Under this new exception, courts should not refer a jurisdictional challenge to an arbitrator if there is a real prospect that the challenge will never be resolved, unless the court determined the issue. For example, this exception was found to arise where the costs that a party faced to participate in the arbitration and challenge jurisdiction were more than the amount of damages the party sought.

In 2022, the Supreme Court of Canada held that an otherwise valid arbitration agreement could be rendered unenforceable in the context of a court-ordered receivership under the Bankruptcy and Insolvency Act, RSC 1985, c B-3 (Peace River Hydro Partners v Petrowest Corp, 2022 SCC 41).

5.3 Circumstances for Court Intervention

A court can intervene in matters relating to arbitral jurisdiction in the following circumstances.

First, a party may bring an application before the court to stay an action and refer the matter to arbitration under Article 8 of the Model Law (Husky Food Importers v JH Whittaker & Sons, 2022 ONSC 1679, aff'd 2023 ONCA 260).

Generally speaking, the courts will refer jurisdictional issues to the arbitral tribunal in the first instance. A court may depart from this general rule only if the following criteria are met:

- the jurisdictional challenge relates solely to a question of law or a question of mixed fact and law, where the questions of fact require only superficial consideration of the documentary evidence in the record;
- the challenge is not a delaying tactic; and
- the court is satisfied that the challenge will not unduly impair the conduct of the arbitration proceeding (Dell Computer Corp v Union des consommateurs, 2007 SCC 34; Uber Technologies Inc v Heller, 2020 SCC 16).

As discussed in **5.2 Challenges to Jurisdiction**, the Supreme Court of Canada recently established a new exception on access to justice grounds and addressed whether insolvency proceedings can render an arbitration agreement "inoperative". Second, following the issuance of an arbitral award, a party may bring an application to set it aside pursuant to Article 34 of the Model Law.

Third, the court can address jurisdiction on applications to recognise and enforce an award pursuant to Article 36 of the Model Law.

5.4 Timing of Challenge

Consistent with Article 16 of the Model Law, jurisdiction must be challenged no later than the submission of the statement of defence. The circumstances when a court may intervene are set out in **5.2 Challenges to Jurisdiction** and **5.3 Circumstances for Court Intervention**.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

Generally speaking, courts in Canada take a deferential approach to the review of arbitral awards.

There has historically been a divergence in Canada on whether the review by a court of a jurisdictional decision of an international arbitration tribunal attracts: (i) the deferential "reasonableness" standard; or (ii) the "correctness

standard", which provides no deference to an arbitral award.

For example, a correctness standard was applied in a line of Ontario decisions (United Mexican States v Cargill, 2011 ONCA 622, leave ref'd [2012] SCCA No 528 (SCC), and The Russian Federation v Luxtona Limited, 2021 ONSC 4604 (Div Ct), aff'd 2023 ONCA 393). In contrast, a reasonableness standard was applied in another line of cases (ACE Bermuda Insurance Ltd v Allianz Insurance Company of Canada, 2005 ABQB 975 and lululemon athletica Canada inc v Industrial Color Productions Inc, 2021 BCSC 15; note that on appeal, the BC Court of Appeal found the judge erred and should have applied the correctness standard, but upheld the judge's decision that the arbitrator had jurisdiction: 2021 BCCA 428).

When applying to set aside an award on jurisdictional grounds, the parties may be able to submit fresh evidence that was not before the arbitrator (Russian Federation v Luxtona Limited, 2023 ONCA 393).

5.6 Breach of Arbitration Agreement

As discussed in **3.2 Arbitrability**, consistent with the Model Law, Canadian courts will enforce an arbitration agreement unless it is void, inoperative or incapable of being enforced.

Where a party commences court proceedings in breach of an arbitration agreement, the other party may seek a stay of the court action consistent with Article 8 of the Model Law. In such cases, the courts will typically refer the matter to arbitration.

5.7 Jurisdiction Over Third Parties

Generally speaking, only parties to an arbitration agreement will be bound by its terms. As the Supreme Court of Canada has recognised, mutual consent is the foundation of private dispute resolution (TELUS Communication Inc v Wellman, 2019 SCC 19).

However, non-signatories/third parties may be subject to an arbitration agreement by operation of the law, including subsidiaries, assignees, trustees and other parties that claim through or under a party to the arbitration agreement (Peace River Hydro Partners v Petrowest Corp, 2022 SCC 4).

Canadian courts have also recognised the following situations where a non-signatory may be subject to an arbitration agreement:

- an agency relationship exists between a party and a non-signatory;
- the corporate veil between subsidiary and parent companies can be pierced;
- an arbitration agreement is incorporated by reference or by hyperlink into a contract; and
- a non-party is bound by an estoppel (DNM Systems v Lock-Block Canada Ltd, 2015 BCSC 2014).

6. Preliminary and Interim Relief

6.1 Types of Relief

Except for Quebec, Ontario and British Columbia, Article 17 of the Model Law (1985 version) applies in Canada. It affords an arbitral tribunal the discretion to order any party to take such interim measures of protection as the arbitral tribunal may consider necessary.

In Quebec, an arbitrator's jurisdiction to grant interim measures is codified in Article 638 of the Code of Civil Procedure.

In Ontario and British Columbia, the 2006 version of Article 17 of the Model Law applies, meaning that interim measures can be issued to:

- maintain or restore the status quo pending determination of the dispute;
- take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitration process itself;
- provide a means of preserving assets out of which a subsequent award may be satisfied; or
- preserve evidence that may be relevant and material to the resolution of the dispute.

Unlike the 1985 version of the Model Law, the 2006 version of the Model Law does contemplate the issuance of preliminary orders.

Article 17 of the 2006 version of the Model Law permits a party to apply without notice for an interim measure and a preliminary order directing a party not to frustrate the purpose of the interim measure requested. The arbitral tribunal may grant the preliminary order without notice where disclosure of the request for the interim measure to the affected party risks frustrating its purpose.

6.2 Role of Courts

Court intervention is limited under Article 5 of the Model Law. However, Article 9 of the Model Law provides that it is not incompatible with an arbitration agreement for a party to request an interim measure of protection from a court. In Quebec, Article 638 of the Code of Civil Procedure permits a party to ask the court to homologate an arbitrator's provisional measure to give it the same force and effect as a judgment of the court.

Institutional rules in Canada also reflect the principle in Article 9 of the Model Law. For example, Article 26(h) of the VanIAC Rules provides that "a request for an interim measure addressed by a party to a judicial authority shall not be deemed incompatible with these Rules..." Similarly, Article 27(3) of the ICDR Rules provides that a request to a court for interim measures is not incompatible with an arbitration agreement and will not be deemed a waiver of the right to arbitrate.

Unique to British Columbia, the BC Act also expressly provides that the court has the same powers to issue an interim measure as it has in relation to court proceedings; however, the court may refer the request to an arbitral tribunal if the court considers it proper.

With respect to preliminary orders issued under the 2006 version of the Model Law, Article 17C(5) expressly states that a preliminary order is not an arbitral award and is not subject to enforcement by a court (this will apply in the provinces of Ontario and British Columbia under Section 17.03(6) of the BC Act).

Similarly, Article 639 of the Quebec Code of Civil Procedure provides that the provisional order of an arbitrator is binding on the parties and cannot be homologated by the court.

The appointment of emergency arbitrators is not contemplated by the legislation. For those arbitrations governed by the ICDR Rules, Article 7 provides that the administrator may appoint an emergency arbitrator and that, once the arbitral tribunal is constituted, the emergency arbitrator has no further powers. Articles 29–32 of the VanIAC Rules provide for the appointment of an emergency arbitrator and set out their powers.

6.3 Security for Costs

The Model Law is silent on an arbitral tribunal's power to order security for costs (except as noted below regarding interim measures).

However, the parties may grant the arbitral tribunal the power to order security for costs in the arbitration agreement.

In British Columbia, the International Commercial Arbitration Act grants arbitral tribunal discretion to order security for costs as an interim measure.

With respect to interim measures, Article 17 of both the 1985 and 2006 versions of the Model Law give the arbitral tribunal the discretion to require any party to provide "appropriate security" in connection with an interim measure. Further, in Ontario, where a party applies for a preliminary order under Article 17B of the 2006 version of the Model Law, Article 17E(2) stipulates that the arbitral tribunal must require the applying party to provide security in connection with the preliminary order, unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Article 638 of the Quebec Code of Civil Procedure grants the arbitrator the power to require that a suretyship is provided to cover costs "and the reparation of any prejudice" from a provisional measure.

The institutional rules provide for the depositing of costs. For example, Article 39 of the VanIAC Rules permits the arbitral tribunal to require each party to deposit an equal amount in advance for costs. Similarly, Article 39 of the ICDR Rules permits the administrator to request that the parties deposit an advance for costs.

7. Procedure

7.1 Governing Rules

As noted in **2.1 Governing Law**, the Model Law is incorporated into Canada's provincial international commercial arbitration statutes.

Article 19 of the Model Law provides that subject to its provisions, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings and, failing such agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate.

There are no other provincial laws or rules governing international arbitration procedure. However, Section 14 of New Brunswick's International Commercial Arbitration Act, RSNB 2011, c 176, provides that the province's Rules of Court enacted apply (except where they may conflict with the provisions of the Act).

7.2 Procedural Steps

There are no particular procedural steps expressly required to be followed under the Model Law or the provincial international commercial arbitration statutes.

However, the institutional rules (VanIAC Rules and ICDR Rules) contain mandatory procedural steps.

7.3 Powers and Duties of Arbitrators

An arbitrator must be impartial and independent and have the qualifications agreed to by the parties. These duties are contemplated in Article 12 of the Model Law and in the international commercial arbitration statutes (see, for example, Section 12(3) of the BC Act).

The institutional rules also impose on an arbitrator the duty to be impartial and independent and to have those qualifications agreed to by the parties: see VanIAC Rules, Article 12, and ICDR Rules, Article 14.

7.4 Legal Representatives

The Canadian legal profession is self-regulated, and legal practitioners must meet the qualifications set by the professional regulators of the province in which they practise.

The Model Law is silent regarding the qualifications or requirements of legal representatives appearing as counsel on international commercial arbitrations governed by it.

Unique to British Columbia, the International Commercial Arbitration Act contemplates that a party may be represented by any person of their choice, including a legal practitioner from another state.

8. Evidence

8.1 Collection and Submission of Evidence

Parties are free to determine the procedure applicable to the collection and submission of evidence, failing which the arbitral tribunal can determine the procedure.

Where the parties have not agreed on a procedure with respect to evidence, this issue will typically be addressed in a pre-hearing conference. Increasingly, the IBA Rules on the Taking of Evidence are often referenced or considered in establishing the specific procedures to be used.

Consistent with international practice, documents are often attached to pleadings, with the parties exchanging requests for the relevant documents using a Redfern schedule. Witnesses' evidence is commonly submitted in detailed written statements with questioning by opposing counsel only at the hearing stage.

Expert evidence is typically exchanged prior to any hearing on the merits.

Practices for evidence taking are often adapted based on the experience of counsel and the specifics of the dispute. Pre-hearing oral discovery (a typical feature of court litigation in Canada) is, however, increasingly uncommon in international arbitration.

8.2 Rules of Evidence

As set out in Article 19(2) of the Model Law, an arbitral tribunal may determine the admissibility, relevance, materiality and weight of any evidence. The statutory rules of evidence in the federal and provincial Evidence Acts do not apply to international arbitration seated in Canada.

8.3 Powers of Compulsion

Under the Model Law, an arbitral tribunal, or a party with the tribunal's consent, can seek the court's assistance to compel evidence. The courts can compel witnesses to attend for questioning or to produce documents.

With respect to non-parties, the court may (i) issue summons for witnesses located in Canada; or (ii) request the assistance of foreign courts for witnesses outside Canada.

Typically, the courts will assist evidence-taking for arbitration proceedings, provided that the request is consistent with local evidentiary rules.

9. Confidentiality

9.1 Extent of Confidentiality

The Model Law does not address confidentiality.

Unlike arbitration legislation that adopts the Model Law directly, British Columbia's International Commercial Arbitration Act was amended in 2018 to provide that, unless otherwise agreed, the parties and tribunal must not disclose:

- non-public proceedings, evidence, documents and information in connection with the arbitration; or
- an arbitral award.

In Canada, the "open court" principle generally does not apply to arbitration proceedings (Fontaine v Canada (Attorney General), 2014 ONSC 4585, var'd 2016 ONCA 241, aff'd 2017 SCC 47).

Parties are free to agree on confidentiality requirements. Even if an arbitration agreement is silent on confidentiality, the governing international arbitration institutional rules may require it.

For example, the VanIAC Rules stipulate that, subject to certain exceptions, the parties must keep the following confidential:

- all awards arising from the proceedings;
- all evidence and materials created for the purpose of the arbitration; and
- all other non-public documents produced by another party in the proceeding not otherwise in the public domain.

However, if the parties to an arbitration decide to appeal an arbitral award, or otherwise apply to the court for relief, the record of arbitration proceedings will no longer be private and confidential (2249492 Ontario Inc v Donato, 2017 ONSC 4975).

British Columbia's International Commercial Arbitration Act expressly provides in Section 36.01 (added in 2018) that, unless otherwise agreed by the parties, the parties and the arbitral tribunal must not disclose arbitration proceedings (or their component parts) or the award.

10. The Award

10.1 Legal Requirements

An arbitral award is subject to legal requirements under Article 31 of the Model Law. These include that the award must:

- be in writing and signed by the arbitrator (or majority of an arbitral panel);
- state the date and place of the arbitration; and
- state the reasons upon which it is based, unless the parties agree otherwise.

There is no time limit requirement on the delivery of the award in the Model Law. These requirements may be contained in arbitral rules. For example, the ICDR Rules specify that the final award must be made no later than 60 days after the closing of the hearing (unless otherwise agreed by the parties, specified by law or determined by the ICDR Administrator). Article 35(a) of the VanIAC Rules specifies a 90-day time limit (unless otherwise agreed by the parties or directed by the arbitral tribunal).

The arbitration agreement itself and the institutional rules adopted by the parties may contain additional requirements for the award.

10.2 Types of Remedies

No limits are imposed on the types of remedies that an arbitral tribunal may award under the Model Law or international commercial arbitration statutes. However, the parties may limit the types of remedies that can be awarded in the arbitration agreement.

The ICDR Rules, amended and effective from 1 March 2021, no longer restrict an arbitral tribunal governed by the ICDR Rules from awarding punitive, exemplary or similar damages.

10.3 Recovering Interest and Legal Costs

An arbitrator's powers to award pre- or post-award interest is not expressly addressed in the Model Law.

Canadian courts have determined that the awarding of pre- or post-award interest is a matter of substantive law. The arbitrator's mandate to resolve the parties' dispute encompasses the power to award interest.

The institutional rules also address the awarding of interest (Article 35(e) of the VanIAC Rules and Article 34(4) of the ICDR Rules).

The Model Law does not address costs. However, the BC Act specifically provides in Section 31(8) that, subject to the parties' agreement, the arbitral tribunal may award costs, which include legal fees and expenses, the fees and expenses of the arbitrators and expert witnesses, administrative fees, and other expenses related to the arbitration (Allard v The University of British Columbia, 2021 BCSC 60).

The institutional rules may also permit an arbitral tribunal to award costs (eg, Article 38 of the VanIAC Rules and Article 34 of the ICDR-Canada Rules).

11. Review of an Award

11.1 Grounds for Appeal

Canada's international commercial arbitration statutes permit a party to an arbitration to apply to the courts to have the award set aside on specific grounds.

However, an application to set aside an arbitral award is not the same as an "appeal" of the judgment in a commercial case. When the decision of a trial judge in a commercial case is appealed in Canada, the grounds on which it may be reviewed are not limited or restricted.

For a discussion about the setting aside of a domestic arbitral award on similar grounds and the distinction with a civil appeal, see Alectra Utilities Corporation v Solar Power Network Inc, 2019 ONCA 254, leave ref'd [2019] SCCA No 202 (SCC).

Article 34 of the Model Law limits the grounds on which an arbitral award may be set aside. In particular, Article 34 of the Model Law provides that an arbitral award may be set aside if the applying party proves:

- contractual incapacity;
- invalidity under the law to which the parties have subjected it;
- lack of notice of the arbitral appointment or proceedings, or inability to present the party's case;
- jurisdictional grounds (ie, the award deals with or decides matters beyond the scope of the submission to arbitration); or

- the composition of the arbitral tribunal or procedure was not in accordance with the parties' agreement.

Article 34(2)(b) further permits the court to set aside an arbitral award if the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the relevant law, or if the arbitral award conflicts with public policy.

11.2 Excluding/Expanding the Scope of Appeal

An application to set aside an arbitral award is not the same as an appeal and is limited to the grounds set out in Article 34 of the Model Law (or its statutory equivalent). Parties to an arbitration cannot agree to exclude or expand the scope of the application to set aside the award.

11.3 Standard of Judicial Review

The traditional approach of Canadian courts has been to show deference to arbitral awards; when reviewing arbitral awards, the courts will apply the deferential standard of "reasonableness", subject to a narrow set of exceptions.

For example, the least deferential "correctness" standard has been applied where the question is one of jurisdiction (ie, whether an arbitral decision was on matters beyond the scope of the submission to arbitration), following the 2011 decision of the Ontario Court of Appeal in Cargill (United Mexican States v Cargill, 2011 ONCA 662, leave ref'd [2012] SCCA No 528 (SCC)). See the discussion on divergence in the case law in **5.5 Standard of Judicial Review for Jurisdiction/Admissibility**.

As a result of two recent decisions of the Supreme Court of Canada, the question of the correct standard of review from an arbitrator's jurisdictional decision is unsettled, and likely to be the subject of further jurisprudence (Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 and Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District, 2021 SCC 7).

In lululemon athletica canada inc v Industrial Color Productions Inc, 2021 BCCA 108, the British Columbia Court of Appeal concluded that the standard of review of an application to set aside an arbitral award under the Model Law (or international commercial arbitration statutes) is correctness, and that Cargill (United Mexican States v Cargill, 2011 ONCA 662, leave ref'd [2012] SCCA No 528 (SCC)) remains the leading case on the standard of review for applications to set aside arbitral awards.

12. Enforcement of an Award

12.1 New York Convention

Canada is a signatory to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"), which entered into force in Canada on 10 August 1986.

Under the Convention, Canada declared one reservation: that it would apply the Convention only to differences arising out of legal relationships, whether contractual or not, that were considered commercial under the laws of Canada, except in Quebec, where the law did not provide for such limitation.

In addition to the New York Convention, Canada is a party to:

- the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (ICSID); and
- numerous free trade agreements, foreign investment promotion and protection agreements, multilateral agreements, and World Trade Organization agreements.

12.2 Enforcement Procedure

The procedure for recognition and enforcement of a foreign award is set out in Articles 35 and 36 of the Model Law, which, generally speaking, serve as a complete code in Canada (CJSC "Sanokr-Moskva" v Tradeoil Management Inc, 2010 ONSC 3073).

In Canada, the court retains the discretion to refuse to recognise or enforce an arbitral award if the party against whom the award is invoked proves the existence of a ground under Article 36(1)(a) (Depo Traffic Facilities (Kunshan) Co v Vikeda International Logistics and Automotive Supply Ltd, 2015 ONSC 999).

12.3 Approach of the Courts

The Model Law limits the ability of national courts to interfere with international arbitration proceedings (Yugraneft Corp v Rexx Management Corp, 2010 SCC 19). In addition to the grounds under Article 36(a) for refusing to enforce arbitral awards, the court retains discretion to refuse to recognise or enforce an arbitral award on the ground of public policy.

The public policy ground for resisting enforcement of an arbitral award has been narrowly construed in Canada (Corporacion Transnacional de Inversiones SA de CV v STET International SpA, 1999 CanLII 14819 (Ont Sup Ct J [Commercial List]), aff'd 2000 CanLII 16840 (ON CA), leave ref'd [2000] SCCA No 581 (SCC)).

There is no onus on a party to convince the court that the award is contrary to public policy; rather, such determination is made by the court itself (Depo Traffic Facilities (Kunshan) Co v Vikeda International Logistics and Automotive Supply Ltd, 2015 ONSC 999).

13. Miscellaneous

13.1 Class Action or Group Arbitration

Arbitration legislation in Canada does not provide for class-action arbitration or group arbitration.

13.2 Ethical Codes

There are no ethical codes in Canada that apply specifically to arbitration counsel. However, the law societies in each province and territory establish the professional and ethical obligations applicable to Canadian lawyers.

As discussed in **4.5 Arbitrator Requirements**, arbitrators must be independent and impartial.

13.3 Third-Party Funding

There is no Canadian legislation providing rules or restrictions on third-party funding. This issue is being addressed primarily in the context of court-based class action proceedings.

13.4 Consolidation

The Model Law does not provide for consolidation of arbitration proceedings. However, the international arbitration legislation in each province and territory generally allows the court to order consolidation on application of the parties.

13.5 Binding of Third Parties

The instances in which third parties can be bound by an arbitration agreement or award are addressed in **5.7 Jurisdiction Over Third Parties**.

CHILE

Law and Practice

Contributed by:
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Jana & Gil Dispute Resolution

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Jana & Gil Dispute Resolution is a law firm specialising in international and domestic arbitration and complex civil and commercial litigation. The team is composed of multilingual and highly skilled lawyers who have gained international experience in important global firms and studied at some of the world's leading universities. Clients receive expert representation in international commercial disputes under global arbitration rules including those of the ICC, UNCITRAL, LCIA, American Arbitration Association, and CAM Santiago. The team regularly acts as a lead counsel in investment arbitrations under ICSID, representing both state and foreign investors. The firm's lawyers have successfully represented clients in ICSID arbitrations. The team has also intervened in the vast majority of international arbitration enforcement proceedings held in Chilean courts, including the defence, execution and appeal of international awards issued in Santiago.

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1. General

1.1 Prevalence of Arbitration

Given the extensive development of domestic arbitration in Chile, in most cases – both with regard to foreign companies that incorporate companies in Chile and Chilean companies – parties use domestic arbitration rather than international arbitration. As such, domestic arbitration is more widely used than international arbitration, and it is rare for domestic parties to resort to international arbitration in Chile (see **1.3 Arbitral Institutions**).

Notwithstanding the foregoing, there has been a tendency in the case of agencies of foreign companies to opt for international arbitration, mostly when the seat of arbitration is Santiago de Chile.

1.2 Key Industries

Industries With Increased International Arbitration Activity

In March 2024, the Santiago Arbitration and Mediation Centre (*Centro de Arbitraje y Mediación Santiago*, or CAM Santiago) presented an annual statistical report on its activities during 2023. According to the report, 18 new requests for international arbitration were submitted to CAM Santiago in 2023. The number of requests in the banking and finance sector increased by 10% compared to 2022, and share purchase agreements were the most important underlying contract, accounting for 27.8% of the total number of requests.

The consultation processes prior to international investment arbitration initiated during 2022–23 have not yet developed into arbitration requests.

Industries With Decreased International Arbitration Activity

The number of international arbitrations in Chile has gradually increased over time. There is not enough information to conclude which industries are experiencing a decrease in international arbitration activity; however, in general, there has not been a decrease in any industry.

1.3 Arbitration Institutions

By far the most widely used arbitration institution for international arbitration cases in Chile is the International Court for Arbitration of the International Chamber of Commerce. Since 2017, the ICC has had a national committee in Santiago, joining forces with CAM Santiago to administer mediations and arbitrations in Chile under the ICC Rules of Arbitration (the "ICC Rules").

Furthermore, it should be noted that CAM Santiago administers both domestic and international arbitrations. The CAM Rules for International Arbitration (the "CAM Rules") have been in force since 1 June 2006.

However, owing to practices adopted by some lawyers, parties in Chile have continued including the domestic arbitration model clause in contracts that qualify as international arbitration under Law No 19,971 on International Commercial Arbitration (ICAL). As a result, during the past few years, CAM Santiago has administered various international arbitrations governed by the ICAL – albeit under its domestic arbitration rules. Notwithstanding the foregoing, the general trend is to conduct arbitration under international arbitration rules.

There have not been any new arbitral institutions established in Chile in 2023–24.

1.4 National Courts

Domestic Arbitration

National courts may hear disputes related to domestic arbitrations in matters involving:

- challenging the award;
- the nomination of the arbitrator(s);
- preliminary relief;
- the production of evidence; and
- the enforcement of the award, etc.

The challenges against arbitral awards rendered by domestic arbitrators are heard by the court of appeal of the place of arbitration and by the Supreme Court. Moreover, the decision of the court of appeal or the second-instance arbitral tribunal "in law" that reviewed the arbitral award by the arbitrator "in law" in the appeal can be set aside on specific grounds by the Supreme Court.

In this regard, in Chile, the waiver of challenges against arbitral awards rendered by domestic arbitrators is allowed and is the general rule. However, for reasons of public policy, there are two challenges that cannot be waived:

- *el recurso de queja;* and
- *el recurso de casación en la forma* on the grounds of lack of jurisdiction and ultra petita.

Moreover, whether the parties wish to appoint a single- or multi-member tribunal, if no agreement can be reached on the name(s) of the arbitrator(s), a national court will appoint a single arbitrator by default (Article 232 of the Code of Judicial Organisation (CJO)).

As regards preliminary relief, if the arbitral tribunal has not yet been constituted, parties must request the preliminary relief before a national court (see **6.2 Role of Courts**).

Parties can request national courts to order the enforcement of an arbitral award. National courts may also aid domestic arbitrators or parties in the taking of evidence.

International Arbitration

National courts may hear disputes related to international arbitrations in matters involving the following.

- Setting aside the award – according to Article 11 of the ICAL (see **2.1 Governing Legislation**), the court that has jurisdiction to hear challenges against the decisions of an arbitral tribunal is the court of appeal of the place of arbitration (see **11.1 Grounds for Appeal**). The Supreme Court has no jurisdiction.
- The recognition and enforcement of the award – national tribunals also have jurisdiction to hear cases regarding recognition and enforcement of a foreign arbitral award (see **12.2 Enforcement Procedure**).
- The nomination of the arbitrator(s) – the president of the respective court of appeal has jurisdiction to resolve matters related to the jurisdiction of the arbitral tribunal (see **5.3 Circumstances for Court Intervention**).
- Jurisdiction of the arbitral tribunal and the impediment to being an arbitrator – the president of the respective court of appeal also has jurisdiction to resolve the nomination of arbitrators (Article 11 of the ICAL) and the impediment to being an arbitrator (Article 14 of the ICAL).
- The challenge or removal of arbitrators – the president of the respective court of appeal has jurisdiction to hear disputes relating to the challenge or removal of arbitrators (see **4.4 Challenge and Removal of Arbitrators**).
- Preliminary relief – regarding preliminary reliefs, if the arbitral tribunal has not yet been constituted (see **6.1 Types of Relief**), parties

must request the preliminary relief before a local court (see **6.2 Role of Courts**).
- The production of evidence – the arbitral tribunal and the parties, with previous authorisation of the former, may apply to the local courts for assistance in the taking of evidence (Article 27 of the ICAL).

2. Governing Legislation

2.1 Governing Law

International commercial arbitration in Chile is ruled by the ICAL, in force since 2004. This law was drafted based on the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law") and has no relevant deviations from it.

As the history of the ICAL shows, the Chilean legislature deemed it necessary to maintain the original law proposed by UNCITRAL as much as possible in order to promote the development of international arbitration in Chile. Therefore, the modifications made to the ICAL in respect of the UNCITRAL Model Law are minimal and specifically related to the jurisdiction of the local courts. In this regard, the intervention of the local courts was limited to specifically regulated cases, such as the appointment of arbitrators on behalf of the parties (Article 11 of the ICAL), challenge (Article 13 of the ICAL), removal (Article 14 of the ICAL), issues of jurisdiction (Article 16 of the ICAL) and the request for annulment (Article 34 of the ICAL).

2.2 Changes to National Law

Domestic arbitration in Chile is ruled by the Code of Civil Procedure (CCP) and the CJO. There have not been significant changes in these rules because domestic arbitration works well in Chile. Although there is pending legislation to reform the CCP, the bill does not include relevant changes to domestic arbitration.

Notwithstanding the foregoing, there have been several attempts to reform the regulation of domestic arbitration. The first came at the beginning of the 1990s, with the introduction of a formalistic bill aimed at maintaining the procedural focus on arbitration instead of granting greater scope to the autonomy of the will of the parties. The bill was not successful and was withdrawn in 2002.

In other efforts to change the domestic arbitration law, there have been discussions at government level since 2013 with a view to presenting a new reform bill that may change the arbitration landscape in Chile, but which has not yet materialised. This is a new and comprehensive draft bill that regulates domestic arbitration activity both in its functional and organic aspects. The most relevant change contained in this bill is that the current dualist system is left behind. Under the current system two models coexist:

- a model for international commercial arbitration, which is flexible and deformalised; and
- a model for domestic arbitration, which is more rigid and formalist.

By making the rules for domestic arbitration and international arbitration more alike, the need for normative coherence will be satisfied, and domestic arbitration will be guided by modern and more flexible principles.

3. The Arbitration Agreement

3.1 Enforceability

For international arbitration, Article 7(1) of the ICAL (see **2.1 Governing Legislation**) deter-

mines that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Article 7(2) establishes that the agreement must be in writing. Under this provision, an agreement is considered to be written when it is "contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication [that] provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another".

3.2 Arbitrability

Chilean law prohibits arbitration for:

- criminal cases;
- minor offences and city ordinances;
- issues related to family law such as child support and requests for the division of marital property;
- disputes between a legally incapacitated person and their legal representative; and
- disputes that must be heard by the judicial prosecutor (*fiscal judicial*)and therefore affect the public interest (Articles 229–230 of the CJO).

Disputes arising under the Labour Code are also excluded from arbitration, owing to the public policy aspects of labour issues and the prohibition on waiving labour rights. The Labour Code does, however, allow for arbitrations related to the collective bargaining process in the form established by the Labour Code.

Reluctance or Refusal to Enforce Arbitration Clauses

Although not addressed by the Chilean legislation or judiciary to date, Chilean courts might be reluctant to enforce an arbitration clause with regard to self-executing instruments such as securities, cheques or promissory notes. In addition, Chilean courts might refuse to enforce an arbitration clause relating to environmental issues, the registration of IP rights or civil responsibility for violations of antitrust or competition law because such matters are part of Chilean public policy.

However, since 2014, the Network Information Center of Chile (NIC Chile) – an institution dependent on the Universidad de Chile, which is responsible for the registrations of ".cl" domain names that identify Chile on the internet – has been submitting disputes arising from the ".cl" domain to arbitration. In addition, in 2018 the Chilean Institute of Industrial Property (*Instituto Nacional de Propiedad Industrial*) signed a memorandum with the World International Intellectual Property Organization to promote alternative dispute resolution procedures.

Accordingly, Article 1(5) of the ICAL specifically states that the law does not change the domestic regulations on non-arbitrable matters. Furthermore, the legislative history of the ICAL (see **2.1 Governing Legislation**) indicates that matters related to public policy (eg, labour, family or consumer rights) cannot be subject to international arbitration.

3.3 National Courts' Approach

The ICAL (see **2.1 Governing Legislation**) does not define which law should govern the arbitration agreement. As it is not expressly established, it has been understood that the parties are free to determine the law or laws by which the arbitration agreement shall be governed. In the absence of such a decision, the implicit will of the parties must be sought among the provisions of the agreement when it comes to rights and obligations arising out of such provisions. If

this is not possible, the Chilean law – as the law of the host state – shall apply.

In this regard, in one case, the Supreme Court considered only Law No 19,971 as the applicable law to revise an arbitration agreement (Almendra y Miel SA v GLG, Supreme Court, Case No 82,442-2016). In another case, the Supreme Court – when reviewing an arbitration clause in a contract governed by the laws of the state of Minnesota – used the rules of the Chilean Civil Code to interpret it (Medtronic USA Inc v Med Implant y Compañía Limitada, Supreme Court, Case No 9,248-2013).

In general, national courts have been inclined to enforce arbitration agreements (see **5.6 Breach of Arbitration Agreement**).

3.4 Validity

The doctrine of separability of the arbitration clause is expressly acknowledged in the ICAL (see **2.1 Governing Legislation**), which – following the UNCITRAL Model Law – states that "an arbitration clause [that] forms part of a contract shall be treated as an agreement independent of the other terms of the contract" for the purposes of establishing the tribunal's jurisdiction (Article 16(1) of the ICAL).

Therefore, under the ICAL, the invalidity of a contract may not affect the validity of its arbitration clause. This has been recognised by the Santiago Court of Appeal (Tampico Beverages, Inc v Productos Naturales de la Sabana SA Alquería, Santiago Court of Appeal, Case No 6,975-2012).

4. The Arbitral Tribunal

4.1 Limits on Selection

The ICAL (see **2.1 Governing Legislation**) specifically establishes that nationality shall not be a barrier to the appointment of an arbitrator (Article 11(1) of the ICAL). Therefore, unless otherwise agreed by the parties, a person's nationality will not be an obstacle for them to act as an arbitrator (Article 11(1) of the ICAL).

Although discussions have arisen as to whether arbitrators need to be lawyers under Article 526 of the CJO in the case of international arbitration, part of the doctrine considers that such a conclusion would be erroneous. This can be corroborated by the history of the ICAL: when this discussion was raised, it was noted that there was consensus that – in the field of international commercial arbitration – the parties themselves are called upon to decide the quality of the arbitrator or arbitrators who will hear and resolve a dispute. It was considered that, if the parties decide that the arbitrator should be a lawyer or other professional, the principle of autonomy should be respected. It was also considered that, for disputes related to essentially technical aspects, it may be more appropriate to appoint an engineering arbitrator – a possibility that the law should not limit.

According to national law, judges cannot be appointed as arbitrators (Articles 226 and 317 of the CJO) and – even though this is self-evident – parties to the dispute cannot be appointed as arbitrators in their own case (Article 226 of the CJO).

The ICAL poses no restrictions on who may act as arbitrator. However, given that Articles 226 and 317 of the CJO are considered to relate to public policy, they necessarily act as a limitation

on the appointment of arbitrators in international arbitrations that take place in Chile.

4.2 Default Procedures

Selecting Arbitrators

In international arbitrations with a sole arbitrator, where the parties have not agreed on an appointment procedure and cannot reach agreement on the appointment of the arbitrator, the appointment will be made by the president of the respective court of appeal.

In the case of a three-member tribunal, each party will name a co-arbitrator and the co-arbitrators will together nominate the president. Where the co-arbitrators cannot reach agreement, or where one of the parties fails to name a co-arbitrator, any party may request the president of the respective court of appeal to make the appointment (Article 11(3) of the ICAL).

The president must make the appointment with due regard to "any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties" (Article 11(5) of the ICAL).

There is no appeal available against the appointment of an arbitrator by the president of the court of appeal.

Multiparty Arbitrations

There are no provisions in international arbitration law for multiparty arbitrations. Parties may choose to incorporate the same arbitration clause in various related contracts or appoint the same arbitrator for related disputes. In multiparty cases under the ICAL, if the president of the court of appeal is called to assist in the appointment of arbitrators, the president may choose to consolidate the various disputes before tribunals of the same composition.

Although there is little – if any – published guidance, there is no reason why the multiparty solutions suggested in Article 10 of the ICC Rules, Article 8 of the LCIA Rules and Article 3(7) of the Rules of the International Centre for Dispute Resolution could not be applied. To a greater extent, Article 14 of the CAM Rules provides that where multiple claimants or respondents cannot agree on the appointment of their respective arbitrator, that arbitrator will be appointed by CAM Santiago.

4.3 Court Intervention

For sole arbitrator cases, the president of the court of appeal will be entitled to intervene and designate the arbitrator when the parties fail to reach an agreement. This designation mechanism is activated upon party request (see **4.2 Default Procedures**). In the case of a three-member tribunal, where the co-arbitrators cannot reach an agreement on the appointment of the president, or where one of the parties fails to name a co-arbitrator, any party may request the president of the respective court of appeal to make the appointment (see **4.2 Default Procedures**).

In addition, the president of the court of appeal is also entitled to intervene in the arbitrators' appointment:

- when one of the parties does not comply with the agreed method; and
- when a third party, including an arbitral institution, does not comply with the rules previously agreed on by the parties for the arbitra-

tors' appointments (Article 11(4)(a), (b), (c) of the ICAL).

Regarding the limitations, the ICAL provides some guidance as to selecting the arbitrator. However, there is no appeal available against the appointment of an arbitrator by the president of the court of appeal.

4.4 Challenge and Removal of Arbitrators

Under the ICAL, an arbitrator may be challenged "only if circumstances exist that give rise to justifiable doubts as to [the arbitrator's] impartiality or independence, or if [the arbitrator] does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by [themselves], or in whose appointment [they have] anticipated, only for reasons of which [they become] aware after the appointment has been made" (Article 12(2) of the ICAL).

Unless the challenged arbitrator withdraws or the other party agrees on the challenge, the tribunal will decide on the challenge (Article 13(2) of the ICAL). If the tribunal rejects the challenge, the challenging party may request the president of the respective court of appeal to decide on the challenge within 30 days of receiving notice of the decision of the tribunal.

The decision of the president of the court of appeal is not subject to appeal and the arbitral tribunal may, in the meantime, continue the proceeding and even issue its award (Article 13(3) of the ICAL). Recent Chilean appellate court case law does not show an increase in the number of challenges against arbitrators under the rules of the ICAL.

Parties arbitrating under the CAM Rules must be aware that CAM Santiago will decide on the challenge without having to state the reasons for its decision. However, if the challenge is rejected, Article 13(3) of the ICAL applies and the party that requested the challenge may "appeal" the decision by requesting that the president of the court of appeal decides on the challenge.

4.5 Arbitrator Requirements

The ICAL specifically requires a potential arbitrator to "disclose any circumstances likely to give rise to justifiable doubts as to [their] impartiality or independence" (Article 12(1) of the ICAL) before confirmation and throughout the proceeding. As regards arbitral institutions, the ICC Rules require that a prospective arbitrator sign a statement of acceptance, availability, impartiality and independence in which they must disclose any facts or circumstances that might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality (Article 12(2) of the ICAL).

For that purpose, the notes to parties and arbitral tribunals on the conduct of arbitration establishes a list of potentially relevant circumstances regarding arbitrators' independence and impartiality. Furthermore, CAM Santiago does not specifically define conflicts of interest for arbitrators under its rules of international arbitration and has not yet issued a code of ethics for arbitrators under its framework. The CAM Rules do require, however, that a candidate arbitrator sign a written declaration confirming their independence and impartiality in the specific case (Article 11 of the CAM Rules).

To a greater extent, if the arbitrator is Chilean, the Chilean Bar Association – of which membership is optional – has a code of ethics providing guidelines regarding the counsel–client relationship, counsel's confidentiality duty, and conflict

of interest. For arbitrators, it provides restrictions to avoid conflicts of interest and also regulates the determination of arbitration fees.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

See **3.2 Arbitrability**.

5.2 Challenges to Jurisdiction

The ICAL recognises the principle of competence-competence, stating in Article 16(1) that the arbitral tribunal may decide on its own jurisdiction, even if exceptions arise concerning the existence or validity of the arbitration agreement.

This recognition of the principle of jurisdiction comes from domestic arbitration. In domestic arbitration law, there is no explicit provision that confirms the competence-competence of an arbitral tribunal. Nonetheless, Chilean courts acknowledge that arbitral tribunals (just like local courts) are entitled to decide issues related to their own jurisdiction. Consequently, where a party commences an arbitral proceeding in apparent breach of an arbitration agreement, the matter shall be submitted to the decision of the arbitral tribunal – given that such tribunal is the authority entitled by law to rule on its own jurisdiction.

5.3 Circumstances for Court Intervention

Jurisdiction of Arbitral Tribunal

If, as a preliminary matter, the arbitral tribunal declares itself to have jurisdiction (see **5.1 Matters Excluded From Arbitration**), either party – within 30 days of receipt of notice of such decision – may request the president of the respective court of appeal to resolve the matter, and the decision of this court will be final. This rule does not apply in cases where the arbitral tribunal, as a preliminary matter, declares that it has no jurisdiction.

In general, appellate courts are reluctant to intervene in jurisdiction matters (see **5.2 Challenges to Jurisdiction**).

Negative Rulings on Jurisdiction

The respective court of appeal could address issues of jurisdiction of an international arbitral tribunal if a party asks for an international arbitral award to be set aside. Nonetheless, there are no cases in which a court of appeal has reviewed a negative ruling on jurisdiction by an arbitral tribunal.

5.4 Timing of Challenge

In international arbitrations, objections to jurisdiction must be raised in advance of or together with the statement of defence. A plea that the arbitral tribunal exceeds the scope of its authority must be raised as soon as the matter that is allegedly beyond the scope of the tribunal is raised during the arbitral proceedings. In either case, the tribunal may admit a later plea if it considers the delay justified (Article 16(2) of the ICAL).

Once the award is rendered by the arbitral tribunal, parties can challenge the jurisdiction of the arbitral tribunal before the respective court of appeal.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

See **11.1 Grounds for Appeal**.

5.6 Breach of Arbitration Agreement

In cases where a party commences court proceedings in breach of an international arbitration agreement, the national courts' approach is to refer parties to arbitration, unless the agree-

ment is null and void, inoperative or incapable of being performed. There is therefore a general reluctance of national courts to allow such proceedings.

5.7 Jurisdiction Over Third Parties

There are no specific rules in Chilean domestic or international arbitration law with regard to the effects of the assignment of an agreement that contains an arbitration clause to a third party. Parties to an assignment are therefore well advised to specifically agree that the arbitration clause will also be part of the assignment.

For further details on Chilean law in this regard, please refer to **13.5 Binding of Third Parties**.

6. Preliminary and Interim Relief

6.1 Types of Relief

The ICAL allows parties to request interim measures from the arbitral tribunal as well as from the domestic courts (Article 9 of the ICAL). The Chilean ICAL is based on the UNCITRAL Model Law of 1985, without the 2006 amendments that regulate interim measures and preliminary orders in more detail.

Under Article 17 of the ICAL, unless otherwise agreed by the parties, the arbitral tribunal may – at the request of a party – order such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. Therefore, the interim relief of the arbitral tribunal is binding.

In this regard, it is possible for the arbitrator to order the issuance of a bank guarantee or attachments. The arbitral tribunal may also require the relevant party to provide appropriate security.

Local courts may also grant interim measures while the constitution of the arbitral tribunal is still pending. When the interim relief is granted by a local court, the CCP shall apply (see **6.2 Role of Courts**).

6.2 Role of Courts

Preliminary Relief

If the arbitral tribunal has not yet been constituted (see **6.1 Types of Relief**), parties must request the preliminary relief before a national court, while proceeding with the constitution of the arbitral tribunal. Once the preliminary relief has been granted, the party must submit its request for arbitration within ten days (which can be extended to 30 days). At the moment of presenting its claim, the party must also request the continuation of the measure. If it fails to do so, or if the request is rejected, the party that had requested the preliminary relief in the first place will be considered liable for any damages and will be presumed to have acted with malice (Article 280 of the CCP).

The ten-day (or extended 30-day) period for presentation of the request for arbitration may be problematic if the preliminary relief had been issued by a local court, pending the constitution of the arbitral tribunal, as the tribunal may not yet have been constituted during this period. Legal practice has established that, in this case, the continuation of the preliminary relief may be requested before the same court that issued it.

As regards interim relief in aid of foreign-seated arbitrations, the Chilean courts have ruled in favour of its admissibility, affirming the jurisdiction of Chilean local courts to order it based on Article 9 of the ICAL and affirming the non-necessity of exequatur for this type of judicial proceedings. Thus, in Case No 5468-2009 (Western Technology Services International

Inc v Cauchos Industriales SA), the Supreme Court – rejecting a request for exequatur from an international arbitral tribunal constituted in Dallas, aimed at guaranteeing the effective compliance with the obligation not to compete that fell on the other party – resolved that "an interim and extendable relief, according to the arbitral tribunal, does not comply with the standard for requesting exequatur, so that it must be filed directly before the ordinary Chilean courts, according to Article 9 of the ICAL".

Emergency Arbitrators

Emergency arbitrator relief is not provided for in the ICAL. Thus, if the arbitral tribunal has not yet been constituted, the only alternative to the party seeking interim relief is to resort to the ordinary jurisdiction, as stated in Article 9 of the ICAL. In such cases, the interim measure's requirement will be regulated under the rules of the Chilean CCP.

However, if the parties agree to conduct the arbitration under the ICC Rules, which do mention the figure of the emergency arbitrator, the appointment of an emergency arbitrator will be valid.

6.3 Security for Costs

The ICAL does not specifically provide for the security for costs. Article 17 of the ICAL allows the arbitral tribunal to order preliminary relief in respect of the subject matter of the dispute (see **6.1 Types of Relief**).

However, the wording of Article 17 of the ICAL and the preliminary relief regulation are wide enough to allow for security for costs as a relief, especially considering they refer to an arbitration proceeding and not to a proceeding before a national court. There have been no known cases regarding security for costs.

7. Procedure

7.1 Governing Rules

The procedure is regulated in the ICAL.

7.2 Procedural Steps

The ICAL does not order any particular procedural steps for arbitral proceedings. Nevertheless, the requirement to comply with certain procedural steps required in domestic arbitration in the case of international arbitration – such as the call for conciliation or the need for an order of proof – was discussed before the Santiago Court of Appeals.

This discussion arose in connection with requests for annulment based on the lack of these essential procedural steps requested in domestic arbitration law. It was decided that it was not necessary to comply with these procedural steps in international arbitration and the nullity actions were rejected.

7.3 Powers and Duties of Arbitrators

Powers

The arbitral tribunal is empowered to:

- decide on its own jurisdiction (Article 16 of the ICAL);
- order interim measures of protection that it deems necessary with regard to the subject matter of the dispute (Article 17 of the ICAL); and
- conduct the arbitration in the manner it deems appropriate, in the absence of agreement and subject to the law, including determining the admissibility, relevance and value of evidence (Article 19 of the ICAL).

Duties

An arbitrator must:

- disclose all circumstances that may give rise to justifiable doubts about their impartiality or independence and, once appointed and during all arbitral proceedings, promptly disclose such circumstances to the parties (Article 12 of the ICAL); and
- decide the dispute in accordance with the rules of law chosen by the parties as applicable to the merits of the dispute (Article 28 of the ICAL), among other things.

To a greater extent, in the event of failure to act in accordance with their duties, under national criminal law, the arbitrator may be criminally prosecuted for the crime of prevarication (Articles 223–225 of the Criminal Code).

7.4 Legal Representatives

See **4.1 Limits on Selection**.

8. Evidence

8.1 Collection and Submission of Evidence

Under Article 19(2) of the ICAL, unless parties can reach an agreement, the arbitral tribunal may direct the arbitration in the way it considers appropriate, having the power to determine the admissibility, relevance and weight of the evidence. However, in international arbitration procedures, parties tend to apply the International Bar Association (IBA Rules) on the Taking of Evidence.

The procedure will depend on the rules applicable to the arbitration – ie, whether the ICC or CAM Rules apply. In the case of the ICC Rules, the arbitral tribunal may:

- decide to not allow requests for document production or to limit the number, length and scope of written submissions and written witness evidence;
- decide the dispute solely on the basis of documents submitted by the parties (Article 3 of the ICC Rules 2021);
- hear witnesses, experts appointed by the parties or any other person;
- summon any party to provide additional evidence; and
- decide the case solely on the documents submitted by the parties, unless any of the parties request a hearing (Article 25 of the ICC Rules 2021).

In the case of the CAM Rules, the parties must attach to their pleadings all documents they deem relevant or refer to the documents or evidence to be submitted at a later date. The tribunal may request a summary of the documents and evidence, request the delivery of additional exhibits and evidence, and also decide whether or not to hold evidentiary hearings (Articles 24–25 of the CAM Rules).

Also, under Article 27 of the ICAL, the arbitral tribunal and the parties may apply to the local courts for assistance in the taking of evidence. The requested local court may execute the request within its jurisdiction and according to its rules on the taking of evidence.

8.2 Rules of Evidence

To review the rules of evidence in the case of international arbitration, see **8.1 Collection and Submission of Evidence**. These rules are different from the ones that apply to domestic arbitration.

8.3 Powers of Compulsion

Arbitral tribunals may request that all parties, including third parties, appear to testify. In the event of refusal, the arbitral tribunal will request

the assistance of the corresponding national court to carry out the proceeding. The courts of law may entrust this proceeding to the arbitrator, assisted by a minister of faith.

9. Confidentiality

9.1 Extent of Confidentiality

There is no confidentiality rule applicable to international arbitrations and therefore the arbitration file is public. Given the existence of a request for annulment, which is heard by the court of appeal, and given the nature of this request, the court will necessarily have knowledge of the arbitration file, which is eminently public.

If the parties prefer the arbitration not to be public, it will be necessary for them to agree this by means of an express agreement. Only in the case of highly confidential parts of the file will it be necessary to request the itemisation and exclusion of those parts of the file either before or just after the award is rendered, so those sections are not made public.

Furthermore, in the case of the ICC Rules, the arbitration will be public as a general rule. However, upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for the protection of trade secrets and confidential information (Article 22.3 of the ICC Rules).

Lastly, in the case of international arbitrations subject to CAM Rules, a rule of confidentiality of the award is established, except:

- when the award's disclosure is necessary for a proceeding to challenge, comply with or enforce the award;
- when the award's disclosure is required by law or any other judicial authority; or
- when the parties by mutual agreement agree to the award's non-confidentiality.

Even so, CAM Santiago – while safeguarding the identity of the parties – may publish the awards (Article 33.8 of the CAM Rules).

10. The Award

10.1 Legal Requirements

According to the ICAL, the arbitral award must state the reasons on which it is based, unless the parties have agreed otherwise. The ICAL does not set a time limit for rendering the award.

10.2 Types of Remedies

The limits are set by the type of arbitrator involved and public policy. If it is an arbitrator "in law", they must decide in accordance with the law – according to which, the arbitrator is empowered to grant effective damage, loss of profit and moral damages to a party in their award. The latter applies even in cases of breach of contract, as the national case law has evolved in this matter during the past few decades.

Monetary awards may include interest. The arbitral tribunal may also order the specific performance or termination of a contract – in both cases, with damages (Article 1489 of the Chilean Civil Code). However, the arbitrators may not grant punitive damages, as they are not recognised under Chilean law.

10.3 Recovering Interest and Legal Costs

Parties are entitled to recover interest and legal costs. In this regard, there are several cases of international arbitration in Chile in which different rules of costs have been applied. The application depends mostly on the composition of the arbitral tribunal. If the arbitral tribunal is composed of Chilean arbitrators, there is a tendency to follow the "costs-sharing approach" rule, as it is the default rule applied by almost all courts and in almost all cases in Chile. Conversely, if the arbitral tribunal is composed of foreign arbitrators, there is a tendency to apply the approach generally used at international level (ie, "costs follow the event").

By way of example, in the case Constructora EMEX Limitada v European Organisation for Astronomical Research in the Southern Hemisphere, the arbitral tribunal made a distribution of costs different from the above-mentioned approaches and this was later challenged through the nullity of the award. Ultimately, the court of appeal rejected the request for annulment, determining that there was no violation of public policy and that the court ruled reasonably and in use of its powers (Case No 9211-2012, Court of Appeal of Santiago).

11. Review of an Award

11.1 Grounds for Appeal

Annulment

The ICAL establishes the request for annulment as the only means of challenging the arbitral award. The request for annulment may be based on the grounds specifically set forth in Article 34, which are the same as those established in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"). Article 34 also regulates the procedural aspects of this recourse, such as the time limit for the request's filing and the power of suspension granted to the court, as well as the court's preference for hearing and ruling.

As for the legal nature of the petition for annulment, although the ICAL defines it as a remedy, part of the jurisprudence has qualified it as an action that would give rise to a new and independent proceeding from the previous arbitration proceeding. Thus, it can be concluded that – unlike domestic arbitration – the ICAL recognises the petition for annulment as the only action against arbitral awards.

In addition, this petition (which will be heard by the court of appeal) is structured "on the basis of specific grounds that point to the examination or external review of the award and not to the merits or content of the decision on the merits". This undoubtedly consistent with a modern arbitration institution.

As regards the request for annulment, the court of appeal has ruled that it is an extraordinary recourse, of strict law and in accordance with the grounds established by law, granting jurisdiction to the court to examine compliance with the forms of the arbitration trial – especially with regard to the formal guarantees that the law itself establishes in an imperative manner (Santiago Court of Appeal, Case No 9134-2007 dated 4 August 2009).

In turn, the Supreme Court has ruled that a request for annulment is the only means of challenging an arbitration award, rejecting a complaint against the judges who ruled on the request for annulment (Supreme Court, Case No 7701-2012 dated 29 January 2012 and Case No 7341-2013 dated 16 November 2013). It has also

been held that parties may waive the possibility of challenging an award in advance (Supreme Court, Case No 7854-2013 dated 21 April 2016).

Varying Recourse Based on Principles of Free Will and Good Faith

In 2020, in a completely exceptional decision, the Supreme Court ruled allowing the parties to vary the recourse regime, based on the principles of free will and good faith. Thus, the parties had agreed in their arbitration agreement that appeals and cassation appeals would be allowed against the final judgment. The court of appeal rejected the appeal against the arbitration award, to which – according to the appeal – the rules of the ICAL were applicable. Therefore, only the request for annulment could be filed against the award.

The requesting party filed a complaint appeal, which was dismissed by the Supreme Court. However, the Supreme Court invalidated the decision of the court of appeal by stating that – owing to the principles of free will and good faith – the parties may vary the recourse regime (Supreme Court, Case No 19,568-2020 dated 14 September 2020).

11.2 Excluding/Expanding the Scope of Appeal

Although it is not a developed discussion, according to the new jurisprudential twist adopted by the Supreme Court (see **11.1 Grounds for Appeal**), just as it is recognised that the parties may vary the system of remedies on the basis of free will and good faith, they may also agree to exclude or expand the scope of appeal or challenge under the national law based on the foregoing principles.

11.3 Standard of Judicial Review

As mentioned in **11.1 Grounds for Appeal**, the motion for annulment is structured on the basis of specific grounds that point to the examination or external review of the award and not to the merits or content of the decision on the merits.

12. Enforcement of an Award

12.1 New York Convention

Chile was one of the first Latin American states to ratify the New York Convention in 1975. In Chile, the New York Convention applies to all foreign arbitral awards without omission, given that Chile did not formulate the reciprocity reservation contained in Article I(3) of the New York Convention.

12.2 Enforcement Procedure

Enforcing Awards

The enforcement of international arbitral awards based in Chile is regulated in Articles 35 and 36 of the ICAL. Under Article 35 of the ICAL, an arbitral award shall be considered as binding, irrespective of the country in which such award was issued.

The execution is requested before the civil court with jurisdiction and the executed party may raise the exceptions contained in Article 36 of the ICAL, which set the standards for the recognition or enforcement of international arbitral awards. Examples of such exceptions include:

- incapacity of the parties or lack of validity of the arbitration agreement;
- lack of notification of the executed party;
- exceeding the provisions of the arbitration agreement;
- when the subject matter of the dispute is not susceptible to arbitration; or

- when the execution would be contrary to Chilean public policy.

Refusing Recognition

One of the grounds recognised by the ICAL for refusing recognition or enforcement of an international arbitration award is that the award has been annulled or suspended by a court of the country in which, or under the law of which, it was rendered (Article 36(v) of the ICAL).

The suspension of the arbitral award by a court of the country in which, or under the law of which, the award was rendered constitutes a ground to refuse enforcement of the award (Article 36(v) of the ICAL).

Also, in the case of a nullity action pending abroad, the Supreme Court has ruled that the award is not binding on the parties. Citing Article 28 No 6 of the ICC Rules 1998, the Supreme Court has stated that the award rendered by such court is unreformable in the system provided by such rules, so that the appeal filed before such court does not suspend the effects of the award – which remains in force – and it is possible to enforce the award as long as there is no contrary resolution (Supreme Court, Case No 5228-2008 and Case No 7854-2012).

Immunity From Execution

As a general rule, the Chilean State and its entities are subject to immunity from execution. Nevertheless, the State and its entities may waive such immunity in some cases. Specifically, Decree Law No 2,349, which regulates the international contracts for the public sector, states in Article 2 that the state and its organisations, institutions and companies may renounce their immunity from execution. It must be noted that this has a restricted scope, given that it will be limited to the execution of awards rendered in proceedings directly related to the international contracts that contain such renouncement.

12.3 Approach of the Courts

Recognition and Enforcement of Arbitral Awards

The national courts have adopted the general approach of recognising and mostly accepting the enforcement of arbitral awards, regardless of the country in which they were rendered and as long as they comply with the legal requirements. By way of example, regarding the enforcement of a foreign arbitral award, the Supreme Court's case law accepts the exequatur, as opposed to a minority of case law that rejects it.

Thus, in the case Klion SRL v Pesquera Villa Alegre SA, Case No 41,841-2017 dated 26 July 2018, the Supreme Court states: "It has become evident that, in the case of the enforcement of an arbitral award, according to the wording of Law 19,971, regardless of the country in which it was issued, it is recognised as binding in Chile if it complies with the requirements of Articles 35 and 36 of that Law, which otherwise constitutes a repetition of the relevant provisions of the New York Convention."

In another case, the Supreme Court accepted a request for the execution of an award issued in an international commercial arbitration, ruling that it is not relevant for its recognition in another country that reciprocity exists between the country in which it was rendered and Chile. According to the Supreme Court, whenever the requirements of the ICAL are complied with, national legislation recognises the award's binding character because it is an international arbitration (I Schroeder KG (GmbH & Co) v Exportadora Las Tinajas Limitada, Supreme Court, Case No 104,262-2020 dated 19 July 2021).

This has been executed in a number of cases allowing the enforcement of foreign arbitral awards, including:

- Gold Nutrition Industria y Comercio v Laboratorios Garden House SA v Laboratorios Garden House SA, Supreme Court, Case No 6615-2007 dated 15 September 2008;
- Almendra y Miel SA v GLG, Supreme Court, Case No 82,442-2016 dated 30 November 2017; and
- Bose Corporation v MusicWorld Audiovisión Limitada, Supreme Court, Case No 12,710-2018 dated 9 July 2019.

Refusal to Recognise

As regards the refusal to recognise or enforce an arbitral award on the grounds of public policy in general, it is understood that this should be applied restrictively and limited only to the infringement of basic and fundamental rules of the Chilean State, so as to avoid limiting the enforcement of international awards in Chile by simply invoking local public policy (Santiago Court of Appeal, Case No 9,134-2007 dated 4 August 2009, rejecting ground No 2(b)(ii) of Article 34 of the ICAL). Therefore, in relation to ground No 2(b)(ii) concerning public policy, the court of appeal has understood that it must point to the infringement of the most basic and essential rules of the Chilean State – the simple invocation of local public policy not being sufficient.

Similarly, in relation to the concept of public policy, this implies distinguishing between national public policy and international public policy. The latter is applicable in matters of international commercial arbitration, which would not include all local rules, but only those that respond to the most essential legal principles of the legal system. As such, those allegations that refer to formalities provided for in the codes of civil procedure or organic codes of courts must be rejected, except in cases where they relate to the most fundamental principles of Chile's legal system (see, for example, Santiago Court of Appeal, Case No 9,134-2007 dated 4 August 2009; Santiago Court of Appeal, Case No 1,971-2012 dated 9 September 2013; and Santiago Court of Appeal, Case No 11,466-2015 dated 28 June 2016).

13. Miscellaneous

13.1 Class Action or Group Arbitration

Chile does not provide for class action arbitration or class arbitration.

13.2 Ethical Codes

The Code of Professional Ethics of the Chilean Bar Association, in force since 1 August 2011, applies in the case of affiliates. In the case of non-affiliates, since 2012 it has been possible to find Supreme Court rulings defending the theory that the 2011 Code of Professional Ethics applies to all lawyers in Chile.

13.3 Third-Party Funding

Chilean law does not provide any rules or restrictions for third-party financiers.

13.4 Consolidation

The ICAL does not provide a specific regulation with regard to consolidating separate arbitral proceedings. Notwithstanding the foregoing, in view of the power granted to the arbitral tribunal to decide the arbitration in the manner it deems appropriate in the absence of agreement of the parties (Article 19 of the ICAL), it may be understood that it would be possible to consolidate separate proceedings for the purpose of efficiency.

As regards arbitral institutions, the ICC Rules specifically regulate this subject matter. Thus, Article 10 of the ICC Rules provides that the court may – at the request of a party – consolidate two or more arbitrations pending under the ICC Rules into a single arbitration, if:

- the parties have agreed to consolidation; or
- all of the claims in the arbitrations are made under the same arbitration agreement or agreements; or
- the claims in the arbitrations are not made under the same arbitration agreement or agreements, but:
  (a) the arbitrations are between same parties;
  (b) the disputes in the arbitrations arise in connection with the same legal relationship; and
  (c) the court finds the arbitration agreements to be compatible.

Furthermore, it is possible to identify a similar rule in the CAM Rules, which recognise the power of the arbitral tribunal to adopt all relevant measures for the valid, effective and prompt conduct of the arbitration (Article 19 of the CAM Rules) in order to avoid unnecessary delays and to ensure efficient and fair means of resolving the dispute (Article 21 of the CAM Rules), which also could include this faculty if it is efficient and if the parties have not agreed otherwise.

13.5 Binding of Third Parties

The general rule under Chilean law is that third parties or non-signatories to an arbitration agreement or to the contract that contains the arbitration agreement are not bound by such agreement or by the award issued in the arbitration proceeding. A third party may only be part of arbitration prior to its consent and the consent of the actual parties to the agreement. However, there are some exceptions to this rule. A third party may be bound by an arbitration agreement that has been assigned to it by law, as occurs in legal subrogation and succession cases. Other exceptions are cases where the corporate veil or alter ego theory is applicable.

Both comparative law and national jurisprudence have extended the application of the arbitration clause to non-signatory third parties under certain assumptions related to:

- cases in which the non-signatory assumes or comes to occupy the place or legal position of one of the contracting parties; and
- cases in which the initial contracting parties are maintained but a non-signatory third party is incorporated – for example, through the stipulation in favour of a third party, the lifting of the veil of legal personality, the group of companies, estoppel, or the "own acts" doctrine.

In these cases, there would not properly be a violation of pacta sunt servanda or of the relative effect of contracts, as they assume that those who are affected by an arbitration clause have consented to it in some way.

The jurisprudence of the Supreme Court has been mainly in line with the general rule in Chile of not extending the arbitration agreement or the award to third parties, mainly on the basis of the relative effect of the contracts (Supreme Court, Case No 29,699-2014).

Recent Jurisprudence

However, some recent Chilean jurisprudence leads to the conclusion that it is possible to impose the arbitration agreement on a non-signatory party in view of the circumstances of the case, with substantive elements prevailing over

the formal element of the absence of the non-signatory party. By way of example, in relation to the application of the arbitration clause to a non-signatory that participated in a bidding process but did not sign the arbitration clause, the court of appeal has ruled to reject the legality of the argument for disregarding it – given that, at the time of participating in the process, it accepted the existence of the clause and consented to it (Santiago Court of Appeal, Case No 1886-2011).

Nevertheless, there is also jurisprudence of the Supreme Court in the sense of not extending the arbitration clause to third parties because it would otherwise be an infringement of the relative effect of the contracts (Supreme Court, Case No 29,699-2014).

No special rule has been found in Chilean law regarding the capacity of the national court to bind foreign third parties.

Trends and Developments

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Pellegrini y Rencoret is a boutique law firm in Chile specialised in complex commercial arbitration and litigation. The firm's expertise spans health insurance, international sales of goods, consumer law, construction contracts, payment methods, among others. In recent years, Pellegrini y Rencoret have been involved in some of the most significant and high-profile cases in the country, earning an outstanding record and a superb reputation in the market. The firm is distinguished by its personalised approach, the excellent credentials of its team, and the thoroughness of its work, which ensures a detailed understanding of each case to determine the best possible strategy for a successful outcome. Many of the firms' lawyers, educated at the most prestigious universities in Chile and with postgraduate studies abroad, are also professors at leading law schools, reinforcing Pellegrini y Rencoret's commitment to academic excellence.

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Introduction

Chile has a long-standing tradition as a respected and open jurisdiction in the field of arbitration. Regionally, it is recognised as a prominent hub for arbitration in Latin America, increasingly becoming a preferred seat for international arbitrations. This reputation is largely attributable to the robust institutions overseeing arbitration, notably the Centre of Arbitration and Mediation of the Santiago Chambers of Commerce, and Chile's highly skilled legal practitioners and arbitrators.

Additionally, Chile is renowned for its adherence to the recognition and enforcement of foreign arbitral awards. Having ratified the New York Convention on the Recognition and Enforcement of Foreign Awards (the "New York Convention") in 1975 and enacted the International Commercial Arbitration Act (the "International Arbitration Act"), largely based on the UNCITRAL Model Law in 2004, Chile has solidified its commitment to international arbitration standards.

The Chilean Supreme Court ("the Court"), vested with exclusive jurisdiction over these matters, has consistently demonstrated deference to foreign awards. It has adopted a restrictive interpretation of grounds for refusing enforcement giving a strong deference to the foreign adjudicator and has clarified that the exequatur process should not be used to re-examine the merits of a case under any circumstances.

This piece examines three recent decisions by the Court:

- Ashlock Company v Procesadora Rengo (No 133.313-2022, dated 27 July 2023);
- Issa v Club O'Higgins (No 20.169-2023, dated 18 January 2024); and
- Fujan v Global Business (No 94-2023, dated 24 January 2024).

As analysed below, these decisions clarify the extent of scrutiny Chilean tribunals may apply when reviewing awards seeking recognition within Chile, reinforcing the current Court's trend.

Standard for Review: The Recognition Process is not an Instance for Substantive Review

As a starting point, the Court confirmed its consistent line of decisions, pointing out that when it comes to arbitral awards or any other foreign judgments, the recognition process does not constitute an instance for reviewing the relevant facts, defences, or rules governing the dispute. On the contrary, its sole purpose is to verify compliance with certain minimum requirements, without delving the intrinsic justice or injustice of the judgment (see Fujan v Global Business and Fujan v Global Business).

Furthermore, the Court clarified the precedence of regulations concerning the minimal requirements that an award must satisfy to be recognised in Chile. In alignment with the leading case law on this matter (Gold Nutrition Industria v Laboratorios Garden), the Court confirmed that the International Commercial Arbitration Act and the New York Convention supersede general provisions.

Accordingly, when faced with an exequatur procedure, the Court bases its analysis on Article 36 of the International Arbitration Act (corresponding to Article V of the New York Convention), which enumerates grounds for refusing recognition. This approach applies even if the defendant opposes enforcement citing general provisions of the Civil Procedure Code ("the Code").

For example, in Fujan v Global Business, the respondent raised a defence based on the lack of endorsement or other approval from a higher court in the country where the judgment was rendered, as required by Article 246 of the Code. However, the Court dismissed this defence because the International Arbitration Act is a specialised and subsequent statute that does not impose such a requirement.

The Supreme Court's Findings on Proper Notice or Fair Hearing

Recently, the Court adjudicated two cases pertaining to proper notice and fair hearing. While both cases are distinct, the Court's reasoning demonstrates a consistent trend.

In Ashlock Company v Procesadora Rengo, the claimant filed an enforcement petition based in an arbitration conducted in California. The arbitral award ordered the defendant to pay USD15,000 for each year of use of eight leased machines. The defendant opposed the request, arguing that neither the arbitration request nor the lawsuit in the underlying proceeding were served in compliance with the strict formalities mandated by the Code.

Importantly, the defendant's argument did not concern the failure to serve the claim, but rather the invalidity of the notice as the complaint was served to the company by one of the claimant's employees in Chile. The defendant alleged a violation of Chilean mandatory rules which require that service of process for a civil lawsuit be conducted exclusively by a duly authorised public official (as stipulated in Article 40 of the Code).

Consistent with previous cases, the Court upheld a broad scope of freedom for parties to agree upon rules and procedural formalities that best suit their relationship, even if they deviate from the requirements of Chilean Law. Specifically, the Court ruled that although service was not made in the manner prescribed by Chilean legislation, it was carried out in a timely manner and did not prevent the defendant from participating in the proceedings or asserting its rights. Furthermore, the Court stated that service was performed in accordance with contractual rules agreed upon by the parties, over which the Court had no authority to exercise external control.

The Court also emphasised that while service is essential to due process, its formalities need only comply with the rules agreed upon by the parties in accordance with their applicable law. This applies even if those rules significantly differ from Chilean domestic rules that would otherwise be applicable.

In Fujan v Global Business, the plaintiff sought enforcement of an ICC arbitral award issued in Singapore, directing the defendant to pay various sums for breach of contract. The defendant opposed enforcement, asserting no notice of any arbitration proceedings. Specifically, Global Business claimed it "never had knowledge of such action, nor of any other proceeding in the arbitration," and consequently "did not assert its rights."

Thus, Fujan presents a substantive difference from Ashlock Company: the court faced an opposition where the defendant alleged no receipt of notice regarding the arbitral proceedings. This opposition did not hinge on a procedural rule breach but on the absolute impossibility of presenting its case in the arbitral proceedings.

The Court dismissed this defence, noting that the award itself detailed notices sent to the defendant and that, according to the arbitrator, the defendant had a reasonable opportunity to

present its case. Therefore, the Court deferred to the arbitrator's analysis, explicitly addressing the defendant's opportunity to exercise its rights, thereby precluding the Court from reassessing this matter.

Both decisions represent significant milestones. One of the key features of arbitration as a method of dispute resolution is the authority given to parties not only to establish applicable substantive rules but also to design procedural provisions that best fit their specific business relationships.

Due to significant variations between countries and legal traditions, the standard of review for such procedural issues often hinges on broadly formulated clauses, making it challenging to determine their exact scope. In these cases, the Court demonstrated considerable flexibility regarding procedural rules concerning notice in arbitration proceedings, prioritising rules agreed upon by the parties even if they conflicted with Chilean law or giving absolute deference to the arbitrator's decision on compliance with procedural notification rules.

What Does "Chilean Public Policy" Mean?

The concept of public policy is relevant in two distinct yet interconnected contexts where domestic courts can scrutinise international arbitral awards. Firstly, it arises in annulment proceedings pursuant to Article 34, 2), b), ii) of the International Arbitration Act. Secondly, it surfaces in recognition and enforcement petitions, where the public policy defence stands as the primary ground for opposition, often used by defendants to contest the enforcement of arbitral awards.

In both scenarios, the central question is: which legal principles should be applied when assessing the concept of public policy?

Up until Issa v Club O'Higgins, the court had not provided a detailed description of the concept of public policy, often limiting itself to concluding that "the concept of public policy established by the International Commercial Arbitration Act is restrictive and refers to the fundamental principles and rules of Chilean law and not to any mandatory rules of domestic law" (see, for instance, Ashlock Company).

In Issa v Club O'Higgins, the claimant sought enforcement of a judgment issued by the Court of Arbitration for Sport, which ordered the football club O'Higgins to pay specific amounts to Hugo Omar Issa for economic rights associated with the transfer of a player.

Initially, O'Higgins entered into a purchase agreement in 2013 to acquire 50% of the economic rights of the player Gastón Lezcano, which were owned by agent Mr Issa. Subsequently, in December 2016, the parties executed a private Termination and Settlement Agreement, terminating their co-ownership arrangement, thereby making O'Higgins the sole proprietor of the player's rights.

In this capacity, the club transferred all of Lezcano's economic rights to the Mexican team Morelia in December 2017. Following this transfer, Mr Issa filed an arbitration request, asserting that he still held a 50% interest in the player's transfer rights and claiming entitlement to 50% of the transfer fee paid to Morelia. In February 2021 an award was rendered against O'Higgins.

O'Higgins opposed enforcement arguing it would conflict with Chilean public policy. Specifically, the defendant noted that the Termination and Settlement Agreement expressly terminated the co-ownership relationship between the parties, upon payment of USD50,000 in favour of claim-

ant. Thus, defendant stated that the enforcement of the award would conflict with the res judicata principle recognised by Chilean law.

The court began its analysis by reviewing the Termination and Settlement Agreement, stating that it corresponds to a settlement agreement (what is known in Chilean law as "*transacción*" a contract that allows the conclusion of a legal dispute, producing the effect of res judicata). Then, it analysed the concept of res judicata under Chilean law, noting its constitutional foundation and that its purpose is to prevent re-litigating issues that have already been subject to a decision.

At this point, the Court reaffirmed that the exequatur procedure is not an instance to re-debate the merits of the issue resolved by the award. However, it considered that enforcing this decision would be contrary to public policy in Chile:

"We must include within the concept of public policy, which must be safeguarded in any exequatur proceeding, that of procedural public policy, based on the effects granted both to a judicial decision and to a settlement agreement, so that it implies the immutability of what was decided or agreed upon, in the forms and within the matters authorised by law."

Just six days after deciding Issa, the Court encountered a similar but differently presented case by the defendant. In Fujan, the defendant also asserted that the parties had entered into a settlement agreement resolving their dispute.

However, the defence did not invoke the principle of res judicata. Instead, it argued that the arbitral award addressed a dispute beyond the scope of the arbitration clause. Specifically, the defendant contended that the settlement agreement terminated the underlying sales contract, thereby invalidating its arbitration clause. Consequently, the defendant claimed that the arbitral tribunal lacked jurisdiction to issue the award.

Significantly, the Court dismissed the opposition, reasoning solely that the arbitration had commenced under the arbitration agreement contained in the sales contract. Therefore, the Court found it sufficient to establish the existence of the arbitration agreement and the initiation of arbitration proceedings under its authority, without analysing any potential subsequent termination (presumably because this issue had been addressed in the award). This raises the question of how the Court would have reasoned if the argument had been made that the award contravened the principle of res judicata.

Conclusion

Chilean Supreme Court has historically adhered to a favourable approach regarding the recognition and enforcement of foreign awards, refusing to adhere to requirements outlined in outdated local laws, applying grounds for opposition restrictively and demonstrating deference towards arbitral decisions.

The three analysed decisions maintain this trend, emphasising that the exequatur procedure does not serve as a forum to re-litigate substantive disputes and setting a high standard (nearly impossible to satisfy) for refusing enforcement based on lack of proper notice or the defendant's inability to present its case: Essentially, the Court finds it sufficient that the foreign award determined the defendant had a reasonable opportunity to present its case in order to dismiss this type of opposition.

Additionally, the court clarified its understanding of Chilean public policy related to "fundamental

principles and rules of Chilean law," grounding its rejection of enforcement on the basis that the decision would contravene a constitutional principle concerning the finality of judgments (res judicata).

These current trends and developments should be taken into account when litigating recognition and enforcement before the Court. While the exact evolution of this jurisprudence remains uncertain, it is clear that Chile continues to uphold its commitment to respecting foreign arbitral awards.

CHINA

Law and Practice

Contributed by:
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GEN Law Firm is a rapidly expanding boutique company renowned for its exceptional accomplishments in dispute resolution (DR), with offices in Beijing, Shanghai, Shenzhen, and Chengdu, and a representative office in LA, USA. The firm has received prestigious accolades from prominent organisations, including Chambers. GEN has approximately 100 professionals, specialising in business areas with commercial transactions at the core, focusing on practices such as DR, intellectual property, government regulation, data protection, and antitrust. It also has diverse clients, including multinational corporations, state-owned enterprises, emerging technology and innovative enterprises. GEN's DR practice excels in domestic and multi-jurisdiction disputes across finance, international trade, and construction. The DR team at GEN is skilled at managing complex disputes and providing tailored legal solutions.

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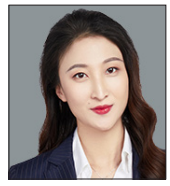

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1. General

1.1 Prevalence of Arbitration

In 2023, as China's economy steadily recovered, the number of international cases also increased according to the 2023 annual work reports of major Chinese arbitration institutions. The Shanghai International Arbitration Center (SHIAC) reported a 9.69% increase, the Beijing Arbitration Commission (BAC) saw a 13.57% rise, and the China International Economic and Trade Arbitration Commission (CIETAC) saw 0.4% growth compared to the same dates last year.

Since 2020, China has been committed to developing several cities into international commercial arbitration centres, with pilot projects in Beijing, Shanghai, Guangzhou, Shenzhen, and Hainan. These efforts include hiring foreign professionals, establishing overseas branches, and providing financial support. By 2023, significant progress had been made, with eight arbitration institutions in these regions handling 2,251 foreign-related cases (72% of the national total) involving CNY137.6 billion in disputes (69% of the national total), as reported by *People's Daily*.

Moreover, 2023 marks the tenth year of China's Belt and Road Initiative. The work reports from major arbitration institutions show a significant increase in participation from countries involved in the Belt and Road Initiative in international arbitration cases. Chinese arbitration institutions handled cases involving parties from over 80 countries, indicating the increasing popularity of international arbitration in China.

Popularity Among Domestic Parties

Arbitration is gaining traction among domestic companies due to national policy support. While litigation remains the default for companies operating solely within China, those involved in international activities, such as construction projects or import/export businesses, increasingly prefer international arbitration.

1.2 Key Industries

Major arbitration institutions in China have released 2023 data revealing the top five sectors that predominantly rely on arbitration for dispute resolution. Consistent with the previous year, these sectors are primarily trade of goods, finance and capital markets, construction, equity investment and transfers, and service and agency contracts.

The data also reveal a significant surge in arbitration cases in construction, financial and capital markets, and international trade compared to the previous year. Significantly, BAC experienced a remarkable increase of over 200% in cases involving construction contracts. The Shenzhen Court of International Arbitration (SCIA) was leader in cases related to financial and capital markets, showing a growth rate of 28%. Meanwhile, SHIAC predominantly managed disputes in international trade, marking a growth rate of 145%. Overall, these figures indicate a robust economic recovery following the COVID-19 pandemic.

Additionally, CIETAC's work report highlighted a significant increase in the number of intellectual property cases and ESG cases, reflecting a growing emphasis on protecting intellectual property and promoting environmental sustainability, which mirrors the latest trends in international arbitration.

1.3 Arbitration Institutions

In 2023, the Guangzhou Arbitration Commission (GZAC) surpassed CIETAC to become the arbitration institution handling the highest number of international arbitration cases, with 671 cases and a year-on-year growth rate of 5.67%. These cases, primarily involving import and export disputes, suggest a post-pandemic recovery in international trade. Despite the high case volume, GZAC's total disputed amount was CNY5 billion, just one-tenth of that of CIETAC.

CIETAC handled 645 cases with a disputed amount of CNY53 billion, remaining China's most preferred arbitration institution. Influenced by the Belt and Road Initiative, CIETAC's cases involved parties from 71 countries, with 62 cases featuring foreign entities on both sides.

SCIA ranked third, with 414 foreign-related cases and the highest disputed amount, at CNY59 billion, surpassing BAC and SHIAC, which handled 251 and 215 international cases, respectively. These trends highlight Guangdong Province's growing prominence in international arbitration, alongside Beijing and Shanghai.

New Arbitration Institutions

Currently, there are almost 280 permanent arbitration institutions in mainland China. In May 2024, the SHIAC established a branch in Hong Kong. In November 2023, to better address disputes related to the Belt and Road Initiative, CIETAC established the Central Asia Trial Center in Xinjiang Province, providing a convenient venue for parties from Central Asia to participate in hearings.

Meanwhile, China is increasingly welcoming foreign arbitration institutions to establish branches within its jurisdiction. In December 2023, the Shanghai Municipal Bureau of Justice approved the registration of the Korean Commercial Arbitration Board's Shanghai Center, which is the first foreign arbitration institution to establish a business office in Shanghai.

1.4 National Courts

In China, intermediate courts have the authority to hear disputes related to arbitrations. This includes matters such as determining the validity of arbitration clauses, deciding on application to set aside and not to enforce domestic awards and ruling on recognition and enforcement of foreign arbitral awards.

Additionally, the power to grant interim measures, such as injunctions or asset preservation orders, is exclusively designated to the courts in accordance with the PRC Civil Procedure Law. If a party wishes to seek an interim measure in

arbitration proceedings, the arbitral tribunal or the institution's secretary (before the tribunal is constituted) will forward an application to the court.

2. Governing Legislation

2.1 Governing Law

The primary legislation governing arbitration in China is the PRC Arbitration Law (revised in 2017) and the PRC Civil Procedure Law (revised in 2023). These laws provide the legal framework for arbitration proceedings and the enforcement of arbitral awards in China. Additionally, there are also other regulations and judicial interpretations that supplement these laws and provide further guidance on arbitration-related matters.

Redefinition of Foreign Arbitration

The amended PRC Civil Procedure Law, effective as of 1 January 2024, redefines foreign arbitration as "an arbitral award made outside of the PRC", rather than "an arbitral award of an overseas arbitration organization". This change aligns with international arbitration practices, determining the nationality of an arbitration award by the seat of arbitration instead of the location of the arbitral institution.

In practice, foreign-related arbitration (the arbitration is seated in China, with foreign-related elements involved) and foreign arbitration (the seat of arbitration is outside of China) are often referred to collectively as "international arbitration". The scope of "foreign-related" disputes is expanding; for instance, cases involving foreign-invested enterprises in free trade zones such as the Shanghai Pilot Free Trade Zone are considered foreign-related under certain circumstances.

Legal Framework

For domestic arbitration and foreign-related arbitration, a comprehensive regulatory framework governs arbitration agreements, arbitrator qualifications, tribunal constitution, proceedings, issuance, and enforcement of awards, including:

- PRC Arbitration Law;
- PRC Civil Procedure Law;
- PRC Law on the Application of Laws to Foreign-related Civil Relations; and
- the SPC's judicial interpretations on the application of laws, etc.

The primary focus of foreign arbitration revolves around the recognition and enforcement of foreign arbitral awards within the boundary of China which shall be subject to laws and regulations including:

- PRC Civil Procedure Law; and
- the SPC Notice on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China (effective as of 1987).

National Legislation and UNCITRAL Model Law

The PRC Arbitration Law, drawing inspiration from the UNCITRAL Model Law, incorporates key principles like party autonomy and separability of arbitration agreements. However, it currently lacks statutory provisions for ad hoc arbitration, the powers of an arbitral tribunal to order interim measures and the emergency arbitrator scheme.

Despite this, ad hoc arbitration is continuously developing in practice. First, a draft amendment to the PRC Arbitration Law ("Draft Amendment to Arbitration Law") included provisions for ad hoc arbitration, and local regulations, such as

the Shanghai Municipal Bureau of Justice's draft measures in 2024, promote ad hoc arbitration in foreign-related maritime and commercial disputes.

Additionally, domestic arbitration institutions are increasingly incorporating ad hoc arbitration into their rules. For example, CIETAC's new rules explicitly support ad hoc arbitration, and SHIAC's guidelines for ad hoc arbitration assistance services became effective in 2024.

In June 2023, the first publicly disclosed ad hoc arbitration case concluded under the Ad Hoc Arbitration Rules of the China Maritime Arbitration Commission (CMAC). CMAC only provides specific administrative services as requested by the parties, such as appointing arbitrators, deciding on arbitrator challenges, handling financial aspects of the case, etc. This case has attracted considerable attention as the first of its kind in the PRC, and CMAC's management approach has also been recognised.

2.2 Changes to National Law

On 1 January 2024, the amended PRC Civil Procedure Law of 2023 officially came into force, enhancing the approach to determining the recognition of arbitral awards and expanding the scope of application for enforcement of foreign arbitral awards as outlined in **2.1 Governing Law** and **12.2 Enforcement Procedure**.

On 9 May 2024, the Legislative Plan of the National People's Congress for 2024 was announced, which includes the initial review of the Draft Amendment to Arbitration Law (released on 30 July 2021, including proposed changes regarding ad hoc arbitration, seat of arbitration, interim measures, etc).

Additionally, amidst strong policy support for arbitration, several institutions, including CIETAC, SHIAC, and GZAC, have updated their rules in late 2023 and 2024. These updates include provisions for ad hoc arbitration, emergency arbitrators, interim measures, etc, enhancing alignment with international arbitration standards.

3. The Arbitration Agreement

3.1 Enforceability

In China, courts typically uphold the enforceability of arbitration agreements provided they comply with the compulsory stipulations outlined in the PRC Arbitration Law. Such an agreement can manifest either as an arbitration clause within a contract or as a standalone accord. According to Article 16 of the PRC Arbitration Law, under Chinese law, an arbitration agreement, to be deemed enforceable under Chinese law, must include the following elements:

- a clear expression of the parties' mutual intention to arbitrate;
- an outline of the subject matter to be arbitrated, which must be arbitrable; and
- the selection of an arbitration institution.

3.2 Arbitrability

Pursuant to Article 3 of the PRC Arbitration Law, certain disputes fall exclusively within the jurisdiction of the Chinese court and are thus non-arbitrable. These include disputes related to matrimonial matters, adoption, custody, fostering, and succession, as well as administrative disputes. These categories of disputes necessitate the direct involvement of the court and are not eligible for arbitration.

It is observed that the scope of arbitrable matters in China is gradually expanding. For example,

international investment arbitration is becoming arbitrable under Chinese law. The Foreign State Immunities Act, effective 1 January 2024, allows arbitration against foreign states that have consented to an arbitration agreement and the following recognition/enforcement/setting aside of such arbitral awards or other judicial review of arbitration. Concurrently, the Draft Amendment to Arbitration Law removes the requirement of "equal entities" in its description of arbitrability clauses, aligning with the Foreign State Immunities Act.

Similarly, Public-Private Partnership (PPP) agreements were sometimes considered non-arbitrable previously. However, new policy documents now clearly state that PPP agreements of a commercial nature can be resolved through arbitration.

Determining Whether or Not a Dispute Is "Arbitrable"

In practice, Chinese courts often deem IP-related contractual disputes and false securities statements as arbitrable. However, in addition to cases excluded by PRC Arbitration Law, disputes involving public interests and administrative affairs, such as private antitrust disputes, are often considered non-arbitrable.

Private anti-trust disputes mainly include disputes over anti-trust agreements and abuse of dominance. The arbitrability of both types of disputes is not explicitly defined in the statutory law. However, judicial practice indicates that most of these disputes cannot be resolved through arbitration. In a 2023 ruling, the SPC held that arbitration clauses in commercial contracts do not bar courts from hearing anti-trust disputes, as these practices affect broader public interests beyond the parties involved.

This is consistent with Article 3 of the Draft SPC Interpretation on Anti-trust Cases, which has not yet come into effect. If and when this interpretation comes into force, the anti-trust disputes are to become non-arbitrable.

3.3 National Courts' Approach

Under Chinese law, the governing law chosen for resolving contract disputes does not automatically extend to the arbitration agreement, which is treated separately. Article 16 of the SPC Interpretation of the PRC Arbitration Law outlines a hierarchy for determining the applicable law: parties' mutual agreement prevails, followed by the law of the chosen arbitration seat if no agreement exists, and defaults to PRC law otherwise.

Agreements Enforced by Courts

The enforceability of an arbitration agreement hinges on the presence of specific elements outlined in **3.1 Enforceability**. If a party wishes to challenge the validity of an arbitration agreement, it is entitled to file the case with a Chinese intermediate court. Subsequently, the court's decision concerning the agreement's validity will be predicated on the aforementioned elements.

Despite the presence of valid elements, courts may invalidate arbitration agreements under certain circumstances. For instance, an arbitration agreement that offers parties the option of resolving their disputes through either a court or an arbitration institution is deemed invalid, unless the opposing party neglects to challenge the agreement's validity prior to the first hearing. Nevertheless, Chinese courts typically uphold the validity of an arbitration agreement that grants a single party the unilateral right to choose between dispute resolution via arbitration or litigation.

Moreover, for the protection of consumers, arbitration clauses in standard form contracts will be deemed invalid if the consumer was not provided clear notice and explanation of such arbitration clauses.

Additionally, the arbitration agreement which states that the parties submit a dispute without any foreign-related element to be arbitrated outside of mainland China is invalid, and the subsequent arbitration award will not be recognised and enforced by Chinese courts. However, an agreement to select a foreign arbitration institution while designating the arbitration seat within China is considered valid.

Validation Principle

Chinese courts generally uphold arbitration clauses unless there are significant defects ("validation principle"). In calendar-year 2023, there were a total of 449 cases regarding the validity of arbitration agreements, among which over 80% of the disputed arbitration agreements were affirmed as valid by Chinese courts.

For foreign-related judicial review cases, if a court proposes to invalidate an arbitration agreement, it shall report the case level by level up to the SPC for approval. Only after the SPC has reviewed and provided its opinion can a ruling be made based on that opinion. This rigorous review process also increases the difficulty of declaring arbitration agreements invalid in foreign-related cases.

3.4 Validity

Under Chinese law, the doctrine of separability in arbitration agreements is vigorously upheld. An arbitration agreement embedded within a contract is to be regarded as a distinct entity, independent from the remainder of the contract. Consequently, its validity remains unaffected by any modifications, terminations, or declarations of invalidity pertaining to the overall contract.

One typical case released by the SPC in 2024 highlighted the principle of the separability of arbitration clauses ((2021) Zhe 01 Ren Gang No.1). In this case, the parties exchanged a draft contract containing an arbitration clause during negotiations, while the other party raised objections to certain terms of the contract but did not object to the arbitration clause. Although the contract was not ultimately signed, the court held that the parties had reached an agreement on the arbitration clause in the draft contract. Therefore, based on the principle of the separability of arbitration clauses, the arbitration clause was deemed valid.

4. The Arbitral Tribunal

4.1 Limits on Selection

Parties generally have the flexibility to form an arbitral tribunal comprising either a sole arbitrator or three arbitrators, where the presiding arbitrator is selected by mutual agreement. In the past, there were no further limitations on the parties' autonomy in nominating arbitrators, either under the law or the arbitration rules.

However, under the new rules of CIETAC in 2024, abuse of such autonomy is prohibited (Article 26). If the agreed method for constituting the tribunal is significantly unfair or unjust, or if one of the parties abuses its rights resulting in unnecessary delays in the arbitration proceedings, the Chairman of the Arbitration Commission may adjust the tribunal's composition, or appoint any member of the arbitral tribunal.

4.2 Default Procedures

Upon selection of a specific arbitration institution's applicable rules by the parties, these rules inherently detail the procedures for arbitrator appointment and are binding on all involved. Many arbitration institutions, like CIETAC, SHIAC, and BAC, maintain their own panels of arbitrators for parties to select from. Additionally, certain institutions permit parties to nominate arbitrators outside of their established panels, subject to the approval of the institution's chairman, as seen in the practices of CIETAC and SHIAC.

Where no such procedure for appointing arbitrators is agreed upon by the parties or set up in the institutional rules, Articles 31 and 32 of the PRC Arbitration Law provide the default procedures for the parties to nominate arbitrators. Please refer to Chambers International Arbitration 2023 for more details.

Improved Approach for Appointing a Presiding Arbitrator

To address the challenges in appointing a presiding arbitrator, the new arbitration rules of CIETAC and SHIAC have both introduced a new option: the nomination of a list of candidates for the role. This method facilitates the selection process and enhances efficiency in arbitrator appointments. Under CIETAC Rules (2024), Article 27(5) allows the CIETAC to nominate a list of candidates for presiding arbitrator, from which both parties can confirm their choice. SHIAC has introduced similar provisions.

The use of nomination or candidate lists is a well-established practice in international arbitration. The recent adoption of this method by major Chinese arbitration institutions enhances the clarity of the default procedures, and aligns their rules with international standards.

Meanwhile, Article 27 of CIETAC Arbitration Rules of 2024 stipulates that the parties may agree to have their respective party-appointed arbitrators jointly select the presiding arbitrator or jointly entrust CIETAC to appoint the presiding arbitrator. This practice of "co-arbitrators selecting the presiding arbitrator" has been widely used in practice, and is now explicitly included in the rules for the first time.

4.3 Court Intervention

Under Chinese law, courts lack the authority to intervene in the selection of arbitrators, as there is no legal basis for them to exercise such power. The extent of court involvement is limited to conducting a judicial review of the arbitrator appointments. However, this review only occurs after the rendering of the arbitral award and upon application by one party for setting aside or non-enforcement of the arbitral award.

One of the grounds for Chinese courts to set aside or refuse to enforce an arbitral award is that the constitution of the tribunal is in breach of the parties' arbitration agreement, arbitration rules or the law of the arbitration seat. Please refer to **11.3 Standard of Judicial Review** for more details.

4.4 Challenge and Removal of Arbitrators

Article 34 of the PRC Arbitration Law sets out grounds for the parties to challenge or for the arbitration institution to proactively remove the arbitrator if the arbitrator:

- is a party to the case or a close relative of a party or of its representatives;
- has an interest in the case;
- has some other relationship with the parties or their representatives which may affect the arbitrator's impartiality; or

- has private meetings with a party or its representative, or accepts gifts from a party or its representative.

In the above circumstances, the parties can request for removal of the arbitrator, and such request shall be made before the first hearing. In practice, different arbitration rules will vary slightly from the laws, and each will have its specific instruction. Please refer to Chambers International Arbitration 2023, China for more details.

Reluctance to Be Challenged

However, in practice, arbitrators would prefer not to be challenged by parties. Thus, in some cases, arbitrators will apply to quit even if there are no statutory events as long as any party applies to challenge the appointment of the arbitrator.

Protection Against Malicious Challenge

CIETAC and SHIAC have implemented new rules – Article 22 and Article 21, respectively – to curb parties from exploiting the arbitration process by changing or adding legal representatives as a tactic to challenge arbitrators and maliciously delay proceedings. The chairman of the arbitration institution may reject a party's request to change or include new legal representatives if there are potential conflicts of interest between the new legal representatives and the current arbitrators, or based on the progress of the case proceedings and taking into consideration the opinions of both parties regarding recusal.

4.5 Arbitrator Requirements

The general requirement is that the arbitrator shall not have any close relationship with the parties or their representatives which may compromise the arbitrator's impartiality when deciding the case (please refer to Section **4.4 Challenge and Removal of Arbitrators**).

Duty of Disclosure

The duty of disclosure for arbitrators under Chinese law is evolving. Article 52 of the Draft Amendment to Arbitration Law mandates arbitrators to disclose in writing any circumstances that could lead to doubts about their impartiality or independence. Major Chinese arbitration institutions, such as CIETAC and BAC, require arbitrators to declare and disclose potential conflicts per their respective rules. Additionally, SHIAC's 2024 rules allow arbitrators to reference the IBA Guidelines on Conflicts of Interest, marking a significant step forward in transparency.

Further, in 2024, Chinese arbitration institutions publicly applied the IBA Guidelines for the first time to address issues concerning the recusal of foreign arbitrators. This landmark case, adjudicated by SHIAC, evaluated the relationship between an arbitrator and a party's director, concluding that their past collaboration falls under the IBA Guidelines' Green List and does not raise doubts about the arbitrator's impartiality. It marks a significant milestone in addressing conflicts of interest involving foreign arbitrators in mainland China.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

Under Chinese law, disputes concerning marriage, adoption, custody, fostering and succession, and administrative disputes are not arbitrable. Please refer to **3.2 Arbitrability**.

5.2 Challenges to Jurisdiction

Chinese law only adopts the principle of competence-competence to a limited extent. Under the PRC Arbitration Law, an arbitral tribunal is not entitled to the power to rule on its own jurisdiction. Instead, this power lies in arbitration insti-

tutions. Under the rules of Chinese arbitration institutions, the arbitration institution can delegate the power to determine a party's jurisdiction objection to the arbitral tribunal.

Generally, if the tribunal has not been formed, the arbitration commission makes the initial decision. However, a prima facie jurisdictional decision by the commission does not bind the tribunal's later conclusions. Notably, Article 28 of the Draft Amendment to Arbitration Law states that the arbitral tribunal decides the validity of the arbitration agreement directly, aligning with global practices.

In addition, disputes over the validity of an arbitration agreement can be referred to either arbitration institutions or Chinese courts. If both are approached, the court shall decide.

Multi-Tier Dispute Resolution Clause

The admissibility of a claim is as crucial as the question of jurisdiction. In international arbitration, multi-tier dispute resolution clauses often require parties to engage in negotiation, mediation, conciliation, or adjudication before initiating arbitration. However, there is considerable debate over the consequences of failing to comply with these pre-arbitration procedures.

Article 12 of the CIETAC Rules (2024) states that failing to negotiate or mediate before arbitration does not affect the admissibility of the arbitration case. The reasons lie in that pre-arbitration procedures do not impact the tribunal's jurisdiction, and negotiation/mediation can occur during arbitration. This change prevents the misuse of pre-arbitration procedures to delay proceedings.

5.3 Circumstances for Court Intervention

Chinese courts address arbitral tribunal jurisdiction in three scenarios, as follows.

- When a party challenges the validity of the arbitration agreement and submits the dispute to the court.
- When a party applies to set aside or refuse enforcement of an arbitral award, the court reviews the tribunal's jurisdiction.
- When a party breaches the arbitration agreement by referring the dispute to the court directly, and the other party objects, the court makes a prima facie jurisdiction decision.

Generally, the court shall not intervene in arbitrations except for certain circumstances stipulated by law.

If an arbitration institution in China decides the arbitral tribunal lacks jurisdiction, courts have no legal ground to review this decision. Therefore, if an arbitration institution rules on the validity of an arbitration agreement, any subsequent court application to challenge this decision will be dismissed.

5.4 Timing of Challenge

Article 20 of the PRC Arbitration Law sets out that the parties shall raise their objections to the jurisdiction of the arbitral tribunal prior to the first hearing before the tribunal. If the parties fail to challenge the arbitral tribunal's jurisdiction before the first hearing but subsequently apply to the court to challenge the jurisdiction, the court shall dismiss such application (Article 13 of the SPC Interpretation of the PRC Arbitration Law).

After the arbitral award is rendered, a party may apply for setting aside or non-enforcement of the award based on the ground that the arbitration agreement is invalid, provided that the party has previously objected to the validity of the arbitration agreement during arbitration proceedings. However, if its previous objection was rejected

by the tribunal or the arbitration institution, it is likely to be rejected by court as well.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

In the process of judicial review of arbitral awards, Chinese courts, adhering to the statutory standards delineated in sections **3.1 Enforceability** and **3.2 Arbitrability**, will conduct a de novo review focusing on admissibility and jurisdiction issues. Specifically, they will scrutinise the existence of a valid arbitration agreement.

5.6 Breach of Arbitration Agreement

Should a party commence court proceedings in breach of an existing arbitration agreement, the opposing party is entitled to contest the court's jurisdiction. This is achieved by invoking the arbitration agreement prior to the court's first hearing.

Under such circumstances, the courts, upon identifying prima facie evidence of a valid existing arbitration agreement, would generally exhibit reluctance to proceed with the case, leading to its likely dismissal.

Subrogation Litigation

In subrogation litigations, arbitration agreements may be breached to protect creditors. Article 36 of the SPC Interpretation of the Civil Code, effective 5 December 2023, states that if a creditor sues the debtor's debtor ("counterparty") and the debtor or counterparty objects based on an existing arbitration agreement, the court will not uphold the objection. However, if arbitration regarding the debtor-counterparty relationship is initiated before the first hearing, the court may stay the litigation. Thus, an arbitration agreement between the debtor and counterparty does not necessarily prevent the creditor from suing the counterparty.

5.7 Jurisdiction Over Third Parties

Arbitration requires mutual consent and cannot be enforced against third parties without such agreement.

Typically, the jurisdiction of the arbitral tribunal is limited to the signatories. However, exceptions include the following.

- Mergers or divisions binding successors to the arbitration agreement.
- The arbitration agreement binding a deceased party's heirs.
- Assignees bound by the arbitration agreement in the contract.
- Principals directly bound by arbitration clauses in contracts made by agents with third parties who are aware of the agency relationship.

These rules apply to both foreign and domestic third parties, regardless of nationality.

Extension of Arbitration Agreements to Ancillary Contracts

Additionally, the Draft Amendment to Arbitration Law, pending review, aims to extend arbitration clauses to ancillary contracts. However, judicial practice remains cautious. In case (2022) Jing 74 Min Te No 13, the judge refused to extend an arbitration clause from a main contract to an ancillary contract, emphasising the necessity of explicit party consent and respecting party autonomy in arbitration agreements.

6. Preliminary and Interim Relief

6.1 Types of Relief

In China, interim measures are currently not available from an arbitral tribunal, but only from the competent Chinese court.

Currently, all six major arbitration institutions in China (CIETAC, BAC, SHIAC, SHAC, GZAC, and SCIA) have introduced emergency arbitrator procedures and for interim measures in its arbitration rules, such as Article 23 of CIETAC Rules (2024), Article 62 of BAC Rules and Article 25 of SCIA Rules. Among them, SHIAC introduced emergency arbitrator procedures this year in Articles 25 and 26.

By the parties' mutual consent to choose the applicable arbitration rules, the relevant arbitral tribunal can order interim measures pursuant to arbitration rules. Such orders shall be binding to the parties and the parties may voluntarily comply with these interim measures.

However, as Chinese law does not vest the tribunal with the power of granting interim measures and such power currently is limited to only Chinese courts, the interim measures ordered by the arbitral tribunal are unenforceable in China, but the parties may apply for enforcement of such interim measures in other jurisdictions, provided that the laws of hosting jurisdiction allow the enforcement of such an interim measure. For example, on 15 November 2022, the Hong Kong High Court recognised and enforced an emergency arbitrator's decision issued by the SHAC. This decision included a temporary measure to freeze the respondent's assets for a period of six months.

Depending on arbitration rules, in foreign-related cases, the arbitral tribunal generally can order the following three types of interim relief:

- preservation of property;
- preservation of evidence; and
- ordering an injunction to restrain a person from doing anything or to compel a person to do something.

6.2 Role of Courts

As mentioned in **6.1 Types of Relief**, Chinese court is the only competent authority to order any interim relief.

If a party needs to prevent the destruction of evidence or disposal of property, they can apply for interim measures through the arbitral tribunal, which will then forward the application to the intermediate court at the respondent's residence or where the property or evidence is located.

It is worth noting that Article 23 of the CIETAC Rules (2024) has been amended to broaden the scope of forwarding property preservation applications from "domestic courts" to "courts," making it possible for CIETAC to forward property preservation applications to foreign courts. However, there have been no reported cases yet.

In the realm of international arbitration, the arbitral tribunals, when adjudicating upon applications for interim measures, are guided by a minimum of three criteria. These requirements form the cornerstone of their decision-making process for granting interim measures:

- emergency/irreparable harm;
- prima facie case (the applicant has a reasonable possibility to succeed on the merits of its claim); and
- proportionality (whether the harm of rendering such interim relief caused to the respondent and/or third parties outweighs the benefit that would be gained by the applicant).

Unlike stringent international standards, Chinese courts adopt a more lenient approach to approving interim measures, focusing primarily on urgency. This makes it comparatively easier for parties in foreign-related arbitration to secure interim measures from Chinese courts.

Interim Relief in Aid of Foreign-seated Arbitrations

Chinese courts generally do not grant any interim measures in aid of foreign arbitrations (except for maritime arbitrations). There is no legislation providing for such a channel for Chinese courts to aid foreign arbitrations via ordering interim relief.

For arbitrations seated in Hong Kong SAR and Macao SAR, special arrangements allow Chinese courts to grant interim measures in aid of these arbitrations ("Interim Measures Arrangement"). Since the implementation of such arrangements on 1 October 2019, Hong Kong's arbitration institutions have handled over 100 applications, with approved property preservation applications totaling CNY15.7 billion (based on statistics derived from a speech made by the Deputy Secretary for Justice of Hong Kong at the seminar "*The Fourth Anniversary of the Interim Measures Arrangement: Review and Prospects*", please see link). Remarkably, no requests for interim measure assistance have been denied under this arrangement.

Intervention of National Courts

Chinese law does not recognise the concept of emergency arbitrators. However, analogous to the power vested in the tribunals by arbitration institutions to order interim measures, these institutions also codify emergency arbitrator procedures within their arbitration rules. This is demonstrated in the rules of organisations such as CIETAC, BAC, and SCIA. Decisions made by emergency arbitrators under these procedures are solely binding on the parties involved but lack enforceability within Chinese jurisdiction.

6.3 Security for Costs

In accordance with Chinese law, no legislative provisions authorise courts or arbitral tribunals to instruct a claimant to furnish security for costs. This contrasts with the international practice, but aligns with China's unique approach where the claimant pre-pays all arbitration fees. These pre-paid fees are later allocated between the parties in accordance with the principle of "costs follow the event." This allocation occurs subsequent to the issuance of the arbitral award by the tribunal, ensuring a fair distribution of costs based on the outcome of the arbitration proceedings.

7. Procedure

7.1 Governing Rules

In accordance with the principle of party autonomy, parties have the discretion to select the governing law for the arbitration procedure. However, it is rarely exercised in practice. Instead, parties typically prefer to opt for specific arbitration rules which encompass detailed provisions concerning the arbitration procedure. This approach provides a structured framework, thereby facilitating a more efficient and predictable arbitration process.

Accordingly, the arbitration procedure will be conducted in accordance with the selected arbitration rules and the law of the arbitration seat. In cases where the arbitration is seated in China, the procedure will be governed by the following legislation:

- the PRC Arbitration Law;
- the SPC Interpretation of the PRC Arbitration Law;
- the PRC Civil Procedure Law; and
- the SPC Interpretation of the PRC Civil Procedure Law.

7.2 Procedural Steps

Chinese law only outlines general procedural steps for how arbitration proceedings should be conducted. However, institutional arbitration rules provide more detailed guidance.

Generally, the arbitration procedure shall be subject to the following rules under Chinese law:

- the arbitration institution shall decide within five (5) days as of the date of receiving the request for arbitration whether to hear the case or to dismiss it;
- arbitration shall be conducted by oral hearings, unless the parties agree otherwise;
- arbitration must be conducted confidentially unless the parties agree otherwise, except where a case involves State secrets;
- evidence shall be produced during the course of the hearing and the parties can cross-examine the evidence; and
- the parties have the right to debate in the course of the hearing.

Early Dismissal Procedure of CIETAC

In 2024, CIETAC introduced the early dismissal procedure mechanism into its arbitration rules, allowing the arbitral tribunal to review and decide whether to dismiss claims that are manifestly without legal merit or outside the jurisdiction of the tribunal at the early stages of the proceedings. According to Article 50 of the CIETAC Rules (2024), parties may apply for early dismissal no later than the submission of the statement of defence or the counterclaim.

The tribunal is required to make a decision or award on the early dismissal application within 60 days of its submission, although, in reasonable circumstances, this period may be extended as appropriate. If the tribunal grants or partially grants the early dismissal application, it does not prevent the tribunal from continuing to hear other claims and counterclaims, despite the one dismissal.

Digitalisation and Electronic Service in Arbitration

Priority for electronic service and filing

In the past, most cases heard by Chinese arbitration institutions required the submission of paper copies of legal documents and evidence materials. However, currently, many arbitration institutions introduce provisions for electronic service and filing. CIETAC and SHIAC, for instance, prioritise electronic means unless parties agree otherwise.

Electronic platforms

Many arbitration institutions have their own online filing platform. For example, SHIAC has developed its own “E-Platform” for parties to submit documents and evidence online and conduct exchanges (Article 10).

Online hearings

Popularised during the COVID-19 pandemic, online hearings are now widely accepted by major Chinese arbitration institutions. CIETAC Rules (2024), for example, allow tribunals’ discretion in conducting hearings online.

GZAC is a leading provider in the APEC Online Dispute Resolution mechanism, and has received significant recognition from APEC. APEC is dedicated to serving micro, small, and medium-sized enterprises (“MSMEs”) in resolving cross-border commercial disputes online. Over the past two years, GZAC has handled the highest number of international arbitration cases in China, despite the relatively small amounts involved. This demonstrates GZAC’s important role in facilitating the resolution of cross-border disputes among MSMEs.

7.3 Powers and Duties of Arbitrators

Under Chinese law, arbitrators can exercise their powers to manage the arbitration proceedings, to collect evidence on their own initiative, to mediate between the parties and to issue the award based on a majority opinion.

In practice, despite arbitrators in China having the authority to collect evidence independently under the PRC Arbitration Law, this is rarely carried out. This is mainly because Chinese law reserves the exclusive right for evidence enforcement to national courts, leading arbitrators to primarily rely on evidence provided by the parties.

Arbitrators must also adhere strictly to rules requiring independent and impartial exercise of their powers, as outlined in Article 34 of the PRC Arbitration Law and detailed in arbitration regulations regarding disclosure requirements.

Implications of Disclosure Failures in Arbitration

If arbitrators fail to fulfil their disclosure obligations as required by law, it may serve as a basis for setting aside the award on the ground of "the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the arbitration rules." In case (2022) Jing 04 Min Te No 454, the applicant sought to set aside a foreign-related arbitral award on this grounds. However, the court ultimately ruled that the arbitrator and one party's attorney having worked together as co-judges in a moot court competition constituted a general social relationship rather than a conflict of interests, and therefore did not require disclosure.

This view aligns with the IBA Guidelines, where "have worked together as joint experts" is listed in the Green List (ie, matters that do not require disclosure). In fact, the case in question might not even fall within the Green List category. This demonstrates that Chinese courts' approach to disclosure standards is largely consistent with common practices in international arbitration.

7.4 Legal Representatives

Under Chinese law, for legal representatives, ie, attorneys of a party, appearing in arbitration seated in China, there is no particular requirement in respect of their nationality and bar qualification. That is to say, in China, both foreigners and foreign lawyers can represent a party in arbitration proceedings as long as they hold the relevant power of attorney (Article 29 of the PRC Arbitration Law).

However, in litigation proceedings, there is a statutory requirement that the attorney representing the parties before a Chinese court must be a PRC lawyer (Article 274 of the PRC Civil Procedure Law).

In addition, it is notable that the autonomy to change or appoint new attorneys after the tribunal has been constituted is restricted with an attempt to prevent any malicious delays in the proceedings. Please refer to **4.4 Challenge and Removal of Arbitrators**.

8. Evidence

8.1 Collection and Submission of Evidence

In the arbitral proceedings, the collection and submission of evidence is mostly carried out by the party with the burden of proof following the principle that whoever makes the claim bears the burden of proof (Article 67 of the PRC Civil Procedure Law).

A party with the burden of proof shall produce evidence within the time period specified by the arbitral tribunal. If a party experiences difficulties in producing evidence within the specified time period, it may apply for an extension.

Under Chinese law, there is no procedure of evidence discovery, although under Article 112 of the SPC Interpretation of the PRC Civil Procedure Law, the court may compel a party to a litigation to produce evidence that is under the party's control upon another party's request. However, this new system is not widely used in Chinese court proceedings.

Generally, the evidence can take the form of the parties' statement, documentary evidence, physical evidence, electronic data, witness statement and expert report. However, in practice, the parties rarely submit a witness statement and call the witness to testify in a court hearing, as judges/arbitrators are more used to documentation evidence and subpoenaing witnesses can be costly and may complicate and delay the procedure. The expert report is more often used as in some professional fields, such as where the arbitral tribunal may need to consult experts or appoint appraisers for clarification on specific technical issues.

8.2 Rules of Evidence

China lacks systematic rules of evidence specifically for arbitral proceedings, relying instead on the parties' presented evidence and arbitrators' discretion in evaluation. Provisions on evidence production for international arbitration seated in the PRC, outlined in the PRC Arbitration Law, PRC Civil Procedure Law, SPC Provisions on Evidence Production for Civil Actions, and the arbitration rules of the chosen institution, are the same as those for domestic arbitrations.

Additionally, if the parties agree to apply other specific evidence rules, such as IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules"), such evidence rules shall prevail. For example, Article 46 of SHIAC Rules of 2024 allows the parties to agree on the applicable rules of evidence.

Notably, in the absence of an agreement between the parties, tribunals constituted under CIETAC Rules (2024) may default to applying the "CIETAC Evidence Guidelines," which are formulated with reference to the PRC Arbitration Law and the IBA Rules.

Notarisation and Legalisation of Foreign Documents

In arbitration, notarisation and legalisation of foreign documents are not mandatory, but parties often do this if authenticity is challenged. The Hague Convention, effective in China since 7 November 2023, simplifies the authentication of foreign public documents, enhancing convenience in international arbitration for evidence and other submissions like certificates of good standing, powers of attorney, and applications for interim measures.

8.3 Powers of Compulsion

Compulsion of Documents

Chinese law does not explicitly grant arbitral tribunals the power to compel document production or witness attendance, but they can order parties to produce evidence, with non-compliance potentially leading to adverse inferences.

Arbitrators cannot compel non-parties to produce documents. However, recent local regulations in places like Xiamen and Shanghai now allow arbitration institutions to seek court-issued investigation orders. These orders have been used in domestic arbitration cases, such

as contract disputes involving identifying heirs of deceased respondents or owners of specific property.

Though no investigation orders have been issued yet in international arbitration cases, the local regulations do not explicitly restrict their application to domestic cases.

Compulsion of Witness Attendance

According to PRC Civil Procedure Law, witnesses are generally under an obligation to testify in court. The court has the authority to require witnesses to testify either on its own initiative or upon application by one of the parties.

However, arbitral tribunals do not have any legal authority (nor any arbitration rules) to compel witnesses to attend. Generally, the powers of the tribunals are limited to the parties involved.

9. Confidentiality

9.1 Extent of Confidentiality

Under Article 40 of the PRC Arbitration Law, arbitration proceedings are strictly confidential, extending to all participants, including parties, arbitrators, witnesses, experts, translators and other individuals. Failure to comply with confidentiality obligations may result in legal liabilities.

Although arbitration is typically confidential, disclosure may be necessary in specific situations. Exceptions allow disclosure for enforcement or challenge of an arbitral award in court, legal mandates in criminal or civil cases, or transparency requirements for publicly listed companies.

In exceptional situations, a breach of confidentiality may lead to the nullification of contracts. In a dispute involving third-party funding, the court invalidated the agreement, ruling that it breached arbitration confidentiality by disclosing case details to a non-party to the arbitration.

10. The Award

10.1 Legal Requirements

An arbitral award shall be determined based on the majority opinion of the tribunal. Where a majority opinion cannot be reached, the award shall be decided according to the presiding arbitrator's opinion (Article 53 of the PRC Arbitration Law). An award shall be legally binding from the date on which it is made.

For the general content of an award, please refer to the China Law & Practice chapter of Chambers International Arbitration 2023.

Time Limit

Under Chinese law, there is no statutory time limit for arbitral tribunals to render awards. However, many arbitral institutions set their own time limit. For instance, CIETAC mandates awards within four months of tribunal formation, while BAC sets a six-month timeframe. Extensions, permitted once for exceptional circumstances, require the chairman's approval.

Partial Award

Article 55 of the PRC Arbitration Law provides that, "[w]here a portion of the facts have been clarified during arbitration of a dispute by an arbitration tribunal, an award concerning those facts may be made first," which empowers the tribunals to grant partial awards. This is often applied in construction disputes.

Interim Award

Although the PRC Arbitration Law does not specifically address interim awards, some arbi-

tration institutions' rules do permit tribunals to issue interim awards on any issues within the case before the final award is rendered (Article 49 of CIETAC Rules and Article 61 of SHIAC Rules, both newly introduced in 2024; Article 28 of SHAC Rules, Article 62 of BAC Rules). In the past, interim awards were rarely issued by the tribunal, now the new arbitration rules may promote the practical application of it.

The distinction between interim awards and partial awards has always been unclear under Chinese Law. This stems from the absence of clear legal provisions delineating the scope of application for each type of award, coupled with the broad discretion granted to arbitral tribunals in their application.

The Draft Amendment to Arbitration Law intends to clarify the distinction between partial awards and interim awards, emphasising that the former is an award made after clarifying some issues of facts, while the latter addresses disputed matters, including procedural issues. But this draft amendment is still pending its first review by the National People's Congress.

10.2 Types of Remedies

Chinese law does not impose legal constraints on the types of remedies that tribunals can award. In practice, the arbitral tribunal often awards remedies as follows:

- legal remedies, such as damages including compensatory damages and liquidated damages if it is reasonable in light of the expected/actual harm; and
- equitable remedies, such as specific performance, injunction relief and declaratory remedies.

10.3 Recovering Interest and Legal Costs

The arbitral tribunal shall decide on the allocation of legal costs between the parties in the arbitral award (Article 54 of the PRC Arbitration Law). In practice, the legal costs often include arbitration fees, attorney's fees, and other third-party fees such as expert fees, appraisal fees, etc. Interest will also be concluded in an award provided that the party made such a petition regarding the interest.

The tribunal typically allocates legal costs based on the parties' agreement or the principle that "costs follow the event" in the absence of agreement. The principle means that the losing party generally bears the costs. When both parties partially succeed, the tribunal determines each party's share of costs based on their respective liabilities.

As for interest, parties can recover interest as per their agreement, not exceeding four times the Loan Prime Rate (LPR) set by the Bank of China. If no rate is agreed upon, the tribunal may refer to the LPR instead.

Additionally, arbitration institutions like SHIAC have implemented new rules where parties causing delays in proceedings will bear additional arbitration costs. This promotes adherence to the principle of good faith and expedites the arbitration process.

11. Review of an Award

11.1 Grounds for Appeal

Under Chinese law, an arbitral award cannot be appealed since it is final and binding as of the date of its issuance.

However, the parties are entitled to the following recourses to raise objections to the award:

- apply to Chinese courts for setting aside of the award; and
- apply to Chinese courts for non-enforcement of the award.

Resumption of the Arbitration Procedures

When a party applies to set aside the award, a Chinese court may instruct the arbitration tribunal to resume the arbitral proceedings for a re-trial within a specified time limit according to article 61 of the PRC Arbitration Law. This provision aligns with the Article 34(4) of the UNCITRAL Model Law.

However, the application of this provision under Chinese law is currently ambiguous, with few specific regulations in arbitration rules. This year, SHIAC introduced new rules stipulating that the arbitral proceedings will resume if instructed by the court, provided that the arbitrators agree (Article 68).

11.2 Excluding/Expanding the Scope of Appeal

Under Chinese law, grounds for a party to challenge an arbitral award are established by legislation and are considered mandatory. Therefore, parties cannot exclude or expand the scope of these grounds through mutual agreement. This means the rules for contesting an arbitral award are fixed and cannot be modified by the parties involved.

11.3 Standard of Judicial Review

Chinese courts judicially review arbitral awards with deference, emphasising respect for the arbitral tribunal's decision on the merits. The court primarily focuses on ensuring compliance with arbitration procedures rather than reevaluating the case's substantive aspects. This approach underscores the central tenets of these laws, which form the primary foundation for the court's review standards and grounds concerning arbitral awards.

Dual-track System

China's dual track system for setting aside awards differentiates between domestic and foreign-related cases, with the key distinction being an additional ground for domestic awards: arbitrator misconduct, including corruption and bribery (please refer to the China Law & Practice chapter of Chambers International Arbitration 2023).

Notably, the Draft Amendment to Arbitration Law proposes transition from the above dual-track system to a unified system by harmonising grounds for setting aside awards applicable to both foreign-related and domestic cases.

Enforcement of Awards

The grounds for refusing to recognise and enforce a foreign arbitral award are set out under Article V of the New York Convention.

For the enforcement of an award made in Hong Kong SAR, Macau SAR and Taiwan Region, the grounds for refusal are provided in special arrangements respectively, which are largely analogous to the grounds contained within Article V of the New York Convention.

Reporting Regime

There is an internal reporting regime governing Chinese courts' decisions on setting aside/non-enforcement of arbitral awards. A ruling on setting aside/non- enforcement of a foreign-related award or non-recognition/non-enforcement of an award made in mainland China can only be rendered subject to the SPC's approval.

For a domestic award, the Chinese high court's approval is sufficient to make such a ruling.

12. Enforcement of an Award

12.1 New York Convention

On 2 December 1987, China officially ratified the New York Convention, thus becoming a Contracting State, with two reservations, as follows.

- Reciprocity reservation: on the basis of reciprocity, China declares that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.
- Commercial reservation: China 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 the national law of the State making such declaration.

12.2 Enforcement Procedure

If a foreign-related or foreign award under the New York Convention is not voluntarily complied with by the respondent, the claimant can apply for enforcement or recognition and enforcement to the Chinese intermediate court where the respondent is domiciled, where their property is located, or at a location relevant to the dispute (Article 29 of the SPC Interpretation of the PRC Arbitration Law and Article 290 of the PRC Civil Procedure Law).

The enforcement application must be filed within two years, with the starting point varying depending on the circumstances (please refer to Chambers International Arbitration 2023, China).

Ongoing Set-aside Proceedings

If the award applied to be enforced in Chinese court is subject to ongoing set-aside proceedings at the seat, Chinese courts will tend to adjourn the decision on the enforcement of the award.

For foreign arbitral awards made within a non-contracting state of the New York Convention, the party can apply for recognition and enforcement of the award based on the relevant treaties and the principle of reciprocity (Article 304 of the PRC Civil Procedure Law).

Raising a Defence of Sovereign Immunity

In the past, states and state agencies were immune from enforcement proceedings in China. However, the court's approach was overturned as the Foreign State Immunities Act, effective on 1 January 2024, includes Article 12 allowing a party to apply for enforcement of an arbitral award against a state or a state agency.

12.3 Approach of the Courts

For Chinese court's approach/standards towards the recognition and enforcement of arbitral awards, please refer to response to **11.3 Standard of Judicial Review**.

Public Policy

Public policy plays a crucial role in the enforcement of arbitration awards. In the enforcement of foreign arbitration awards, Chinese courts principally adhere to domestic public policy standards. The court will examine, on its own initiative, whether there is a violation of public interest, without requiring the applicant or the respondent to raise this as a defence.

Generally, the SPC will deem a foreign award as contravening public policy only if the award violates fundamental legal principles, state sov-

ereignty, national or public security, social and public interests or moral standards. However, the invocation of public policy as a ground for refusal is a rare occurrence. In the last two decades, only two foreign awards have been denied enforcement in China due to public policy violations (for further details, please refer to Chambers International Arbitration 2023, China).

13. Miscellaneous

13.1 Class Action or Group Arbitration

Under Chinese law, class action arbitration or group arbitration is not specifically provided for in foreign-related or international arbitration. Such mechanisms are limited to certain cases like labour disputes and securities misrepresentation disputes.

13.2 Ethical Codes

Counsel

Ethical standards for counsels in arbitral proceedings are guided by the PRC Lawyers' Law (amended in 2017) and further detailed by national and local lawyers' associations. The All China Lawyers Association, for example, issued the Rules of Counsels' Participation in Arbitration in 2013, providing specific guidelines for counsel conduct in arbitration.

Arbitrator

Arbitrators in China currently lack specific legislation or self-disciplinary organisations governing their ethical standards. Although the China Arbitration Association was registered on October 14, 2022, it has not yet begun formal operations. Despite this, each arbitration institution has established its own arbitration rules that arbitrators must follow upon appointment, ensuring ethical conduct and professional integrity throughout proceedings. For updates on arbitrators' disclosure duties, please refer to Sections 4.4 and 7.3 of the relevant guidelines.

13.3 Third-Party Funding

Third-party funding is an emerging practice in China, currently with no specific legislation in place to regulate its use. As for arbitration rules, CIETAC has taken a leading role in arbitration rules, notably addressing third-party funding in its 2024 Arbitration Rules and International Investment Arbitration Rules.

However, Chinese courts have divergent views on the enforceability of third-party funding agreements. Please refer to Chambers International Arbitration 2023, China for potential risks of unenforceability of such contracts in China.

Importance of Third-Party Funding Disclosure in Arbitration

It is necessary to truthfully disclose third-party funding arrangements to the arbitral tribunal. For example, Article 48 of the CIETAC Rules (2024) stipulates that details such as third-party funding arrangements, economic interests involved by each party, and the name and address of the third-party must be disclosed to the tribunal and cannot be kept confidential independently.

The presence of third-party funding can create potential conflicts of interest that may necessitate an arbitrator's recusal from the case. Should an arbitrator have grounds for recusal, it could serve as a basis for setting aside the arbitration award. Consequently, it is imperative for parties to disclose any third-party funding to the arbitral tribunal.

13.4 Consolidation

Chinese law is silent on consolidation of separate arbitral proceedings. However, the majority

of arbitration institutions have established rules regarding consolidation of arbitral proceedings.

Types of Consolidation Under PRC Law

Specifically, consolidation of arbitration involves merging independent and related arbitration cases accepted by the same institution into a unified arbitration proceeding. Concurrent hearing involves the simultaneous adjudication of multiple arbitration cases within the same proceedings, under certain conditions. Although the cases are heard together, each case maintains its individual procedures, and separate awards are issued for each case. Single arbitration under multiple contracts refers to the consolidation of disputes arising from interrelated contracts based on the same underlying transaction. This consolidation allows the applicant to seek arbitration for all related disputes as a single case.

For more detailed distinctions among the three types of consolidation, please refer to Chambers International Arbitration 2023, China.

One update is that the new rules introduced by CIETAC and SHIAC in 2024 have expanded the scope of arbitration under multiple contracts. Article 14 of the CIETAC Rules (2024) stipulates that arbitration applications can be consolidated if the multiple contracts:

- are interrelated as principal and ancillary contracts;
- involve the same parties with similar legal relationships; or
- have interconnected subject matters.

Similarly, Article 15 of the SHIAC Rules mirrors these provisions.

13.5 Binding of Third Parties

Arbitration agreements or awards usually bind only the parties directly involved, but, under certain conditions, third parties – whether domestic or foreign – may be bound by them. This principle is outlined in Articles 8 and 9 of the SPC's Interpretation of the PRC Arbitration Law.

Updates in PRC Arbitration Rules

Certain arbitration rules in China, such as Article 27(3)-(4) of GZAC Arbitration Rules of 2023 and Article 41(5) of SHIAC Rules of 2024, allow additional parties who are not signatories to the arbitration agreement to join proceedings if both such additional parties and all existing parties to the arbitration agree. This mechanism is designed to protect the rights of the additional parties who have an interest in the case.

Group of Companies Doctrine

The Group of Companies Doctrine, though not formally adopted under PRC law, finds its application in some cases where subsidiaries have been bound by arbitration awards. For instance, in case (2023) Jing 04 Min Te No 549, the court refused to set aside an arbitral award involving several non-signatory sub-entities of a group company, ruling that these sub-entities, though not signatories to the arbitration clause, had interests tightly intertwined with the contract and were therefore bound by its terms.

Trends and Developments

Contributed by:
Ernest Yang, Xiaoshan Chen, Edison Li and Eva Yao
DLA Piper

DLA Piper is a global law firm with lawyers located in more than 40 countries throughout the Americas, Europe, the Middle East, Africa and Asia Pacific. Our leading international arbitration practice has lawyers located worldwide. Many of our lawyers are recognised leaders in the field of international arbitration and serve on the institutions that administer international arbitration across the world. Our global team has vast experience in conducting international arbitration including acting as counsel or sitting as arbitrator under all the major institutional and procedural rules, including those of the AAA, CIETAC, DIAC, HKIAC, the ICC, the ICSID, the LCIA, the Milan Chamber of Commerce, the SCC, SIAC and the UNCITRAL. The global reach of our team means we are particularly well placed to put together teams that speak the 'right language' – not just literally, but also in the sense of understanding first-hand the key business, political and cultural issues.

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Introduction

China encompasses a number of arbitral jurisdictions, including Hong Kong and Mainland China. The most well-known arbitration institutions are the Hong Kong International Arbitration Centre (HKIAC), the China International Economic Trade Arbitration Commission (CIETAC) and the Shanghai International Arbitration Center (SHIAC).

In Mainland China, the arbitration institutions continue to promote innovation. New rules have been adopted for both CIETAC and SHIAC. All of these combined efforts continue to drive sophistication of arbitration in Mainland China and bring the practice closer to other major arbitration venues.

Meanwhile, HKIAC's 2023 statistics reaffirm Hong Kong's appeal as a premier hub for international arbitration, especially for Mainland China-related arbitrations. In 2023, a total of 500 matters were submitted to HKIAC (similar to the caseload in 2022). Of those cases, 281 were arbitrations (which is the third highest number of cases received since 2017), ten were mediations and 209 were domain name disputes. The total amount in dispute across all arbitrations in 2023 was HKD92.8 billion, and the average amount in dispute in administered arbitrations was HKD467.6 million, both of which represent a record high for HKIAC.

In the past year, one of the most significant developments in Hong Kong was the release of the 2024 Administrated Arbitration Rules by HKIAC (2024 HKIAC Rules), which took effect on 1 June 2024. While the structure and content of the rules have not been overhauled, the changes include some eye-catching provisions on diversity and sustainability issues which have been at the forefront of discussions among parties and practitioners in recent years.

From 5 to 8 May 2024, the 26th ICCA (International Council for Commercial Arbitration) Congress was held in Hong Kong. The Congress achieved a record-breaking attendance, with over 1,400 legal and dispute resolution professionals from more than 70 different jurisdictions. This global event showcases Hong Kong's role as a leading hub for international arbitration.

Furthermore, the ties and co-operation between Hong Kong and Mainland China have continued to strengthen. As of 24 May 2024, HKIAC (being one of the seven qualified arbitral institutions under the Hong Kong-Mainland China arrangement on interim measures introduced in 2019) has issued Letters of Acceptance in respect of 122 applications for preserving assets, evidence or conduct. The total value of assets preserved amounted to RMB30.6 billion.

On the judiciary level, the Hong Kong courts issued a number of significant decisions regarding the interpretation of arbitration clauses. A few of these cases will be discussed in this article.

With these developments, it is expected that Mainland China and Hong Kong will continue to be two of the most important and busiest arbitration hubs in the world for years to come.

The 2024 CIETAC Rules

The updated CIETAC rules came into effect on 1 January 2024. The new updates to the rules include:

- Expanded scope of tribunal powers.
- New provisions on consolidation of proceedings.

- Continued effort to regulate third party funding.
- Adoption of digital tools.

Expanded tribunal powers

Under the new CIETAC Rules, the power of the Tribunal is expanded while the power of the institution is reduced, which brings CIETAC Rules more in line with other renowned arbitration institutions. Examples of this development include:

- Under Article 6 of the new CIETAC rules, once the tribunal is constituted, it has the authority to determine its own jurisdiction. This is a departure from the previous 2015 version, where CIETAC had default jurisdiction determination powers, and the tribunal could only decide on jurisdiction when deemed necessary by CIETAC.
- Article 49 of the new CIETAC rules explicitly allows the tribunals to issue interim awards on any issue before the final award. These partial awards can be initiated by the tribunal itself (when deemed "necessary") or at the request of a party.
- Article 50 of the new CIETAC rules further gives the tribunals the power, upon a party's request, to dismiss a claim or counterclaim either wholly or partially if it lacks legal merit or falls outside the tribunal's jurisdiction. The ruling must be provided as a reasoned decision or award within 60 days of the early dismissal request.

Consolidation

- Article 14 of the new CIETAC Rules provides for addition of contracts during the arbitration proceedings. Under the new rules, the Claimants can now apply to add contracts to an ongoing arbitration, even if they did not initially commence a single arbitration covering multiple contracts.
- Articles 14 and 19 of the new CIETAC rules allow for a single arbitration to cover multiple contracts with "related subject matters." This is in addition to existing grounds where contracts involve a principal contract and its ancillary contracts or the same parties with legal relationships of the same nature. Other requirements for single arbitration or consolidation must also be met.

Third party funding

Article 48 of the new CIETAC rules introduces a framework for third party funding (TPF), which mandates that once a TPF agreement has been concluded, the funded party must promptly inform CIETAC about the existence of the TPF Agreement, the financial interest involved, and the identity of the third-party funder. This information is then forwarded to the other parties and the arbitral tribunal, whereby the latter has the authority to order the disclosure of additional relevant information if deemed necessary. This provision enhances the transparency of the arbitration process and helps to address potential conflicts of interest.

When determining the costs of arbitration and other fees in the award, the arbitral tribunal may consider the existence of the TPF arrangement and whether the funded party has complied with the disclosure requirements set forth. This provision ensures that the use of TPF does not unfairly influence the arbitration process and outcome, and also underscores the importance of compliance with the disclosure requirements, thereby promoting fairness and integrity in arbitration proceedings.

Digitalisation

- The new CIETAC rules continue to promote the use of digitalisation. Articles 8 and 21 of the new CIETAC rules explicitly allow arbitra-

tion documents to be filed electronically, with electronic delivery as a preferred method.
- Article 37 of the new CIETAC rules provides that the tribunals now have the discretion, after consulting with parties, to hold oral hearings via remote virtual conferences.
- Article 52 of the new CIETAC Rules further allows the tribunals to sign and deliver awards to parties in electronic form.

The 2024 SHIAC Rules

On 7 November 2023, SHIAC introduced new arbitration rules effective from 1 January 2024. These comprise the SHIAC Arbitration Rules (2024), the SHIAC Arbitration Rules for Aviation, the SHIAC Arbitration Rules for Data and two instruments of SHIAC Guidance for online arbitration and for assisting ad hoc arbitration. The new SHIAC Arbitration Rules (2024) replace those made in 2015.

The highlights in the new SHIAC rules include:

Enhanced provisions on consolidation and joinder

Article 15 of the new SHIAC rules adds a provision on the consolidation of multiple contracts to one arbitration, allowing the parties to initiate an arbitration on the consolidation of disputes arising from the same transaction or the same series of transactions, or the existence of related contractual relationship, or if the subject matter of arbitration is of the same type, subject to certain conditions. At the same time Article 41 of the new SHIAC rules provides that after the Secretariat agrees to the joinder of third parties in the arbitration proceedings, if the multiple claimants or the respondents cannot jointly select the co-arbitrator, all the arbitrators in the case shall be appointed by the chairman of SHIAC, unless the parties agree otherwise.

New list procedure to appoint presiding arbitrator

Article 31 allows the parties to choose arbitrators from outside the SHIAC's panel of arbitrators. Article 32 allows the parties to agree that the presiding arbitrator shall be jointly appointed by the two co-arbitrators, and allows the parties to apply to SHIAC to use the "recommended short list" method to determine the presiding arbitrator.

Expanded power of the tribunal

Article 6 of the new SHIAC rules authorises the arbitral tribunal to make a jurisdictional decision, and the jurisdictional decision made by SHIAC on the basis of prima facie evidence shall not prevent the arbitral tribunal from making a new decision based on facts or evidence found in the course of hearing which makes their decision inconsistent with the decision founded on the prima facie evidence.

Conversely, Article 46(5) of the new SHIAC rules provides that the form of evidence submitted by the parties and the matters related to the submission of evidence shall be in accordance with the rules of evidence applicable to the case. If the parties have not agreed on the rules of evidence or the agreement cannot be enforced, the arbitral tribunal may make a decision with reference to the relevant provisions of the law applicable to the arbitration proceedings.

New rules for arbitration seated in Hong Kong

To further strengthen the capacity of SHIAC and assist Chinese companies expanding globally with more accessible arbitration services, the new SHIAC rules mandate in Article 2 that SHIAC establishes its first overseas branch, that is, the Shanghai International Arbitration (Hong Kong) Center. Accordingly, Chapter 9 of the

new SHIAC rules is dedicated to regulating the arbitration procedures in SHIAC's new center in Hong Kong.

New Amendments to the PRC Civil Procedure Law

On 1 September 2023, the Standing Committee of China's National People's Congress (NPC) released the amendments to the PRC Civil Procedure Law (2021 CPL), which took effect from 1 January 2024 (Amended CPL). The amendments also touch on international arbitration. One of the most important amendments is that the Amended CPL clarifies the criteria for the nationality of an arbitral award issued in an arbitration administered by a foreign arbitration institution in China.

The Amended CPL clarifies that the nationality of the arbitral awards should be decided by the seat of the arbitration, rather than the place in which the arbitral institution is located. The previous CPL provides that "arbitral awards made by foreign arbitral institutions" shall be enforced pursuant to bilateral and international treaties, which gives rise to confusion whether an arbitral award made by a foreign arbitration institution but seated in the PRC should be regarded as a foreign arbitral award or a PRC domestic arbitral award, which is otherwise subject to the CPL in terms of enforcement as opposed to the New York Convention.

The Amended CPL makes it clear that "arbitral awards made outside the territory of the PRC" shall be regarded as foreign arbitral awards to be recognised and enforced in the PRC pursuant to the New York Convention. I also provides a more coherent approach to arbitral awards, emphasising the seat of arbitration and ensuring consistency in enforcement procedures.

First Foreign Arbitration Institution to Administer Foreign-related Arbitration Cases Registered in Mainland China

On 1 December 2023, the Korean Commercial Arbitration Board (KCAB) received approval to set up the Shanghai Center of the KCAB (KCAB Shanghai).

The KCAB Shanghai is the first institution centre established by a foreign arbitration body in China. It is allowed to administer foreign-related arbitration for civil and commercial disputes arising from international commerce, maritime affairs, and investment.

The business scope of the KCAB Shanghai encompasses accepting cases, conducting hearings, issuing awards, and managing cases and services. Additionally, the KCAB Shanghai can also provide business consulting, guidance, trainings and seminars.

In 2015, HKIAC opened its representative office in China, which is the first offshore arbitration institution to open an office in Mainland China. However, HKIAC made it clear that its Shanghai office does not provide case administration services, which will continue to be provided by the HKIAC Secretariat in Hong Kong. HKIAC's opening in Shanghai happened at a time of uncertainty around the administration of foreign-related arbitrations seated in Mainland China by offshore arbitration institutions.

Now with the Amended CPL making it clear that the award issued by foreign arbitration institution seated in Mainland China will be treated as domestic awards, it is expected that more offshore institutions may open new centres in Mainland China in the coming years.

The 2024 HKIAC Rules

The 2024 HKIAC Rules came into force on 1 June 2024. Key changes include (among others):

- Promoting the designation and appointment of diverse arbitrators (2024 Rules, Article 9A).
- Ensuring the environmental impact of proceedings is considered by arbitral tribunals (2024 Rules, Article 13.1).
- Empowering arbitrators to take into account adverse environmental impact when determining reasonable costs and apportioning arbitration costs (2024 Rules, Article 34.4(f)).
- Updates to reflect more widespread use of electronic communication, and the need to better protect information security in arbitrations (2024 Rules, Article 45A).
- Granting the tribunal additional express powers over case management, including determining preliminary issues and bifurcating proceedings (2024 Rules, Article 13.6).
- Measures to avoid conflicts of interest arising out of changes to party representatives (2024 Rules, Article 13.9).

Arbitrator diversity

Under the new Article 9A, the HKIAC is obliged (the word "shall" is used) to take into account considerations of diversity, alongside all other relevant considerations, when exercising its authority to appoint arbitrators (2024 Rules, Article 9A.2). This is a welcome move, even if it reflects existing HKIAC tribunal appointment practice.

In addition, parties and co-arbitrators are expressly "encouraged" to take into account considerations of diversity when designating arbitrators (2024 Rules, Article 9A.1).

Environmental impact

Limited revisions are proposed with respect to the environmental impact of HKIAC arbitrations:

- When adopting suitable procedures for the conduct of the arbitration, the arbitral tribunal shall have regard to "environmental impact" (2024 Rules, Article 13.1).
- When deciding on whether costs of the arbitration are reasonable and apportioning the costs of the arbitration, the tribunal shall take into account "any adverse environmental impact arising out of the parties conduct" as part of the circumstances of the case (2024 Rules, Article 34.4(f)).

Enhanced case management powers

Additional express discretionary case management powers are granted to arbitral tribunals, subject to consultation with the parties (2024 Rules, Article 13.6). Tribunals may:

- Determine preliminary issues that the tribunal considers could dispose of all or part of the case.
- Bifurcate the proceedings.
- Conduct the arbitration in sequential phases.
- Decide the stage of the arbitration at which any issue(s) shall be determined.
- Otherwise adopt procedures to decide the case efficiently.

These techniques compliment the existing early determination procedure in Article 43, which is unamended.

Information security

Reflecting growing international arbitral practice, revisions are proposed with the aim of protecting information security (2024 Rules, Article 45A). Specifically:

- the parties may agree on any reasonable measures to protect information shared, stored or processed in relation to the arbitration;
- the tribunal may, after considering the views of the parties, give directions to the parties to project the security of any information shared, stored or processed during the arbitration; and
- the tribunal may, after taking into account the views of the parties, make a decision, order or award in respect of breaches of any agreed or directed information security measures.

Significant Decisions by the Hong Kong Courts

There have been a number of significant decisions in Hong Kong in the past year.

Re Simplicity & Vogue Retailing (HK) Co., Limited [2024] HKCA 299

The Hong Kong Court of Appeal (HKCA) decision of Re Simplicity provides clarity that the principles laid down regarding exclusive jurisdiction clause (EJC) in Guy Kwok-Hung Lam v Tor Asia Credit Master Fund LP [2023] HKCFA 9 (Re Guy Lam) shall also apply to a dispute over a petition debt subject to an arbitration clause. The Re Guy Lam case held that a winding-up petition will be dismissed where the dispute over the petition debt is subject to an EJC in favour of a foreign court, unless there are countervailing factors.

In Re Simplicity, a winding up petition was brought against the appellant, which acted as the guarantor to discharge payment obligations under certain convertible bond instruments. The appellant challenged the petition on the ground that there are arbitration clauses in the underlying contracts.

The Hong Kong Court of First Instance (HKCFI) accepted that the Lasmos [2018] HKCFI 246 approach instead of the Re Guy Lam approach should be followed. The Lasmos approach does not require a party resisting a winding-up petition to show that the debt is disputed on genuine and substantial grounds. After finding that the requirements under the Lasmos approach were not satisfied, the HKCFI made a winding-up order against the appellant.

The appellant then appealed mainly on the basis that the HKCFI judge erred in failing to apply the Re Guy Lam approach by analogy in the context of arbitration which stressed the importance of party autonomy.

After considering the relevant authorities, the HKCA confirmed that the Re Guy Lam approach is applicable in the context of arbitration clause:

- the Court will generally give effect to the arbitration agreement, and compared to EJC, there is an even stronger case for upholding the parties' contractual bargain for arbitration;
- the approach of the Court in exercising its discretion to decline insolvency jurisdiction is "multi-factorial", and the Court may have regard to "the risk of insolvency affecting third parties and a dispute that borders on the frivolous or abuse of process" as instances of "countervailing factors" in exercising its discretion; and
- the Court would expect there is a genuine intention to arbitrate such that a debtor is deterred from merely raising an arbitration clause as a tactical move.

The HKCA found that there was insufficient evidence to indicate that the petition debt was disputed, and that the dispute would be referred to arbitration. In any event, the appellant's defence

is "wholly without merit" and "borders on the frivolous or abuse of process". Applying the principles in Re Guy Lam by analogy, there is a sufficient countervailing factor which militates against the exercise of the Court's discretion to decline jurisdiction in the winding-up petition. The appeal was accordingly dismissed.

Re Shandong Chenming Paper Holdings Ltd [2024] HKCA 352

The judgment of Re Shandong Chenming was handed down by the HKCA on the same day as the judgment of Re Simplicity.

In Re Shandong Chenming, the debtor company does not challenge the petition debt itself but raises a cross-claim subject to an arbitration agreement in support of its application to dismiss or stay the winding-up proceedings.

By upholding the HKCFI's decision, the HKCA confirms that the Re Guy Lam approach is applicable irrespective of whether the dispute arises by way of a petition debt, a claim of set-off, or a cross-claim that does not give rise to a set-off as long as they are subject to an arbitration agreement.

Based on the facts, the HKCA did not find that the dispute borders on the frivolous or an abuse of process on the part of the party resisting petition and raising cross-claim, nor did the Petitioner so allege. Accordingly, HKCA decided that the dispute should be referred to arbitration.

BB v. KO [2023] HKCFI 2661

The dispute arose from the applicant (BB), a top US law firm, providing legal services on a contingency basis to the respondent (KO), a prominent Hong Kong businessman. Due to unpaid fees, BB commenced US arbitration per their agreement and obtained a USD50 million award against KO in December 2019.

BB then sought enforcement of the award in Hong Kong. In March 2020, the leave to enforce was granted. In September 2022, over two years after the initial enforcement order, KO applied to set the award aside, mainly on the grounds that the award was based on contingency fee arrangements, which was champertous and was therefore contrary to the public policy in Hong Kong.

The HKCFI first refused the extension of time in enforcement as there was no good reason to grant an extension in this case.

With regard to the merit of the challenge on public policy, this was rejected by the HKCFI because BB's entitlement to the contingency fee hinges solely upon the successful outcome of the US litigation, and there is no evidence that it related partly to Hong Kong litigation. Hence, there is no concern that KO or BB would be encouraged to maintain, intermeddle with, or gamble on the outcome of any judicial process in Hong Kong.

For those lawyers acting in multiple jurisdictions including Hong Kong, on a contingency fee basis, they must take extra care to ensure that the arrangement will not be related, even partly, to Hong Kong litigation proceedings. However, there is no concern about arbitration related proceedings as the operation of the Outcome Related Fee Structures for Arbitration has allowed lawyers to enter into outcome-related fee structures for arbitration, emergency arbitration and related court and mediation proceedings since 16 December 2022.

COOK ISLANDS

Law and Practice

Contributed by:
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Bankside Chambers

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Bankside Chambers is Aotearoa New Zealand's leading set of independent barristers, arbitrators and mediators. It has more than 40 members, who include some of New Zealand's leading international and domestic arbitration advocates and arbitrators, together with many of New Zealand's leading mediators. Its barristers represent major global and New Zealand-based companies, private commercial entities, charities, private individuals and government departments. Many of its members are King's Counsel and a number of former members have served as Justices of the High Court and Court of Appeal, as well as judges in various foreign jurisdictions such as Samoa and the Cook Islands. Its current and former members also sit on important tribunals and public bodies in New Zealand and abroad. Bankside Chambers is ranked Band 1 by Chambers & Partners for Dispute Resolution in New Zealand. It is the first New Zealand barristers' chambers to have a presence in Singapore, based out of Maxwell Chambers Suites.

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BANKSIDE CHAMBERS

1. General

1.1 Prevalence of Arbitration

The Cook Islands has sought to promote international arbitration as a method of dispute resolution in order to improve the climate for foreign investment. It has sought to do so principally by becoming a party to the New York Convention in 2009 and by enacting modern arbitration legislation in 2009 and 2014, implementing the Cook Islands' commitments under the New York Convention and providing a comprehensive framework for international arbitration in the Cook Islands that generally reflects the UNCITRAL Model Law.

1.2 Key Industries

We are not aware of any industries in the Cook Islands for which international arbitration is more or less popular.

1.3 Arbitration Institutions

There are no arbitral institutions established in the Cook Islands.

1.4 National Courts

In the limited circumstances in which courts are permitted to intervene in arbitral proceedings, the Arbitration Act 2014 (the "Act") designates the High Court of the Cook Islands as the supervisory court in matters of arbitration. The High Court is a court of general jurisdiction that is responsible for the administration of justice in the Cook Islands.

The composition of the High Court reflects the Cook Islands' status as a country that attained self-governance in 1965, but which remains in free association with New Zealand. The Court consists of the Chief Justice and other judges, who must have practised in New Zealand or another Commonwealth country, or hold or have held office as a judge of the senior courts of New Zealand. At present, all the judges of the High Court, including the Chief Justice, are New Zealanders.

2. Governing Legislation

2.1 Governing Law

The Act governs arbitration proceedings seated in the Cook Islands, including international arbitrations. The Act has the same structure, and virtually the same content, as New Zealand's Arbitration Act 1996 (with a notable difference in relation to appeals on questions of law, described further below). Given the similarities between the Act and the New Zealand Arbitration Act 1996, and the makeup of the Cook Islands judiciary, it is to be expected that judgments of the New Zealand courts under the New Zealand Arbitration Act 1996 will be highly persuasive in interpreting and applying the equivalent provisions of the Act.

The Act contains three core parts:

- The general provisions of the Act, which are denoted by "sections" on various matters including: arbitrability (s 11); the power of arbitral tribunals to grant relief (s 13); arbitrator immunity (s 14); and confidentiality and privacy (s 15).
- Schedule 1, which contains "articles" that substantially reproduce the Model Law.
- Schedule 2, which contains "clauses" with additional rules on, for example: the appointment of arbitrators (cl 1); consolidation (cl 2); and preliminary determinations of, and appeals on, points of law by agreement (cls 4 and 5).

The general provisions of the Act and of Schedule 1 to the Act apply to all domestic and international arbitrations. Schedule 2 to the Act applies to a domestic arbitration unless the parties agree that it does not, and to an international arbitration only if the parties agree that it does.

There are some notable differences between the Act and the Model Law, including the following:

- An arbitrator is not liable in respect of anything done or omitted to be done in their capacity as arbitrator, unless the act or omission was in bad faith (s 15).
- Express requirements of privacy and confidentiality (ss 15–15F).
- The arbitration agreement may be made orally or in writing (Art 7(1) of Sch 1).
- A stay of court proceedings may be refused if "there is not in fact any dispute between the parties" (Art 8(1) of Sch 1). However, the New Zealand Supreme Court has held that the identical words in the New Zealand Arbitration Act 1996 were not intended to expand the jurisdiction of the courts beyond that provided for in the Model Law, and therefore a court may only grant summary judgment despite the existence of a valid arbitration agreement if there is no actual dispute (and not merely no arguable defence) (Zurich Australian Insurance Ltd v Cognition Education Ltd [2015] 1 NZLR 383).
- The powers of courts to grant interim measures are assimilated to those of an arbitral tribunal, though the courts are bound by any findings of fact made by the tribunal (Art 9(2)–(3) of Sch 1).
- The ability of a party to request a decision on jurisdiction from the High Court is not limited to situations where the tribunal has positively ruled as a preliminary question that it has jurisdiction (Art 16(3) of Sch 1).
- Security for costs is available as an interim measure (Art 17 of Sch 1, definition of "interim measure").
- Witnesses and counsel have the same privileges and immunities as witnesses and counsel in a court proceeding (Art 19(3) of Sch 1).
- If a claimant fails to prosecute its claim, the arbitral tribunal may make an award dismissing the claim or give directions for the speedy determination of the claim (Art 25(d) of Sch 1).
- The High Court is empowered to take various steps to assist the arbitral tribunal in taking evidence (Art 27(2) of Sch 1).
- Unless the arbitration agreement provides otherwise, or the award otherwise directs, any sum awarded shall carry interest from the date of the award at the same rate as a judgment debt (Art 31(5) of Sch 1).
- The death of a party does not terminate the arbitration, unless otherwise agreed by the parties (Art 32(4) of Sch 1).
- Grounds for setting aside, or refusing to recognise or enforce, an arbitral award on the basis that it is contrary to public policy expressly include the award having been induced or affected by fraud or corruption, or a breach of the rules of natural justice (Arts 34(6) and 36(3) of Sch 1).

2.2 Changes to National Law

There have been no significant changes to the Act in the past year, and there is no pending legislation relating to arbitration of which we are aware.

3. The Arbitration Agreement

3.1 Enforceability

Section 3(1) of the Act provides that an arbitration agreement is "an agreement by the parties to submit to arbitration all or certain disputes

which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not".

An arbitration agreement may be made orally or in writing (Art 7(1) of Sch 1).

3.2 Arbitrability

Section 11 of the Act provides that any dispute that the parties agree to submit to arbitration may be determined in that way "unless the arbitration agreement is contrary to public policy or, under any other law, such a dispute is not capable of determination by arbitration". However, Section 12 of the Act clarifies that "[t]he fact that an enactment confers jurisdiction in respect of any matter on the High Court but does not refer to the determination of that matter by arbitration does not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration".

Whether a particular type of dispute is considered arbitrable is therefore a matter for the courts, having regard to either relevant public policy factors in the Cook Islands, or other laws.

There are two recent decisions of the New Zealand courts on the concept of arbitrability under the equivalent to Section 11 in the New Zealand Arbitration Act 1996. One decision has confirmed that matters relating to child guardianship (that is, the care and custody of children) are not arbitrable (Wade v Wade [2022] NZHC 3254). Another decision, which has proved controversial, held that issues of whakapapa (loosely translated as one's genealogical identity) could not be arbitrated and that to do so would be an abuse of process (Ngawaka v Ngāti Rehua-Ngātiwai Ki Aotea Trust Board (No 1) [2021] NZHC 291).

3.3 National Courts' Approach

There are no judgments of the Cook Islands courts under the Act with respect to determining the law governing the arbitration agreement. The Cook Islands courts would, however, likely follow the UK Supreme Court decision in Enka v Chubb [2020] UKSC 38.

Likewise, there do not appear to be any judgments of the Cook Islands courts under the Act with respect to the enforcement of arbitration agreements. However, it is to be expected that – like the New Zealand courts – the Cook Islands courts would take a pro-arbitration stance and strive to enforce arbitration agreements where possible (see, eg, Maritime Mutual Insurance Association (NZ) Ltd v Silica Sandport Inc [2023] NZHC 793). Indeed, in Aitu v Faireka [2011] CKCA 1, the Court of Appeal of the Cook Islands cited with approval the New Zealand judgment in Marnell Corrao Associates Inc v Sensation Yachts (2000) 15 PRNZ 608, in which it was held that a liberal interpretation of arbitration agreements should be favoured, and that inconsistencies or uncertainties in the wording used by the parties in their arbitration agreement should not be allowed to thwart their intent to arbitrate disputes.

3.4 Validity

An arbitration clause in a contract may be considered valid even if the rest of the contract in which it is contained is invalid. Article 16(1) of Schedule 1 to the Act states that, for the purposes of the arbitral tribunal's competence to rule on its own jurisdiction, "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract", and that "[a] decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure (necessarily) the invalidity of the arbitration clause".

4. The Arbitral Tribunal

4.1 Limits on Selection

The parties are "free to determine the number of arbitrators" (Art 10(1) of Sch 1 to the Act). If the parties do not make such a determination, in an international arbitration, the number of arbitrators shall be three; in every other case, the number of arbitrators shall be one (Art 10(2) of Sch 1).

No person shall be precluded from acting as an arbitrator by reason of their nationality, unless the parties agree otherwise (Art 11(1) of Sch 1). The parties are also "free to agree on a procedure of appointing the arbitrator or arbitrators" (Art 11(2) of Sch 1).

4.2 Default Procedures

If the parties' chosen machinery for selecting arbitrators fails, then (unless the parties have agreed otherwise) at a party's request the High Court shall take the necessary measures under that machinery (Art 11(4) of Sch 1 to the Act).

If the parties have not agreed any machinery, then the applicable default procedures are specified in the Act:

- In an arbitration with two parties:
  (a) If there are to be three arbitrators, then each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator. If a party fails to appoint an arbitrator within 30 days, or if the two arbitrators fail to agree on a third arbitrator within 30 days, the appointment shall be made by the High Court upon request (Art 11(3)(a) of Sch 1).
  (b) If there is to be a sole arbitrator, if the parties are unable to agree on the arbitrator, a party may request the High Court to make the appointment (Art 11(3)(b) of Sch 1).
- If the parties have agreed to an arbitration with two or four or more arbitrators, or there are three arbitrators and more than two parties, then, unless the parties have agreed otherwise, the High Court may appoint the requisite number of arbitrators upon the request of a party (Art 11(6) of Sch 1).

4.3 Court Intervention

The courts may intervene in the selection of arbitrators only upon request, in the circumstances described above.

4.4 Challenge and Removal of Arbitrators

Articles 12 and 13 of Schedule 1 to the Act govern the challenge and removal of arbitrators. An arbitrator may be challenged "only if circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence, or if that arbitrator does not possess qualifications agreed to by the parties".

The parties are free to agree the procedure for challenging an arbitrator. Under the default procedure, the challenging party must send a written statement of the reasons for challenge to the arbitral tribunal within 15 days of the constitution of the tribunal or after becoming aware of the circumstances giving rise to the challenge. The arbitral tribunal shall decide on the challenge. However, if the challenge is unsuccessful, the challenging party may request the High Court to decide on the challenge.

4.5 Arbitrator Requirements

The Act has adopted the Model Law requirement that a person who is approached in connection with appointment as an arbitrator must disclose any circumstances likely to give rise to justifiable doubts as to that person's impartiality or independence. An arbitrator also has an ongo-

ing duty to disclose any such circumstances (Art 12(1) of Sch 1 to the Act). As set out above, an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence (Art 12(2) of Sch 1).

The Court of Appeal of the Cook Islands has held the test for impartiality is objective: "The concept of objective impartiality is well-established in the context of professional disciplinary proceedings. The question is what the fair-minded and informed observer would think" (George v Cook Islands Law Society [2017] CKCA 6). The New Zealand courts have held that such a fair-minded observer has an awareness of the circumstances of the case, but is objective and does not stand in the complainant's shoes (Todd Taranaki Ltd v Energy Infrastructure Ltd HC Wellington CIV-2007-485-2684, 19 December 2007).

5. Jurisdiction

5.1 Matters Excluded From Arbitration

As set out above, Section 11 of the Act provides that any dispute that the parties agree to submit to arbitration may be determined in that way "unless the arbitration agreement is contrary to public policy or, under any other law, such a dispute is not capable of determination by arbitration".

5.2 Challenges to Jurisdiction

Pursuant to Article 16 of Schedule 1 to the Act, an arbitral tribunal may rule on whether (and, if so, to what extent) it has jurisdiction to determine the particular dispute.

The tribunal may rule on the point as a preliminary question, or in an award on the merits.

5.3 Circumstances for Court Intervention

There are three circumstances in which the High Court might address the question of jurisdiction and competence of an arbitral tribunal:

- When a question of jurisdiction is referred to it after a tribunal has already ruled on the point as a preliminary question. There is no appeal from such a decision of the High Court (Art 16(3) of Sch 1 to the Act).
- When the jurisdictional ruling is given in an award on the merits. If Schedule 2 to the Act applies (Schedule 2 applies automatically to domestic arbitrations, but not to international arbitrations unless the parties specifically agree), an appeal might lie on a question of law under clause 5 of Schedule 2, if the parties have so agreed (or so agree). Alternatively, the issue of jurisdiction may be considered by the Court in connection with setting-aside or enforcement proceedings (Arts 34(2)(1)(i), (iii) and 36(1)(a)(i), (iii) of Sch 1).
- When deciding whether to stay court proceedings to allow an arbitration to proceed.

5.4 Timing of Challenge

If the arbitral tribunal rules on jurisdiction in a preliminary ruling, the parties have 30 days from notice of that decision to apply to the High Court to decide the question (Art 16(3) of Sch 1 to the Act).

If the arbitral tribunal rules on jurisdiction in an award on the merits, the parties have three months from the date on which the award is received (or a request made for a correction, interpretation or additional award is disposed of) within which to exercise any right of appeal on a question of law (see cl 5 of Sch 2 and Art 34 of Sch 1).

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The court can review jurisdiction on a de novo basis (see the judgment of the New Zealand High Court in Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd HC Auckland CIV-2004-404-4488, 26 October 2004).

5.6 Breach of Arbitration Agreement

If a party commences court proceedings in breach of an arbitration agreement, it is for the opposing party to apply to have the court proceeding stayed while arbitration is in train. Any application for stay must be made before the applicant submits its first statement on the substance of the dispute.

Article 8(1) of Schedule 1 to the Act provides that a court must stay the proceeding and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed, or there is not in fact any dispute between the parties with regard to the matters agreed to be referred. In Ursem v Chung [2014] NZHC 436, the New Zealand High Court held that the correct approach is to stay court proceedings if the court is satisfied of the prima facie validity of an arbitration agreement. The Cook Islands courts are likely to follow this approach.

As with other Commonwealth courts of general jurisdiction, the High Court has an inherent jurisdiction and therefore retains a residual discretion to grant a stay of proceedings in circumstances where Article 8(1) is not engaged. For example, in Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-operative Group Ltd [2014] NZCA 536, the New Zealand Court of Appeal upheld a temporary 'case management' stay of court proceedings on the basis that the court proceedings between Danone and Fonterra were duplicative of arbitral proceedings involving Danone and wholly-owned subsidiaries of Fonterra.

5.7 Jurisdiction Over Third Parties

As set out in **3.1 Enforceability**, the Act defines "arbitration agreement" to mean an agreement to submit to arbitration disputes "in respect of a defined legal relationship, whether contractual or not". Thus, while the point does not appear to have been decided by the Cook Islands courts, they are likely to follow the New Zealand (and other) courts in holding that an arbitral tribunal cannot assume jurisdiction over persons that are not party to an arbitration agreement, and that "a person is a party to an arbitration agreement only if that person is one of the persons who has submitted the dispute to arbitration and the arbitration is in respect of a defined legal relationship which involves that person" (Methanex Motunui Ltd v Spellman [2004] 3 NZLR 454 (NZCA)).

Some questions might remain with regard to third-party non-signatories, implied consent, groups of companies and principals/agents. A Cook Islands court would likely also follow the approach taken by the House of Lords in Fiona Trust & Holding Corporation v Privalov [2007] 4 All ER 951, such that an arbitration agreement contained in one of a number of related contracts would bind a party to those contracts even if they have not signed the arbitration agreement, on the basis that "rational businessmen" are likely to have intended that disputes arising out of their relationship be decided by the same tribunal. But, generally speaking, the Cook Islands courts would regard the compulsion of arbitration with non-signatory parties as being at odds with the basic principle that arbitration must be consensual.

6. Preliminary and Interim Relief

6.1 Types of Relief

The powers of an arbitral tribunal to grant interim relief in the Cook Islands are based on the Model Law, as amended in 2006 (see Arts 17–17M of Sch 1 to the Act). Such relief is binding and not merely recommended. As set out in **6.3 Security for Costs**, such relief may include an order to give security for costs.

6.2 Role of Courts

If a party requests an interim measure of protection from the High Court before or during arbitral proceedings, the High Court "shall have the same power as it has for the purposes of proceeding before that court" to make specified orders, including orders "to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party" (Art 9 of Sch 1 to the Act).

The Cook Islands courts must also recognise and enforce interim measures granted by an arbitral tribunal, including a foreign arbitral tribunal, unless there are grounds for refusing recognition or enforcement (Arts 17L and 17M).

Notably, the Act does not refer to emergency arbitrators. Indeed, unlike the New Zealand Arbitration Act 1996, which was amended to include emergency arbitrators within the definition of an arbitral tribunal, the Act does not include a definition of "arbitral tribunal". This appears to be an anomaly, as such a definition is contemplated elsewhere in the Act (eg, Art 2(a) of Sch 1).

6.3 Security for Costs

In addition to the interim measures specified in the Model Law, interim measures under Article 17 of Schedule 1 include an order to "give security for costs".

7. Procedure

7.1 Governing Rules

The Act governs the procedure of arbitration in the Cook Islands. Schedule 1 to the Act, "Rules applying to arbitration generally", includes rules of procedure and expressly covers the following matters of procedure:

- the date of commencement of arbitral proceedings (Art 21);
- the language to be used in the proceeding (Art 22);
- the form and timing of statements of claim and defence and the circumstances in which they may be amended or supplemented (Art 23);
- the receipt and consideration of evidence and argument by the tribunal (Art 24);
- the power of the tribunal to make or authorise a request for court assistance in taking evidence (Art 27);
- the conferring on witnesses giving evidence and counsel, experts or other persons appearing before an arbitral tribunal, of the same privileges and immunities as witness and counsel in proceedings before a court (Art 19(3));
- the powers of the tribunal in the event of default of a party (Art 25); and
- the power of the tribunal to appoint an expert or experts (Art 26).

7.2 Procedural Steps

The parties are generally free to agree on the procedure to be followed by the arbitral tribunal (Art 19(1) of Sch 1 to the Act). Failing agreement, the arbitral tribunal is authorised to conduct the

arbitration in such manner as it considers appropriate (Art 19(2)).

Any procedure adopted by the arbitral tribunal must not conflict with: (a) the requirements of equality of treatment and full opportunity to present each party's case imposed by Article 18 of Schedule 1; or (b) any other provision of Schedule 1 from which the parties may not derogate or the relevant public policy, which would have the effect of rendering an award susceptible to being set aside or being refused recognition or enforcement.

7.3 Powers and Duties of Arbitrators

The Act provides for a range of powers for arbitrators, including: procedural powers; the power to award any remedy or relief that could have been ordered by the High Court in civil proceedings (s 13); and, unless the parties have agreed otherwise, the power to grant interim measures (Art 17A of Sch 1).

Further, unless the parties have agreed otherwise, clause 3(1) of Schedule 2 to the Act provides for an arbitral tribunal to have certain powers in those arbitrations to which Schedule 2 applies (again, Schedule 2 applies automatically to domestic arbitrations unless the parties 'opt out', but applies to international arbitrations only if the parties expressly 'opt in'). Those powers include drawing on their own knowledge and expertise and ordering any party to do such things to enable an award to be made properly and efficiently.

As for duties, many of the mandatory rules in Schedule 1 operate as duties on the arbitral tribunal in practice. For example, an arbitral tribunal must: ensure the equal treatment of the parties and provide the parties with an opportunity to be heard (Art 18 of Sch 1); decide the dispute in accordance with the rules of law chosen by the parties (Art 28 of Sch 1); and issue an award in writing, signed and with reasons (Art 31 of Sch 1).

7.4 Legal Representatives

There are no requirements or restrictions on persons able to represent a party in an arbitration under Cook Islands law. Foreign counsel may appear in Cook Islands-seated arbitrations.

8. Evidence

8.1 Collection and Submission of Evidence

As set out in **7.2 Procedural Steps**, in the absence of an agreement between the parties to the contrary, the arbitral tribunal has the power to conduct the arbitration in the manner it considers appropriate. In exercising that power, the general approach followed by arbitral tribunals in practice is likely to follow the approach in New Zealand-seated arbitrations:

- In relation to discovery/disclosure, arbitral tribunals can be expected to make orders for the production of documents.
- Evidence may be given informally or under oath. Witnesses may provide written witness statements prior to the hearing. If they do, such evidence may be taken as read during the hearing or read out, depending on the preference of the arbitral tribunal.
- Cross-examination and re-examination would typically follow. Following cross-examination, arbitrators will commonly ask questions of the witness.

8.2 Rules of Evidence

In the absence of an agreement between the parties to the contrary, the arbitral tribunal has

the power to conduct the arbitration in the manner it considers appropriate, including to determine the admissibility, relevance, materiality and weight of any evidence (Art 19(2) of Sch 1 to the Act).

Subject to the requirements of equal treatment and a full opportunity to be heard (Art 18 of Sch 1), there are no rules of evidence that apply to arbitral proceedings in the Cook Islands. In practice, however, arbitrators may be guided by the rules of evidence that would apply to court proceedings in the Cook Islands.

8.3 Powers of Compulsion

If the optional Schedule 2 to the Act applies, clause 3 states expressly that the parties shall be taken as having agreed that the arbitral tribunal has the power to "order the discovery and production of documents or materials within the possession or power of a party", "order the answering of interrogatories", "order that any evidence be given orally or by affidavit or otherwise", and "order that any evidence be given on oath or affirmation".

Arbitral tribunals do not have the power to compel a witness to appear before them.

9. Confidentiality

9.1 Extent of Confidentiality

Sections 15–15F of the Act contain a code on confidentiality that applies to every arbitration for which the place of arbitration is or would be the Cook Islands.

- Arbitral proceedings must be conducted in private.
- Arbitration agreements are deemed to provide that the parties and the arbitral tribunal must not disclose confidential information. There are, however, limits on that prohibition.
- Disclosure may be made to a professional or other adviser of any party, or if the disclosure is necessary to ensure each party has a full opportunity to present its case, for the establishment or protection of legal rights in relation to a third party or for making and prosecuting any application to a court, provided disclosure is no more than what is reasonably required to serve the purposes for which it is necessary.
- Disclosure is also allowed if required under a subpoena issued by a court.
- Another circumstance is where disclosure is authorised or required by a competent regulatory body (eg, a stock exchange) and written details of the disclosure are provided to the opposing party. The arbitral tribunal and High Court also have discretion, in certain circumstances, to order disclosure.

Court challenges are generally heard in public. However, in limited circumstances, the High Court may make an order allowing the whole or any part of the proceeding to be conducted in private. Such an order can only be made if the Court is satisfied that the public interest in having the proceedings conducted in public is outweighed by the interests of any party to the proceeding in having the whole or any part of the proceedings conducted in private.

Confidential information from an arbitral proceeding may be disclosed in a subsequent proceeding if the parties agree or if permission is given, either by the arbitral tribunal or by the High Court (eg, in response to a subpoena).

10. The Award

10.1 Legal Requirements

The formal requirements for a valid arbitral award are contained in Article 31 of Schedule 1 to the Act, which follows the Model Law. The award must be in writing, signed by (a majority of) the tribunal, state reasons and include the date and place of the arbitration. The signed award must be delivered to each party after it has been made. There is no requirement that the arbitrators sign each page of the award.

Such formal requirements apply to substantive awards as well as corrections/interpretations of an award, and to any additional award made by the tribunal. They also apply to any costs award.

The Act does not contain any time limits on the delivery of an award.

10.2 Types of Remedies

Section 13(1)(a) of the Act provides that, unless otherwise agreed by the parties, "an arbitral tribunal may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that court".

10.3 Recovering Interest and Legal Costs

Parties are generally entitled to recover interest and legal costs.

In relation to interest, Article 31(5) of Schedule 1 to the Act states that "[u]nless the arbitration agreement otherwise provides, or the award otherwise directs, a sum directed to be paid by an award shall carry interest as from the date of the award and at the same rate as a judgment debt". Section 13(1)(b) also provides arbitral tribunals with a broad power to award interest. The rate of interest is a matter for the tribunal.

In relation to costs, tribunals have the power to award costs under the broad power given to arbitral tribunals under Section 13(1) of Act to award any relief that could have been ordered by the High Court in the dispute (see the judgment of the New Zealand Supreme Court in General Distributors Ltd v Casata Ltd [2006] 2 NZSC 8).

Schedule 2, which applies to domestic arbitration (unless otherwise agreed) and is optional for international arbitration, also contains specific provisions on costs. Clause 6 of Sch 2 states that: (a) the costs and expenses of the arbitration (including legal costs) shall be fixed and allocated by the tribunal; (b) the default position on costs in the absence of an award is that the parties bear their own legal costs and share equally the costs of the arbitration; and (c) the tribunal may have regard to settlement offers that are without prejudice save as to costs (ie, Calderbank offers).

The practice as to costs in the Cook Islands is generally that costs follow the event.

11. Review of an Award

11.1 Grounds for Appeal

There is no right to appeal (whether by consent or otherwise) a question of fact arising from an arbitral award (see the judgment of the New Zealand Supreme Court in Carr v Gallaway Cook Allan [2014] 1 NZLR 792 (SC)).

However, under Schedule 2 to the Act (which, again, applies automatically to domestic arbitrations unless the parties 'opt out', but applies to international arbitrations only if the parties

expressly 'opt in'), there is a limited ability to appeal against a question of law arising from an arbitral award, but only "if the parties have so agreed before the making of that award" or "with the consent of every other party given after the making of the award". In this respect, clause 5 of Schedule 2 differs from the equivalent provision of the New Zealand Arbitration Act 1996, in which the parties have such a right to appeal against a question of law arising from an arbitral award if they agree or if they receive leave of the High Court.

Clause 5(8) of Schedule 2 provides that a question of law "(a) includes an error of law that involves an incorrect interpretation of the applicable law (whether or not the error appears on the record of the decision); but (b) does not include any question as to whether – (i) the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; and (ii) the arbitral tribunal drew the correct factual inferences from the relevant primary facts".

If an appeal on a question of law is successful, the court may choose to vary the award, set it aside or remit the award back to the tribunal.

11.2 Excluding/Expanding the Scope of Appeal

As set out in **11.1 Grounds for Appeal**, the parties can agree to allow for the appeal of an award to the High Court on a question of law arising out of an award. The parties cannot otherwise agree to exclude or expand the scope of appeal against an arbitral award (eg, to encompass appeals on questions of fact).

11.3 Standard of Judicial Review

The standard of review on appeal is de novo, not deferential, in relation to the question of law that is appealed.

12. Enforcement of an Award

12.1 New York Convention

The Cook Islands has signed and ratified the New York Convention without reservation. Section 6(1)(f) of the Act confirms that a purpose of the Act is to give effect to the New York Convention, which is attached as Schedule 3 to the Act.

12.2 Enforcement Procedure

The recognition and enforcement of awards – both those made in the Cook Islands and those made overseas – is governed by Articles 35 and 36 of Schedule 1 to the Act, which reflect the Model Law and basic New York Convention requirements.

Article 35 of Schedule 1 provides that awards must be recognised as binding and, on application, enforced by entry as a judgment or by action.

If the award has been set aside by the courts in the seat of arbitration, the Cook Islands courts have discretion to refuse enforcement of that award (Art 36(1)(a)(v) of Sch 1). While the point has not yet been tested in the courts, it seems likely – given the general respect for the law of the seat that is well established in New Zealand and therefore likely also the Cook Islands – that awards set aside by the courts of the seat will not be enforced in the Cook Islands, unless the set-aside decision was procured by judicial corruption.

If an award is subject to ongoing set-aside proceedings, the Cook Islands courts have discretion to adjourn their decision on enforcement (and may require the payment of security) (Art 36(2) of Sch 1). But if the court considered that the application lacked merit, the court may refuse an adjournment request and enforce the award.

In relation to sovereign immunity, the common law doctrine continues to apply in the Cook Islands. Sovereign immunity applies only to the State's sovereign or public acts as opposed to its commercial activity. The Cook Islands has not seen any cases regarding enforcement of an arbitral award against State assets.

12.3 Approach of the Courts

The approach of the Cook Islands courts to the recognition and enforcement of arbitral awards can be expected to be consistent with the New Zealand courts: encouraging arbitration as a method of dispute resolution and facilitating the recognition and enforcement of arbitral awards (ss 6(1)(a) and (e) of the Act; see also Gallaway Cook Allan v Carr [2013] NZCA 11 (CA) at [66]; Carr v Gallaway Cook Allan [2014] 1 NZLR 792 (SC) at [30]–[32]).

Article 36(1)(b) of Schedule 1 to the Act provides that recognition or enforcement may be refused if it would be "contrary to the public policy of the Cook Islands". The Act confirms that an award is contrary to the public policy of the Cook Islands if (a) the making of the award was induced or affected by fraud or corruption, or (b) a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award.

However, the courts are likely to find that the bar for establishing such a conflict with public policy is very high. In Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd [2004] 2 NZLR 614, the New Zealand Court of Appeal concluded that a fundamental principle of law and justice must be at issue to establish a conflict with public policy, and that the alleged conflict should be obvious. Similarly, in Hi-Gene Ltd v Swisher Hygiene Franchise Corporation [2010] NZCA 359, the New Zealand Court of Appeal held that "a narrow reading is to be given to the public policy ground". In relation to the circumstances in which a breach of natural justice will amount to a conflict with public policy, the Court held that such a breach would need to be something that violates a State's "most basic notices of morality and justice", constitutes an abuse of process, or "shocks the conscience of the court".

While Article 36(1)(b) of Schedule 1 expressly refers to the public policy "of the Cook Islands", it is less clear whether there is a difference between Cook Islands public policy as applied to domestic and to foreign arbitral awards. However, in both Amaltal and Swisher Hygiene, the New Zealand Court of Appeal cited overseas judgments involving the enforcement of foreign awards, which suggests that the distinction between domestic and foreign may have limited practical relevance under Article 36(1)(b).

13. Miscellaneous

13.1 Class Action or Group Arbitration

The Act does not provide for class action or group arbitration.

13.2 Ethical Codes

As in New Zealand, the Cook Islands has a "fused" profession whereby most lawyers are "barristers and solicitors". Lawyers can opt to

be a barrister sole. Lawyers must comply with the Law Practitioners Act 1993–94. Cook Islands lawyers with a Cook Islands practising certificate are bound by the Law Practitioners Act whether the arbitration is seated in the Cook Islands or elsewhere.

Counsel from countries other than the Cook Islands would not automatically be bound by the Law Practitioners Act simply by virtue of an arbitration being seated in the Cook Islands. Those lawyers would, however, continue to be governed by the laws of their own home jurisdiction.

13.3 Third-Party Funding

There are no specific laws regulating third-party funding of arbitration in the Cook Islands.

13.4 Consolidation

Schedule 2 to the Act provides for the consolidation of separate arbitral proceedings by agreement (cl 2(9)) or absent agreement:

- Where the proceedings have the same arbitral tribunal, consolidation may be ordered by the tribunal on terms the tribunal thinks just, failing which by the High Court (cl 2(1)).
- Where the proceedings do not all have the same arbitral tribunal, consolidation may provisionally be ordered by a tribunal on terms the tribunal thinks just (cl 2(2)). Consolidation ceases to be provisional when consistent consolidation orders are made for all the arbitral proceedings, failing which the High Court may make such orders.

13.5 Binding of Third Parties

As set out in **5.7 Jurisdiction Over Third Parties**, non-signatories may sometimes be regarded as parties to and therefore bound by an arbitration agreement, and award. Third parties cannot otherwise be bound by an arbitration agreement or award.

The Cook Islands courts do have the ability to bind third parties in circumstances in which an arbitral tribunal cannot, eg, in making interim orders, or making an order of subpoena or issuing a witness summons, compelling the attendance of a witness before the tribunal to give evidence or produce documents.

CYPRUS

Law and Practice

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Patrikios Legal is a multi-award-winning, leading law firm based in Cyprus. With 60 years of experience in the local and international legal markets, the firm has developed distinguished expertise in dispute resolution and ADR, and has a renowned legal consulting department. The litigation practice, the largest and most experienced department of the firm, handles a wide range of claims and disputes, both locally and internationally, with a focus on corporate and commercial disputes, fraud and conspiracy claims, injunctive reliefs, registration and enforcement of foreign judgments and arbitral awards as well as insolvency proceedings. Additionally, the team handles general civil, banking and criminal litigation, as well as administrative recourses to the Administrative Court of Cyprus.

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1. General

1.1 Prevalence of Arbitration

Arbitration is usually used in Cyprus for construction disputes, shareholder disputes, banking disputes between debtors and co-op institutions, and commercial disputes. Despite the fact that international arbitration has become increasingly popular over the last few years, litigation is clearly the most favoured method of resolving disputes in Cyprus. However, there is a growing trend to resort to arbitration, given the court system's inefficiency, in order to resolve disputes quickly.

As companies and residents in Cyprus often act within the context of international corporate structures and participate in international business transactions, international arbitration is most used as a method of dispute resolution for those transactions.

1.2 Key Industries

As mentioned in **1.1 Prevalence of Arbitration**, construction disputes, shareholder disputes, banking disputes between debtors and co-op institutions, and commercial disputes constitute the main areas that are currently experiencing international arbitration activity in Cyprus. The reason is that Cyprus has emerged as an international business centre providing services for a wide spectrum of business transactions, including real estate investments and the setting up of companies for joint ventures and specific large projects abroad.

1.3 Arbitration Institutions

The most established arbitral institutions in Cyprus are the following:

- Cyprus Center for Alternative Dispute Resolution;
- Cyprus Eurasia Dispute Resolution and Arbitration Center (CEDRAC); and
- Cyprus Arbitration and Mediation Centre (CAMC).

Also, the Cyprus Chamber of Commerce and Industry (CCCI), on the basis of pertinent contractual arbitration clauses, regularly acts as an appointing authority which appoints ad hoc arbitral tribunals but does not act as an arbitration body itself.

In the construction industry, the ETEK ADR Center is another option. It operates under the ETEK ADR Provisions and offers, among other ADR methods, arbitrations governed by the ETEK Arbitration Rules.

However, the use of arbitral institutions is limited in Cyprus. The reason might be that these arbitral institutions are not as well known in the arbitration community worldwide as the ICC or the LCIA.

1.4 National Courts

There are no specific courts in Cyprus that are designated to hear disputes relating to international or domestic arbitrations. However, on 12 May 2022, the Cyprus Parliament enacted a law (the Establishment and Operation of Commercial Court and Admiralty Court Law 2022 – Law 69(I)/2022) establishing a Commercial Court and an Admiralty Court in Cyprus. The Commercial Court will have jurisdiction to hear and determine at first instance all commercial disputes where the amount or value in dispute is not less than EUR2 million, albeit with some exceptions where the Commercial Court will have jurisdiction to hear cases where the amount or value in dispute is less than EUR2 million. The exceptions are set out in paragraphs (i), (l) and (m) of the definition of the term "commercial dispute" that is pro-

vided in Article 2 of Law 69(I)/2022 and include disputes where the subject matter relates to infringement of competition issues, intellectual property issues and arbitration issues. It is also worth noting that prior to the commencement of Law 69(I)/2022, the Cyprus Parliament approved the amendment of Article 3 of the Constitution of the Republic of Cyprus to allow the use of the English language in the newly established Commercial Court.

2. Governing Legislation

2.1 Governing Law

Domestic arbitration is governed by the Arbitration Law Cap 4 ("Cap 4"), which is based on the English Arbitration Act 1950, now largely superseded in England and Wales by the Arbitration Act 1996.

The International Commercial Arbitration Law (L.101/1987) (ICAL) applies exclusively to international commercial disputes, and it is based on and is now almost identical to the UNCITRAL Model Law of 1985. There are no significant variations, with the exception of Article 2(4) of the ICAL, which sets forth the definition of the term "commercial arbitration". The ICAL was very recently amended in February 2024 to bring it in line with the amendments made to the UNCITRAL Model Law in 2006 (the "ICAL Amendment").

Cyprus is also a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) (ratified in Cyprus by the Ratification Law L.84/1979), and an award issued in Cyprus can easily be recognised and enforced both locally and in all the other contracting states. Furthermore, the procedure for recognition and enforcement of a foreign award issued in a country with which the Republic of Cyprus has concluded a bilateral or multilateral treaty on mutual recognition and enforcement of arbitral awards is laid down in the Foreign Courts Judgments (Recognition, Registration and Enforcement) Law of 2000 (Law 121(I)/2000). The procedure is now also codified in Section II of Part 44 of the new Civil Procedure Rules (CPR), which entered into force in September 2023.

2.2 Changes to National Law

A very significant amendment in the past year was the amendment of the ICAL in February 2024 with Amendment Law 11(I)/2024, which brought the ICAL in line with the UNCITRAL Model Law amendments made in 2006.

However, especially as regards Cap 4 (which applies to domestic arbitrations), further amendment is fundamental to the promotion and development of arbitration in Cyprus, and an initiative has been established under the auspices of the Ministry of Justice to amend the arbitration laws. The approach suggested is that Cap 4 and the ICAL should be abolished and a new arbitration law adopted. This new arbitration law should be based on the UNCITRAL Model Law, but it should apply in relation to all types of arbitrations (ie, domestic arbitrations, international arbitrations, energy arbitrations and arbitrations based on bilateral investment treaties).

Moreover, the new CPR have been drafted in the context of two projects funded by the EU with the support of the Council of Europe and cover, among other things, alternative dispute resolution, which includes arbitration. For example, Section 44 of the new CPR provides procedural rules that apply to claims referred to arbitration both under the ICAL and under Cap 4 (domestic arbitrations).

3. The Arbitration Agreement

3.1 Enforceability

The only requirement pursuant to the arbitration laws is that the arbitration agreement must be in writing in order to be enforceable. Despite the fact that there are no other formal statutory requirements, pursuant to the common law principles, the arbitration agreement must be clear and certain in order to be enforceable, it should deal with matters that are arbitrable under the laws of Cyprus and it should be valid under the general law of contract.

In Writing

Under Section 2(1) of Cap 4, an "arbitration agreement" is defined as a written agreement to submit present or future disputes to arbitration. Likewise, Section 7 of the ICAL determines that for an arbitration agreement to be valid, it must be in writing. An agreement is considered to be in writing if it is contained in:

- a document signed by the parties;
- an exchange of letters, telexes, telegrams or other means of telecommunication which provide a record of the agreement; or
- an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

Further, an arbitration agreement can be in the form of an arbitration clause duly incorporated into a contract or in the form of a separate agreement. A reference in a contract to another document containing an arbitration clause also constitutes an agreement to arbitrate if the contract is in writing and the reference is such as to make the clause an integral part of the contract.

After the ICAL Amendment, an arbitration agreement is also considered to be "in writing" if (i) included in electronic communication if the information contained therein is accessible and usable for subsequent reference (Section 7(4), ICAL) (ii) included in the exchange of statements of claim and defence, where one parties has included an allegation by one of the parties of the existence of an arbitration agreement, which allegation is not rebutted by the other party (Section 7(5), ICAL), or (iii) a reference in a contract to any document containing an arbitration clause is such as to make that clause part of the contract (Section 7(6), ICAL).

Clear and Certain

An arbitration agreement is void if its terms are uncertain or if it does not include a clear reference to arbitration. The relevant English judgment that constitutes a persuasive precedent for Cyprus courts is *Finnegan v Sheffield City Council (1988) 43 BLR 124*. In *Yalta Sea Trade Port v 1. EMED CHARTERING LIMITED a.o. (2001) 1 ΑΑΔ 7*, the Supreme Court (first instance jurisdiction), taking into account *Finnegan*, noted that the courts tend to uphold arbitration agreements when they clearly express the will and choice of the parties to use the institution of arbitration.

3.2 Arbitrability

While the ICAL, like the UNCITRAL Model Law, determines that it applies only to disputes that may be settled by arbitration, Cap 4 does not include any provision regarding arbitrability. Nevertheless, pursuant to Article 9(2) of Cap 4, Cyprus courts have the discretion to invalidate an arbitration agreement and refer the dispute to adjudication by the courts if any of the parties involved in a dispute is guilty of fraud.

Although most matters are arbitrable in Cyprus, some matters that affect the public interest can-

not be referred to arbitration. For instance, matrimonial and family disputes, disputes involving minors, criminal matters and disputes involving a matter of public policy belong exclusively to the domain of the Cyprus courts. Disputes directly affecting the existence or validity of a registered intellectual property right are not arbitrable, and the same applies to competition or antitrust matters. Furthermore, an arbitral tribunal will have limited powers to issue orders which affect the status of a Cyprus company such as a winding-up order or amendment of a company's register of members, even though the underlying substantive dispute may be arbitrable.

3.3 National Courts' Approach

Cyprus courts are generally inclined to enforce arbitration agreements.

Under Article 36(1)(a) of the ICAL and Article V(1)(a) of the NYC, the invalidity of an arbitration agreement shall be decided by the law chosen by the parties and, in the absence of such a choice, the applicable law shall be the law of the country where the award was issued. There is no case law on the matter similar to that of other jurisdictions analysing whether the law chosen by the parties to govern the main agreement or the law chosen by the parties governing the arbitral procedure can be considered as an implicit choice of law governing the arbitration agreement.

Pursuant to Cap 4, the court may stay the court proceedings and refer the dispute to arbitration upon the application of a party, if the court considers that there is no sufficient reason why the dispute should not be referred to arbitration and that the applicant, at the time of commencement of proceedings, was and still remains ready and willing to do all things necessary for the proper conduct of the arbitration.

According to the ICAL, the court must refer the parties to arbitration upon the request of a party which is made before the submission of its pleadings, unless the court finds that the arbitration agreement is null, void or incapable of being enforced. When there are allegations of fraud, the court may be reluctant to enforce an arbitration agreement; however, each case is decided on the basis of its facts.

Both Cap 4 and the ICAL provide for the recognition and enforcement of an arbitral award. The former provides for the enforcement of the arbitral award as if it were a judicial judgment, upon a relevant application.

The ICAL sets out provisions for enforcement which resemble those found in the NYC. With the ICAL Amendment, the requirements for recognition and enforcement have been significantly relaxed in comparison to those of the NYC. Under the recently amended Article 35 of the ICAL, the party requesting the recognition and enforcement of an arbitral award has to submit an application to the court accompanied only by the duly authenticated original award or a duly certified copy thereof. If the award is not in one of the official languages of the Republic of Cyprus, the court may request that a translation is also submitted. An original or certified copy of the arbitration agreement is no longer required to be filed with an application for recognition. The national courts will pay particular attention to the proper certification of the documents submitted before them and will only refuse to register an arbitral award in the specific circumstances provided in the ICAL, which again resemble the reasons for refusal of recognition found in the NYC. These are:

- the parties to the arbitration agreement were, under the law applicable to them, under

contractual incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing such agreement, under the law of the country where the award was issued;
- the party against which the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case;
- the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award containing decisions on matters submitted to arbitration may be recognised and enforced;
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;
- the award has not yet become binding on the parties, 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 subject matter of the difference is not capable of settlement by arbitration under the law of the Republic of Cyprus; or
- the recognition or enforcement of the award would be contrary to the public policy of the Republic of Cyprus.

3.4 Validity

The doctrine of separability is codified in Section 16(1) of the ICAL, which stipulates that:
- an arbitration agreement which forms part of a contract is considered a separate agreement from the rest of the contract; and
- an arbitral tribunal's decision that the contract is void at the outset (ab initio) does not necessarily affect the validity of the arbitration agreement.

Separability ensures that, if a clause of the contract is breached by one of the parties or the contract itself is deemed invalid, non-existent or ineffective due to a mistake concerning the identities of the signatories, undue influence or non est factum, the arbitration agreement will survive.

Nevertheless, when the arbitration agreement is deemed non-existent or invalid for the same reasons that the whole contract is non-existent or invalid, it will not stand. An example is a case in which the whole contract including the arbitration agreement is invalid because of forgery and thus the invalidity of the contract will entail the invalidity of the arbitration clause as well.

4. The Arbitral Tribunal

4.1 Limits on Selection

Neither the ICAL nor Cap 4 imposes any limits on the parties' autonomy to select arbitrators in Cyprus.

Pursuant to the ICAL, the parties are free to determine the number of arbitrators and the procedure of appointment of the arbitrators, as well as to select anyone as arbitrator, irrespective of their nationality (Sections 10 and 11(1) and (2), ICAL). If the parties do not determine the number of arbitrators, the arbitration will be carried out by three arbitrators.

4.2 Default Procedures

Where there is no agreement between the parties, a default appointment procedure for international commercial arbitrations is laid down in Section 11(3) of the ICAL, which stipulates as follows.

In an arbitration with three arbitrators:

- each party must appoint one arbitrator;
- the two arbitrators who are appointed by the parties will then appoint the third arbitrator; and
- if a party fails to appoint an arbitrator within 30 days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment will be made, upon request of a party, by the court.

In an arbitration with a sole arbitrator (Section 11(3)(b), ICAL), if the parties are unable to agree on the arbitrator, the arbitrator will be appointed, upon request of a party, by the court.

With regard to multi-party arbitrations, there is no default procedure, but where the parties have not agreed on the number of arbitrators (Section 10(2)), the procedure for a three-arbitrator tribunal would apply. There is a gap in the law, as there is in the UNCITRAL Model Law, in a case where the parties have reached an agreement on a number of arbitrators other than one or three but have not determined the appointment procedure. This would again inevitably lead to the court assuming jurisdiction to fill the void.

Similarly, under Section 10(2) of Cap 4, the Cyprus courts have the power to appoint an arbitrator, umpire or third arbitrator in a situation where the appointment is not made within seven clear days after notice has been served.

4.3 Court Intervention

As mentioned in **4.2 Default Procedures**, the Cyprus courts can intervene in the selection of arbitrators at the request of a party (Section 11(4), ICAL), unless there is an agreement between the parties, if:

- a party fails to act in accordance with the arbitration agreement;
- the parties or the two appointed arbitrators are unable to reach an agreement expected of them under the procedure; or
- a third natural or juridical person, including the arbitral institution, fails to perform any function entrusted to it under the procedure.

In addition, the court may set aside any appointment made pursuant to Section 11 of Cap 4, which sets out that where an arbitration agreement provides for a two-arbitrator tribunal, each party appoints one arbitrator and unless the arbitration agreement expresses a contrary intention:

- if either of the appointed arbitrators refuses to act, is incapable of acting or dies, the party that appointed that arbitrator may appoint a replacement; or
- if one party fails to appoint an arbitrator, the party that has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator.

4.4 Challenge and Removal of Arbitrators

Challenge

In international commercial arbitrations, an arbitrator can be challenged where circumstances exist that give rise to justifiable doubts as to their impartiality or independence, or where the arbitrator does not have the qualifications agreed by the parties (Article 12, ICAL). A party can challenge an arbitrator appointed by it, or in whose appointment it has participated, only for reasons

of which it becomes aware after the appointment has been made and within 15 days of acquiring the relevant knowledge.

The parties are free to agree on a procedure for challenging an arbitrator. If a challenge under any procedure agreed on by the parties is not successful, the challenging party can, within 30 days of receiving notice of the decision rejecting the challenge, request that the court decide on the challenge. The court's decision is final and not subject to appeal. While such a request is pending before the court, the arbitral tribunal, including the challenged arbitrator, can continue the arbitral proceedings and issue an award.

Removal

The parties can agree to remove an arbitrator when they become de jure or de facto unable to perform their functions or if, for other reasons, they fail to act without undue delay (Article 14, ICAL). Otherwise, if a disagreement remains regarding any of these grounds, any party can ask the court to decide on the termination of the mandate, and this decision cannot be appealed.

In domestic arbitrations, a party can apply to the court in order to remove an arbitrator or an umpire who fails to act expediently in the proceedings or in issuing an award (Section 13, Cap 4).

Moreover, in a case where an arbitrator or an umpire has misconducted themselves or the proceedings, the court can remove the arbitrator or umpire (Section 20(1), Cap 4). Any award issued by them may be set aside (Section 20(2), Cap 4).

In *Bank of Cyprus Ltd v Dynacon Limited and Another (1999) 1 CLR 717*, the court defined the term "misconduct" to include every type of behaviour which tends to destroy the trust that the parties should have towards an arbitrator that the arbitrator will issue a just award.

In *Solomou Neophitos v Laiki Cyprialife Ltd (2010) 1 SCJ 687*, the Supreme Court of Cyprus mentioned that the classic approach to "misconduct" refers to bribery of the arbitrator or to the existence of a secret interest on their behalf in the dispute before them.

Nevertheless, the term when applied to "misconduct of the arbitration proceedings" expands to other matters as well, to include morally or ethically improper behaviour or the wrongful admission or exclusion of evidence, or the acceptance of extrinsic evidence for the construction of the contract.

4.5 Arbitrator Requirements

The ICAL prescribes that any person who is asked to be an arbitrator has to disclose any circumstances which are likely to give rise to justifiable doubts as to their impartiality or independence. The arbitrator is obliged to disclose such circumstances following their appointment and until the completion of the arbitration proceeding (Section 12, ICAL).

Although such requirements are not included in Cap 4, if it is revealed that an arbitrator is not impartial, the court has the power to remove the arbitrator at the request of a party and annul an arbitral award issued by said arbitrator (Section 20, Cap 4).

The approach that the independence and impartiality of arbitrators constitutes a fundamental principle in arbitration has been followed by Cyprus courts.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

See **3.2 Arbitrability**.

5.2 Challenges to Jurisdiction

With respect to international commercial arbitrations, Section 16 of the ICAL sets forth that an arbitral tribunal has competence to rule on its own jurisdiction. Despite the absence of a similar rule in Cap 4, the Cyprus courts apply this doctrine in domestic arbitrations as well.

5.3 Circumstances for Court Intervention

A plea that the arbitral tribunal lacks jurisdiction must be raised no later than the submission of the statement of defence (Section 16(2), ICAL). If the arbitral tribunal issues a preliminary award that it has jurisdiction, any objecting party can request, within 30 days after having received notice of that award, that the Cyprus court decide the question of jurisdiction. The decision of the court is final and is not subject to appeal. While the court proceedings on the matter are pending, the arbitration proceedings can be continued by the arbitral tribunal.

The issue of jurisdiction can also be decided by the Cyprus courts in the following circumstances:

- if a respondent to arbitration proceedings fails to respond to the notice of arbitration, the claimant will apply to the court for the appointment of an arbitrator. In this case, the issue of jurisdiction can be raised by the respondent through its objection to such an application;
- where a party to the arbitration agreement files an action before the Cyprus courts in breach of the arbitration agreement, the defendant can file an application to request an order to stay proceedings and refer the parties to arbitration because of the existence of the arbitration agreement and the court may consider any allegation that the arbitral tribunal lacks jurisdiction to take the case; and
- the lack of jurisdiction of the arbitral tribunal to hear the dispute may be decided by the courts even after the issuance of the award, and more precisely in the context of an application to set aside or to recognise and enforce an arbitral award.

The arbitration laws do not include provisions for the review of negative rulings on jurisdiction by arbitral tribunals.

5.4 Timing of Challenge

See **5.3 Circumstances for Court Intervention**.

In *Government of the Republic of Yemen through the Ministry of Legal Affairs of the Republic of Yemen v Compagnie D'Entreprises CFE, SA (2002) 1 CLR 945*, the Supreme Court of Cyprus held that since the appellant had not requested review by the proper court of the preliminary ruling concerning jurisdiction within 30 days after having received notice of the issuance of the preliminary ruling, as provided by Section 16(3) of the ICAL, the decision was final and could not be reviewed.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The Cyprus courts have not yet adopted a clear approach to the standard of judicial review for questions of admissibility and jurisdiction, and there are no explicit statutory provisions governing this. The following two approaches can be followed by the court:

- pursuant to de novo review, the court will proceed with a completely new review of the facts of the case, the validity of the arbitration agreement, the appointment procedure, etc; and
- according to deferential review, the court will assume that the tribunal's award is correct and the latter will simply be reviewed.

5.6 Breach of Arbitration Agreement

Where an action is brought before the Civil Court in a matter which is subject to an arbitration agreement, a party can apply to the court and request that the dispute be referred to arbitration (Section 8, ICAL). In this case, an order for stay and/or dismissal of the proceedings must be issued by the court, unless it finds that the agreement is null and void, inoperative or incapable of being performed/enforced.

Section 8 of Cap 4 contains similar provisions in relation to domestic arbitrations. However, there is one fundamental difference: it is in the discretion of the court ("may issue an order suspending the proceedings") whether an order for the suspension of the proceedings will be issued, if it is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration and that the applicant, at the time of commencement of proceedings, was and still remains ready and willing to do all things necessary for the proper conduct of the arbitration.

National courts will generally enforce an arbitration agreement and refer the dispute to arbitration, unless matters of fraud are alleged or unless the arbitration agreement is found to be null, void or incapable of being enforced.

5.7 Jurisdiction Over Third Parties

See **13.5 Binding of Third Parties**.

6. Preliminary and Interim Relief

6.1 Types of Relief

With the ICAL Amendment in early 2024, the provisions included in Chapter IV A of the UNCITRAL Model Law on interim measures and preliminary orders have been incorporated into the ICAL, bringing the latter in line with the UNCITRAL Model Law (as amended in 2006). Specifically:

- Article 17 of the ICAL provides that unless the parties agreed otherwise, the tribunal may, at the request of a party, grant interim measures. An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party 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. The provisions of the Article apply mutatis mutandis in the event that the arbitration proceeding, as determined by the parties, provides for the appointment of an interim arbitrator to resolve an urgent dispute.
- Article 17A lays down the conditions for the issuance of interim measures.
- Article 17B allows a party, unless otherwise agreed by the parties, without notice to any other party, to make a request for an interim measure together with an application for a preliminary order directing a party not to

frustrate the purpose of the interim measure requested.
- Article 17C provides for the specific regime for preliminary orders.
- Article 17D provides for modification, suspension and termination of interim measures or preliminary orders.
- Article 17E covers the provision of security.
- Article 17F provides that the arbitral tribunal may require any party to disclose promptly any serious change in the circumstances on the basis of which the measure was requested or granted, and that a party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant, and such obligation continues until the party against whom the order has been requested has had an opportunity to present its case.
- Article 17G covers costs and damages.
- Article 17H covers recognition and enforcement of interim measures. Specifically, an interim measure issued by an arbitral tribunal shall be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of Article 17I and in accordance with the provisions of the Ratification Law 84/1979 by which the NYC was adopted in Cyprus. This requirement was added by the Cypriot legislature and was not included in the UNCITRAL Model Law. It surprisingly creates a further obligation to abide by the provisions of the NYC as regards recognition and enforcement of interim measures. We have not yet seen this Article being applied in practice, but it would be interesting to see how it plays out.
- Article 17I covers the grounds for refusing recognition or enforcement.

6.2 Role of Courts

According to Section 9 of the ICAL, the court is empowered to issue protective measures either before or during arbitration proceedings, which are deemed in aid of and granted in parallel with the arbitration proceedings. Their aim is mostly to protect the subject matter of the arbitration, but in general there are no limitations as to the types of orders which may be issued by a court, which may include Mareva-type orders or other mandatory or prohibitive orders. Section 3 of the ICAL explicitly states that Section 9 applies to foreign-seated arbitrations.

Further, Section 17J of the ICAL now provides that a court shall have the same power of issuing an interim measure in relation to arbitration proceedings as it has in relation to proceedings in courts, irrespective of whether they are taking place in the territory of Cyprus, and the court shall exercise such power in accordance with its own jurisdiction and competence, taking into account the specific features of international arbitration.

In addition, Article 35 of the Recast Brussels Regulation (Regulation (EU) 1215/2012) provides a legal basis for the issuance of interim measures in support of the arbitration proceedings, in specific circumstances.

As far as domestic arbitrations are concerned, while arbitration proceedings are pending, the court can grant different kinds of preliminary or interim relief in relation to the following:

- security for costs;
- discovery of documents and interrogatories;
- taking and preserving of evidence;
- securing the amount of the dispute;

- maintenance, storage or sale of any goods which are the subject matter of the arbitration;
- other forms of interim relief or appointment of a receiver; and
- detention, preservation or inspection of any property or thing which is the subject matter of the arbitration.

The use of emergency arbitrators is not provided for by the arbitration laws.

6.3 Security for Costs

There is no provision in the ICAL entitling the arbitral tribunal to order security for costs. Such an order may be available, however, under the procedural rules selected and adopted by the parties. In the absence of an agreement of the parties giving it such power, a tribunal is generally reluctant to order security for costs.

In domestic arbitrations, the issuance of an order for security for costs by the court is available pursuant to the provisions of Cap 4.

7. Procedure

7.1 Governing Rules

There are no specific procedural rules governing international commercial arbitrations, and the parties are free to agree on the procedure to be followed by the arbitral tribunal. The ICC Arbitration Rules, the UNCITRAL Arbitration Rules and the LCIA Arbitration Rules are most commonly chosen by parties so as to have a framework regarding the conduct of the proceedings. In the absence of such agreement, the arbitral tribunal may conduct the arbitration in any manner it deems appropriate. If the seat of arbitration is in Cyprus, the ICAL will govern some aspects of the arbitration, such as the appointment of arbitrators if this is not already agreed upon by the parties, the replacement of arbitrators when the arbitration is considered to have been initiated, and other matters.

In relation to domestic arbitrations, the First Schedule of Cap 4 includes implied terms which are considered part of the arbitration agreement unless the arbitration agreement explicitly provides otherwise.

7.2 Procedural Steps

The ICAL provides that an international commercial arbitration is initiated on the day on which the respondent receives the notice of arbitration. There are also provisions for the constitution of the arbitral tribunal within certain timeframes. Other than that, there are no further specific procedural steps required by law, and the parties may to a large extent determine the procedure by agreeing on the applicable rules or by drafting their own procedural road map with the help of the tribunal.

7.3 Powers and Duties of Arbitrators

With respect to international commercial arbitrations, the impartiality and independence of the arbitration proceedings constitutes a fundamental duty of the arbitrators which is imposed by the ICAL. The arbitral tribunal is obliged to grant equal rights and obligations, as well as opportunities, to all parties to present their case. Under Sections 14 and 15 of the ICAL, an arbitrator can be replaced if they become, de jure or de facto, unable to perform their functions or in the event that they fail to act without undue delay.

As also mentioned in **6.1 Types of Relief**, with the ICAL Amendment the arbitrators now have the power to issue interim measures and preliminary orders (Part IV(A), ICAL, as per Chapter IV A of the UNCITRAL Model Law). In addition,

pursuant to Section 26 of the ICAL, experts can be called by the arbitrators so as to provide evidence in relation to the dispute. Lastly, Section 31 of the ICAL lays down that the form and contents of the arbitral award must meet particular legal requirements.

In domestic arbitrations, arbitrators have a general duty to conduct the arbitration proceedings and issue the arbitral award with impartiality, due diligence and expedition.

In accordance with the provisions of Cap 4, arbitrators have the power to administer oaths, appoint expert witnesses, request the production of documents for inspection, apply to the court to settle any legal issues that may arise throughout the arbitration proceedings, and correct errors that may have been made in the wording of the arbitral award.

7.4 Legal Representatives

All advocates who practise the profession in Cyprus, including those from other EU member states, must comply with the provisions of the Advocates' Law, Cap 2 and the Advocates' Code of Conduct Regulations of 2002. The latter prescribe rules of professional conduct and ethics. Cyprus advocates are bound by these rules even when they participate in proceedings abroad. No persons other than those licensed to practise in Cyprus may provide legal services, including legal advice, to any person. There are no specific provisions excluding foreign lawyers from appearing in arbitrations in Cyprus, if they are from the EU. If they are from other countries, then immigration rules would be applicable, prohibiting the exercise of a profession in Cyprus without a special permit.

8. Evidence

8.1 Collection and Submission of Evidence

In international commercial arbitrations, where there is no agreement on the matter between the parties, the arbitral tribunal has wide discretion to determine the rules applicable to the production of evidence and the conduct of the hearings. Particularly, the arbitral tribunal can specify the procedure on the admissibility, relevance and significance of any evidence brought before it (Section 19(2), ICAL). Orders for disclosure of documents, attendance of witnesses and so on can be issued by the arbitral tribunal based on these rules. Hearings can either be oral or document-based. Moreover, pursuant to Section 26 of the ICAL, in the absence of an agreement between the parties, the arbitral tribunal can appoint one or more experts to report to it on specific issues, or require a party to give an expert any relevant information or to produce or provide access to any relevant documents, goods or other property for inspection.

In domestic arbitrations, in the absence of any applicable rules, the CPR that apply in court proceedings apply mutatis mutandis. Furthermore, Section 17 of Cap 4 states that any party to an arbitration can apply to the court for the issue of a summons requiring any person to attend for examination or to produce any document, but no person will be compelled under any such writ to produce any document which they could not be compelled to produce on the trial of an action.

Under Part 44.13 of the new CPR, a party to an arbitration proceeding in Cyprus that wishes to rely upon Article 17 of Cap 4 or Article 27 of the ICAL may apply to the court for the issuance of a witness summons in the same manner as in court proceedings. The applicant has to show

that the application is filed with the arbitral tribunal's leave or with the agreement of all parties.

With regard to privilege, all correspondence between professional legal consultants and their clients regarding the dispute are covered by professional privilege and may not be presented as evidence in court or arbitration proceedings. Additionally, all correspondence between an advocate and a third person is covered by professional privilege if it takes place while expecting court or arbitration proceedings. If the client consents or if the advocate-client relationship has been formed for the purpose of and/or results in the commitment of illegal acts or offence, such a privilege can be waived.

8.2 Rules of Evidence

In relation to international arbitration, the ICAL does not specify any rules of evidence other than in Article 19(2), which provides that, in the absence of an express agreement of the parties, the tribunal is free to determine the admissibility, relevance, materiality and weight of any evidence brought before it. The parties may opt to adopt other rules of evidence, such as the IBA Rules on the Taking of Evidence, in order to have clarity on the procedure to be followed.

Cap 4 does not specify any rules of evidence that apply to domestic arbitral proceedings. Nevertheless, the general rules of evidence that govern court proceedings apply, unless otherwise agreed by the parties.

The above is especially the case where the arbitration is initiated by reference to the subject matter thereof to a specialist arbitrator for determination within the parameters of an ongoing case pending before a court.

Apart from the analysis mentioned in **8.1 Collection and Submission of Evidence**, Cyprus law does not specify any rules of evidence applying to arbitral proceedings seated in Cyprus. Nevertheless, where the seat of arbitration is in Cyprus, the general rules of evidence that govern court proceedings apply. The reason is that these rules constitute part of the procedural law of the place where the arbitration is taking place, ie, Cyprus, and thus, they are applicable unless otherwise agreed by the parties. For instance, under the general rules of evidence, an arbitral tribunal can order the disclosure of any documents which are considered to be relevant to the dispute before it.

In the case of *DH.MA.RO LTD v Lakis Construction Ltd (2010) 1 CLR 223*, the Supreme Court followed the approach that unless the parties have agreed otherwise, an arbitrator is obliged to apply the rules of evidence that are applicable to court proceedings.

8.3 Powers of Compulsion

The arbitral tribunal or a party (with the approval of the arbitral tribunal) can request the Cyprus court's assistance in taking evidence (Section 27, ICAL). Pursuant to its rules on taking evidence, the court can execute such a request within its competence.

See **8.1 Collection and Submission of Evidence** in relation to Section 26 of the ICAL and Section 17 of Cap 4.

According to the new CPR, a party to an arbitration taking place in Cyprus wishing to rely on Section 17 of Cap 4 or Section 27 of the ICAL to secure the attendance of a witness shall apply to the court for the issuance of a witness summons in accordance with Section II of Part 32 of the new CPR, but the applicant has to show

that the said application is submitted upon leave of the tribunal or with the consent of the other party/parties.

9. Confidentiality

9.1 Extent of Confidentiality

Arbitration is a private method of alternative dispute resolution on the basis of the consent of the parties. This private nature of arbitration proceedings entails an obligation on the part of the arbitrators not to reveal or disclose information with regard to the arbitral proceedings, documents or awards.

The principle of confidentiality is not expressly included in the arbitration laws of Cyprus and there is little case law on the matter. Nevertheless, English case law on the confidentiality of arbitration proceedings constitutes persuasive precedent in Cyprus. For instance, in *Dolling-Baker v Merret [1990] 1 WLR 1205*, Parker LJ mentioned that the very nature of arbitration proceedings imposes a duty on the parties not to disclose or use, for any other aim, information used, disclosed or produced in the arbitration without the agreement of the other party or unless it is pursuant to an order or leave of the court.

The obligation of confidentiality is not unconditional. The following are cases in which disclosure may be allowed:

- when it is reasonably necessary for the protection of the parties to the arbitration (*Hassneh Insurance Co of Israel v Steuart J Mew [1993] 2 Lloyd's Rep243 QB*);
- for the purposes of invoking the supervisory roles of the court over arbitration awards and for enforcing the award itself (*Hassneh Insurance Co of Israel v Steuart J Mew [1993] 2 Lloyd's Rep 243 QB*);
- when the public interest or the interests of justice require it (*Emmot v Michael Wilson & Partners [2008] EWCA (Civ) 184 CA*); and
- if there is express or implied consent by the parties (*Emmot v Michael Wilson & Partners [2008] EWCA (Civ) 184 CA*).

Nevertheless, where a party applies for the recognition and enforcement of an arbitral award and the respondent files an objection, the case will proceed to a hearing, and the judgment of a Cyprus court will be published; thus, the basic elements of the dispute will inevitably be disclosed to publicly available resources and hence confidentiality will be lost.

10. The Award

10.1 Legal Requirements

Under Section 31 of the ICAL, the issued award should be in writing, signed by the tribunal, contain the reasons behind it – unless the parties have agreed otherwise – and mention the seat of arbitration and the date of issue. Where the arbitral award is issued by multiple appointed arbitrators, it is sufficient to have the award signed by the majority of arbitrators provided that this omission is justified in the award. There are no specific time limits on delivery of an award, either in international commercial arbitrations or in domestic arbitrations, but Cap 4 provides that an arbitrator must use all reasonable dispatch in entering into and proceeding with the Reference to Arbitration and making an award.

10.2 Types of Remedies

All types of general remedies can be awarded by an arbitral tribunal, provided that the parties have not agreed otherwise. Following on from

what was discussed in **3.2 Arbitrability**, there are certain subject matters which are generally not arbitrable and the tribunal will have limited powers to make certain orders, such as for the dissolution of a company or a marriage, or to rectify the register of members of a company, or to determine marital matters, or where a remedy would affect the registration of rights over immovable property situated in Cyprus, or where other public policy reasons dictate that the relevant remedy can only be granted by the court.

With regard to punitive damages, these are only issued under the Cypriot legal order in exceptional and limited cases, and almost invariably not in relation to pure contractual disputes.

10.3 Recovering Interest and Legal Costs

The ICAL does not include a relevant provision on recovering interest and legal costs, and the matter is one of general discretion. As a general rule, pursuant to Cyprus law, costs are awarded in favour of the winning party.

According to Cap 4, the payment of the costs will be decided by the arbitral tribunal. If a relevant provision is included in the arbitration agreement, such a provision is void. The cost of the arbitration is at the discretion of the arbitral tribunal or the umpire (Section 23).

Where Cyprus law applies, the awarding of interest is recognised as a suitable remedy to compensate for non-payment of pecuniary claims.

With regard to the interest, it will be added to the sum of the award as from the date of issue of the award, except if the arbitral tribunal decides otherwise. In the absence of any other basis, the tribunal will award interest equal to the legal interest ordered by the courts, which is currently fixed at 5% per annum. A greater interest may be awarded by way of damages, and the percentage thereof will depend either on the existence of a contractual provision for interest or on proof of special circumstances. Such interest may be awarded from the date of the breach if the tribunal considers it an appropriate remedy.

11. Review of an Award

11.1 Grounds for Appeal

As far as international commercial arbitrations are concerned, under Section 34(2) of the ICAL, the parties are entitled to file an application for annulment of an arbitral award when:

- a party to the arbitration agreement lacked contractual capacity, or the arbitration agreement is not valid pursuant to the applicable law that the parties have subjected it to or, failing such agreement, under the laws of the Republic of Cyprus;
- a party was not given timely and proper notice of the appointment of the arbitrator or of the arbitral proceedings, or was by any other means deprived of the chance to present its case;
- the award deals with a dispute not contemplated by, or not falling within, the terms of submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration;
- the composition of the arbitral tribunal or the arbitration proceedings was in breach of the agreement of the parties, unless such agreement was in conflict with a provision of the ICAL from which the parties cannot derogate or, failing such agreement, was not in accordance with the ICAL;

- the subject matter of the dispute is not capable of being resolved by arbitration under the laws of the Republic of Cyprus; or
- the award is in conflict with the public policy of Cyprus.

In domestic arbitrations governed by Cap 4, the parties are entitled to request the annulment of an arbitral award from the district courts of Cyprus where the arbitrator or the umpire has misconducted themselves or handled the proceeding poorly, or where the arbitration proceeding was conducted improperly, or where the award has been improperly issued (Section 20(2), Cap 4). The last of these grounds is very wide and includes matters of jurisdiction and whatever else would render an award invalid or unenforceable.

In both cases, either in international commercial arbitrations or in domestic arbitrations, a party can request the annulment of an arbitral award by way of an application, which has to be filed to the competent district court. It should be mentioned that there is a time limit regarding international commercial arbitrations and, more precisely, an application for setting aside may not be made more than three months from the date of notification of the award.

The judgment issued by the district court concerning an application to set aside an arbitral award can be appealed before the Supreme Court of Cyprus.

11.2 Excluding/Expanding the Scope of Appeal

In relation to excluding the right of appeal, Cyprus courts have not developed case law on this matter yet. With regard to expanding the scope of appeal, the parties cannot agree to expand the scope of appeal or challenge, since the grounds contained in the ICAL and Cap 4 are exhaustive.

11.3 Standard of Judicial Review

Judicial review of the merits of a case is not allowed under the arbitration laws of the Republic of Cyprus.

12. Enforcement of an Award

12.1 New York Convention

The NYC was adopted in Cyprus by Ratification Law 84/1979. With respect to reservations, the NYC is applied by Cyprus courts on the basis of reciprocity, in recognition and enforcement of awards issued only in the territory of another contracting state and only in relation to disputes arising out of legal relationships which are considered as commercial under its national law.

In addition, Cyprus ratified the Washington Convention of 1965 concerning awards issued by the International Centre for Settlement of Investment Disputes and the Convention on Conciliation and Arbitration within the Conference on Security and Co-operation in Europe of 1992. In addition, Cyprus is party to several bilateral investment treaties dealing with protection of investors.

12.2 Enforcement Procedure

The provisions for recognition and enforcement laid down in the ICAL are similar to those set out in the UNCITRAL Model Law and in the NYC.

As mentioned in **3.3 National Courts' Approach**, following the ICAL Amendment, the requirements for recognition and enforcement have been significantly relaxed in comparison to those of the NYC, and the only requirement for the party requesting the recognition and enforcement

of an arbitral award is to submit an application to the court accompanied by the duly authenticated original award or a duly certified copy thereof. The court may, if it wishes, request that a translation is also submitted if the award is not in one of the official languages of the Republic of Cyprus (Section 35, ICAL).

The national courts will pay particular attention to the proper certification of the documents submitted before them and will only refuse to register an arbitral award in the specific circumstances provided in the ICAL, which again resemble the reasons for refusal of recognition found in the NYC.

These grounds are set out in Section 36 of the ICAL and are as follows:

- the parties to the arbitration agreement were, under the law applicable to them, under contractual incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing such agreement, under the law of the country where the award was issued;
- the party against which the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case;
- the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;
- the award has not yet become binding on the parties, 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 subject matter of the difference is not capable of settlement by arbitration under the law of the Republic of Cyprus;
- the recognition or enforcement of the award would be contrary to the public policy of the Republic of Cyprus.

Enforcement of Awards That Have Been Set Aside

As mentioned above, whether the award has been set aside or suspended by a competent authority of the country in which it was made is one of the grounds on which the court may refuse the registration and enforcement of an award (Section 36(1)(a)(v), ICAL).

Although Section 36 of the ICAL largely resembles Article V of the NYC (and Article 36 of the 1985 Model Law), there is one fundamental linguistic difference. Article V of the NYC (and Article 36 of the 1985 Model Law) states that "recognition and enforcement of the award may be refused…" while Section 36(1) of the ICAL uses a Greek word ("απορρίπτεται") which if translated correctly means "is rejected" or "shall be rejected", which is clearly different from the word "may" which gives discretion to the court whether to accept or reject an application if one of the grounds exists.

As of the date of this article, there has not been any case law on the specific provision of the national law, which has yet to be interpreted by the courts. It is the authors' opinion that the courts will generally dismiss an application for recognition and enforcement if the arbitral decision was set aside unless it has been set aside due to a minor violation of procedural rules applicable to the arbitration.

Furthermore, it is likely that the courts will follow the territorial approach of recognising the primary jurisdiction of the courts of the seat. The territorial approach has been supported by English judgments such as *Dardana Ltd v Yukos Oil Co [2002] EWCA Civ 543, [2002] 2 Lloyd's Rep 326* and *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2009] EWCA Civ 755*, par 58–63 and 75–76, which constitute persuasive precedents for Cyprus courts. In any case, a judgment setting aside an arbitral award can be recognised and enforced in Cyprus under the regime of the European Regulation (EU) 44/2001 or 1215/2012, depending on the case, where the seat of arbitration is another EU member state, or the Lugano Convention, the Judgment of Foreign Courts (Recognition, Registration and Enforcement pursuant to Treaty) Law of 2000, Law No 121(I)/2000, if there is a bilateral treaty between Cyprus and the seat of arbitration or based on common law provisions.

An Award Which is Subject to Ongoing Set-Aside Proceedings at the Seat

The Cyprus courts have discretion when an award is subject to ongoing set-aside proceedings at the seat (eg, suspension of enforcement proceedings pending a resolution of the proceedings at the seat) and the approach to be adopted depends on the judge hearing the case.

In *SUEK AG v Larcher Trading Limited, No Foreign Decision: 5/2018, 30/1/2019*, the Cyprus court highlighted that under Article VI of the NYC, the court has a wide discretion in deciding whether to suspend the registration process until the conclusion of the proceedings in the country where the arbitral award was issued. However, the NYC does not provide that the registration process should be automatically suspended when an application to set aside is filed.

As the suggestion in the *Travaux préparatoires*, in appropriate circumstances, an arbitral award may be registered even though an application to set aside the same is pending (*Travaux préparatoires*, Summary Records of the United Nations Conference on International Commercial Arbitration, 17th meeting [E/CONF.26/SR.17 – E/2704 and Corr.1, E/CONF.26/L.31, L.37/Rev.1, L.43 and L.45]).

Sovereign Immunity

There is no legal provision for sovereign immunity in Cyprus, but the defence of state immunity has been recognised by Cyprus courts. Despite this recognition, where the actions of foreign states are of a financial and commercial nature that could also be conducted by a natural person (jure gestionis), the defence of state immunity cannot be applied. In such cases, arbitral awards which were issued against another state will be recognised and enforced by the Cyprus courts.

12.3 Approach of the Courts

The general approach of Cyprus courts is the recognition and enforcement of arbitral awards issued in international commercial arbitrations or in domestic arbitrations, except where there is a ground for refusing recognition and enforcement as analysed in **12.2 Enforcement Procedure**.

It should be noted that the Cyprus courts carefully examine whether the certification and translation of the documents meet the requirements prescribed by the law and case law. Furthermore, the Cyprus courts will reject an application for registration and enforcement of an arbitral award only if one of the reasons prescribed in the ICAL, which resemble the reasons for refusal of recognition and enforcement laid down in the NYC, exists. The Cyprus courts do not review the merits of the case. Cyprus courts will most likely reject an application for recognition, in the event that neither the applicant nor the respondent resides in Cyprus.

In the absence of a statutory provision to define the concept of public policy, the Cyprus courts have adopted a restricted definition of public policy. More precisely, the term "public policy" includes any fundamental principle or value or rule which is necessary for the social, legal, economic and political functioning of the Republic of Cyprus. The review by the courts of the arbitral award is supervisory and includes examination of whether the arbitral award is in conflict with public policy, but the Cyprus courts will not review the merits of the case. The Cyprus courts accept public policy as a ground for sparingly resisting enforcement and when the circumstances of the case are clear. The term "public policy" has been judicially recognised to include the fundamental governing principles which society in general recognises at the specific time and which permeate the established legal order (*Charalampides v Westacre Investments Inc (2008) 1 (B) JSC 1217*).

Also, it is worth noting that an arbitral award that is final and binding upon the parties will preclude the promotion of a civil claim on the same facts/dispute/claim. The fact that the arbitral award creates res judicata between the parties has been recognised in the recent Supreme Court judgment of *Civil Appeal No. 117/2018 Bitonic Ltd v Bank of Moscow-Bank Joint Stock Company, former Joint Stock Commercial Bank "Bank of Moscow" (Open Joint-Stock Company)*, dated 16 March 2022.

13. Miscellaneous

13.1 Class Action or Group Arbitration

There is no provision for class-action arbitration or group arbitration in the arbitration laws. However, by virtue of Section 30 of Cap 4 in relation to domestic arbitrations, the CPR are applicable mutatis mutandis, in the absence of other applicable rules. Therefore, under Part 20.1 of the new CPR (or Order 9 of the old CPR, if they apply), all persons may be joined in one action as plaintiffs.

13.2 Ethical Codes

All advocates practising in Cyprus are bound by the Advocates' Law, Cap 2 and the Advocates' Code of Conduct Regulations of 2002. This code specifies rules of professional conduct and ethics, such as a duty to act with honour, dignity, due care and independence and a duty to respect the court, clients and colleagues.

As explained in **4. The Arbitral Tribunal**, arbitrators must be impartial and independent and disclose any potential conflict of interest. The IBA Guidelines on Conflicts of Interest in International Arbitration (2014) are not binding, but they are taken into account when arbitral tribunals or the Cyprus courts face challenges to international arbitrators.

13.3 Third-Party Funding

Third-party funding is not governed by the laws of Cyprus, and the Cyprus courts have not

examined this matter extensively. Third-party funding is not common and may not be available in Cyprus from a practical perspective. The concept of public policy and the equitable principles of champerty and maintenance may constitute impediments to the availability of third-party funding, although it appears that there is a growing willingness to accept third-party/litigation funding on the basis of common law.

In *Kazakhstan Kagazy PLC a.o. v Arip a.o., General Application: 1/2020, 31/1/2022*, albeit in the context of recognition and enforcement of a foreign judgment under the relevant EU Regulation, the court examined an application to set aside an order for the recognition and enforcement on the ground that it would be contrary to the public policy of Cyprus due to the existence of a third-party funding agreement. The court held that the funding agreement did not violate the doctrine of "maintenance and champerty" by drawing guidance from a number of other common law jurisdictions and having in mind that in Cyprus there has never been such a prohibition by law. The said decision was issued by a first-instance court and is therefore of a persuasive but not binding nature. The matter has not been examined by the Supreme Court yet.

13.4 Consolidation

Although the consolidation of arbitral proceedings is not regulated by the arbitration laws, pursuant to Section 30 of Cap 4, which establishes the applicability of the CPR mutatis mutandis in the absence of other applicable rules, consolidation may be available in domestic arbitrations. When two or more actions are pending in the same court, whether by the same or different plaintiffs against the same or different defendants, and the claims of such actions involve a common question of law or fact of such importance in proportion to the rest of the matters involved in such actions as to render it desirable that the actions should be consolidated, the court or a judge may order that they be consolidated.

13.5 Binding of Third Parties

Generally, the rule is that arbitration is "a creature of contract" and the parties to arbitration are those that have signed an arbitration agreement or a main contract including an arbitration agreement. The rule of privity is found in Article II (2) of the NYC, Section 7 of the ICAL and Section 2 of Cap 4. However, arbitral tribunals and courts occasionally enforce an arbitration agreement or award on non-signatories to that arbitration agreement.

Jurisdiction of National Courts

The Cyprus courts have not clearly determined the circumstances in which an arbitration agreement is extended to third parties. Such circumstances can be the concepts of third-party beneficiary, piercing the corporate veil, succession, subrogation, agency, assignment, estoppel and the "group of companies" doctrine. Even if the Cyprus courts apply one of these exceptions to the rule of privity in order to extend the arbitration agreement to non-signatories, consent will remain the central point in addressing this issue. For instance, in *Cooresby v Astroplus, Application No 377/17 District Court of Nicosia*, the court decided that since the company and the subsidiary were not parties to the shareholders' agreement and had not agreed to the arbitration procedure, the arbitration could not be conducted against them.

English Judgments

In addition, English judgments on the matter, such as *Peterson Farms v C&M Farming [2004] EWHC 121 (Comm)*, can provide persuasive guidance to Cyprus courts. In this case, the

arbitral tribunal had awarded damages in favour of other companies within the claimant's group of companies which had not executed the arbitration agreement, and the English Commercial Court set aside the arbitral award. In relation to the "group of companies" doctrine, the court highlighted that the matter is governed by the applicable law of the arbitration agreement and that this doctrine is not recognised by English law. The court also rejected the concepts of estoppel, agency and ad hoc jurisdiction for this specific case, and the principle of privity prevailed.

With respect to interim orders, Chabra orders can be issued in the context of interim proceedings in aid of arbitration proceedings.

DENMARK

Law and Practice

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Bech-Bruun is a market-oriented law firm offering a wide range of specialist advisory services to large sections of the Danish corporate and public sectors as well as global enterprises. Counting more than 500 experienced and highly specialised employees, of which 54 are partners, Bech-Bruun is among the leading full-service law firms in Denmark and one of the largest within the Nordic region. It advises on all aspects of corporate and commercial law providing Danish as well as international clients with tailored, interdisciplinary and value-adding solutions based on in-depth industry knowledge. Its dispute resolution department comprises 37 experts specialising in litigation before the Danish Supreme Court, High Courts, as well as arbitration and administrative complaints boards. The group has in-depth knowledge of alternative dispute resolution, such as mediation and court-based mediation, as well as litigation risk assessments and choice of law and jurisdiction clauses in international contracts.

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Bech·Bruun

1. General

1.1 Prevalence of Arbitration

Solving legal disputes before a tribunal outside the state-established court system has been accepted and recognised in Denmark for centuries. However, the use of arbitration as a method for dispute resolution has grown in popularity since the enactment of the first comprehensive act regulating arbitration in 1972. The possibility of confidentiality, the ability for the parties to influence the appointment of arbitrators, the expediency of proceedings, the finality of the arbitration award, the expertise of the arbitrators and global enforcement opportunities are some of the main factors driving this increased popularity, particularly in relation to commercial disputes.

International arbitration in Denmark is most prevalent in disputes between professional parties, where one of the parties is domiciled in Denmark and the other parties involved are from other countries. However, since 2022 we have seen an increase in pure international cases with no Danish parties referred to arbitration under Danish law pursuant to the rules of the Nordic Offshore and Maritime Arbitration Association.

An arbitration agreement is also found in many of the agreed documents most commonly used in Denmark. For example, most agreements regarding construction projects refer to arbitration, as these agreements often refer to agreed documents (the general conditions for consulting services for building and construction works from 2018, known as ABR 18, or general conditions for building and construction works and supplies from 2018, known as AB 18), where arbitration is the default dispute resolution option.

1.2 Key Industries

Statistics regarding the use of arbitration in general are not available in Denmark. However, the Danish Institute of Arbitration (the "DIA") posts statistics of the cases filed with it. The latest statistics published by the DIA for 2023 show that the most dominant sectors are industry, telecommunications and information technology, commerce, transport, finance and insurance, and energy, while the remaining cases are spread across a variety of industries.

Divided into subject matters, the statistics indicate that the largest categories are shareholders' agreements, M&A, purchase agreements, cooperation agreements and service agreements. Approximately a quarter of the cases commenced at the DIA in 2023 are characterised as international arbitration. Naturally, international arbitration cases would be most common in industries with prevalent cross-border activities, engagements, etc.

1.3 Arbitration Institutions

The DIA has existed as an institution for arbitration since 1894. The DIA in its current form was created as a non-profit, self-governing institution in 1981. In contrast to sector-specific institutions, the DIA adjudicates cases in a wide variety of sectors. The DIA has prepared the DIA Rules for Arbitration Procedures (the "DIA Rules"), with the latest version being in force as of 13 April 2021.

The Danish Building and Construction Arbitration Board (the "Arbitration Board") oversees the vast majority of arbitral disputes in the construction sector. Along with its predecessors, AB 18 is the most commonly used document in agreements concerning the building and construction sector. AB 18 contains an arbitration clause referring to the Arbitration Board as the

dispute resolution institute. While dispute resolution before the Arbitration Board is categorised as arbitration under the Danish Arbitration Act of 2005 (the "DAA") and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), the proceedings deviate from international arbitration in relation to the opportunity and custom of appointing technical arbitrators instead of legal arbitrators. Arbitrators with a legal background are, as a rule, appointed from a committee consisting of judges from the High Courts and the Supreme Court, while arbitrators with a professional background in the field of conflict are proposed by the Secretariat of the Arbitration Board.

Institutions of international character, such as the International Chamber of Commerce, are also occasionally used by Danish parties.

Finally, since 2022 we have seen an increase in cases being referred to arbitration under the Nordic Offshore and Maritime Arbitration Association.

1.4 National Courts

There are no specific courts that are designated to hear disputes relating to international or domestic arbitrations. In the Danish civil court system, matters pertaining to international arbitrations and/or domestic arbitrations of commercial disputes would proceed before the ordinary national courts.

2. Governing Legislation

2.1 Governing Law

The central statute governing arbitral proceedings is the DAA. The DAA applies when the arbitration is seated in Denmark, and it does not differentiate between national arbitration (ie, arbitration without international affiliation) and international arbitration (ie, arbitration with international affiliation): see Section 1(1) of the DAA. Some of the provisions of the DAA also apply when the place of arbitration is a foreign country, or when the place of arbitration has not yet been determined: see Section 1(2) of the DAA. The DAA reflects, to a large extent, the 1985 version of the UNCITRAL Model Law.

One deviation of the DAA from the Model Law is the scope of application. The DAA also applies in cases of national arbitration and in cases of non-commercial arbitration.

The DAA contains a number of provisions referring to the national courts. Proceedings at the national courts are regulated by the Administration of Justice Act of 1916 (the "AJA"). The proceedings will therefore also be subject to this Act if the national courts are engaged.

If institutional arbitration is chosen, the arbitral proceedings will be subject to the rules in force at that particular institution. An example of this is the DIA Rules that regulate the proceedings that take place at the DIA. If the proceedings are filed with the DIA, the arbitration is governed by the DIA Rules and, where the rules are silent on a specific point, by any other rules of the parties or, failing that, by rules decided by the tribunal (see Article 28(2) of the DIA Rules).

2.2 Changes to National Law

No recent changes have been made to the DAA. The last major change in regulatory arbitration rules was in 2021 when the DIA Rules were changed. The new DIA Rules entered into force on 13 April 2021 and replaced the 2013 DIA Rules. The new Rules were formulated in line

with the standards of Danish and international arbitration practice.

3. The Arbitration Agreement

3.1 Enforceability

Neither the DAA nor Danish contract law in general stipulate that the arbitration agreement must meet certain formal requirements. There are therefore no formal legal requirements for an arbitration agreement to be enforceable. An oral agreement may also suffice, although such an agreement may be difficult to prove and thereby uphold. An arbitration agreement based on the parties' unequivocal behaviour, such as failure to object throughout the proceedings, can also be considered binding for the parties.

However, under Section 7 of the DAA, arbitration agreements regarding disputes not yet arisen must relate to a specific, concretised legal relationship.

An arbitration clause in a consumer contract is not binding on the consumer when the agreement is concluded prior to the dispute (see **5.1 Matters Excluded from Arbitration**).

3.2 Arbitrability

Under Section 6 of the DAA, it is a principal rule that arbitration can be agreed for disputes relating to subject matters that the parties have an unrestricted right to dispose of. For some matters, specific statutory provisions establish that these cannot be subject to arbitral agreements; eg, disputes regarding a residential lease cannot be subject to an arbitration agreement.

Disputes pertaining to matters of law protecting interests of public policy are also generally non-arbitrable. In these cases, the public interest outweighs the contractual autonomy of the parties. It is possible for public authorities to enter into arbitration agreements when the authority does not act in its capacity as public authority but, for example, enters into contracts regarding construction of a building.

A list of non-arbitrable subject matters is not set out in the DAA. The question of arbitrability is determined on a case-by-case basis by the arbitral tribunal. Disputes pertaining to public law are not, per se, non-arbitrable. The approach to be applied therefore largely depends on the specific circumstances of the case and the interests of that particular legal area.

3.3 National Courts' Approach

The considerations that in many other countries have led to the requirement that arbitration agreements must be in written form have traditionally been handled in Danish law by the courts imposing relatively strict requirements for the adoption of an arbitration agreement. The courts have traditionally adopted a restrictive approach when determining the disputes covered by an arbitration agreement. However, there is some debate as to whether this traditional approach is still being practised by the national courts. Regardless, the courts' assessment and interpretation of an arbitration agreement will largely depend on the specific circumstances of the case (namely the wording and context of the agreement).

When a valid arbitration agreement is in force, the national courts are confined to specific issues explicitly mentioned in the DAA: see Section 4 of the DAA. These issues include assisting in appointing arbitrator(s) (Section 11(3)), securing and obtaining evidence (Section 27), setting aside the award (Section 37), and refusing rec-

ognition or enforcement of the award (Section 39).

Under Section 8(1) of the DAA, the courts' jurisdiction is limited if a matter submitted before the Danish national courts but subject to a valid arbitration agreement (see **5.3 Circumstances for Court Intervention**). The case must, at a party's request, be dismissed by the court, unless the arbitration agreement is invalid or the arbitration cannot be completed due to other reasons.

If the subject matter is arbitrable and the arbitration agreement otherwise conforms with Danish contract law, the national courts will enforce the agreement.

3.4 Validity

According to the doctrine of separability set out in Section 16(1) of the DAA, the examination of the validity of an arbitration clause is to be done separately and detached from a review of the main agreement. The arbitral tribunal may therefore uphold the arbitration agreement's validity even if it finds the main agreement in which the arbitration agreement is contained invalid.

4. The Arbitral Tribunal

4.1 Limits on Selection

The DAA does not contain provisions restricting the parties when selecting the arbitrators. Unless the parties' agreement (or any institutional rules) provides otherwise, the parties are free to select whoever they find suitable as an arbitrator. Although there are no direct restrictions for the parties when selecting arbitrators, the individual to be appointed as arbitrator must still fulfil the general requirements of impartiality and independence.

The DIA Rules contain specific rules on the appointment of arbitrators, including rules on impartiality, disclosure obligations for previous appointments by the parties or their legal advisers and country and domicile (in international arbitration cases). Article 18(2) of the DIA Rules stipulates that the president of the tribunal, or a sole arbitrator, hold a law degree. All appointments of arbitrators are also subject to confirmation by the Chair's Committee of the DIA under Article 19(1) of the DIA Rules.

4.2 Default Procedures

The DAA contains default procedures that regulate the selection process if the arbitral tribunal cannot be established in line with the procedure set out in the parties' agreement or if the parties have not agreed on this issue. Under Section 11(2) of the DAA, if the arbitration agreement does not set out the procedure of constituting the arbitral tribunal, the tribunal will consist of three arbitrators. Each party will appoint one arbitrator within 30 days of a request to do so from the other party. The two arbitrators appointed will engage the third arbitrator, who will act as president of the tribunal.

If the arbitral proceedings are filed with the DIA, the dispute will be decided by a sole arbitrator if the parties have not agreed upon the number of arbitrators under Article 18(1) of the DIA Rules. However, in special circumstances, a panel of three arbitrators can be decided upon.

In respect of the selection of arbitrators in the case of multi-party arbitrations, there is no default procedure that applies, ie, unless otherwise agreed.

4.3 Court Intervention

The selection of the arbitrators is subject to the agreement of the parties and the courts will not

automatically intervene. However, the courts can become involved at the request of a party under Section 11(3) of the DAA.

If the arbitral tribunal cannot be successfully constituted, a party may request the courts to appoint the arbitrator not appointed. Section 11(3) of the DAA applies if the arbitral tribunal cannot be constituted in line with the procedure agreed by the parties or, in the absence of such agreement, in line with the default rules mentioned in **4.2 Default Procedures**.

In appointing an arbitrator, the courts will have regard to any qualifications required of the arbitrator by the agreement of the parties. The courts must also ensure that the arbitrator to be appointed is impartial and independent of the parties. This provision establishing the constitutive competence of the national courts cannot be derogated from by agreement between the parties under Section 2(2) of the DAA.

4.4 Challenge and Removal of Arbitrators

Under Section 13(1) of the DAA, the procedure for challenging an arbitrator is to be decided freely by the parties. The DIA Rules contain provisions establishing that a challenge of a selected arbitrator is to be decided by the DIA.

If the parties' agreement does not regulate the procedure for challenging an arbitrator, Section 13(2) of the DAA applies by default. According to this provision, a party that intends to challenge an arbitrator must send a written statement of the reasons for the challenge to the arbitral tribunal within 15 days after becoming aware of the constitution of the arbitral tribunal and of the circumstances on which the challenge is based.

The grounds for a challenge can be that the arbitrator is not impartial or independent, or does not possess the qualifications or characteristics specified in the parties' agreement. The arbitral tribunal will decide on the challenge, unless the arbitrator voluntarily resigns from the position or the other party agrees with the challenge. If the arbitral tribunal rules that the challenge is unfounded, the challenging party may, within 30 days, request the national courts to decide on the challenge under Section 13(3) of the DAA.

Filing a challenge against an arbitrator will extend the overall timeframe of the proceedings in most cases, as challenges often suspend the proceedings until the challenge has been settled.

If the arbitral proceedings are filed with the DIA, a challenge of arbitrators must be submitted to the secretariat of the DIA within 15 days after having become aware of the appointment and the circumstances on which the challenge is based under Article 21(1) of the DIA Rules. The Chair's Committee of the DIA decides on the challenge under Article 21(3) of the DIA Rules.

4.5 Arbitrator Requirements

Following Section 12 of the DAA, arbitrators must be impartial and independent. An individual approached to be appointed as an arbitrator as well as acting arbitrators must disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence. This includes personal or economic relations with either party or previous appointments by either of the parties.

With inspiration from Sections 60 and 61 of the AJA, which concern the disqualification of judges at the national courts, the approach applied is done on a case-by-case basis. For international arbitration in particular, the Guidelines on Conflicts of Interest in International Arbitration from

the International Bar Association have had some importance in determining the requirements of impartiality and independence.

For proceedings filed at the DIA, it follows from Article 20 of the DIA Rules that any individual appointed as an arbitrator must be available, impartial and independent. Similarly to the DAA, the individual must disclose any matters that may give rise to legitimate doubts as to their accessibility, impartiality or independence.

For proceedings carried out by the Arbitration Board, arbitrators must disclose any matters that may cast doubt over their impartiality or independence under Section 6(3) of the Arbitration Board's Rules on arbitration.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

As stated in **3.2 Arbitrability**, there is no list of non-arbitral subject matters and the assessment of arbitrability is done on a case-by-case basis (see also **3.3 National Courts' Approach**).

As a general rule, fields of law traditionally concerned with public policy, such as family law and criminal law, the grant of patents and other IP rights, and the grant of citizenship, are jurisdiction-exclusive to the national courts.

Arbitration clauses in a consumer contract are not, per se, invalid. However, an arbitration agreement concluded before the dispute arose is not binding on the consumer under Section 7(2) of the DAA. A consumer has only waived the right to plead that the arbitration agreement is non-binding if they proceed with the arbitration after being informed that the arbitration agreement is non-binding.

5.2 Challenges to Jurisdiction

In the first instance, the arbitral tribunal will rule on its own competence. The arbitral tribunal will, in particular, consider whether a binding arbitration agreement covering the dispute is in place between the parties. It is also a prerequisite for the arbitral tribunal's competence that the subject matter of the dispute is arbitrable. This principle of competence-competence follows from Section 16(1) of the DAA, or Article 25(1) of the DIA Rules (see **3.4 Validity**).

5.3 Circumstances for Court Intervention

If the action addressing issues of jurisdiction is filed with the national court before arbitration is commenced and the dispute is subject to an arbitration agreement, the courts can only assess whether the arbitration agreement is null and void, inoperative or incapable of being performed. This limitation for the courts follows from Section 8(1) of the DAA. If the action is brought before a national court after the commencement of arbitral proceedings, the court is further limited to ruling on the jurisdiction of the arbitral tribunal only in respect of whether the subject matter of the dispute is capable of settlement by arbitration under Section 8(1) of the DAA.

The national courts can also become involved when the arbitral tribunal has ruled on its own jurisdiction in a decision separate from the final award. If it is preliminarily ruled by the arbitral tribunal that it has jurisdiction, any party may, within 30 days after having received notice of that ruling, request the national courts to review the decision of the arbitral tribunal upholding its own jurisdiction under Section 16(3) of the DAA.

Ultimately, the national courts can invalidate an arbitral award containing decisions on matters beyond the scope of the arbitration agreement as this is one of the explicit grounds on which

an award may be set aside under Section 37(2)(i)(c) of the DAA.

5.4 Timing of Challenge

Under Section 8(2) of the DAA, if an action is brought at the court after the commencement of the arbitral proceedings, the court can rule on the jurisdiction of the arbitral tribunal only in respect of whether the subject matter of the dispute is arbitrable.

Under Section 16(2) of the DAA, it is the principal rule that a submission regarding the arbitral tribunal not having jurisdiction must be submitted no later than the submission of the statement of defence. A submission that the arbitral tribunal is exceeding the scope of its authority will be submitted as soon as possible after the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. Similarly, it also follows from Article 25(2) of the DIA Rules that objections to the jurisdiction of the tribunal must be raised no later than the statement of defence.

A submission concerning the arbitral tribunal not having jurisdiction cannot be invoked in the enforcement process of the arbitral award, unless the subject matter of arbitration was non-arbitrable in the first place, as set out in Section 6 of the DAA under Section 16(4) of the DAA.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

As mentioned in **3.3 National Courts' Approach**, the DAA includes limitations as to the national courts' availability to review disputes subject to a (valid) arbitration agreement under Section 8(1) of the DAA. The standard of judicial review for jurisdiction to be employed is not specified in the statutory provisions of Danish law. There is no conclusive case law on the standard to be applied. Therefore, a case-by-case assessment has to be carried out to take the specific circumstances of the case into account.

The Danish courts have traditionally been reluctant to set aside decisions from an arbitral tribunal. A national court will most likely be reluctant to set aside a decision from the tribunal ruling on its own jurisdiction.

5.6 Breach of Arbitration Agreement

As mentioned in **3.3 National Courts' Approach**, the national courts must dismiss the case if a dispute covered by an arbitration agreement is filed with the national courts and impose costs on the losing party. Naturally, this does not apply if an arbitration agreement is found null and void, inoperable or incapable of being performed.

As the parties can agree to enter into an arbitration agreement, the same parties can also agree to waive the agreement and proceed at national courts or through other means of dispute resolution. If a dispute is filed with the national courts regardless of whether the dispute is subject to an arbitration agreement, the national court will generally not raise the question of breach when the parties do not raise any objection against the jurisdiction of the court.

5.7 Jurisdiction Over Third Parties

The arbitral tribunal generally does not have competency to assume jurisdiction over third parties that have not signed or entered into the arbitration agreement. However, third parties may sometimes be assimilated to a party bound by the arbitration agreement, such as in cases of universal succession (see **13.5 Binding of Third Parties**).

It has been debated whether this principal rule – ie, that only signatories of the agreement

are bound by the agreement – is modified by a Danish Supreme Court decision issued in 2014. In this case (U 2014.2042 H), the court ruled that the claim between two parties with no direct contractual relationship (and therefore no arbitration agreement between them either) was to be resolved through arbitration, as the agreements of each party contained an arbitration clause that allowed this interpretation. The agreements of each link contained reference to the same agreed document and, therefore, the same arbitration clause.

In relation to disputes governed by the Arbitration Board, Section 69(7) of AB 18 provides that when AB 18 (or its predecessor, AB 92) applies to the relationship between the employer and several parties (contractors, suppliers), the arbitration agreement will apply to the interrelationship between the parties.

6. Preliminary and Interim Relief

6.1 Types of Relief

If a party requests it, the arbitral tribunal can order any party to take such interim measures of protection as the arbitral tribunal deems necessary in respect of the circumstances of the dispute under Section 17 of the DAA. However, if a party does not comply with the order from the arbitral tribunal, there is no legal basis providing for the enforceability of the interim measures of protection ordered by the tribunal. To ensure enforceability, the party must engage the national courts (see **6.2 Role of Courts**).

In the majority of the arbitration cases taking place in Denmark, the types of interim relief that the tribunal considers are typically injunctions and actions preserving assets and evidence corresponding to those employed by the national courts (ie, the types found in the AJA).

In arbitral proceedings with the DIA, the tribunal can, upon a request from a party, order another party to take such interim measures as the tribunal considers necessary under Article 36 of the DIA Rules.

6.2 Role of Courts

Under Section 9 of the DAA, an arbitration agreement does not prejudice a party from petitioning the national courts for preliminary or interim measures in line with the provisions found in the AJA.

The courts may order an injunction if the following circumstances are shown to be sufficiently probable or proven by clear and convincing evidence:

- that the party holds the right for which protection by way of an injunction is sought;
- that the conduct of the opposing party requires the granting of the injunction; and
- that the ability of the party to enforce its right will be lost if the party has to await a full trial.

The courts can also deny the granting of an injunction if the damage or inconvenience caused to the counterparty is manifestly disproportionate to the interests supporting the injunction.

Section 9 not only applies when the seat of the arbitration is in Denmark but also if the place of arbitration is in a foreign country or if it has not yet been determined where the arbitration is taking place under Section 1(2) of the DAA. Where the parties cannot agree that Section 9 is not applicable, see Section 2(1) of the DAA.

Types of Relief

Subject to the provisions in the AJA, the types of reliefs that the national courts can grant are, eg, injunctions and actions preserving assets and evidence, for instance, in the case of infringement of IP rights.

Danish statutory law does not contain provisions specifically relating to the use of emergency arbitrators. However, as no statutory provisions preclude the use of emergency arbitrators, the parties can, in their arbitration agreement, decide to explicitly allow the use of emergency arbitrators.

Article 48 of the DIA Rules allows for the appointment of an emergency arbitrator where the taking of evidence or interim measures cannot await the confirmation of the "permanent" arbitrator(s). These procedures are further regulated in Appendix 3 of the DIA Rules.

6.3 Security for Costs

Under Section 36(1) of the DAA, an arbitral tribunal can order the parties to provide security for the fees and expenses of the tribunal. In most cases, the security will be ordered by the tribunal or the institution at which the arbitration is being conducted. The arbitral tribunal has the power to determine the nature and extent of the security. Unless agreed otherwise, the arbitral tribunal cannot order security for a party's costs to the other party. If the parties have agreed to use, eg, the DIA Rules, the arbitral tribunal can order a party upon request to provide security for the other party's costs under Article 12(3) of the DIA Rules.

Specifically in relation to instances where the arbitral tribunal requires a party to take interim measures (see **6.1 Types of Relief**), it further follows from Section 17 of the DAA that the arbitral tribunal can require any party to provide appropriate security in connection with the measures. The arbitral tribunal can decide that the security is a condition for employing the interim measure requested.

In proceedings at the national courts filed by a plaintiff not domiciled in the EU/European Economic Area, the courts may order a party to provide security for costs. However, security cannot be ordered by the courts when the plaintiff is domiciled in a country where the security will not be ordered for plaintiffs from Denmark.

Specifically in procedures of interim measures before the national courts, the court may provide the interim relief conditional on the party establishing security for any detriment and disadvantage inflicted on the opposing party.

7. Procedure

7.1 Governing Rules

Chapter 5 (Sections 18–27) of the DAA contains provisions governing the procedure of arbitration. Except for those specified in **7.2 Procedural Steps**, the provisions in this chapter apply by default if the parties have not agreed otherwise. In the absence of agreement between the parties, it follows from Section 19(2) that the arbitral tribunal is vested with a wide discretion to conduct the proceedings in the manner it considers appropriate.

Section 20 of the DAA relates to the place of arbitration. If the place is not determined by the parties' agreement, the arbitral tribunal decides the place having regard to the circumstances of the case.

If it follows from the arbitration agreement that arbitral proceedings are to be filed at a specific

institution, the rules of the institution will govern the procedure of the arbitration. For example, if the proceedings are filed with the DIA, the place of arbitration is Copenhagen, unless otherwise agreed between the parties under Article 27 of the DIA Rules.

Commencing Arbitration

If the parties have not agreed otherwise, it follows from Section 21 of the DAA that the arbitration commences when a written request for arbitration is received by the respondent.

If the proceedings are filed with the DIA, it follows from Articles 4(1) and 4(2) of the DIA Rules that a statement of claim must be submitted to the DIA and the date on which the DIA receives this statement of claim is the date on which the arbitration case is considered commenced. The statement of claim will be submitted to the DIA in the language which the parties have agreed, and in the absence of an agreement, or if there is otherwise disagreement between the parties regarding the language, the statement of claim will be submitted in the language that is used in the parties' arbitration agreement under Article 5 of the DIA Rules.

Language

If the language of the arbitration is not agreed by the parties, the language of the arbitration is to be decided by the arbitral tribunal under Section 22 of the DAA.

Filing of Statement of Claim/Defence

Section 23 of the DAA relates to the filing of a statement of claim and statement of defence, while Section 25 of the DAA concerns instances where the claimant or defendant (without showing sufficient cause) fails to submit a statement of claim/defence, does not attend hearings or fails to produce documentary evidence.

Section 24 of the DAA relates to the question of oral hearings. If requested by a party, the tribunal must hold these hearings. Otherwise, the proceedings can be conducted on a written basis.

7.2 Procedural Steps

With the exception of Sections 18 and 27, the provisions in Chapter 5 of the DAA only apply when the parties have not agreed otherwise. See also **7.1 Governing Rules**.

Section 18 of the DAA sets out the basic principles of equal treatment of the parties and the right for each party to fully present its case. These principles must be respected by the arbitrators.

Under Section 27(1) of the DAA, which the parties cannot derogate from, the arbitral tribunal or a party with the approval of the arbitral tribunal can request the national courts' assistance in taking evidence in line with the provisions of the AJA. This can, inter alia, be relevant if a witness is unwilling to give testimony before the tribunal (see **8.3 Powers of Compulsion**). Section 27(2) allows the arbitral tribunal to request the national courts refer the matter to the Court of Justice of the European Union (CJEU) if the ruling from the CJEU is necessary to enable the arbitral tribunal to issue the award.

7.3 Powers and Duties of Arbitrators

Under Section 19 of the DAA, the arbitrators have wide discretion to conduct the proceedings in the way they see fit. According to Section 19(2) of the DAA, it is explicitly stated that the power vested in the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

It follows from Section 18 of the DAA that it is the duty of the arbitrators to ensure equal treatment

of the parties as well as to ensure that each party is given a fair opportunity to present its case. In line with Section 12, arbitrators must also be impartial and independent. Both prospective and acting arbitrators are under a duty to remain impartial and independent of the parties and must disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence.

7.4 Legal Representatives

In arbitral proceedings, there are no statutory provisions outlining particular qualifications or other requirements for legal representatives for arbitration cases. A party can decide not to assume legal counsel at all (although this is not recommended in most cases).

However, there are legal requirements for representatives acting on behalf of their clients before the regular courts in Denmark. As a rule, a legal representative must be a Danish Bar-qualified lawyer (or EU lawyer admitted to practice in Denmark) in order to appear before the national courts.

8. Evidence

8.1 Collection and Submission of Evidence

While to a large extent it is possible for the parties to customise the proceedings in the way they would like, arbitration in Denmark is often conducted in a uniform way. It is the principal rule that the parties themselves are responsible for collecting and submitting the evidence they consider relevant and necessary for the case. If relevant, the parties can also agree on the factual circumstances to be assumed by the arbitral tribunal in considering its award.

In terms of collecting evidence, a party can request disclosure of documents from the other party. If the disclosure order by the tribunal is not complied with, the tribunal can choose to apply adverse inference to the disadvantage of the non-complying party. The courts cannot force disclosure upon a party to the case. However, it is possible to request assistance from the courts to force disclosure upon a third party.

The use of written witness statements in arbitration cases has become widely prevalent, particularly in international arbitration cases, through the influence from the procedures used in international arbitration cases, including the International Bar Association rules. This is, in particular, applicable for cases before the DIA. The parties also commonly submit separate reports from experts. The tribunal can also instigate a process involving a neutral expert not engaged directly by either of the parties, much like the process usually followed by the national courts when obtaining expert appraisal: see, for example, Article 35 of the DIA Rules.

8.2 Rules of Evidence

Section 19(2) of the DAA establishes the arbitral tribunal's discretion when assessing and weighing the evidence presented to it. The arbitral tribunal can, therefore, inter alia, decide which documents or other pieces of evidence are to be included and which are to be excluded as irrelevant. However, this principle can be derogated from by agreement between the parties.

8.3 Powers of Compulsion

Under Danish law, arbitrators are not vested with powers of compulsion to order the production of documents or require the attendance of witnesses.

The provisions found in the AJA stating the duty to give evidence and the powers of compulsion if a witness refuses to testify are not applicable for an arbitral tribunal. A false testimony given by a witness (or a party) under arbitration is also not punishable under Section 158 of the Criminal Code, but instead as lawsuit fraud. If coercive powers are necessary to make a witness testify or if it is found desirable that the testimony is subject to criminal liability, the arbitral tribunal can, under Section 27 of the DAA, request the national courts' assistance in taking evidence. While it is the principal rule that everyone has the duty to give testimony before the national courts, this rule has exceptions. For example, individuals closely related to a party do not have this duty.

Additionally, the arbitral tribunal can order any party or third party to produce certain documents that are (or are believed to be) under its disposal. However, the arbitral tribunal does not have any coercive powers in the event of non-compliance. In these cases, the arbitral tribunal can refer to the national courts and request assistance in securing the evidence. In line with the provisions found in the AJA, the national courts only have coercive powers if the unwilling subject is a third party.

9. Confidentiality

9.1 Extent of Confidentiality

It is the most common view that there are no general rules in Danish law asserting that arbitral proceedings or materials from arbitral proceedings are confidential. Following this view, the parties are not necessarily obliged to keep confidentiality regarding the case. In practice, hearings are mostly not held with free access for the public. The parties are also free to enter into an agreement according to which they undertake a duty of confidentiality. The extent of the confidentiality will then depend on the terms of the parties' agreement.

If the arbitral proceedings are filed with the DIA, under Article 28(4) of the DIA Rules the arbitral tribunal can (if requested by a party) decide that the proceedings be kept confidential. The tribunal can also take measures to protect trade secrets and confidential information.

Proceedings at the Arbitration Board are confidential except for the award, which the Arbitration Board can choose to publish in anonymous form if the parties do not object thereto under Section 43 of the Rules of the Arbitration Board.

10. The Award

10.1 Legal Requirements

Section 31 of the DAA establishes that the award must be in written form and signed by the arbitrators (or by the majority of the arbitrators). The award must be provided with the date and place as well. In addition, the award must state the reasons it is based on, unless the parties have agreed otherwise or the parties have asked for a consent award; for example, in cases where a settlement agreement has been reached.

Article 39 of the DIA Rules outlines similar requirements for the form and content of the award.

The DAA contains no explicit time limits on the delivery of the award. If the arbitration takes place at the DIA, it is a fundamental principle that the arbitral tribunal ensures that the arbitration is conducted within reasonable time and in an efficient and cost-conscious manner (see

Article 28(1) of the DIA Rules). Under Article 39 of the Rules the award must be submitted by the arbitral tribunal as soon as possible after the conclusion of the oral hearings and, if possible, no later than six months from when the case was referred to the tribunal by the secretariat of the DIA.

Under Section 25(2) of the Rules of the Arbitration Board, the arbitral tribunal must deliver the award as early as possible and, in so far as possible, no later than four weeks after the hearing is concluded.

10.2 Types of Remedies

There are no general limitations in Danish law as to the types of remedies that an arbitral tribunal can award. Unless the parties have agreed otherwise, the arbitral tribunal may award any remedy it finds appropriate. However, the legitimacy of remedies contrary to public policy may be questionable.

In order for the award to be enforceable at the national courts, the conclusion of the award must be clear.

10.3 Recovering Interest and Legal Costs

The parties are, under Danish law, entitled to recover interest and legal costs.

Under Section 34 of the DAA, the arbitral tribunal determines its own fees and the settlement of its expenses unless the parties and arbitrators have agreed otherwise. The parties are jointly and severally liable for the costs of the arbitral tribunal (see also Article 42 of the DIA Rules). Under Section 35 of the DAA, the arbitral tribunal can allocate the proportion of costs each party will bear. Within 30 days of receiving notice of the costs, any party may request the national courts to review the determination of the costs of the arbitral tribunal under Section 34(3) of the DAA. The possibility for a party to petition the national courts to review the determination of the costs cannot be derogated from by agreement under Section 2(2) of the DAA.

In most cases, the losing party will, in the award, be required to bear (some of if not all) the legal costs of the winning party. However, the exact amount of legal costs recoverable for the winning party from its counterparty is at the discretion of the arbitral tribunal. There has in recent years been a growing tendency towards awarding legal costs closer to the actual amounts paid by the parties.

When arbitral proceedings are filed with the DIA, Article 40(1) of the DIA Rules stipulates that the award will state the costs of the arbitration and the proportion of costs to be borne by the parties. The arbitrator costs are to be determined on the basis of an appendix to the Rules under Article 41 and Appendix 2 to the DIA Rules. The award will also determine whether a party will compensate the other party for reasonable costs, including legal costs under Article 40(3) of the DIA Rules.

11. Review of an Award

11.1 Grounds for Appeal

It is the principal rule in Denmark that arbitral awards are unappealable. However, the national courts can, pursuant to Section 37 of the DAA, set aside an arbitral award or, in line with Section 39 of the DAA, refuse recognition or enforcement of an award. Contesting the validity of an award or refusing to enforce it can only be done in line with the grounds specified in each section (see **12.2 Enforcement Procedure**). The

specific grounds listed in Sections 37 and 39 largely overlap.

11.2 Excluding/Expanding the Scope of Appeal

The parties can agree that an arbitral award is appealable. This agreement will derogate from the principal rule (see **11.1 Grounds for Appeal**). The parties cannot agree that Section 37 (grounds for setting aside the award) or Section 39 (refusing recognition or enforcement of the award) is not applicable (see Section 2(1) of the DAA).

11.3 Standard of Judicial Review

As mentioned in **11.1 Grounds for Appeal**, the national courts can, under specific circumstances, contest the validity of an arbitral award or refuse recognition or enforcement of the award. The grounds on which an arbitral award according to Sections 37 and 39 of the DAA may be contested or recognition/enforcement refused are very narrow.

12. Enforcement of an Award

12.1 New York Convention

Denmark adopted the New York Convention by ratifying the Convention in 1972. Previously, the Danish implementing act set out a reservation to the applicability of the Convention. However, as of today, Denmark's domestic law fully incorporates the Convention.

12.2 Enforcement Procedure

Enforcement Procedure

The matters of recognition and enforcement of awards are governed by Chapter 9 (Sections 38 and 39) of the DAA, which does not deviate substantively from Articles 35 and 36 of the UNCITRAL Model Law. The parties cannot agree to derogate from the applicability of these rules (see Section 2(1) of the DAA).

Subject to Section 39, an arbitral award is recognised as binding and is enforceable in line with the provisions regarding enforcement of judgments of the AJA irrespective of the country in which it was made. This applies regardless of whether the award is made in a country that has acceded to the New York Convention.

Under Section 39 of the DAA, enforcement of an arbitral award may, at the request of a party, be refused if that party provides sufficient evidence that:

- a party to the arbitration agreement was under some form of incapacity, or the agreement is not valid;
- the party against which 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 its case;
- the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the submission to arbitration;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or with the law of the country where the arbitration took place; or
- the award has not yet become binding on the parties or has been set aside or suspended.

The court can also refuse to enforce an arbitral award if it finds that the subject matter of the dispute is not capable of settlement by arbitration under Danish law, or the recognition or enforce-

ment of the award would be manifestly contrary to the public policy of this country.

Commencing Enforcement Proceedings

Enforcement proceedings can be commenced by filing at the competent enforcement court (in Danish: *Fogedretten*) in accordance with Chapter 46 of the AJA. The competent enforcement court will generally be where the losing party is domiciled or has its usual place of business.

A party applying for enforcement of an arbitral award must supply the court with a duly certified copy of the award and of the arbitration agreement if the agreement is in writing. The documents will, if necessary, be accompanied by a duly certified translation into Danish.

A proceeding for setting aside an arbitration award will most likely not suspend enforcement. However, enforcement may, be suspended if well-supported reasons can be provided, eg, if it is determined that there is a certain probability that the proceeding will lead to the arbitration award being set aside.

12.3 Approach of the Courts

The list of grounds for the courts to refuse enforcement in Section 39 are exhaustive, and are generally construed narrowly by the courts. It is the primary rule that it is irrelevant whether the court responsible for the enforcement agrees with the assessment of the arbitrators.

13. Miscellaneous

13.1 Class Action or Group Arbitration

The DAA does not contain provisions that allow for class action arbitration or group arbitration. Articles 15 and 16 of the DIA Rules allow for consolidating various claims between the same parties under the same arbitration case or joinder of third parties (see **13.4 Consolidation**). Arbitration cases before the Arbitration Board very often have several parties (see **5.7 Jurisdiction Over Third Parties**).

13.2 Ethical Codes

Danish Bar-qualified lawyers acting as legal counsels in arbitration must act in line with the ethical codes generally applicable for lawyers. For example, it follows from Section 12.3 (from September 2022, Section 9) of the Code of Conduct for the Danish Bar and Law Society that a lawyer may not act as an arbitrator if they have previously acted for or advised any parties as their representative in matters connected with the dispute at issue. Similarly, after having acted as an arbitrator, the lawyer may not act for or advise any of the parties as their representative in matters pertaining to the dispute at issue.

13.3 Third-Party Funding

It is still a relatively rare phenomenon in Denmark that equity funds, investment banks or other third parties fund litigation against a share of the possible outcome of the case but the trend is certainly on the rise. There are no general rules or restrictions on third-party funding in arbitration, but there is a duty of disclosure on the funder (see **2.2 Changes to National Law**).

13.4 Consolidation

Whether an arbitral tribunal can consolidate separate arbitral proceedings will depend on the arbitration agreement between the parties. Consolidation can only happen if the arbitration agreement covers all of the parties' claims. The defendant can therefore only file a counterclaim to be consolidated under the same arbitral proceedings if the counterclaim is covered by the same arbitration agreement. Provided the newly made claim is covered by the arbitration agree-

ment, it follows from Section 23(3) of the DAA that the claim can be made during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate having regard to the delay in making it.

If the arbitration is agreed to take place at the DIA, consolidation is regulated by Article 15 of the DIA Rules. Upon the request of a party, the DIA's Chair's Committee can decide that separate cases should be consolidated. If the counterparty does not agree to the consolidation, the chair decides after consulting the parties and confirmed arbitrators in the other proceedings (if any). Under Article 15(3) of the DIA Rules, the Chair's Committee must consider all relevant circumstances, including the mutual connection between the cases and/or the parties, and the progress already made in the pending case, in addition to taking the aforementioned hearings into account.

The courts cannot decide to consolidate separate arbitral proceedings under Section 4 of the DAA.

13.5 Binding of Third Parties

The principal rule of privity of contracts applies in Denmark, meaning that a third party is not bound by an arbitration agreement or an award issued under this agreement when this third party has not signed the agreement or otherwise accepted to be bound by the agreement.

However, in the case of succession (both universal and singular) where the agreement into which the third party is succeeded contains an arbitration clause, this clause will generally be binding upon the third party.

If relevant in a case filed with the national courts, the national courts will interpret the arbitration agreement in order to, inter alia, determine the scope of the agreement. If the national courts find that a foreign third party is subject to or bound by the arbitration agreement to the same extent as elaborated above (see **5. Jurisdiction**), the court will bind the third party to the arbitration agreement.

Under Article 16 of the DIA Rules, a party in an arbitration pending under the Rules may request that a third party join as an additional party in the arbitration and, likewise, a third party may request to join as an additional party in an arbitration pending under the Rules. If the third party and/or a party objects to the request to join the additional party, the tribunal will decide on the objection, after consultation of the third party and the parties under Article 16(3) of the DIA Rules.

Similarly, the DIA Rules also allow for consolidation of arbitration cases pending before the Institute under Article 15 of the DIA Rules.

Trends and Developments

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Bech-Bruun is a market-oriented law firm offering a wide range of specialist advisory services to large sections of the Danish corporate and public sectors as well as global enterprises. Counting more than 500 experienced and highly specialised employees, of which 54 are partners, Bech-Bruun is among the leading full-service law firms in Denmark and one of the largest within the Nordic region. It advises on all aspects of corporate and commercial law providing Danish as well as international clients with tailored, interdisciplinary and value-adding solutions based on in-depth industry knowledge. Its dispute resolution department comprises 37 experts specialising in litigation before the Danish Supreme Court, High Courts, as well as arbitration and administrative complaints boards. The group has in-depth knowledge of alternative dispute resolution, such as mediation and court-based mediation, as well as litigation risk assessments and choice of law and jurisdiction clauses in international contracts.

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Recent Decisions from the Danish High Court

One of the advantages often attributed to choosing arbitration as the dispute resolution mechanism instead of litigation through the national court system is that the award will be final and enforceable. In recent Eastern High Court decisions, this topic has been considered.

Confirming the finality of an arbitral award

In May 2022, in Decision U 2022.3012 H, the Eastern High Court ruled on whether or not an arbitration award should be set aside. The dispute involved two companies and related to whether two non-compete clauses that had been agreed upon in a shareholder agreement and a management shareholder agreement were invalid and inapplicable as they violated the regulation against anti-competition agreements found in national Danish law and EU law.

In its decision award, the court tribunal concluded that the two non-compete clauses were valid and applicable. The court tribunal found that the agreements with the non-compete clauses had been signed by the claimant in the capacity of a professional investor and not in the capacity of an employee. Section 38(2) of the Danish Act on Contracts was therefore not applicable to the agreements.

The losing party to the arbitration case (ie, the claimant) then commenced proceedings before the Danish national courts claiming that the arbitral award was contrary to Danish national competition law as well as EU law and that the award should be set aside under Section 37(2)(ii)(a) and (ii)(b) of the Danish Arbitration Act 2005.

Section 37 of the Danish Arbitration Act states that:

"An arbitral award may be set aside only if: […]

2. the court finds that:

a. the subject-matter of the dispute is not capable of settlement by arbitration, or

b. the award is manifestly contrary to the public policy of this country."

In its decision, the High Court found that based on the provisions of the Danish Arbitration Act related to the arbitrability of disputes and the invalidity of arbitral awards (see Sections 6 and 37 of the Danish Arbitration Act) and based on the preparatory works of this legislation, there was no basis for assuming that disputes on agreements, claimed by one of the parties to be contrary to statutory competition rules, could not be settled by arbitration as happened in this case. In short, the court considered that it was a legal relationship in which the parties had an unrestricted right of disposition, and the dispute could therefore be considered arbitrable. The High Court also noted that this was also in line with the decisions of the Court of Justice of the European Union.

The High Court therefore concluded that there was no basis for setting aside the arbitral award under Section 37(2)(ii)(a) or (ii)(b) of the Danish Arbitration Act.

Overall, the decision is in line with the preparatory works to the Danish Arbitration Act, from which it follows that the national courts cannot carry out a substantive review of an arbitral award. It is also in line with previous case law of the Danish national courts, including the Danish Supreme Court, in undertaking a restrictive practice to set aside arbitral awards.

The court also considered whether questions should be raised with the Court of Justice of the European Union for a preliminary ruling on the

interpretation of EU competition law. The High Court did not find reason to raise any questions with the Court of Justice of the European Union.

Enforcement of an arbitral award under appeal/review

In two recent decisions, the Eastern High Court decided whether or not enforcement of an arbitral award should be stayed when separate proceedings have been commenced against the validity of the award.

The decision in U 2023.334 – where the enforcement proceedings were stayed

In this decision, the High Court ruled on the question of whether an arbitral award from the International Chamber of Commerce (ICC) in Paris was enforceable in Denmark when the arbitral award was being appealed at the Cour d'appel de Paris in Paris.

Company A, who had won against a Danish company in the ICC arbitration in Paris, commenced proceedings before the Danish Enforcement Court for enforcement of the arbitral award. However, the Danish company had appealed the arbitral award to the Cour d'appel de Paris contending that the arbitral award should be set aside.

In the proceedings before the Danish Enforcement Court, the Danish company claimed that enforcement should be stayed pending the outcome of the appeal case before the Cour d'appel de Paris. Company A claimed that the enforcement proceedings should be continued or alternatively that staying the enforcement proceedings was made contingent on the Danish company providing appropriate security up to the amount that it was awarded in the arbitral award.

Firstly, the High Court noted that the arbitral award rendered from the ICC established an obligation for payment and could serve as the basis for enforcement proceedings in Denmark under Section 38 of the Danish Arbitration Act and Section 478 of the Danish Administration of Justice Act. However, the High Court found that the matters raised by the Danish company before the Cour d'appel de Paris were fundamental issues which could potentially lead to the arbitral award being set aside.

Based on an overall assessment, the High Court found that there were sufficient reasons to stay the enforcement of the arbitral award. In this regard, it was noted by the High Court that there was no basis for establishing that the submission to the Cour d'appel de Paris was made on make-believe reasons, including that it had been made to delay enforcement.

However, the High Court did render its decision pursuant to Company A's alternative claim and the Danish company, as a condition for the stay, was ordered to provide security for the full amount that was awarded to Company A in the arbitral award from the ICC.

The decision in U 2022.923 – where the enforcement proceedings were continued

In this decision, before the High Court stayed the enforcement of the arbitral award on the condition that the defendant provided adequate security in U 2023.334, the High Court decided that the enforcement proceedings should be continued.

This case pertained to a dispute between two Danish companies. One of the companies, Company X had commenced legal proceedings before one of the District Courts in Denmark claiming that an arbitral award should be set aside. While this proceeded, Company X claimed that the enforcement proceedings

commenced pursuant to this arbitral award be stayed. The High Court denied the staying of the enforcement proceedings pending a decision on the validity of the arbitral award. In its reasoning, the court referred to the fact that enforcement of an arbitral award can only be refused pursuant to Section 39(2), no 2()(ii)(b) of the Danish Arbitration Act if the Court finds that the enforcement will be manifestly contrary to public policy.

Section 39(2), no 2()(ii)(b) of the Danish Arbitration Act corresponds to the provision in Section 37. The High Court then pointed out that it follows from the preparatory works to the Danish Arbitration Act that these provisions are narrow exceptions to the so-called ban on the national courts reviewing the contents of the tribunal's conclusions and that it is only in exceptional cases where there are extraordinary, serious errors on the part of the tribunal that enforcement of the arbitral award would be manifestly contrary to public policy. The High Court stated that the court's ability to stay the enforcement proceedings must be seen in this context.

Overall, the High Court found that based on the nature and content of Company X's objections against the validity of the arbitral award that it was not proved probable that the arbitral award suffered from such extraordinary, serious errors that enforcement would be manifestly contrary to public policy. The court then confirmed the decision of the Danish Enforcement Court and refused a stay of the enforcement proceedings.

Putting the decisions on enforcement of an arbitral award under appeal/review into perspective

The High Court has therefore recently delivered two decisions on the question of staying enforcement proceedings with different results. However, it is notable that in the decision in U 2023.334 H (where enforcement proceedings were stayed) as opposed to the decision in U 2022.923 H (where enforcement proceedings were continued) that the relevant arbitral award was under review by a non-Danish judicial entity. As part of its reasoning in U 2022.923 H, the High Court referred largely to Danish law, from which it follows that the national courts cannot carry out a substantive review of an arbitral award. In general and under Danish law, the national courts will be reluctant to review whether the arbitral tribunal has applied the rules incorrectly or whether the tribunal has assessed the facts of the case incorrectly. This is also in line with current Danish Supreme Court practice.

In the U 2023.334 H case, the relevant arbitral award was not pending before a Danish legal entity subject to Danish law, meaning that it did not allow for the High Court to consider that its ability to stay the enforcement proceedings should be construed narrowly against the background of the restrictive approach that is applicable when the validity of an arbitral award is reviewed pursuant to Danish law. This is a potential explanation for the different results between the decision in U 2023.334 H and the decision in U 2022.923 H.

It remains the principal rule in Danish law that arbitral awards are final and enforceable, which are often considered as some of the advantages of choosing arbitration instead of the national court system. From the decisions it can also be concluded that Danish courts are more inclined to allow a stay if the arbitral award is foreign (on terms that security is provided).

EGYPT

Law and Practice

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Zulficar & Partners is an international arbitration and corporate law practice based in Cairo, Egypt, prosecuting arbitration cases across the MENA region and beyond, with unique market expertise in international arbitration. The firm is regularly ranked as top-tier in various practice areas, and its partners and lawyers are regularly ranked as leading practitioners, notably in Chambers & Partners. The firm is increasingly instructed to prosecute high-value and highly complex arbitral proceedings spanning the business and investment spectra, and has handled mega-multimillion-dollar disputes and successfully prosecuted complex cases under major institutional rules and in ad hoc proceedings in the MENA region, Africa, Europe and Asia. Attorneys of the firm are highly regarded in the market and have earned the title "precedent setters".

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1. General

1.1 Prevalence of Arbitration

Arbitration is commonly used as a method for resolving commercial disputes arising between private parties in Egypt. Contracting parties tend to insert an arbitration clause in their commercial contracts to guarantee a faster process for the resolution of any potential disputes that may arise. Usually, in most of the contracts, commercial transactions or projects of high value, whether being concluded between domestic parties or with a foreign party, an arbitration clause is automatically included.

The prevalence of arbitration is recognised by Egyptian courts. In this respect the Cairo Court of Appeal held that, internationally, arbitration is a conventional and efficient means for resolving commercial disputes. Thus, the international commercial community constantly seeks to unify the arbitral legal principles, terms, criteria, interpretation and applicability of arbitration-related laws on the international level, in order to promote and ensure confidence and trust between contracting parties, and eventually safeguard their rights to maintain a stable international market. The Court explained that arbitration, being an international legal system, has its own legal principles and standards, its specific criteria and its unified interpretations, which are stable and known to the international market and cannot be denied. National courts are bound to respect the aforementioned unified and well-known principles and standards, as these "most probably" relate to international procedural public policy (Cairo Court of Appeal, (First) Commercial Circuit, Petition No 2 of JY 139, Hearing session dated 9 March 2022).

The Egyptian judiciary generally tends to adopt a pro-arbitration policy with respect to the recognition and enforcement of arbitral awards by limiting the grounds for setting aside an arbitral award to those specifically provided for under Law No 27 of 1994 on Arbitration in Civil and Commercial Matters (the "Egyptian Arbitration Law", or EAL). This has been explained by the Court of Cassation, which has expressly inserted the English term "pro-arbitration policy" in a recent judgment whereby the Court held that by limiting the grounds for setting aside an arbitral award, the Egyptian legislature has adopted a pro-arbitration policy in compliance with

the principle of party autonomy, which grants the parties the freedom to choose to resort to arbitration for the resolution of their disputes, being practically, the dispute resolution mechanism used in settling international commercial disputes (Court of Cassation, Commercial and Economic Circuit, Challenge No 8199 of JY 80, Hearing session dated 22 March 2022).

However, in administrative contracts, arbitration agreements must be approved by the competent minister or whoever assumes their authority with respect to public entities, and delegation in this regard is prohibited (Article 1 of the EAL and State Council, Challenge No 8256 of JY 56, Hearing session dated 5 March 2016).

Moreover, Prime Ministerial Decree No 1062 of 2019 (as amended by Prime Ministerial Decrees No 2592 of 2020 and No 3218 of 2022) establishing the 'High Committee for Arbitration and International Disputes' within the Council of Ministers binds ministries, public entities, state-owned companies and companies in which the state participates in any form not to conclude any contracts with foreign investors or enter into contracts including an arbitration clause, and/or amend these contracts, or take any measure that would lead to the rescission or termination of any of these contracts including an arbitration clause without having them first reviewed by the said Committee. The Committee, which is reconstituted occasionally, is entrusted with reviewing and opining on pending international arbitration in both commercial and investment cases involving the state, its organs and state-controlled entities.

As to investment disputes, arbitration remains a favourable dispute resolution mechanism, as most of Egypt's bilateral investment treaties (BITs) provide for arbitration as the available dispute settlement mechanism. Since the Egyptian Revolution in 2011, a considerable number of investment cases have been brought against Egypt (26 ICSID cases until July 2024). This led to the enactment of a new Investment Law No 72 of 2017 (the "Investment Law") repealing and replacing the previous Law No 8 of 1997 and imposing a rigid mechanism of dispute avoidance and amicable settlement to minimise the financial burden of investment arbitration. The Investment Law reserves the parties' right to resort to litigation under Article 82 and provides under Article 90 that disputes shall be settled in the manner agreed with the investor or pursuant to the provisions of the EAL; it also refers to ad hoc and institutional arbitration as available options.

Whilst remaining a favourable dispute resolution mechanism in commercial matters, resorting to arbitration in investment disputes is subject to the prior review and opinion of the High Committee for Arbitration and International Disputes. The Egyptian state's intention regarding investment disputes is to provide a dispute avoidance and amicable settlement mechanism rather than resorting to arbitration or litigation.

1.2 Key Industries

In 2020-23, the construction sector and the banking and finance sector remain the sectors experiencing significant arbitration activity in Egypt, where disputes arise out of or in connection with ongoing construction projects and works taking place all over Egypt, as well as the financing of large projects. This results from the increased construction activity in Egypt and new infrastructure projects undertaken to build compounds, factories and facilities in the new cities. In this respect, the Cairo Regional Centre for International Commercial Arbitration (CRCICA) statistics for 2023 confirm that construction rep-

resents the most active sector in terms of disputes brought before it, whereby 39.62% of the 2023 caseload (21 cases related to construction disputes out of a total of 53 cases filed during 2023) consisted of construction disputes. Arbitrations also continue to be conducted in other industries, such as energy, telecommunications, transportation, tourism, media and real estate development.

1.3 Arbitration Institutions

The most used and leading arbitral institution in Egypt is the CRCICA, which is an independent non-profit international organisation established in 1979 under the auspices of the Asian African Legal Consultative Organisation. The CRCICA administers domestic and international arbitration disputes and also offers alternative dispute resolution mechanisms, such as mediation, conciliation and mini-trials. The CRCICA also has its own set of arbitration rules (2024) amending the 2011 arbitration rules and entering into force as of 15 January 2024, mediation rules (2013) and dispute board rules (2021) in the Arabic, English and French languages, except for the mediation rules, which are available only in the Arabic and English languages. Furthermore, the CRCICA often organises conferences and workshops led by renowned international arbitration practitioners from Egypt and abroad.

There is also another specialised arbitral institution, established in 2019 within the Financial Regulatory Authority in Egypt, named the Egyptian Center for Arbitration and Settlement of Non-Banking Financial Disputes (ECAS). In 2019, Presidential Decree No 335 of 2019 provided for the establishment of the ECAS as an independent body established within the Financial Regulatory Authority. On 10 December 2020, the statutes of the ECAS as well as its arbitration and mediation rules were issued by virtue of Prime Ministerial Decree No 2597 of 2020.

1.4 National Courts

There are no specific courts per se designated to hear disputes relating to arbitration. However, there are specialised circuits for hearing arbitration-related matters within the competent national courts, where judges in said circuits are experienced in arbitration-related matters. In this regard, Article 9 of the EAL provides that the competent court is that having original jurisdiction over the dispute, and in relation to international arbitration, whether conducted in Egypt or abroad, the Cairo Court of Appeal is the competent court, unless the parties agree on another appellate court.

2. Governing Legislation

2.1 Governing Law

Arbitration in Egypt is governed by the EAL, which replaced the provisions pertaining to arbitration that were previously included in the Egyptian Code of Civil and Commercial Procedures (CCCP). The EAL is based on the 1985 UNCITRAL Model Law but diverges therefrom on the following points:

- The EAL applies to both domestic and international arbitrations (Article 1 of the EAL).
- The EAL has possible extraterritorial application to arbitral proceedings seated abroad, subject to the parties' agreement (Article 1 of the EAL).
- The arbitration agreement in an administrative contract must be approved by the competent minister or whoever assumes their authority with respect to public entities, and delegation in this regard is prohibited (Article 1 of the EAL).

- The EAL introduces several criteria for establishing the international nature of an arbitration including, amongst others, if the arbitration is institutional, if it involves parties whose principal places of business are in different states or, alternatively, if the place of the arbitration determined by the arbitration agreement, the place of performance of the obligations or the place with the closest connection to the dispute is abroad (Article 3 of the EAL).
- The EAL requires in case of incorporation by reference that the reference to the arbitration agreement is explicit in order for it to form an integral part of the main contract (Article 10 of the EAL).
- The EAL does not expressly include the possibility to enter into an arbitration agreement by electronic means, but it does not exclude it either. Therefore, the conclusion of arbitration agreements by electronic means is not prohibited as long as it fulfils the writing requirement for validity of the arbitration agreement. In this respect, the EAL provides that an arbitration agreement is in writing if it is contained in a document signed by the parties or contained in an exchange of letters, telegrams or other means of communication. The arbitration agreement must be in writing under penalty of nullity. Accordingly, the writing requirement under the EAL is stricter than the one under the Model Law (Article 12 of the EAL).
- The EAL has excluded the "referral exception" provided for under Article 8 of the Model Law, whereby a state court may decide over jurisdiction if it finds that the arbitration agreement is null and void, inoperative or incapable of being performed (Article 13 of the EAL). However, in practice, some Egyptian courts have considered the validity and operability of the arbitration agreement before an arbitral tribunal rendered its award.
- The EAL requires an odd number of arbitrators, under penalty of nullity of the arbitral award (Article 15 of the EAL).
- The threshold used by the EAL for the challenge of arbitrators is relatively higher than its counterpart (Article 12 of the Model Law), such that an arbitrator may be challenged only if there exist serious doubts as to their impartiality or independence (Article 18 of the EAL).
- A preliminary arbitral award on jurisdiction cannot be challenged before the competent court prior to the rendering of the final award deciding on the entire dispute (Article 22 of the EAL).
- The arbitral tribunal does not have default power to order interim relief; rather, the parties must agree to confer such power to the tribunal (Article 24 of the EAL). Such power is granted to the tribunal when the parties agree to the application of institutional arbitration rules that provide for the tribunal's power to order interim relief.
- The default language for conducting the arbitration is Arabic unless the parties have agreed otherwise (Article 29 of the EAL).
- The arbitral tribunal may apply the law having the closest connection to the dispute in case of absence of agreement between the parties on the applicable law (Article 39 of the EAL).
- The EAL adds a ground for annulment based on the non-application by the arbitral tribunal of the lex causae chosen by the parties (Article 53 of the EAL).
- The EAL introduces a further condition for purposes of exequatur that is not listed in the Model Law, namely that the award does not contradict a prior judgment rendered by the Egyptian courts on the merits of the dispute (Article 58 of the EAL).

2.2 Changes to National Law

There are ongoing discussions for possible amendments to the EAL. On 22 March 2022, the Deputy Minister of Justice for Arbitration and International Disputes issued Decree No 8 of 2022 establishing a committee in charge of discussing possible amendments to the EAL. The committee is headed by the Deputy Minister of Justice for Arbitration and International Disputes and comprises the members of the ministry's arbitration and international disputes department as well as other arbitration practitioners, including academics and lawyers. The committee is in charge of preparing a proposal for the amendment of the EAL to be submitted to the Minister of Justice for his review and consideration.

3. The Arbitration Agreement

3.1 Enforceability

The legal requirements for an arbitration agreement to be enforceable under the EAL consist of the following:

- The parties, whether physical or juridical persons, must dispose of all their rights and have the capacity to enter into the arbitration agreement (Article 11 of the EAL).
- The subject matter of the arbitration must be arbitrable, ie, can be subject to compromise (Article 11 of the EAL).
- The *compromis* (arbitration agreement concluded after the dispute has arisen) must indicate the subject of the dispute, or, in case of a *clause compromissoire* (prior agreement to arbitrate), the subject of the dispute must be specified in the request for arbitration. Also, in case of incorporation by reference, the arbitration agreement must be explicit in order for the arbitration agreement to form an integral part of the main contract (Article 10 of the EAL).
- The arbitration agreement must be in writing under penalty of nullity. The writing requirement is fulfilled when the arbitration agreement is contained in a document signed by both parties or contained in an exchange of letters, telegrams or other means of written communication (Article 12 of the EAL).
- The arbitration agreement included in an administrative contract must be approved by the competent minister or whoever assumes their authority with respect to public entities, under penalty of nullity, and delegation in this regard is prohibited (Article 1 of the EAL and State Council, Challenge No 8256 of JY 56, Hearing session dated 5 March 2016). Also, see **1.1 Prevalence of Arbitration**.

3.2 Arbitrability

The general approach used in Egypt to determine the arbitrability of a dispute is whether the subject matter of the dispute is capable of compromise. Article 11 of the EAL expressly states that matters not capable of compromise are inarbitrable, and these mainly include criminal matters, personal status or family relations, and/or rights in rem over immovables, such as registration of real estate mortgages. Furthermore, Article 2 of the EAL provides that the right subject to arbitration must be of an economic nature, whether it is contractual or non-contractual.

3.3 National Courts' Approach

The approach adopted by Egyptian courts with respect to determining the law governing the arbitration agreement consists of applying the law of the seat as chosen by the parties, provided that the provisions of said law are not contradictory to Egyptian public policy rules (Court of Cassation, Challenge No 453 of JY 42, Hearing session dated 9 February 1981; and Chal-

lenge No 1259 of JY 49, Hearing session dated 13 June 1983).

With respect to enforcement of arbitration agreements by Egyptian courts, please see **3.1 Enforceability**. Arbitration agreements fulfilling the above-referenced legal requirements are usually enforced by Egyptian courts, when the matter is brought by a party before the competent court.

In this respect, the Court of Cassation held that the arbitration agreement is a contract with all the conditions and pillars of contracts at large, which must be respected by the parties to that contract, such that in its presence each party has an obligation to refrain from filing an action before the judiciary on any dispute subject to the contract, including the arbitration agreement, and the court before which the action is filed shall declare the case inadmissible (Court of Cassation, Challenge No 3449 of JY 78, Hearing session dated 11 February 2020).

Also see **5.2 Challenges to Jurisdiction**.

3.4 Validity

The EAL recognises the rule of separability of the arbitration clause from the contract in which it is contained as per Article 23. The EAL treats the arbitration clause as an independent agreement separate from the other provisions of the contract, such that it is not affected by the invalidity, termination or rescission of the contract, provided that the arbitration clause itself is valid.

4. The Arbitral Tribunal

4.1 Limits on Selection

Generally, the parties are free to select the arbitrators of their choice to decide their dispute. The EAL does not impose limits as to the parties' autonomy in the selection of arbitrators in relation to their gender, nationality, education, ethnicity or religious belief, other than attaining the age of majority and disposing of all of their civil rights (Article 16 of the EAL). With respect to the appointment of judges to sit as arbitrators, judges are required to obtain the permission of the Supreme Judicial Council. The absence of obtaining such authorisation does not affect the validity of the arbitral award (Court of Cassation, Commercial Circuit, Challenge No 9968 of JY 81, Hearing session dated 9 January 2018).

4.2 Default Procedures

Generally, in institutional arbitration, the procedural rules of the institution provide for the method of appointment of arbitrators. However, in ad hoc arbitration, and absent the parties' choice of the method of appointment of arbitrators, the EAL provides for a default procedure in its Article 17, differentiating between the appointment of a sole arbitrator and a panel of arbitrators. In the event of appointment of a sole arbitrator, the competent court undertakes the appointment of the arbitrator upon the request of either party. However, if the arbitral tribunal consists of three arbitrators, each party shall appoint an arbitrator, then both arbitrators shall appoint the chairperson. The competent court may intervene, upon the request of a party, to appoint any arbitrator in case of failure of their appointment by a party or failure of the appointment of the chairperson by the co-arbitrators within 30 days from the request to appoint the arbitrator. The same procedure applies to arbitral tribunals composed of more than three arbitrators.

Moreover, the number of arbitrators must be an odd number under penalty of nullity of the arbitration (Article 15 of the EAL).

The EAL does not address issues pertaining to multi-party arbitrations; hence, there are no provisions specifying a default procedure for the appointment of arbitrators applicable to multi-party arbitrations.

4.3 Court Intervention

Egyptian courts can intervene in the selection of arbitrators only upon a party's request to do so, as explained in **4.2 Default Procedures**.

Furthermore, when appointing an arbitrator, the competent court shall observe the conditions required by the law (see **4.1 Limits on Selection**) and those agreed upon by the parties. The court's decision is final and is not subject to an appeal (Article 17 of the EAL).

However, the Court of Cassation held that affirmative appointing decisions are not subject to appeal but that refusal appointing decisions are subject to appeal (Court of Cassation, Challenge No 5211 of JY 78, Hearing session dated 18 February 2015). Furthermore, the Court of Cassation held that appeal is also admissible in cases of breach of the law, breach of the parties' agreement, or breach of the rules of attribution of jurisdiction by the court decision (Court of Cassation, Challenge No 12459 of JY 85, Hearing session dated 10 June 2016).

4.4 Challenge and Removal of Arbitrators

The EAL contains particular provisions governing the challenge or removal of arbitrators. In this respect, an arbitrator may only be challenged if there exist circumstances that give rise to serious doubts as to their impartiality or independence (Article 18 of the EAL).

In this regard, in ad hoc arbitration, Article 19 of the EAL provides for the procedure of challenging arbitrators. The challenge request must be submitted to the arbitral tribunal in writing incorporating the reasons for such challenge within 15 days from the date of knowledge of the circumstances giving rise to serious doubts as to the arbitrator's impartiality or independence, and if the arbitrator does not withdraw from their office within 15 days, the challenge request shall be forwarded to the competent court, which decides on the matter and renders a final decision that is subject to no appeal. An arbitrator can only be challenged once by a party in the same proceedings. The challenge request does not suspend the arbitral proceedings, but if the challenge request is successful, it results in the annulment of the prior arbitral proceedings conducted by the challenged arbitrator, including the arbitral award.

Furthermore, Article 20 of the EAL enables the competent court, upon the request of a party, to end the mandate of an arbitrator who fails to perform their mission or duties or who interrupts the performance thereof causing undue delay in the arbitral proceedings. In this respect, the Cairo Court of Appeal ended a chairman's mandate for his inability to manage the procedural hearing and for suspending the proceedings in unwarranted circumstances (Cairo Court of Appeal, 50th Commercial Circuit, Challenge No 3 of JY 132, Hearing session dated 30 January 2019).

4.5 Arbitrator Requirements

Under Article 16 of the EAL, an arbitrator shall accept their mission in writing, and shall disclose any circumstances that are likely to cast doubts as to their independence or impartiality at the time of accepting their mission. In the same vein, Article 12 of the CRCICA Arbitration Rules 2024 binds an arbitrator to disclose in writing at the time of accepting their mission any circumstances likely to give rise to justifiable doubts as to their independence or impartiality from the time

of their appointment and throughout the proceedings. Arbitrators shall also avoid ex parte communications with any party.

Egyptian courts' judgments have set the definitions of the duties of independence and impartiality of arbitrators. In this respect, the Cairo Court of Appeal held in pertinent part: "The independence of the arbitrator is the absence of his connection to or dependency on the parties to the dispute, the state or the third party, and the absence of any financial or psychological relation that is contradictory to his independence, whereas such [circumstances] constitute a definite danger resulting in the inclination to one of the parties of the arbitration" (Cairo Court of Appeal, 91 Commercial Circuit, Appeal No 1 of JY 120, Hearing session dated 29 April 2003).

"*Impartialité* is any psychological or mental inclination of the arbitrator towards or against any of the parties to the dispute, a third party, or the state, which is likely to result in the arbitrator's inability to rule without inclination towards or against any of the parties mentioned above" (Cairo Court of Appeal, 91 Commercial Circuit, Appeal No 78 of JY 120, Hearing session dated 30 March 2004).

These definitions have been upheld in many other judgments such as the judgment of the Cairo Court of Appeal in Challenge No 42 of JY 136, Hearing session dated 8 March 2021, the judgments of the Court of Cassation in Challenge No 1392 of JY 81, Hearing session dated 22 February 2022 and Challenges Nos 7913 and 13996 of JY 91, Hearing session dated 9 May 2023. In the Court of Cassation judgments, the Court of Cassation expressly referred to the IBA Guidelines on Conflicts of Interest in International Arbitration (2014). In this respect, it is worth mentioning that the IBA Guidelines on Conflicts of Interest in International Arbitration (2014) provide for three non-exhaustive lists of specific situations indicating whether the arbitrator has a duty of disclosure, depending on the gravity and sensibility of the situation that would require or not such arbitrator's disclosure (ie, 'Red', 'Orange' and 'Green' Lists) to avoid unnecessary challenge, withdrawal or removal of an arbitrator. The Orange List sets out non-exhaustive examples of specific situations that may give rise to justifiable doubts as to an arbitrator's impartiality or independence, in the eyes of the parties, where the arbitrator has a duty to disclose but can nevertheless act unless the parties make a timely objection. In the 2022 judgment, the Court of Cassation quoted clause 3.3.5 of the Orange List, which reads: "A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute." The Court of Cassation explained that the duty of disclosure of an arbitrator is a binding legal obligation that is necessary to guarantee integrity and impartiality in the conduct of the arbitration process. In this regard, the arbitrator's failure to disclose does not in itself lead to setting aside the arbitral award; however, the Court shall assess on a case-by-case basis whether the undisclosed circumstance in itself gives reason to infer a real danger of bias and therefore to set aside the award. In the circumstances of this case, the chairman of the arbitral tribunal had not disclosed that one of the partners of the law firm representing the claimant in the arbitral proceedings was a family relative; however, this partner was not involved in any counsel work related to the arbitration case (Court of Cassation, Commercial and Economic Circuit, Challenge No 13892 of JY 81, Hearing session dated 22 February 2022). In the 2023 judgment, the Court of Cassation referred to Clauses 4.3.1 and 4.3.4 of the Green list, which read consecutively: "The

arbitrator has a relationship with another arbitrator, or with the counsel for one of the parties, through membership in the same professional association, or social or charitable organisation, or through a social media network," and: "The arbitrator was a speaker, moderator or organiser in one or more conferences, or participated in seminars or working parties of a professional, social or charitable organisation, with another arbitrator or counsel to the parties." In the circumstances of this case, the chairman and one appointed arbitrator failed to disclose that they were both members of the advisory committee at the CRCICA. Also, the legal counsel of one of the parties was a member of the same committee. The Court of Cassation held that the membership of both arbitrators and the legal counsel is publicly available information in their respective biographies accessible on the CRCICA's official website. Furthermore, the Court held that the chairman disclosed his participation in an event where the legal counsel of one of the parties was a speaker and the parties did not raise any concerns during the arbitral proceedings, which constitutes a waiver of their right to object. In this respect, the Court upheld its findings by relying on the IBA Guidelines on Conflicts of Interest in International Arbitration (2014) to confirm that the above-mentioned circumstances do not raise doubts as to the impartiality and independence of the arbitrators (Court of Cassation, Commercial and Economic Circuit, Challenges Nos 7913 and 13996 of JY 91, Hearing session dated 9 May 2023).

Interestingly, in another, prior decision, the Cairo Court of Appeal set aside an arbitral award for breach of the duty of disclosure resulting from the non-disclosure of an existing relationship between a co-arbitrator and the chairman, which created doubts as to their impartiality and independence (Cairo Court of Appeal, 18th Commercial Circuit, Challenge No 92 of JY 135, Hearing session dated 12 January 2019).

5. Jurisdiction

5.1 Matters Excluded From Arbitration

Matters that are not capable of compromise are excluded from arbitration under the EAL. Please see **3.2 Arbitrability**.

5.2 Challenges to Jurisdiction

Article 22 of the EAL acknowledges the principle of competence-competence granting arbitral tribunals the authority to decide any jurisdiction-related claims, including the existence, validity and scope of the arbitration agreement.

However, in practice, there are instances where Egyptian courts, in relation to administrative contracts and beyond, have decided on the existence and validity of an arbitration agreement prior to the commencement of arbitral proceedings or while arbitral proceedings were still pending and irrespective of the arbitral tribunal's jurisdiction.

5.3 Circumstances for Court Intervention

Egyptian courts can only intervene to address issues of jurisdiction of an arbitral tribunal when requested by a party to do so and provided that the other party does not object to such intervention. In this respect, according to Article 13 of the EAL, Egyptian courts are under an obligation to declare inadmissible any claim pertaining to a dispute subject to an arbitration agreement only when the defendant raises an objection at the commencement of the proceedings. The court cannot declare inadmissibility ex officio. In the absence of an objection by the defendant before the competent court, parallel proceedings will be conducted before the arbitral tribunal and the

competent court to decide on the matter, and if the two decisions are contradictory, the winning party may elevate the conflict to the Supreme Constitutional Court.

Furthermore, Egyptian courts may also address issues of jurisdiction in the event of an action for nullity of an arbitral award based on the ground of non-existence of the arbitration agreement or the lack of jurisdiction of the arbitral tribunal as to all or part of the disputed matters. Please see **11.1 Grounds for Appeal**.

Decisions on jurisdiction rendered by arbitral tribunals cannot be challenged before the competent court prior to the rendering of the final award on the merits within the course of a nullity action (Article 22 of the EAL).

5.4 Timing of Challenge

As stated in **5.3 Circumstances for Court Intervention**, the parties have the right to go to court to challenge the jurisdiction of the arbitral tribunal only after the rendering of the final award within 90 days of the date of notification of the award to the party against which it was made, ie, the time limit for initiating a nullity action.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

With regard to questions of admissibility and jurisdiction, Egyptian courts conduct a de novo review. In this respect, courts normally assess the parties' arguments on questions of law and questions of fact to determine the existence, validity and scope of the arbitration agreement in order to decide on a party's objection to the tribunal's jurisdiction.

5.6 Breach of Arbitration Agreement

If a party commences court proceedings in breach of an arbitration agreement, national courts shall hold this action inadmissible only if the defendant raises an objection pertaining to the existence of an arbitration agreement at the commencement of those proceedings and prior to submitting any defence on the substance. Accordingly, the court is not under an obligation to reject the case ex officio, such that in the absence of an objection raised by the defendant, the court will continue examining the action brought before it in breach of the arbitration agreement, and this shall not prevent parallel arbitral proceedings from being commenced or continued (Article 13 of the EAL).

5.7 Jurisdiction Over Third Parties

The EAL does not expressly regulate the extension of the arbitration agreement to third parties or non-signatories of the contract containing the arbitration agreement. However, the Egyptian courts have addressed the issue of extension of the arbitration agreement under several doctrines; they are becoming more flexible in considering such extension and usually defer to the arbitral tribunal's findings in this regard.

In this respect, in application of the 'group of companies' doctrine, the Court of Cassation ruled that the extension of the arbitration agreement is subject to the non-signatory company's active contribution in the performance of the contract causing a confusion between the intents of the two relevant companies, ie, the signatory and the non-signatory company forming part of the group (Court of Cassation, Challenge No 4729 of JY 72, Hearing session dated 22 June 2004).

Furthermore, the Court of Cassation held that an arbitration agreement cannot exist without the consent of the parties; however, it may extend to third parties and to other contracts connected to the principal contract on the basis of several

doctrines which include the following: group of companies, group of contracts, universal succession, merger and assignment, if their conditions are met (Court of Cassation, Challenges Nos 2698, 3100 and 3299 of JY 86, Hearing session dated 13 March 2018).

The doctrines of extension of the arbitration agreement apply to both domestic and foreign third parties.

6. Preliminary and Interim Relief

6.1 Types of Relief

An arbitral tribunal may award interim relief or conservatory measures only if the parties to arbitration have conferred such power to the tribunal (Article 24 of the EAL). Such power could be conferred to an arbitral tribunal by the choice of the parties to apply institutional arbitration rules providing for such default power.

Furthermore, Article 42 of the EAL provides that arbitral tribunals may issue interim or partial awards. In this respect, interim relief rendered in the form of an award is subject to the ordinary procedures for enforcement and recognition of arbitral awards. Nevertheless, interim awards do not have a res judicata effect.

As to the types of relief that can be awarded, the EAL does not provide for a specific list. Therefore, it is generally accepted that arbitrators have the discretion to order any type of interim relief or conservatory measure provided that such relief or measure is warranted and available under the applicable law.

6.2 Role of Courts

Article 14 of the EAL expressly allows courts to order interim relief or conservatory measures, upon the request of a party, before or during the arbitration proceedings.

Furthermore, Egyptian courts may grant interim relief to a foreign-seated arbitration, if the parties agreed to apply the provisions of the EAL to their arbitration.

The types of preliminary or interim relief that may be granted by Egyptian courts are subject to the provisions of the CCCP. The general requirements for issuing an interim order are as follows:

- the possible existence of a right;
- the matter is urgent; and
- the purpose of the interim order is to avoid a prejudice without affecting the final ruling.

The EAL does not address the use of emergency arbitrators.

6.3 Security for Costs

The EAL allows arbitral tribunals to request adequate security to cover the costs of ordered interim relief (Article 24 of the EAL). In the same vein, courts are free to order security for costs to ensure the implementation of interim orders or conservatory measures.

7. Procedure

7.1 Governing Rules

Article 25 of the EAL provides that the parties are free to determine the rules governing the procedure of their arbitration, including submitting the arbitral proceedings to the institutional arbitration rules of any arbitral institution, in Egypt or abroad. In the absence of an agreement by the parties, the arbitral tribunal may, subject to the mandatory provisions of the EAL, adopt the

rules it considers appropriate to govern the procedure.

7.2 Procedural Steps

The EAL does not provide for any particular mandatory procedural steps as long as public policy is preserved. The parties shall be treated with equality and shall be given an equal and full opportunity to present their case (Article 26 of the EAL).

The EAL provides for procedural steps which generally pertain to the below-mentioned steps.

- Arbitral proceedings commence on the day the respondent receives the request for arbitration, unless otherwise agreed by the parties (Article 27 of the EAL).
- The parties are invited to exchange written submissions with supporting evidence, ie, a statement of claim and a statement of defence (and counterclaim if desired), within the period of time agreed by the parties (Article 30 of the EAL). Either party may amend or supplement its submission or supporting evidence (Article 32 of the EAL).
- The arbitral tribunal may hold a hearing or decide on a document-only basis, unless otherwise agreed between the parties. Also, the parties must be notified of the hearing dates sufficiently in advance and the minutes of the hearing shall be recorded in a procès-verbal. The hearing of witnesses and experts shall be conducted without taking an oath (Article 33 of the EAL).
- Unless otherwise agreed by the parties, if the claimant fails to submit its written submission without showing sufficient cause, the tribunal shall terminate the proceedings, but if the respondent fails to submit its statement of defence, the tribunal shall continue the proceedings without treating such failure as an admission by the respondent of the claimant's allegations (Article 34 of the EAL).
- If a party fails to appear before the tribunal or fails to submit a document required therefrom, the tribunal may continue the proceedings and decide upon the elements of evidence before it (Article 35 of the EAL).
- The arbitral tribunal may appoint one or more experts, who may be heard and examined by the tribunal and the parties (Article 36 of the EAL).
- The arbitral tribunal shall issue an award terminating the dispute within the period agreed by the parties, or in the absence of an agreement between the parties, within 12 months from the beginning of the proceedings, which may be extended for six months, unless otherwise agreed by the parties (Article 45 of the EAL).

7.3 Powers and Duties of Arbitrators

Arbitrators shall exercise their mission in compliance with the duties of impartiality and independence (see **4.5 Arbitrator Requirements**).

As to the powers attributed to the arbitral tribunal, these mainly include:

- ordering interim relief and conservatory measures, if the parties conferred such power to the tribunal;
- issuing interim and partial awards;
- deciding on its own competence;
- determining the procedural rules applicable to the dispute in the absence of an agreement between the parties;
- appointing experts;
- assessing, admitting and weighing evidence;
- acting as *amiable compositeur* by agreement between the parties; and
- determining the place of arbitration in the absence of an agreement between the par-

ties, and deciding to convene meetings/hearings at any place it deems appropriate.

However, an arbitral tribunal cannot make a determination with respect to a challenge for forgery of a submitted document; this falls within the competence of national courts, which shall conduct criminal proceedings (Article 46 of the EAL).

Also see **10.2 Types of Remedies**.

7.4 Legal Representatives

Article 3 of the Egyptian Advocacy Law No 17 of 1983 expressly stipulates that advocacy work is exclusively reserved to lawyers admitted to the Egyptian Bar Association, such that non-lawyers cannot undertake any advocacy-related work, which includes representing parties before arbitral tribunals.

Nevertheless, in a decision issued by the Egyptian Court of Cassation on 27 October 2020, the Court held that there are no limitations or restrictions on party representation in arbitrations seated in Egypt. The Court recognised that the parties to an arbitration, be it domestic or international, may be represented by any person of their choice, irrespective of their nationality or qualification (Court of Cassation, Economic and Commercial Circuit, Challenge No 18309 of JY 89, Hearing session dated 27 October 2020).

8. Evidence

8.1 Collection and Submission of Evidence

The EAL does not specifically address the manner of collection and submission of evidence. The parties normally adduce evidence in support of their written submissions. The applicable rules are those provided under the Egyptian Evidence Law No 25 of 1968.

Generally, arbitral tribunals enjoy the power to admit, assess and weigh evidence on record. For example, an arbitral tribunal may undertake any evidentiary procedure it deems appropriate, or reverse a procedure it had previously ordered, and accept or deny a party's request for an order on evidentiary procedures without prejudice to the party's rights of defence. The types of evidence that may be admitted before arbitral tribunals in Egypt are:

- documentary evidence;
- witness statements;
- expert reports; and
- site inspections as ordered by an arbitral tribunal.

Fact witnesses and technical experts may be examined and cross-examined during hearings. However, witness testimony cannot be taken under oath.

It is common for arbitral tribunals to apply the IBA Rules on the Taking of Evidence in International Arbitration, subject to the parties' agreement and in the manner and to the extent agreed upon by the parties.

With respect to document disclosure, the common law practice of discovery is neither recognised nor applicable in Egypt. Article 20 of the Egyptian Evidence Law No 25 of 1968 (the "Evidence Law") provides for limited requests for production of documents at the possession of a party in exceptional cases, namely:

- if the law permits the request for submitting said document;

- if the document in possession of the party is a joint document providing for reciprocal obligations and rights; and/or
- if the opposing party relies on said document at any stage of the procedures.

Furthermore, Article 21 of the Evidence Law provides for the following requirements to be included in a request for document production:

- the specificity and characteristics of the document(s) requested;
- its content to the extent possible;
- its materiality and relevance to the disputed fact;
- the circumstances and indications that prove that such document is in the possession of the opposing party; and
- the basis for ordering the production thereof.

8.2 Rules of Evidence

The rules of evidence that apply to arbitral proceedings seated in Egypt are the same rules as those that apply to domestic matters, ie, the provisions of the Egyptian Evidence Law No 25 of 1968 (see **8.1 Collection and Submission of Evidence**).

8.3 Powers of Compulsion

Arbitral tribunals do not possess the coercive and executive powers enjoyed by courts and may only draw negative inferences as a result of a party's non-compliance with the tribunal's orders, especially if no reasonable justification is provided.

Arbitral tribunals may seek the competent court's assistance with respect to:

- imposing a fine on witnesses who refrain from appearing before arbitral tribunals; and
- ordering a rogatory commission (Article 37 of the EAL).

9. Confidentiality

9.1 Extent of Confidentiality

Arbitral proceedings are generally confidential. Article 44 of the EAL provides that arbitral awards cannot be published, in whole or in part, unless agreed by the parties. There is an implied duty of confidentiality with respect to pleadings and documents pertaining to arbitration. However, the confidentiality of the award may be breached by initiating arbitration-related court proceedings, ie, requests for enforcement or nullity actions, which like other court proceedings would form part of the public domain.

10. The Award

10.1 Legal Requirements

Article 43 of the EAL provides for the legal requirements for validity of arbitral awards, which include the following:

- The award must be in writing and signed by the majority of arbitrators, indicating the reasons of the minority of arbitrators for refusing to sign, if it is the case.
- The award must include the reasoning leading to the decision, unless otherwise agreed by the parties or if it is not required by the law applicable to the proceedings.
- The award must include the names and addresses of the parties, the names, addresses, nationalities and titles of the arbitrators, a copy of the arbitration agreement, a summary of the parties' requests, submissions and documents, the dispositive (ie, the award's operative part), the date and place of issu-

ance of the award, as well as the reasons for a decision whenever their inclusion is required.

As to the time limits for issuing an award, Article 45 of the EAL provides that in the absence of an agreement between the parties on a specific period, the award must be issued within 12 months from the beginning of the proceedings, and such period may be extended for six months, unless otherwise agreed by the parties. The sanction of a delay entitles any of the parties to request from the competent court an additional extension or an order to terminate the arbitration proceedings.

10.2 Types of Remedies

There are no specific limits on the types of remedies awarded by arbitral tribunals other than issues relating to public policy. Arbitrators generally have a broad authority to order any declaratory relief, specific performance or monetary compensation, and to award interest and costs. However, arbitral tribunals are generally not entitled to award punitive damages.

10.3 Recovering Interest and Legal Costs

Parties are generally entitled to recover interest and legal costs; however, there are no specific provisions addressing the same under the EAL.

With respect to interest, Egyptian courts strictly adhere to the cap of 7% per annum imposed by the Court of Cassation, which is considered a rule of public policy for the purpose of enforcement and annulment of arbitral awards, even if the parties had agreed on a higher rate (in such case, the interest rate will be reduced to the 7% cap) (Court of Cassation, Challenge No 3778 of JY 64, Hearing session dated 17 February 2004).

However, there exists an exception with regard to banking transactions that are exempted from the 7% cap and public policy should not be contravened. In this regard, interest may be payable at the rate set by the Central Bank of Egypt (CBE) which in fact may exceed 7% at the CBE's annual decision. This rate would apply in relation to (i) commercial loans; and (ii) amounts/expenses pertinent to the trader's trade (Article 50 of the Egyptian Commercial Code). Furthermore, compound interest is perceived contrary to public policy, unless a clear and unequivocal practice of compounding interest exists in the trade pertinent to the transaction.

As to the recovery of incurred legal costs, arbitral tribunals enjoy a broad discretion in allocating costs. The costs sharing approach is not uncommon; however, arbitral tribunals tend to apply international norms of costs allocation, and the general practice is that costs follow the event.

11. Review of an Award

11.1 Grounds for Appeal

Arbitral awards are not subject to appeal before Egyptian courts (Article 52 of the EAL); they can only be challenged by initiating an action for nullity or for the setting aside of the award within 90 days from the date of notification of the award to the party against which it was rendered (Article 54 of the EAL).

Article 53 of the EAL expressly provides an exhaustive list of grounds for setting aside an arbitral award, namely:

- if there is no arbitration agreement, or if it was void or voidable, or if its duration had lapsed;
- if either party to the arbitration agreement was at the time of the conclusion of the arbi-

tration agreement fully or partially incapacitated, in accordance with the law governing said person's legal capacity;
- if either party to the arbitration was unable to present its case as a result of not being given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or for any other reason beyond its control;
- if the arbitral award excluded the application of the substantive law chosen by the parties to govern the merits of the dispute;
- if the composition of the arbitral tribunal or the appointment of the arbitrators was in conflict with the EAL or the parties' agreement;
- if the arbitral award ruled on matters not falling within the scope of the arbitration agreement or exceeding the limits of that agreement – however, if the matters falling within the scope of the arbitration can be separated from the parts of the award which relate to matters not included within the scope of the arbitration, the nullity affects exclusively the latter parts only;
- if the arbitral award itself or the arbitration procedures affecting the award contain a legal violation that causes nullity; or
- if the award contains issues violating the public order in Egypt.

In this respect, a nullity action is a contradictory procedure subject to the same rules for bringing a legal action before a court.

11.2 Excluding/Expanding the Scope of Appeal

The parties cannot agree to exclude or expand the scope of challenge of an arbitral award as Article 53 of the EAL strictly provides for an exhaustive list as to the grounds of annulment of an arbitral award. However, the parties may waive their right to recourse to annulment, only after and not prior to the issuance of the arbitral award (Article 54 of the EAL).

Moreover, it shall be noted that pleas pertaining to the violation of the arbitration agreement or to a non-mandatory provision of the EAL must be raised earlier during the arbitral proceedings (Article 8 of the EAL) in order to be admissible as a ground for annulment at the time of bringing the nullity action.

11.3 Standard of Judicial Review

Courts' judicial review of nullity actions consists of a control of the legality of the award. A nullity action is not an appeal of the award; hence, Egyptian courts are restricted from conducting a de novo review of the merits of the case. This has been confirmed by Egyptian courts on many occasions. The Court of Cassation has issued several judgments upholding the same principle, ie, the court examining the nullity action shall not conduct a de novo review of the merits, such that any error in the arbitral tribunal's assessment or findings does not qualify as a nullity ground given that a nullity action is not an appeal. In this respect, there are two important judgments worth mentioning. In the first judgment, the Court of Cassation dismissed with prejudice the nullity action brought against the famous Al Kharafi v Libya arbitral award rendered in 2013 (Court of Cassation, Civil and Commercial Circuit, Challenge No 12262 of JY 90, Hearing session dated 24 June 2021). Furthermore, in another important judgment, the Court of Cassation annulled an ICC arbitral award, on its own initiative for the first time in its history, on the ground of violation of Egyptian public policy being one of the grounds for annulment under Article 53 of the EAL. The Court upheld the principle restricting a de novo review of the merits, unless a matter of public policy is in play (Court of Cassation, Civil and Commercial Circuit, Challenges Nos

1964 and 1968 of JY 91, Hearing session dated 8 July 2021).

12. Enforcement of an Award

12.1 New York Convention

Egypt ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 9 March 1959 and it entered into force as part of the Egyptian legal system on 7 June 1959 without any reservations or declarations.

Egypt also ratified the 1952 Convention of the Arab League on the Enforcement of Judgments and Arbitral Awards on 28 August 1954, and signed the 1983 Riyadh Arab Agreement for Judicial Co-operation in 2014. There are also several bilateral treaties on judicial co-operation that refer to mutual co-operation in the recognition and enforcement of arbitral awards, concluded by Egypt with Tunisia (1976); Italy (1978); France (1982); Jordan (1987); Morocco (1989); Bahrain (1989); Libya (1993); China (1994); Hungary (1996); Syria (1998); the United Arab Emirates (2000); Oman (2002); and Kuwait (2017).

12.2 Enforcement Procedure

Article 56 of the EAL sets out the procedure for enforcing a domestic arbitral award or a foreign arbitral award subject to the application of the EAL provisions by agreement of the parties in Egypt.

In this respect, a party seeking to enforce an arbitral award shall submit before the president of the competent court an application/request for enforcement to obtain the exequatur, ie, affixing of the execution formula on the award, accompanied by:

- the original award or a signed copy thereof;
- a copy of the arbitration agreement;
- an Arabic translation of the award, certified by a competent entity, if the award was not in that language; and
- a copy of the procès-verbal attesting to the deposit of the award pursuant to Article 47 of the EAL.

Furthermore, pursuant to Article 58 of the EAL, the application for enforcement will not be admissible prior to the expiry of the 90-day period for initiating a nullity action and it shall not be granted unless it is ascertained that:

- it does not contradict a judgment previously rendered by the Egyptian courts on the subject matter in dispute;
- it does not violate the public policy in the Arab Republic of Egypt; and
- it was properly notified to the party against whom it was rendered.

An order granting or refusing exequatur may be challenged before the competent court within 30 days from the date of issuance of such order.

Moreover, Article 57 of the EAL provides that, in principle, a nullity action does not suspend the enforcement of the arbitral award. Nevertheless, the court may order said suspension if requested by the applicant upon serious grounds.

As to the enforcement of foreign arbitral awards, the default applicable provisions are Articles 296 to 299 of the CCCP, which apply to foreign judgments without prejudice to the provisions of treaties concluded between Egypt and any foreign state. Accordingly, Article 299 extends the application of Article 298 of the CCCP to foreign arbitral awards, which provides that enforce-

ment will be granted if the following conditions are satisfied:

- Egyptian courts do not have jurisdiction over the dispute, and the foreign court which rendered the judgment enjoys jurisdiction pursuant to its rules on international jurisdiction;
- the parties have been notified of the proceedings and were duly represented before the competent court;
- the judgment is final and binding pursuant to the rules prevailing under the law of the foreign court;
- the foreign judgment is not in conflict with a prior award or judgment rendered by Egyptian courts; and
- the judgment is not in contravention of the prevailing public policy considerations.

However, Egyptian courts have extended the application of the EAL provisions to the enforcement of foreign arbitral awards, which provide for less onerous conditions, based on Article III of the New York Convention. This has been recently confirmed by the Cairo Court of Appeal in its judgment in relation to Petition No 2 of JY 139, Hearing session dated 9 March 2022.

Egyptian courts have not directly addressed the issue of enforcing an award that has been set aside in the seat of arbitration, and the EAL is silent in this regard.

State entities may successfully raise a defence of sovereign immunity at the enforcement stage, only if enforcement is sought against publicly owned assets that are not subject to enforcement, such as a public utility or public interest funds.

12.3 Approach of the Courts

Egyptian courts are generally pro-enforcement with respect to arbitral awards rendered in non-administrative disputes, as they strictly observe the annulment grounds and normally the public policy ground is narrowly construed. This was confirmed by the Court of Cassation, which held that the Egyptian judiciary adopts a 'pro-arbitration policy' with respect to the recognition and enforcement of arbitral awards by limiting the annulment to those specifically provided for under the EAL (Court of Cassation, Commercial and Economic Circuit, Challenge No 8199 of JY 80, Hearing session dated 22 March 2022).

The approach taken by Egyptian courts with respect to the contravention of the public policy ground for annulment of an arbitral award is discussed below by means of some examples.

The definition of public policy set by the Court of Cassation consists in the contravention of the social, political, economic and ethical principles in Egypt, which are related to the nation's higher interests (Court of Cassation, Challenge No 385 of JY 44, Hearing session dated 24 April 1980). This approach adopted by the Court consists of an "objective" notion of public policy, such that the judge must define public policy based on objective criteria, reflecting general trends of the Egyptian community at a given time (Court of Cassation, Challenge No 10132 of JY 78, Hearing session dated 11 May 2010 and Challenge No 12790 of JY 75, Hearing session dated 22 March 2011).

There is also a distinction between procedural public policy, which relates to the violation of provisions of the law regulating the arbitral process, and substantive public policy, which deals with violations of public policy through the process of deciding on the merits of the dispute

(Court of Cassation, Challenge No 10132 of JY 78, Hearing session dated 11 May 2010 and Challenge No 12790 of JY 75, Hearing session dated 22 March 2011).

Moreover, the Court of Cassation held that the breach of a mandatory rule does not ex officio or ipso facto qualify as a ground for annulment of an award for a violation of public policy (Court of Cassation, Challenge No 12790 of JY 75, Hearing session dated 22 March 2011).

13. Miscellaneous

13.1 Class Action or Group Arbitration

The EAL does not provide for class action or group arbitration.

13.2 Ethical Codes

The EAL does not provide for specific ethical codes that apply to counsel and/or arbitrators. However, lawyers are subject to the ethical rules provided under the Advocacy Law No 17 of 1983. Nevertheless, arbitrators and counsel adhere to acceptable professional standards prevailing in practice, unless they are bound by other specific prevailing standards in their own jurisdiction.

13.3 Third-Party Funding

The EAL does not address the issue of third-party funding. However, third-party funding may be prohibited in case the funding arrangement is considered as a gambling contract (which is contrary to Sharia) and/or if there is counsel funding in the form of champerty. It is worth mentioning that despite the absence of provisions addressing third-party funding, the CRCICA Arbitration Rules 2024 introduced a provision regarding third-party funding in Article 53 thereof. Moreover, the 2019 Egyptian Model BIT, as amended in 2022, contains a provision addressing third-party funding, allowing same under a strict duty of disclosure of the funding agreement all throughout the arbitral proceedings; otherwise, the failure of disclosure would constitute a manifest contravention of a fundamental rule of procedure. This may indicate that third-party funding in Egypt is becoming gradually accepted in the context of international arbitration, as it is becoming recognised in investment disputes (being included in the Egyptian Model BIT) and also given that the CRCICA, being the leading arbitral institution in Egypt, is embracing this increasingly important practice.

13.4 Consolidation

The EAL does not address the issue of consolidation of separate arbitral proceedings; however, nothing prohibits the parties from agreeing to consolidate separate proceedings, whether directly or indirectly by agreeing to apply institutional arbitration rules permitting so. It is worth noting that the CRCICA Arbitration Rules 2024 introduced new provisions relating to the consolidation of arbitrations (Article 50), multi-party arbitrations (Article 11) and multiple contract arbitrations (Article 51).

13.5 Binding of Third Parties

Third parties can be bound by an arbitration agreement in the case of an extension of said arbitration agreement, as explained in **5.7 Jurisdiction Over Third Parties**.

As to arbitral awards, third parties cannot be bound by an award pertaining to a dispute to which they were not a party.

Trends and Developments

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Zulficar & Partners is an international arbitration and corporate law practice based in Cairo, Egypt, prosecuting arbitration cases across the MENA region and beyond, with unique market expertise in international arbitration. The firm is regularly ranked as top-tier in various practice areas, and its partners and lawyers are regularly ranked as leading practitioners, notably in Chambers & Partners. The firm is increasingly instructed to prosecute high-value and highly complex arbitral proceedings spanning the business and investment spectra, and has handled mega-multimillion-dollar disputes and successfully prosecuted complex cases under major institutional rules and in ad hoc proceedings in the MENA region, Africa, Europe and Asia. Attorneys of the firm are highly regarded in the market and have earned the title "precedent setters".

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Overview of Egypt

Egypt is located in the heart of the Middle East and North Africa (MENA) region, attracting foreign direct investment due to its strategic geographical placement but also due to the available investment opportunities for doing business in many sectors, including construction, transportation, energy and tourism.

More than a decade "post-revolution" and four years "post-pandemic" have led to a lot of changes witnessed by the executive power, the legislative power and the judicial system. The political environment has heavily impacted the legal environment.

Here is a snapshot of the Egyptian legal system. Egypt is a civil law jurisdiction based on a well-established system of codified laws. Arabic is the official language, but English is commonly used in business transactions. The supreme law is the Egyptian Constitution, which supports the fundamental principles of legislation of the Arab Republic of Egypt. Many other specialised codes exist, among which the most important are:

- the Egyptian Civil Code;
- the Egyptian Commercial Code;
- the Code of Civil and Commercial Procedures;
- the Egyptian Arbitration Law;
- the Evidence Law;
- the Companies Law;
- the Capital Markets Law;
- the Investment Law; and
- the Penal Code.

The major financial authorities/actors in Egypt are:

- the General Authority for Investments and Free Zones (GAFI);
- the Financial Regulatory Authority (FRA);
- the Central Bank of Egypt; and
- the Egyptian Stock Exchange (EGX).

As to the courts system, distinction is made between the administrative judicial order (administrative courts within the State Council vested with the power to decide over disputes pertaining to administrative contracts and administrative decrees issued by government officials or public law entities) and the ordinary judicial order, which is divided into three degrees (the

Court of Cassation, which sits at the apex of the judicial system, courts of appeal and courts of first instance).

Specialised courts, such as economic courts, were established by virtue of Law No 120 of 2008.

Egypt has also signed and ratified many multilateral conventions and bilateral treaties with respect to the promotion of investment and judicial co-operation. Egypt is a party to over 100 bilateral investment treaties (BITs) and is usually proactive in adhering to regional and international multilateral conventions, such as:

- the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (the "ICSID Convention");
- the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention");
- the Convention of the Arab League on the Enforcement of Judgments and Arbitral Awards of 1952;
- the Unified Agreement for Investment of Arab Capital in the Arab States signed on 26 November 1980 in Amman and in force as of 7 September 1981;
- the Organisation of the Islamic Conference Investment Agreement of 1981 (the "OIC Investment Agreement");
- the Convention establishing the Multilateral Investment Guarantee Agency (the "MIGA Convention") of 1985;
- the COMESA Investment Agreement signed on 23 May 2007; and
- the Riyadh Arab Agreement for Judicial Co-operation of 1983.

On 15 August 2021, Law No 137 of 2021 amending Law No 48 of 1979 of the Supreme Constitutional Court was passed and published in the Egyptian Official Gazette extending the scope of the Supreme Constitutional Court's control and vesting it with new powers to review the constitutionality of (i) decisions rendered by international organisations and bodies, and (ii) foreign court judgments whose enforcement is sought against the Egyptian state.

In light of these new powers, the Prime Minister may request the Supreme Constitutional Court to disregard any decision/judgment rendered by an international organisation/body or a foreign court, and the obligations deriving therefrom, when enforcement is sought against the state. The request shall indicate the alleged violated constitutional provision or constitutional court judgment and the nature of said violation. The Court shall promptly rule over said request.

The adoption of these amendments came as a surprise and has spurred a lot of debate over their impact on investing in Egypt and the state's international obligations under the treaties to which the state is a party. It remains to be seen whether and to what extent such new powers will be exercised by the Supreme Constitutional Court and in what context.

Moreover, it is worth noting that an earlier draft of Law No 137 of 2021 had also included review of arbitral awards among the new powers to be vested in the Supreme Constitutional Court. However, this was later excluded, such that the Supreme Constitutional Court will not have jurisdiction to review arbitral awards, which remain subject to the traditional review regimes under the Egyptian Arbitral Law No 27 of 1994 and any pertinent applicable international treaties.

The Egyptian state is keen to attract foreign investment, but this new law comes at a time when investors were expecting further assurances and protections. Thus, the ramifications of this new law remain, at the present time, uncertain and unknown.

The Arbitration Legal Framework

Egypt remains a central hub for arbitration practice in the MENA region. The Egyptian legal system constitutes the basis of the respective legal systems of other countries in the region. In the same vein, Egyptian court practice and scholarly writings remain a main source of influence over arbitration practice in the region at large.

The Egyptian Arbitration Law No 27 of 1994 (EAL) is principally derived from the UNCITRAL Model Law (1985) with some variations. The EAL addresses all principal aspects of arbitral proceedings, including the arbitration agreement, issues of arbitrability, the composition of the arbitral tribunal, the challenge of arbitrators, the conduct of the proceedings, the intervention and assistance by national courts throughout the proceedings, the applicable law(s) and the rules pertaining to the award, its annulment and enforcement. The EAL offers a certain flexibility with respect to the choice of procedural rules and guarantees fundamental principles, such as treating the parties to an arbitration with equality. The EAL also recognises well-established principles such as the principle of competence-competence and the principle of separability of the arbitration agreement from the main contract.

Egyptian courts are generally viewed as arbitration-friendly and are attentive to the implementation of international arbitration trends within the Egyptian legal system. Despite the non-existence of specific courts designated to hear arbitration-related disputes, specialised circuits have been designated within the competent national courts in order to deal with arbitration-related matters, where sitting judges are familiar with arbitration matters. The competent national court with respect to matters pertinent to international commercial arbitrations is the Cairo Court of Appeal, unless the parties agree on another appellate court.

There are specific issues worth highlighting with respect to arbitration in administrative contracts. At the outset, the EAL expressly provides that an arbitration agreement included in an administrative contract must be approved by the competent minister, or whoever assumes their authority with respect to public entities, and delegation in this regard is prohibited. Such requirement is a matter of public policy and, in the absence of the approval of the competent minister or whoever assumes their authority with respect to public entities, the arbitration agreement will be null and void.

Moreover, Prime Ministerial Decree No 1062 of 2019 (as amended by Prime Ministerial Decrees No 2592 of 2020 and No 3218 of 2022) establishing the 'High Committee for Arbitration and International Disputes' within the Council of Ministers, binds ministries, public entities, state-owned companies and companies in which the state participates in any form not to conclude any contracts with foreign investors or enter into contracts including an arbitration clause, and/or amend these contracts, or take any measure that would lead to the rescission or termination of any of these contracts including an arbitration clause without having them first reviewed by the said Committee. The Committee, which is reconstituted occasionally, is entrusted with reviewing and opining on pending international arbitration in both commercial and investment cases involving the state, its organs and state-

controlled entities. The Decree does not present an obstacle to investor-state arbitration involving Egypt, as it makes express reference to the prevalence of the provisions of the Investment Law, and does not impact any of the valid BITs or multilateral treaties concluded by Egypt.

It is worth noting that in March 2022, the Deputy Minister of Justice for Arbitration and International Disputes issued Decree No 8 of 2022, establishing a committee headed by him and comprising Egyptian arbitration practitioners in charge of preparing a proposal for the amendment of the EAL. These discussions are still ongoing.

Arbitral Institutions in Egypt

The leading arbitral institution in Egypt is the Cairo Regional Centre for International Commercial Arbitration (CRCICA), which is an independent non-profit international organisation established in 1979 under the auspices of the Asian African Legal Consultative Organization. The CRCICA offers other alternative dispute resolution services such as mediation, conciliation and mini-trials. The CRCICA has its own set of arbitration rules (2024) amending the 2011 arbitration rules and entering into force as of 15 January 2024, mediation rules (2013) and dispute board rules (2021) in the Arabic, English and French languages, except for the mediation rules, which are available only in the Arabic and English languages. The latest version of the CRCICA arbitration rules (2024) entered into force as of 15 January 2024. The amended arbitration rules (2024) include provisions addressing issues that were not addressed in the 2011 arbitration rules, such as, for example, consolidation of arbitrations, multi-party arbitrations, multiple contract arbitrations, third-party funding, emergency arbitrator rules and expedited procedure rules. The CRCICA also has many partnerships with other reputable institutions and constantly organises conferences, seminars – and now webinars – and workshops in relation to the services it provides.

There is also the Egyptian Center for Arbitration and Settlement of Non-Banking Financial Disputes (ECAS), which is a specialised arbitral institution established by virtue of Presidential Decree No 335 of 2019 as an independent body within the FRA in Egypt. On 10 December 2020, the statutes of ECAS, as well as its arbitration and mediation rules, were issued by virtue of Prime Ministerial Decree No 2597 of 2020.

Recent Developments in Arbitration Jurisprudence

Egyptian judges are following trends in international arbitration and incorporating them to the extent possible within the Egyptian legal system. Below are a few examples of the Court of Cassation's and the Cairo Court of Appeal's judgments.

(i) The Court of Cassation referred to Clauses 4.3.1 and 4.3.4 of the Green list of the IBA Guidelines on Conflicts of Interest in International Arbitration (2014) in the circumstances where: (1) the chairman and one appointed arbitrator failed to disclose that they were both members of the advisory committee at the CRCICA; and (2) the legal counsel of one of the parties was a member of the same committee. The Court held that the membership of both arbitrators and the legal counsel is publicly available information in their respective biographies accessible on the CRCICA's official website. The Court added that the chairman disclosed his participation in an event where the legal counsel of one of the parties was a speaker and the parties did not raise any concerns during the arbitral proceedings, which constitutes a waiver of their right to

object. Therefore, the above-mentioned circumstances do not raise doubts as to the impartiality and independence of the arbitrators (Court of Cassation, Commercial and Economic Circuit, Challenges Nos 7913 and 13996 of JY 91, Hearing session dated 9 May 2023).

(ii) The Cairo Court of Appeal held that the requirement for an arbitral award to be reasoned is not a public policy requirement, given that Article 43 of the EAL enables the parties to agree on releasing the arbitral tribunal from its duty to render a reasoned award. The Court explained that a defect or lack of reasoning does not lead to the setting aside of an arbitral award, given that this ground is not provided under Article 53 of the EAL, which strictly stipulates all grounds for setting aside. In this specific case, the Court found that the awards subject to the motion for setting aside were sufficiently reasoned, by including a clear and unambiguous description of the facts in dispute, expressly referring to the evidence submitted and complying with the dispositive part of the award. The Court explained that contradictory reasoning is a defect in substance ("*vice de fond*") while the lack of reasoning is a defect in form ("*vice de forme*"); thus, they are not synonymous. In this regard, the Court concluded that allowing the nullity court to examine the existence of a contradiction in the reasoning of an award would be a back door for the court to re-examine the merits of the case, which falls outside the scope of its review (Cairo Court of Appeal, 4th Commercial Circuit, Challenge No 53 of JY 138, Hearing session dated 30 May 2022).

(iii) The Court of Cassation expressly held that the Egyptian judicial system adopts a "pro-arbitration policy" with respect to the recognition and enforcement of arbitral awards by limiting the grounds for setting aside an arbitral award to those specifically provided for under the EAL. In the same judgment, the Court of Cassation seized the opportunity to define what is meant by deliberations and dissenting opinions. The Court explained that deliberations consist in the exchange of views between the arbitrators regarding the facts of the case, the claims put forward by the parties and the relief sought. Furthermore, the Court stated that it is well established in international arbitration for arbitrators who refuse to sign an arbitral award to render a dissenting opinion; this derives from the judicial duty upon arbitrators to issue a reasoned award. On this occasion, the Court explained that the arbitrator who refrains from signing the award shall state the reasons for their non-signature of the award in the form of a dissenting opinion, whether included in the award or in a separate document. The Court added that in case the minority arbitrator (who refused to sign the award) has not stated the reason(s) for their non-signature, the chair of the tribunal shall state in the award that the minority arbitrator refused to sign due to their disagreement with the opinion of the majority. The Court stated that there are three conditions to be met to dismiss a motion for setting aside an arbitral award that is not signed by all arbitrators:

- all arbitrators must have participated in the deliberations (including the arbitrator(s) who refused to sign the award);
- the arbitral award must be signed by the majority of arbitrators; and
- the award must state the reason(s) for non-signature of the minority arbitrator if the latter has not stated said reason(s).

In the same judgment, the Court reaffirmed that an arbitral award's erroneous reasoning does not lead to setting aside the award, given that the grounds for setting aside are strictly listed in

the EAL (Court of Cassation, Commercial and Economic Circuit, Challenge No 8199 of JY 80, Hearing session dated 22 March 2022).

(iv) The Cairo Court of Appeal upheld that the writing requirement is fulfilled when the arbitration agreement is contained in any exchange of letters, telegrams, emails or any means of communication, but also held that when the parties to a contract refer to the terms, conditions or templates of well-known and widely spread model agreements which include an arbitration agreement, the arbitration agreement is thus included by reference in the parties' initial contract. The incorporation into the contract by reference to a model agreement containing an arbitration agreement fulfils the writing requirement and is considered as a written agreement which is sufficient to enable the parties to resort to arbitration. The clauses of the model agreement that are incorporated by reference in the initial contract, which include the arbitration agreement clause, are binding on the contracting parties (ie cannot be denied by the contracting parties) and are well-established and prevailing clauses in the same type of transaction. In the same judgment, the Court of Appeal reaffirmed the importance of the New York Convention, which forms part of the Egyptian legal system and which extends the applicability of the EAL provisions to the enforcement of foreign arbitral awards, given that the EAL provisions are less onerous than the default provisions for enforcement of foreign judgments (Cairo Court of Appeal, (First) Commercial Circuit, Petition No 2 of JY 139, Hearing session dated 9 March 2022).

(v) The Court of Cassation expressly referred to the IBA Guidelines on Conflicts of Interest in International Arbitration (2014) quoting clause 3.3.5 of the Orange List in its judgment, on the occasion of non-disclosure by an arbitrator that a partner of the law firm representing the claimant in the arbitral proceedings, but who was not involved with any counsel work in the case, was a family relative of the chairman. The Orange List sets non-exhaustive examples of specific situations that may give rise to justifiable doubts as to an arbitrator's impartiality or independence, in the eyes of the parties, where the arbitrator has a duty to disclose but can nevertheless act unless the parties make a timely objection. The Court explained that simple non-disclosure does not lead to the setting aside of an award, and the Court shall assess whether the undisclosed circumstance leads in a reasonable manner to an inference that there is a real danger of bias and therefore to the setting aside of the award. The Court added that the Egyptian judicial system supports and ensures the independence and impartiality of arbitrators, which is among the reasons for the increased trust of international arbitration parties and their choosing Egypt as the seat of arbitration (Court of Cassation, Commercial and Economic Circuit, Challenge No 13892 of JY 81, Hearing session dated 22 February 2022).

(vi) The Court of Cassation, for the first time in its history, has annulled, on its own motion, an ICC arbitral award for violation of Egyptian public policy, in compliance with the provision of Article 53(2) of the EAL (Court of Cassation, Civil and Commercial Circuit, Challenges Nos 1964 and 1968 of JY 91, Hearing session dated 8 July 2021).

(vii) The Court of Cassation has put an end to the ongoing saga in relation to the setting aside of the famous Al Kharafi v Libya arbitral award after almost a decade. The Court upheld the validity of the arbitral award and dismissed the nullity action brought by Libya (Court of Cassation, Civ-

il and Commercial Circuit, Challenge No 12262 of JY 90, Hearing session dated 24 June 2021).

(viii) The Court of Cassation affirmed the parties' right to be represented by foreign lawyers and/or non-lawyers under Egyptian law, and also recognised trends in international arbitration such as delocalisation and the increase of virtual hearings (Court of Cassation, Challenge No 18309 of JY 89, Hearing session dated 27 October 2020). The delocalisation trend distinguishing between the legal seat and physical place of hearings was confirmed in a more recent judgment in 2021 (Cairo Court of Appeal, Challenge No 42 of JY 136, Hearing session dated 8 March 2021).

(ix) The Court of Cassation provided insight on what is meant by an arbitral institution under Article 3 of the EAL by referring to the ICC International Court of Arbitration (Court of Cassation, Challenge No 14126 of JY 88, Hearing session dated 22 October 2019).

(x) The Court of Cassation held that for an arbitration to be international, it is not a prerequisite that its subject matter relates to international trade. The Court explained that Article 3 of the EAL provides for specific criteria for a "deemed internationalisation", which include resorting to arbitral institutions in Egypt or abroad (Court of Cassation, Challenge No 11348 of JY 88, Hearing session dated 11 April 2019).

Tendency Towards Dispute Avoidance Rather Than Dispute Settlement

The Investment Law in Egypt has undergone considerable change and constant development since the enactment of the first Investment Law No 65 of 1971 until the enactment of the current Investment Law No 72 of 2017. The current Investment Law is a result of many lessons learnt throughout the past four decades, whereby Egypt has entered into a considerable number of investment arbitration disputes, be it ICSID arbitration (38 cases against Egypt until July 2024), or other institutional arbitration, or ad hoc arbitration.

The Egyptian legislature has observed all provisions in relation to dispute settlement and has gathered the best practices to ensure a favourable investment climate for investors by granting them preferential treatment. Rather than wasting time and spending colossal sums on arbitration, the Egyptian state has preferred to adopt a dispute-avoidance and amicable-settlement mechanism.

This has been reflected in the provisions of the current Investment Law, such that the reference to ICSID arbitration or any other arbitral institution has been removed and replaced by a reference to the Egyptian Arbitration and Mediation Centre, which is yet to be established as provided under the Law.

The Investment Law encourages the amicable settlement of any dispute through negotiations between the parties at any time, but also reserves the parties' right to litigation. It allows disputes to be settled in the manner agreed with the investor or pursuant to the provisions of the EAL, and also refers to ad hoc and institutional arbitration as available options. Three committees have been established, namely:

- the Grievance Committee, which has the authority to examine complaints filed by investors against decisions/orders relating to issuance of approvals, permits and licences;
- the Ministerial Committee on Investment Dispute Resolution, which examines applications, complaints or disputes between investors and the state or any of its entities; and

- the Ministerial Committee for the Settlement of Investment Contract Disputes, which shall examine the differences arising between the parties to the investment contract.

Impact of the COVID-19 Pandemic

Like any other jurisdiction, the COVID-19 pandemic accelerated the access to and use of information and communication technologies in Egypt, in both arbitration and litigation. With respect to arbitration, parties were encouraged to conduct virtual hearings and proceed with cross-examination via video-conferencing tools and platforms. This led to the postponement of some hearings, changes to procedural timetables and delays in the issuance of arbitral awards. However, it was observed that the costs of arbitration were reduced to some extent, owing to the absence of costs associated with travel and the booking of hearing rooms, as well as expenses in relation to binding and printing of hearing bundles. There were some difficulties at the beginning of the pandemic resulting from the complete shift to online, such as poor internet connection, enabling and disabling the camera and microphone, finding the online platforms, time zone differences, etc. Now, things run much more smoothly and parties are more used to online platforms, whether they are used to conduct virtual hearings or attend webinars.

The COVID-19 pandemic has accelerated the Egyptian government's plan to digitalise its services generally, within the legal system and beyond, by gradually offering more online services to the public. There are ongoing discussions between dispute resolution practitioners and the Ministry of Justice as to the possibility of introducing the digitalisation of judicial proceedings within the Egyptian judicial system.

ENGLAND & WALES

Law and Practice

Contributed by:
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Slaughter and May

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Slaughter and May is a leading international law firm advising on high-profile and ground-breaking transactions and disputes around the world. The international arbitration practice acts for leading global companies and financial institutions on their most complex, high-value and strategically significant disputes, across a broad range of sectors, from energy and infrastructure to healthcare to financial services. Partners are leaders in their field, delivering innovative solutions in disputes under the rules of every major arbitral institution, including the ICC, LCIA and UNCITRAL, in addition to having significant experience in acting for clients in arbitration-related court proceedings in the English and overseas courts. The practice is global, acting on arbitrations in all the major arbitral seats, under English and foreign law, working with the world's leading independent advisers.

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SLAUGHTER AND MAY/

1. General

1.1 Prevalence of Arbitration

London is consistently ranked among the most popular arbitral seats in the world, with a 2021 survey conducted by Queen Mary University of London finding that London was the most preferred seat (joint with Singapore). The Law Commission of England and Wales (the "Law Commission") estimates that at least 5,000 domestic and international arbitrations take place in England and Wales each year, potentially worth at least GBP2.5 billion to the economy, although the actual figures may be much higher.

The London Court of International Arbitration (LCIA) has seen steady growth in the last decade, receiving 377 referrals in 2023, up from 333 in 2022. The sums claimed also increased significantly, with 29% of monetary claims set at over USD20 million (up from 19% in 2022).

1.2 Key Industries

Taking the LCIA's data on sectors as a guide, the transport and commodities, energy and resources and banking and finance sectors dominate the LCIA's caseload year-on-year, representing 66% of the LCIA's caseload for 2023 (36% for transport and commodities; 16% for banking and finance; and 14% for energy and resources). A broad range of other sectors make up not-insignificant proportions of the LCIA's caseload, including in 2023, for example, professional services (7%), construction and infrastructure (6%) and technology (6%).

1.3 Arbitration Institutions

The International Chamber of Commerce (ICC) and the LCIA are the most used arbitral institutions for international arbitration in England and Wales.

1.4 National Courts

The Commercial Court is the principal court for arbitration-related claims (known as "arbitration claims"), with approximately 25% of all claims issued in the Commercial Court being arbitration claims. The procedure for arbitration claims is set out in Civil Procedure Rule (CPR) Part 62 and its Practice Direction.

In addition to the Commercial Court, arbitration claims may be issued in the Technology and Construction Court or the Circuit Commercial Court (Practice Direction 62, paragraph 2.3(1)). Arbitration claims relating to landlord and tenant or partnership disputes, however, must be issued in the Chancery Division (paragraph 2.3(2)).

In deciding where to issue an arbitration claim, claimants should have regard to the criteria set out in the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996 (SI 1996/3215), which include the financial value, nature and importance of the dispute (including for any third parties) and whether the balance of convenience points to the proceedings being brought in the London Circuit Commercial Court (Article 5(4)). Where the financial value of the dispute exceeds GBP200,000, the proceedings shall be taken in the High Court unless the proceedings do not raise questions of general importance to third parties (Article 5(4)(d)).

2. Governing Legislation

2.1 Governing Law

International arbitration in England and Wales is primarily regulated by the Arbitration Act 1996 (the "Arbitration Act"), which applies to all domestic and international arbitrations where the seat of the arbitration is England and Wales

or Northern Ireland (unless otherwise stated, references to "Sections" herein are to the Arbitration Act). Certain provisions in the Arbitration Act, in exceptional cases, such as stays of legal proceedings, enforcement of awards and the English courts' powers exercisable in support of arbitration, apply even if the seat of arbitration is outside England and Wales or Northern Ireland, or if no seat has been designated or determined. In addition, certain areas of arbitration law (eg, confidentiality in arbitration) are not codified in legislation and are instead found in case law.

The Arbitration Act is strongly influenced by the UNCITRAL Model Law, but England and Wales has not adopted the Model Law wholesale. Examples of divergences between them include the following:

- by default, the Arbitration Act specifies that the tribunal shall comprise a sole arbitrator (Section 15(3)), whereas the Model Law specifies three arbitrators (Article 10(1));
- absent agreement, the Model Law sets out rules for the exchange of pleadings (Article 23), whereas the Arbitration Act does not;
- the Model Law does not include a mechanism for summary enforcement of domestic awards, whereas the Arbitration Act does (Section 66); and
- the Arbitration Act applies to all forms of arbitration, whereas the Model Law applies only to international commercial arbitration.

2.2 Changes to National Law

In July 2024, the newly elected Labour government reintroduced a Bill to Parliament to reform the Arbitration Act. The proposed changes in the Arbitration Bill aim to ensure the Arbitration Act remains fit for purpose and continues to promote England and Wales as a leading destination for commercial arbitration. The Arbitration Bill is almost identical to a previous Bill that fell in May 2024 after a general election was announced and Parliament was dissolved.

The Arbitration Bill reflects proposals made by the Law Commission in 2023 following an extensive consultation with legal practitioners, industry bodies and arbitral institutions in the jurisdiction. Following that consultation, the Law Commission concluded that the Arbitration Act works well and that "root and branch reform is not needed or wanted". The reforms in the Arbitration Bill are therefore confined to a few major initiatives and tidy-up changes, including the following.

- Governing law: introducing a new default provision into the Arbitration Act that, unless the parties expressly agree otherwise, the governing law of the arbitration agreement will be the law of the seat of arbitration. Significantly, this provision would undo the current rule laid down by the UK Supreme Court in Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38. This provision will not apply to arbitration agreements in investment treaty arbitration (and similar cases arising under foreign investment legislation). See **3.3 National Courts' Approach** for the current law in this area.
- Impartiality: codifying the rule in Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48 requiring an arbitrator to disclose any circumstances that should reasonably give rise to justifiable doubts as to their impartiality. See **4.5 Arbitrator Requirements** for more information.
- Summary disposal: granting an express power to the tribunal (subject to the agreement of the parties) to issue awards on a summary basis.
- Challenges of awards:

(a) making provision to amend the court CPRs to place limits on when parties that have participated in arbitral proceedings can raise new objections and evidence in subsequent court proceedings to challenge the jurisdiction of the tribunal (Section 67);
(b) expanding the remedies available under Section 67 to be consistent with the remedies available for other routes to challenge awards; and
(c) amending the rules on time limits for applications in circumstances where there has been a request for a correction or additional award; see **11.1 Grounds for Appeal** for information on the current rules.

- Preliminary determination of tribunal's jurisdiction: providing that the court's ability to make a preliminary determination on the tribunal's jurisdiction may do so only as an alternative to the tribunal itself ruling on this question, providing that an application on this issue (or on a preliminary point of law) requires only the agreement of the parties or the tribunal's permission; see **5.3 Circumstances for Court Intervention** for the current position.
- Court's powers against third parties: clarifying expressly that the English court can make orders against third parties in support of arbitration proceedings, and that third parties have full rights of appeal in respect of such orders; see **6.2 Role of Courts** for the current rules.
- Emergency arbitrators: making provision for court applications to enforce the orders of emergency arbitrators; see **6.2 Role of Courts** for the current position.
- Immunity: strengthening an arbitrator's immunity in situations of resignation or removal.

The changes in the Arbitration Bill will apply to arbitration agreements whenever made, but not to arbitrations and court proceedings concerning arbitration commenced before the reforms enter force.

As part of its consultation into potential reforms of the Arbitration Act, the Law Commission considered other proposals, including to:

- prohibit discrimination in the appointment of arbitrators;
- codify common law rules on confidentiality;
- reform the non-mandatory provision enabling appeals on a point of law; and
- make express provision to address third-party funding.

However, ultimately the Law Commission did not recommend reform in these areas and these proposals have not found their way into the Arbitration Bill.

3. The Arbitration Agreement

3.1 Enforceability

There are no formal legal requirements for an arbitration agreement to be enforced under English law.

There are some qualifications in the application of the Arbitration Act – for example, Part 1 of the Arbitration Act only applies where the arbitration agreement is in writing (Section 5). For these purposes, "in writing" is broadly defined and can include, for example, an arbitration agreement being "evidenced in writing". Oral arbitration agreements are valid under English law but are rare in the commercial context. Parties that wish to rely on an oral arbitration agreement would

only be able to rely on the common law to govern its arbitration.

The Arbitration Act does not impose any strict requirements on the content of an arbitration agreement – only that the parties must agree "to submit to arbitration present or future disputes (whether they are contractual or not)" (Section 6(2)).

3.2 Arbitrability

The Arbitration Act does not define the meaning of arbitrability but, consistent with the New York Convention, it recognises the right of the court to refuse recognition or enforcement of an award where the matter is not capable of settlement by arbitration (Section 103(3)).

Contractual and non-contractual disputes may be submitted to arbitration (Section 6(1)). Beyond this, the Arbitration Act does not define nor describe the matters that are capable of resolution by arbitration. Instead, Section 81(1)(a) of the Arbitration Act provides that common law governs whether matters are capable of settlement by arbitration.

The Arbitration Act is founded on a principle that parties should be free to agree how their disputes are resolved, subject only to public policy safeguards (Section 1(6)). In addition, the English courts emphasise the importance of upholding party autonomy to agree to arbitration to resolve their disputes. Consistent with this:

- English courts have held that a broad range of non-contractual disputes (including tort, competition, intellectual property and certain statutory claims) are capable of resolution by arbitration; and
- there is a strong assumption when construing an arbitration clause under English law that the parties intended to have disputes arising out of their relationship decided in the same forum (Fiona Trust & Holding Corporation v Privalov [2007] UKHL 40).

In practice, albeit more of a question of scope than arbitrability, the English courts interpret arbitration agreements broadly to encompass non-contractual as well as contractual disputes.

In recent years, there has been an apparent trend towards widening the range of disputes that may be capable of resolution by arbitration. However, a dispute will not generally be arbitrable under English law if it involves matters of public policy or public rights, for example. Consistent with this, disputes that are generally not capable of being resolved by arbitration under English law include:

- criminal, planning and certain family law matters;
- certain insolvency-related claims, including disputes arising from the exercise of statutory powers by a liquidator under the statutory regime contained in the Insolvency Act 1986; and
- certain employment disputes, in which an employee has a statutory right to be heard by an employment tribunal.

3.3 National Courts' Approach

Courts' Approach to Determining the Governing Law of the Arbitration Agreement

The English courts apply common law rules to determine the law governing the arbitration agreement. The leading case on governing law is the decision of the UK Supreme Court in Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38. The Enka v Chubb rule is complex, but in summary provides as follows.

- The law applicable to the arbitration agreement will be the law chosen by the parties to govern it or, in the absence of such a choice, the system of law with which the arbitration agreement is most closely connected.
- Whether the parties have agreed on a choice of law to govern the arbitration agreement will be ascertained by construing the arbitration agreement and its matrix contract as a whole, applying English law rules on contractual interpretation.
- Where the law applicable to the arbitration agreement is not specified, a choice of governing law for the matrix contract will generally apply to the arbitration agreement, as an implied choice.
- However, additional factors may negate such an inference and instead imply that the arbitration agreement was intended to be governed by the law of the seat. Such factors include:
  (a) any provision of the law of the seat which indicates that, where an arbitration is subject to that law, the arbitration agreement will also be treated as governed by that country's law; or
  (b) the existence of a serious risk that, if governed by the same law as the matrix contact, the arbitration agreement would be ineffective.
- In the absence of any choice of law, the arbitration agreement is governed by the law with which it is most closely connected. Where the parties have chosen a seat of arbitration, the closest connection will generally be to the law of the seat, even if this differs from the law applicable to the matrix contract.

For information on proposed future reforms in this area, see **2.2 Changes to National Law**.

Enforcement of Arbitration Agreements

Consistent with England and Wales being an "arbitration-friendly" jurisdiction, the English courts adopt a broadly pro-enforcement approach to arbitration agreements. The courts generally aim to construe contracts to give effect to parties' agreement to arbitrate, even where potential inconsistencies appear on the face of the contract.

The case of Adactive Media Inc v Ingrouille [2021] EWCA Civ 313 is illustrative in this regard. The court was asked to enforce a judgment in default obtained from the Californian courts. The contract underlying the dispute contained an arbitration clause providing for all disputes to be referred to arbitration, save for claims relating to breach of confidence, which were subject to the exclusive jurisdiction of the Californian courts. The English Court of Appeal refused to enforce the Californian judgment as it related to claims the Court of Appeal considered fell within the scope of the arbitration agreement.

3.4 Validity

The rule of separability applies in English law and is codified in Section 7 of the Arbitration Act. Unless the parties agree otherwise, an arbitration agreement is separable from the main contract in which it is incorporated, such that it generally survives the invalidity, inexistence or ineffectiveness of the main agreement.

However, there are certain limits to the doctrine of separability – eg, where the arbitration agreement itself is directly impeached (Fiona Trust & Holding Corporation v Privalov [2007] UKHL 40) or where there is a question concerning the formation of the contract (eg, mistake) that may invalidate the arbitration agreement (DHL Project and Chartering Ltd v Gemini Ocean Shipping Co Ltd [2022] EWCA Civ 1555).

4. The Arbitral Tribunal

4.1 Limits on Selection

Parties have broad discretion to agree on arbitrators and the procedure for their appointment, but the court retains the power to remove arbitrators in certain circumstances, such as where there are justifiable doubts about their impartiality, or where the arbitrator does not possess the qualifications required by the parties' arbitration agreement (Section 24).

There are no requirements regarding religion, gender or ethnicity, for example, that may limit who can be selected as an arbitrator. Arbitrators are not employees of the parties and therefore anti-discrimination legislation does not apply (Jivraj v Hashwani [2011] UKSC 40).

4.2 Default Procedures

Section 16 of the Arbitration Act contains the following default mechanisms for the appointment of arbitrators:

- a sole arbitrator – by joint appointment of the parties no later than 28 days after service by one of the parties of a request to do so (Section 16(3));
- a tribunal comprising two arbitrators – by each party appointing one arbitrator within 14 days of a written request by one of the parties to do so (Section 16(4));
- a tribunal comprising three arbitrators – by each party appointing one arbitrator within 14 days of a written request by one of the parties to do so, and the two party-appointed arbitrators then appointing a chairperson (Section 16(5)); and
- a tribunal comprising two arbitrators and an umpire – as with three, subject to differences regarding the timing of the umpire's appointment (Section 16(6)).

Unless the parties agree otherwise, the default position is that the tribunal will consist of a sole arbitrator (Section 15(3)).

Where parties have agreed a tribunal appointment mechanism but that mechanism fails, the Arbitration Act grants the English courts powers exercisable on application by either party, including:

- to give directions when making appointments, which includes delegating its power to make the necessary appointment to an arbitral institution if it thinks fit (Section 18(3)(a), Chalbury McCouat International Ltd v PG Foils Ltd [2010] EWHC 2050 (TCC));
- to direct that the tribunal be constituted by the appointments made (Section 18(3)(b));
- to revoke any previous appointments (Section 18(3)); and
- to make the necessary appointments itself (Section 18(3)(d)).

Furthermore, unless the parties agree otherwise, where each of the two parties is required to appoint an arbitrator and one party refuses to do so (either at all or within the agreed time period), the other party may give notice in writing to the party in default that it proposes to appoint its arbitrator to act as sole arbitrator (Section 17(1)).

4.3 Court Intervention

The English courts can exercise certain powers to appoint under the default procedure, or the court can intervene where the parties have agreed an appointment mechanism but it has failed (see **4.2 Default Procedures**).

4.4 Challenge and Removal of Arbitrators

A party may apply to the English courts to remove an arbitrator and the court has the power to remove an arbitrator on the grounds that:

- there are justifiable doubts about their impartiality;
- an arbitrator does not possess the qualifications required by the parties' arbitration agreement;
- an arbitrator is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to their capacity to do so; or
- an arbitrator fails to conduct the proceedings properly or to use all reasonable dispatch in conducting the proceedings (Section 24).

While the challenge is pending, the tribunal may continue the arbitral proceedings and make an award (Section 24(3)). Arbitrators who are subject to a Section 24 challenge may be heard before the court makes an order (Section 24(5)).

In H1 v W [2024] EWHC 382 (Comm), the court removed an arbitrator for apparent bias after remarks by that arbitrator during a procedural hearing that he knew one of the parties' expert witnesses well and that there would be no need for him to be called to an evidential hearing, suggesting that the arbitrator had already decided to accept the expert's evidence rather than assessing it objectively following cross-examination.

4.5 Arbitrator Requirements

Section 33 of the Arbitration Act provides for the general duties of arbitrators. These are mandatory and include a requirement that arbitrators act fairly and impartially between the parties. The English courts apply an objective test to the issue of impartiality. The court will ask whether a fair-minded and informed observer would conclude that there was a real possibility of bias (Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48).

In Halliburton, the UK Supreme Court confirmed that an arbitrator has a legal duty to disclose matters that would or might give rise to justifiable doubts as to their impartiality. The Supreme Court held that there may be circumstances where the acceptance of multiple appointments involving a common party and the same or overlapping subject matter gives rise to an appearance of bias. Whether it does so will depend on the facts of the case and, in particular, the customs and practice in the relevant field of arbitration. Based on the facts of the case, the Supreme Court in Halliburton concluded that the arbitrator had a legal duty to disclose the appointments in related disputes. However, the failure to disclose did not ultimately give rise to apparent bias for several reasons, including the fact that there was no prospect of the appointing party gaining any advantage by reason of overlapping references.

When considering the basis for such disclosures, the English courts are not bound by the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration, but they will be considered by the English courts as persuasive authority (Halliburton). Accordingly, the "non-waivable red", "waivable red", "orange" and "green" issues are an important guide to arbitrators sitting in arbitrations seated in England and Wales.

There are plans to codify the common law duty of disclosure laid down by Halliburton in the Arbitration Act; see **2.2 Changes to National Law**.

A failure to disclose may give rise to a ground to challenge the arbitrator, by applying either to the relevant arbitral institution (eg, LCIA Rules 2020, Article 10.1) or to the court (see **4.4 Challenge and Removal of Arbitrators**).

5. Jurisdiction

5.1 Matters Excluded From Arbitration

See **3.2 Arbitrability**.

5.2 Challenges to Jurisdiction

Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, including:

- whether there is a valid arbitration agreement;
- whether the tribunal is properly constituted; and
- what matters have been submitted to arbitration in accordance with the arbitration agreement (Section 30(1)).

5.3 Circumstances for Court Intervention

There are three circumstances in which a court can address issues of jurisdiction of an arbitral tribunal (apart from at enforcement stage – see **12.2 Enforcement Procedure**).

First, Section 32 of the Arbitration Act allows a party to apply to the court for determination of a preliminary point of jurisdiction. Such an application can only be made with:

- the agreement in writing of all the other the other parties to the proceedings; or
- the permission of the tribunal and if the court is satisfied that:
  - (a) the determination is likely to result in substantial savings in costs;
  - (b) the application was made without delay; and
  - (c) there is good reason why the matter should be decided by the court.

These criteria will be met only in exceptional circumstances (VTB Commodities Trading Dac v JSC Antipinsky Refinery [2019] EWHC 3292 (Comm)). While the court is considering a preliminary question of jurisdiction, the arbitration may continue and an award may be granted (Section 32(4)).

For information on proposed future reforms to Section 32, see **2.2 Changes to National Law**.

Second, Section 67 of the Arbitration Act permits a party to challenge an arbitral award on grounds of lack of substantive jurisdiction; see **11.1 Grounds for Appeal**.

Third, Section 72 of the Arbitration Act enables a party that has not participated in the arbitration proceedings to apply to the court for a declaration or injunction to restrain the arbitration proceedings by challenging:

- the validity of an arbitration agreement;
- whether the arbitral tribunal has been properly constituted; or
- what matters have been referred to arbitration in accordance with the arbitration agreement.

The right to object to the substantive jurisdiction of the tribunal can be lost if a party takes part or continues to take part in proceedings without raising an objection (Section 73).

5.4 Timing of Challenge

A party can challenge the jurisdiction of the tribunal at any time before the English courts; see **5.3 Circumstances for Court Intervention**.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The standard of review under a Section 67 challenge to the jurisdiction of the tribunal is de novo; see **11.3 Standard of Judicial Review**. For information on proposed future reforms in this area, see **2.2 Changes to National Law**.

Questions of admissibility are separate from questions of jurisdiction. A dispute as to the jurisdiction of the tribunal concerns whether a tribunal has the power to determine the dispute in question at all, whereas questions of admissibility concern whether the tribunal will exercise its power in relation to a particular claim submitted to it where there is an alleged defect in the way the claim has been brought. For example, the court has held that the question of whether a party had complied with a multi-tier dispute resolution clause raised questions of admissibility rather than jurisdiction, and that it therefore did not have the power to review the tribunal's decision (Republic of Sierra Leone v SL Mining Ltd [2021] EWHC 286 (Comm); NWA v NVF [2021] EWHC 2666 (Comm)).

5.6 Breach of Arbitration Agreement

A court must stay court proceedings in respect of a matter that under an arbitration agreement is to be referred to arbitration (Section 9(1)). The burden of proof is on the applicant to establish the existence of an arbitration agreement and that it covers the matter in dispute.

In Mozambique v Privinvest Shipbuilding SAL (Holding) [2023] UKSC 32, the Supreme Court confirmed the relevant test to be as follows:

- the court must identify the matters that have been or will foreseeably be raised in the court proceedings, and determine if each matter falls within the scope of the arbitration agreement;
- a matter need not cover the whole of the dispute;
- a matter is a substantial issue, not an issue that is peripheral or tangential to the subject of the proceedings;
- a common-sense approach to evaluating the substance and relevance of a matter should be taken; and
- the true nature of the matter must be considered, as well as the relevant context.

A party must challenge the court's jurisdiction within the time limit for acknowledging service of the claim form. The right of a stay may be lost where the applicant has taken steps in court proceedings to answer the substantive claim. This can include participating in a case management conference and inviting the court to make related orders (Nokia Corp v HTC Corp [2012] EWHC 3199 (Pat)).

The court has an inherent jurisdiction to stay proceedings even where Section 9 of the Arbitration Act is not satisfied. The court has exercised this discretion where there is a dispute as to the validity or scope of the arbitration agreement (Golden Ocean Group v Humpuss Intermoda Transportasi [2013] EWHC 1240 (Comm)).

If a party commences litigation in another jurisdiction, the party against whom proceedings are commenced can apply to the English courts for an anti-suit injunction. The English courts may grant an anti-suit injunction where proceedings are brought in breach of an English-seated arbitration agreement. The English courts may also grant an anti-suit injunction in support of a foreign-seated arbitration, provided that the court is satisfied that it has jurisdiction, such as pursuant to an English law contract (UniCredit Bank v RusChemAlliance [2024] EWCA Civ 64), and that it is the proper forum to grant such relief.

5.7 Jurisdiction Over Third Parties

English law does not permit a tribunal to assume jurisdiction over non-parties (Kabab-Ji SAL v Kout Food Group [2021] UKSC 48). The tribunal

does not have the power to compel a non-party to produce documents, for example, but it may invite non-parties to do so.

Parties may seek to bind a non-signatory to the arbitration agreement in certain circumstances, such as via the doctrine of agency (Filatona Trading Ltd v Navigator Equities Ltd [2020] EWCA Civ 109).

The English courts have emphasised that the group of companies doctrine "forms no part of English law" (Peterson Farms Inc v C & M Farming Ltd [2004] EWHC 121 (Comm)). Furthermore, the Supreme Court has held that the circumstances in which English law will be willing to pierce the corporate veil are extremely rare (VTB Capital Plc v Nutritek International Corp [2013] UKSC 5).

See also **13.5 Binding of Third Parties**.

6. Preliminary and Interim Relief

6.1 Types of Relief

Sections 38–39 of the Arbitration Act list a tribunal's powers to grant preliminary or interim relief. Parties are free to agree on the powers of the tribunal (Section 38(1)).

Subject to contrary agreement, the tribunal has the power to:

- order a claimant to provide security for costs in the arbitration (Section 38(3));
- give directions relating to property that is the subject matter of the proceedings or about which any question arises in the proceedings (Section 38(4));
- direct a party or witness to be examined (Section 38(5)); and
- give directions for the preservation of evidence (Section 38(6)).

Parties may agree that the tribunal will have the power to order, on a provisional basis, any relief it would have the power to grant in a final award (Section 39).

Unless otherwise agreed, the Arbitration Act does not confer on the tribunal the power to grant an interim injunction to secure the sum in dispute. However, it is possible to seek a freezing injunction from the English courts in support of arbitral proceedings (Section 44(2)(e)).

6.2 Role of Courts

Preliminary/Interim Relief

Unless the parties agree otherwise, the English courts have the power to make orders in respect of:

- taking witness evidence;
- the preservation of evidence;
- the preservation, detention, inspection or sampling of the disputed property;
- the sale of any goods the subject of the proceeding; and
- granting an interim injunction (Section 44(2)).

Where urgent, the court may (on the application of a party or proposed party to arbitral proceedings) make such orders as it thinks necessary to preserve evidence or assets (Section 44(3)).

However, if the application is not urgent, the court will only make interim orders with the permission of the tribunal or where the tribunal has no power or is unable to act effectively (Section 44(4)). The court will only act to the extent that the tribunal has no power or is unable at the time to act effectively (Section 44(5)).

Despite some uncertainty in case law, it is generally considered (and is the view of the Law Commission) that the court can make orders against non-parties under Section 44 – eg, by ordering the taking of evidence from a non-party witness for the purpose of aiding foreign arbitral proceedings (A & B v C, D & E [2020] EWCA Civ 409).

For information on proposed future reforms in this area, see **2.2 Changes in National Law**.

Emergency Arbitrators

The Arbitration Act does not contain any provisions addressing emergency arbitrators. The agreement of emergency arbitrator provisions (whether in institutional rules or otherwise), does not prevent a party from applying to court under Section 44, provided the usual requirements in Sections 44(3) to (5) have been met (Gerald Metals SA v Timis [2016] EWHC 2327 (Ch)). In Gerald Metals, the High Court refused to grant a freezing order against a defendant to arbitration proceedings. This was because the defendant had given undertakings in the arbitration which satisfied the arbitral institution that the matter was not sufficiently urgent to require an emergency arbitrator and could await the formation of the tribunal. There has been uncertainty among the arbitration community about the effects of the decision in Gerald Metals – namely, a concern that the existence of emergency arbitrator provisions (which are now found in most of the leading institutional rules) preclude the parties from obtaining relief from the court under Section 44. However, the Law Commission considers that this is an incorrect reading of Gerald Metals.

For information on proposed future reforms in this area, see **2.2 Changes to National Law**.

6.3 Security for Costs

Under the Arbitration Act, unless the parties agree otherwise, the tribunal has the power to order the claimant to provide security for costs (Section 38). Costs for which security can be ordered include the arbitrators' and the defendant's costs (Section 39).

The court has no power to order security for costs during arbitration proceedings. It can order security in respect of challenges to an award under Sections 67–69 (Section 70(6)) (see **11.1 Grounds for Appeal**).

7. Procedure

7.1 Governing Rules

Parties are free to agree procedural and evidential matters. In the absence of an agreement by the parties, the tribunal will determine all procedural and evidential matters (Section 34).

7.2 Procedural Steps

No mandatory procedural steps are required by law. Instead, the parties can agree their own procedural rules (see **7.1 Governing Rules**).

7.3 Powers and Duties of Arbitrators

Section 33 of the Arbitration Act imposes a "general duty" on the tribunal to:

- act fairly and impartially, so that each party is given a reasonable opportunity to put its case and deal with that of its opponent; and
- adopt procedures that avoid unnecessary delay and expense, to provide a fair means for the resolution of the dispute.

Section 33 is a mandatory provision that cannot be excluded by agreement of the parties.

Arbitrators are also under a duty to render an enforceable award.

In addition to the general powers granted to a tribunal under Section 38 (see **6.1 Types of Relief**), a tribunal has the power under Section 56(1) to withhold an award for non-payment of its fees.

7.4 Legal Representatives

There are no specific qualifications or other requirements for legal representatives appearing in arbitrations seated in England and Wales. Unless the parties agreed otherwise, a party may be represented in proceedings "by a lawyer or other person chosen by [the party]" (Section 36). Accordingly, foreign lawyers are free to appear without restriction, as are non-lawyers that are not qualified in any jurisdiction.

8. Evidence

8.1 Collection and Submission of Evidence

Parties have broad discretion to agree evidential matters, including:

- the extent of disclosure and at what stage this should occur; and
- whether evidence should be presented at an oral hearing.

Absent party agreement, Section 34(2) of the Arbitration Act gives the tribunal a broad power to determine all procedural and evidential matters.

8.2 Rules of Evidence

Unless the parties agree otherwise, the tribunal has broad powers to decide all evidential matters, including about disclosure of documents, witness evidence and whether to apply rules of evidence (Section 34).

In practice, the IBA Rules on the Taking of Evidence in International Arbitration are often adopted in English-seated arbitrations.

Under Section 37 of the Arbitration Act, unless the parties agree otherwise, the tribunal may appoint experts, legal advisers or assessors to report to it and the parties, and allow them to attend hearings.

8.3 Powers of Compulsion

The tribunal may order disclosure of specific documents from parties under its general power under the Arbitration Act to determine all procedural and evidential matters (Section 34(2)(d)).

Tribunals do not have the power to order disclosure from a non-party, nor the attendance of a witness. Accordingly, if a party wishes to compel a witness to attend a hearing and provide evidence, or requires a non-party to produce documents, they will need to apply to court.

For witnesses located inside the UK, a party to arbitral proceedings may apply to the court to "secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence" (Section 43). This provision is mandatory. However, before applying to court, the applicant must first obtain either the agreement of the other party/ies to the arbitration or the permission of the tribunal.

For witnesses located outside of the UK, a party to an arbitration must rely on Section 44. This allows the party to apply to a court for an order in relation to "the taking of evidence of witnesses" (Section 44 2(a)) and "the preservation of evi-

dence" (Section 44 2(b)) for the purposes of arbitral proceedings. See also **5.7Jurisdiction Over Third Parties** and **6.2 Role of Courts**.

9. Confidentiality

9.1 Extent of Confidentiality

The Arbitration Act does not contain provisions on confidentiality. However, under English law, in the absence of explicit agreement to the contrary, an arbitration agreement contains an implied term obliging the parties to maintain confidentiality (Emmott v Michael Wilson & Partners Ltd [2008] EWCA Civ 184). This reflects the prevailing view that arbitration is private in nature, and that confidentiality is a key perceived advantage of arbitration as opposed to litigation. This duty of confidentiality applies to all constituent parts of the arbitral proceedings, including the award, the pleadings and all documents disclosed or produced.

Confidentiality may also arise in equity (Halliburton Co v Chubb Bermuda Insurance Ltd [2020] UKSC 48) or the tort of misuse of private information (Campbell v MGN Ltd [2004] UKHL 22), for example. Furthermore, some institutional rules contain express confidentiality provisions, including Article 30 of the LCIA Rules 2020.

However, there are certain recognised exceptions to confidentiality in English law, including:

- where parties agree to dispense with the obligation;
- where the disclosure of documents is ordered or permitted by the court;
- where disclosure is reasonably required to establish or protect a party's legal rights; and
- where disclosure is necessary in the interests of justice.

In Manchester City Football Club Ltd v The Football Association Premier League Ltd and others [2021] EWCA Civ 111, the Court of Appeal upheld a decision permitting the publication of a judgment dismissing challenges to an award under the Arbitration Act, as the public interest in publication of the judgment outweighed any duty of confidentiality, and publication would not lead to the disclosure of significant confidential information.

10. The Award

10.1 Legal Requirements

Unless the parties agree otherwise, a majority of the tribunal must agree to an award in order for it to be given (Section 20(3)).

The parties are free to agree on the form of an award (Section 52(1)). In the absence of such agreement, the award must:

- be in writing and signed by all the arbitrators or all those assenting to the award (Section 52(3));
- contain reasons for the award, unless it is an agreed award or the parties have agreed to dispense with reasons (Section 52(4)); and
- state the seat of the arbitration and the date when the award was made (Section 52(5)).

The term "in writing" means recorded by any means, including as an electronic document (Section 5(6)).

The Arbitration Act does not specify a time limit in which an award must be delivered, except that:

- where an award is remitted by the court to the tribunal, the tribunal shall make its award

within three months of the date of the order for remission, unless the court orders otherwise (Section 71(3));
- any correction of the award must be made within 28 days from when the application was received by the tribunal or, if the correction is made at the initiative of the tribunal, within 28 days of the award (Section 57(5)); and
- any additional award must be made within 56 days of the original award (Section 57(6)).

Time limits for corrections and additional awards can be extended by agreement of the parties (Sections 57(5)–(6)).

10.2 Types of Remedies

Unless the parties agree otherwise, the tribunal has the power to grant the following remedies:

- make a declaration about any matter to be determined in the proceedings (Section 48(3));
- order the payment of a sum of money in any currency (Section 48(4));
- order a party to do or refrain from doing anything (Section 48(5)(a));
- order specific performance of a contract (other than a contract relating to land) (Section 48(5)(b)); and
- order the rectification, setting aside or cancellation of a deed or other document (Section 48(5)).

In addition, the parties can agree that the tribunal will have the power to order on an interim basis any relief it would have the power to grant in a final award (Section 39).

Under English law, punitive (exemplary) damages are not recoverable for claims of breach of contract (Addis v Gramophone Company Limited [1909] A.C. 488) but may be recoverable in certain tort claims. However, in accordance with Section 48 of the Arbitration Act, it may be possible for the parties to agree in writing that the tribunal has the power to award punitive damages.

The English courts have enforced foreign arbitral awards for punitive damages, notwithstanding arguments that this would be contrary to English public policy (Pencil Hill Ltd v US Citta di Palermo Spa [2016] EWHC 71(QB)).

10.3 Recovering Interest and Legal Costs

Costs

The parties can agree how costs are allocated, but an agreement that one party is to pay part or the whole of the costs of the arbitration is valid only if that agreement is made after the dispute has arisen (Section 60).

In the absence of an agreement between the parties, the tribunal can allocate the costs of the arbitration between the parties (Section 61(1)). This is done on the general principle that "costs should follow the event" (ie, the losing party pays the successful party's legal costs), unless this is inappropriate in the circumstances (Section 61(2)).

"Costs" include the arbitrators' fees and expenses, the fees and expenses of any arbitral institution, and the legal and other costs of the parties (Section 59).

If the parties do not agree costs, the tribunal can determine the recoverable costs (Section 63(3)). If it does so, the tribunal must specify the basis on which it has acted and the items of recoverable costs and the amount referable to each. If the tribunal does not determine the recoverable costs, either party can apply to the court (Section 63(4)).

The tribunal can direct that the recoverable costs of the whole or part of the arbitration are limited to a specified amount (Section 65(1)).

Where contingency fee arrangements apply, Section 58(A)(6) of the Courts and Legal Services Act 1990 provides that a costs order made in proceedings (including arbitral proceedings) "may not include provision requiring the payment by one party of all or part of a success fee payable by another party under a conditional fee agreement".

Interest

Unless the parties agree otherwise (including in a contractual term), the tribunal has broad discretion to award pre-award and post-award interest on a simple or compound basis, at such rates and with such rests as the tribunal considers meet the justice of the case (Section 49).

11. Review of an Award

11.1 Grounds for Appeal

There are three grounds upon which to challenge an arbitral award:

- lack of substantive jurisdiction (Section 67);
- serious irregularity that has or will cause substantial injustice (Section 68); and
- appeal on a point of law (Section 69)

Section 67: Challenge to the Tribunal's Substantive Jurisdiction

A challenge to the tribunal's substantive jurisdiction is usually based on one of three grounds:

- the existence or validity of the arbitration agreement;
- the constitution of the tribunal; or
- the scope of the arbitration agreement.

A challenge can be made to a final award that deals with the merits, or to a preliminary award on the tribunal's jurisdiction. If the challenge is against a preliminary award on jurisdiction, the tribunal may continue with the arbitration proceedings and make a further award while the challenge to its jurisdiction is pending (Section 67(2)).

Following a challenge under Section 67, the court may confirm, vary or set aside the award in whole or in part (Section 67(3)). For potential future changes to Section 67 remedies, see **2.2 Changes to National Law**.

Section 68: Challenge on the Grounds of Serious Irregularity

The applicant must show both that:

- there has been a "serious irregularity"; and
- "substantial injustice" has resulted or will result from this irregularity.

Section 68 is intended to remedy procedural irregularities, and not to correct errors of fact or law. An exhaustive list of circumstances amounting to a serious irregularity is contained in Section 68(2):

- the tribunal has failed to comply with its general duties under the Arbitration Act– eg, the duty to give each party a reasonable opportunity to present its case under Section 33;
- the tribunal has exceeded its powers;
- the tribunal has failed to conduct the proceedings in accordance with the parties' agreed procedure;
- the tribunal has failed to deal with all the issues put to it;
- an arbitral or other institution or person has exceeded the powers vested in it by the

parties in relation to the proceedings or the award;
- there is uncertainty or ambiguity as to the effect of the award;
- the award was obtained by fraud or is otherwise contrary to public policy;
- the award does not comply with requirements as to form; or
- there was irregularity in the conduct of the proceedings or in the award that is admitted by the arbitral tribunal or other institution or person vested by the parties with powers relating to the proceedings or the award.

A "high threshold" must be met to make a successful challenge under Section 68 (K v A [2019] EWHC 1118 (Comm)).

An applicant may lose its right to bring a Section 68 challenge if it did not act promptly as soon as it thought it had a reason to object and continued to take part in the proceedings (Section 73 of the Arbitration Act; Radisson Hotels APS Denmark v Hayat Otel Işletmeciliği Turizm Yatırım Ve Ticaret Anonim Şirketi [2023] EWHC 892 (Comm)).

Following a successful challenge under Section 68, the court may remit the award to the tribunal for reconsideration, set aside the award or declare the award to be of no effect in whole or in part (Section 68(3)).

Section 69: Appeal on a Point of Law

An appeal on a point of law can be brought with the agreement of all other parties to the arbitration or with the permission of the court (Section 69(2)). An application for permission to appeal under Section 69 will usually be dealt with on the papers, unless the court considers it necessary to hold a hearing (Osler v Osler and others [2024] EWCA Civ 516).

An applicant must show that:

- the appeal relates to a question of law and not fact;
- the question arises out of the award;
- a determination of the question will "substantially affect its rights";
- the question of law is one that the tribunal was asked to determine;
- based on the findings of fact, the tribunal's decision is "obviously wrong" or, where the question is one of "general public importance", at least "open to serious doubt"; and
- it is just and proper for the court to determine the question.

To be open to challenge, a point of law must have been "fairly and squarely before the arbitration tribunal for determination" (Sharp Corp Ltd v Viterra BV [2024] UKSC 14).

It is not sufficient for an applicant to demonstrate that the tribunal may have come to a different conclusion if it had applied the law correctly. The applicant must show that a tribunal that had correctly applied the law could not have reached the conclusion that was reached (John Sisk & Son Ltd v Carmel Building Services Ltd (In Administration) [2016] EWHC 806).

Following a successful appeal, the court may vary the award, remit the award to the tribunal in whole or in part, for reconsideration in light of the court's determination, or set aside the award in whole or in part (Section 69(7)).

Procedure

A challenge or appeal is started by filing an arbitration claim form under CPR Part 62.

Before making a challenge or appeal, the applicant must first exhaust any available recourse in

the arbitral process and any available recourse under Section 57 to correct or obtain an additional award (Section 70(2)).

A challenge or appeal must be brought within 28 days of the date of the award or of being notified of the outcome of any appeal or review in the arbitral process (Section 70(3)). Where a request for correction of an award is first made under Section 57, the date of an award for the purposes of the 28-day period for challenge or appeal runs from the date of the original award, not the date of the corrected award, except in cases where the corrections were material to the challenge in question (Daewoo Shipbuilding and Marine Engineering v Songa Offshore Equinox [2018] EWHC 538 (Comm)). For proposed reforms to Section 70(3), see **2.2 Changes to National Law**.

11.2 Excluding/Expanding the Scope of Appeal

Section 69 is not mandatory and can be excluded by agreement of the parties. It is often disapplied by the parties agreeing certain institutional rules, such as the ICC rules (Article 28.6) and LCIA rules (Article 26.8).

However, Sections 67 and 68 of the Arbitration Act are mandatory provisions, so the right to challenge an arbitral award for lack of jurisdiction or a serious irregularity cannot be excluded by agreement of the parties.

11.3 Standard of Judicial Review

The standard of review adopted by the court for an appeal on a point of law under Section 69 is intended to be deferential rather than meticulous (Zermalt Holdings SA v Nu-Life Upholstery Repair Limited [1985] 275 EG 1134).

Where the substantive jurisdiction of the tribunal is challenged under Section 67, the standard of review is de novo and will take place via a full rehearing (Dallah Real Estate & Tourism v Government of Pakistan [2010] UKSC 46). For information on proposed future reforms in this area, see **2.2 Changes to National Law**.

12. Enforcement of an Award

12.1 New York Convention

The UK (England, Wales, Northern Ireland and Scotland) is party to the New York Convention, so foreign awards made in the territory of another state that is party to the New York Convention are binding in the UK. Sections 101 to 104 of the Arbitration Act provide for the enforcement of awards under the New York Convention.

The UK is also party to the Geneva Convention on the Execution of Foreign Arbitral Awards 1927, and an arbitral award that is made in the territory of a contracting party can be enforced under the Arbitration Act (Section 99). The Geneva Convention 1927 has largely been superseded by the New York Convention.

The UK has also enacted:

- the Foreign Judgments (Reciprocal Enforcement) Act 1933, which provides for the reciprocal recognition and enforcement of arbitral awards in former Commonwealth countries, although this statute has largely been superseded by the New York Convention; and
- the Arbitration (International Investment Disputes) Act 1966, which provides for the recognition and enforcement of arbitral awards from the International Centre for Settlement of Investment Disputes.

12.2 Enforcement Procedure

English-Seated Awards

Section 66 of the Arbitration Act sets out a summary procedure for the enforcement of English-seated awards. First, under Section 66(1), an arbitral award may "by leave of the court, be enforced in the same manner as a judgment or order of the court". Alternatively, an award can be converted into a court judgment under Section 66(2). In practice, the Section 66(2) mechanism is rarely used.

An award can also be enforced by action on the award for failure to comply with the award (Section 6(4)). Again, this method is rarely used in practice.

The enforcing party will need to apply to the court for permission following the procedure in CPR 62. This involves submitting an arbitration claim form, attaching a witness statement, the award and the arbitration agreement. This is generally done without giving notice to the other party. If permission to enforce is granted, a judgment will be entered in the terms of the award and the same powers that are available to enforce an ordinary court judgment will be available. Where a party can show that a tribunal lacks substantive jurisdiction to make an award, leave to enforce will be refused (Section 66(3)).

Foreign Awards

To enforce a foreign award under the New York Convention, a party should follow the procedure under Section 102 of the Arbitration Act. This requires the enforcing party to produce the duly authenticated award or a duly certified copy of the award and the original arbitration agreement or a duly certified copy of it. If an award is in a foreign language, a certified copy of it should also be produced.

Section 103(2) of the Arbitration Act mirrors Article V of the New York Convention, providing the following six grounds under which the enforcement of an award may be resisted in the UK:

- that a party to the arbitration agreement was (under the law applicable to them) under some incapacity;
- that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;
- that a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present their case;
- that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration;
- that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;
- that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

In addition, the English courts have discretion to refuse to enforce a foreign award in the UK on the grounds of public policy (Section 103(3)).

The court may adjourn its decision whether to enforce an award if an application to set aside or suspend an award has been made to the courts of the seat of the arbitration and is pending (Section 103(5)).

Although the Arbitration Act and the New York Convention are silent on the point, a party, such as a sovereign state, may be immune from enforcement proceedings. Where a state has agreed in writing for a dispute to be resolved by arbitration, the state is not immune from court proceedings "which relate to the arbitration" (Section 9 of the State Immunity Act 1978, or SIA). This includes proceedings to recognise and enforce awards (Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and AB Geonafta [2006] EWCA Civ 1529). However, a party may not execute against the property of a state unless the state has separately expressly waived its immunity from execution (Section 13(2)(b) of the SI) or execution is sought against property that is in use or intended for use for commercial purposes (Section 13(4) of the SIA).

12.3 Approach of the Courts

The English courts adopt a strongly pro-enforcement attitude to arbitration awards and, for this reason, have been reticent to refuse to enforce arbitral awards. For example, while Section 103(3) grants the English courts the discretion to refuse to enforce an award in the UK on the grounds of public policy, the courts have emphasised that this is to be approached with "extreme caution" (IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation (2017) UKSC 16).

In certain cases, however, such as where the arbitration agreement is between a consumer and a business, the English courts have been willing to refuse enforcement on public policy grounds (Chechetkin v Payward Ltd and others [2022] EWHC 3057 (Ch)).

13. Miscellaneous

13.1 Class Action or Group Arbitration

Aside from consolidation (see **13.4 Consolidation**), the Arbitration Act is silent on the availability of class or group arbitration. In contrast to jurisdictions such as the United States, group arbitration remains uncommon in England and Wales and faces similar challenges to those that arise in multiparty or multi-contract arbitration (eg, consent). However, the rise in group litigation claims before the English courts (and elsewhere) and examples of group claims in investment treaty arbitration (eg, Abaclat v Argentina, ICSID Case No ARB/07/5 and Theodoros Adamakopoulos and others v Republic of Cyprus, ICSID Case No ARB/15/49) indicate that there is potential for group arbitration to become more prevalent in the future.

13.2 Ethical Codes

The Bar Standards Board's BSB Handbook regulates English barristers participating in arbitrations in England and Wales. Similarly, the Solicitors Regulation Authority (SRA) Standards and Regulations, including the Code of Conduct for Solicitors, RELs and RFLs, regulate the activities of Solicitors acting in arbitrations in England and Wales. There are no separate rules that apply to counsel from jurisdictions outside England and Wales participating in arbitrations in England and Wales.

Several arbitral institutions incorporate mandatory ethical standards into their arbitration rules – eg, the 2020 LCIA Rules, which give the tribunal the power to order sanctions for non-compliance (see 2020 LCIA Rules, Articles 18.4 and 18.5).

13.3 Third-Party Funding

Third-party funding for arbitration is now well established in England and Wales. It is a rapidly

growing sector, serviced by increasingly sophisticated financing arrangements and specialist litigation financing providers.

In general, English law permits funding agreements between claimants and third-party funders that provide for funders to receive payment in the event of success. However, such agreements need to comply with the Courts and Legal Services Act 1990 and relevant case law.

In R (on the application of PACCAR Inc) v Competition Appeal Tribunal [2023] UKSC 28, the Supreme Court held that litigation funding agreements, which provide for a funder's success fee to be calculated as a percentage of damages recovered, are a damages-based agreement for the purposes of Section 58AA of the Courts and Legal Services Act 1990. Such agreements must therefore meet the requirements of the Damages-based Agreements Regulations 2013 or are otherwise unenforceable.

The UK government announced in March 2024 that it would fast-track legislation that would reverse the decision in PACCAR. However, the proposed Litigation Funding Agreements (Enforceability) Bill did not come into force before Parliament was dissolved after the general election was announced, and it was not among the planned bills announced by the new Labour government on 17 July 2024 for the 2024–25 Parliamentary session.

13.4 Consolidation

A tribunal may order the consolidation of arbitration proceedings with consent of the parties to the arbitration (Section 35(1)). In the absence of such agreement, however, the Arbitration Act provides no default power for the tribunal to order the consolidation of proceedings (Section 35(2)).

Some commonly used institutional rules for arbitration give the tribunal the power to order consolidation in certain circumstances – eg, the LCIA Rules 2020 (Articles 22.1 and 23).

13.5 Binding of Third Parties

Under English law, a non-signatory third party may be bound by an arbitration agreement, but the circumstances are limited. Circumstances in which this may occur include the following.

- Where an agent has executed an arbitration agreement on behalf of its principal.
- Where contractual rights or causes of action are assigned or transferred to a third party – where those rights or causes of action were originally subject to an arbitration agreement, the third party may also be bound by it (West Tankers Inc v Ras Riunione Adriatica Di Sicurta SpA [2005] EWHC 454 (Comm)).
- The Contracts (Rights of Third Parties) Act 1999 provides that, in certain circumstances, a third party may enforce rights arising under a contract. If those rights are subject to an arbitration agreement, the third party may be bound to it (Nisshin Shipping v Cleaves & Co [2003] EWHC 2602 (Comm)). It is relatively common for contracts to exclude the application of the Contract (Rights of Third Parties) Act 1999.
- An insurer may be subrogated to contractual rights that are themselves subject to an obligation to arbitrate.
- Where, in limited circumstances, the corporate veil is pierced to extend an arbitration agreement to a group company because the corporate entity is simply a "façade to conceal the true facts" (VTB Capital plc v Nutritek International Corp and others [2013] UK SC 5).

An arbitral award will not bind third parties, including parent companies of parties to an arbitration. For example, the English courts have held that a prior arbitration award that had rescinded a joint venture agreement had no binding effect on a subsequent proprietary claim made against third parties who were not parties to the arbitration (Vale SA v Steinmetz [2021] EWCA Civ 1087).

See also **5.3 Circumstances for Court Intervention.**

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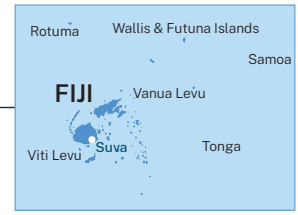

Law and Practice

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BANKSIDE CHAMBERS

1. General

1.1 Prevalence of Arbitration

Fiji has sought to promote international arbitration as a method of dispute resolution in order to improve the climate for foreign investment. It became a party to the New York Convention in 2010 and, in 2017, enacted the International Arbitration Act of 2017 (the "Act"): a modern arbitration statute that implements Fiji's commitments under the New York Convention and provides a comprehensive framework for international arbitration in Fiji, in accordance with the UNCITRAL Model Law and international best practices.

1.2 Key Industries

We are not aware of any industries in Fiji for which international arbitration is more or less popular.

1.3 Arbitration Institutions

There are no arbitral institutions established in Fiji. We are aware that disputes involving parties from Fiji have been administered by the Australian Centre for International Commercial Arbitration (ACICA).

1.4 National Courts

In the limited circumstances in which courts are permitted to intervene in arbitral proceedings, the Act (in the case of international arbitrations) and the Fiji Arbitration Act 1965 (in the case of domestic arbitrations) designate the High Court of Fiji as the supervisory court in matters of arbitration.

2. Governing Legislation

2.1 Governing Law

International arbitration in Fiji is governed by the Act.

The Act is based on the Model Law as amended in 2006. It also incorporates some elements of the arbitration laws of other jurisdictions, such as Australia, Hong Kong and Singapore, including:

- By defining an "arbitral tribunal" to include "an emergency arbitrator" (s 2).
- By providing for the liability and immunity of arbitrators, appointing authorities, and arbitral institutions (s 21).
- By providing, in addition to having a "full opportunity" to present their case, that the parties may also "appear in person before an arbitral tribunal" and either be self-represented or represented by a representative "of that party's choice" (s 35).
- By providing for the confidentiality of information relating to the arbitration, the arbitral proceedings and any awards (s 45).
- By providing (or clarifying) that fraud, corruption and a breach of the rules of natural justice amount to public policy matters (s 55).

As set out above, domestic arbitration in Fiji is governed by the Fiji Arbitration Act 1965. In this guide we focus on international arbitration in Fiji.

2.2 Changes to National Law

There have not been any changes to the Act in the past year, and there is no pending legislation of which we are aware that would materially change the arbitration landscape in Fiji.

3. The Arbitration Agreement

3.1 Enforceability

Section 11 of the Act provides that an arbitration agreement is "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not".

An arbitration agreement shall be in writing (s 11(1)), but an arbitration agreement shall be regarded as being in writing if it is recorded "in any form", even if it was "concluded orally" (s 11(2)).

3.2 Arbitrability

Section 1(5) of the Act provides, consistently with the Model Law, that it shall not affect any other law of Fiji "by virtue of which certain disputes shall not be submitted to arbitration".

3.3 National Courts' Approach

We are not aware of any judgments of the Fijian courts under the Act with respect to determining the law governing the arbitration agreement. The Fijian courts would, however, likely follow the UK Supreme Court decision in Enka v Chubb [2020] UKSC 38.

The Fijian courts have taken a pro-arbitration stance and sought to enforce arbitration agreements under the Act. For example, in Housing Authority v Top Symphony Sdn. Bhd HBC No. 328 of 2018 at [49], the High Court referred to English authority and held that, under the Act, "[a]rbitration is regarded [as] an appropriate way of resolving international commercial disputes, and courts give effect to arbitration agreements wherever possible… [T]he parties may submit their disputes to be resolved in the manner they have agreed upon… The court will not lightly disregard the principle of party autonomy."

3.4 Validity

An arbitration clause in a contract may be considered valid even if the rest of the contract in which it is contained is invalid. Section 22(1) the Act states that, for the purposes of the arbitral tribunal's competence to rule on its own jurisdiction, "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract", and that "[a] decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause". The High Court has held, consistently with Section 22(1), that "[a]n arbitration clause is a self-contained contract, collateral to the main contract. It can stand on its own notwithstanding an attack on the containing contract" (Housing Authority v Top Symphony Sdn. Bhd HBC No. 328 of 2018 at [49]).

4. The Arbitral Tribunal

4.1 Limits on Selection

The parties are "free to determine the number of arbitrators" (s 15(1) of the Act). Failing such a determination, the number of arbitrators shall be three (s 15(2) of the Act).

No person shall be precluded from acting as an arbitrator by reason of their nationality, unless the parties agree otherwise (s 16(1) of the Act). The parties are also "free to agree on a procedure of appointing the arbitrator or arbitrators" (s 16(2) of the Act).

4.2 Default Procedures

If the parties' chosen machinery for selecting arbitrators fails, then (unless the parties have

agreed otherwise) at a party's request the court shall take the necessary measures under that machinery (s 16(4) of the Act).

If the parties have not agreed any machinery, then the applicable default procedures are specified in the Act:

- If there are to be three arbitrators, then each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator. If a party fails to appoint an arbitrator within 30 days, or if the two arbitrators fail to agree on a third arbitrator within 30 days, the appointment shall be made by the court upon request (s 16(3)(a)).
- If there is to be a sole arbitrator, if the parties are unable to agree on the arbitrator, a party may request the court to make the appointment (s 16(3)(b)).

There is no default procedure that applies under the Act in the case of multiparty arbitrations.

4.3 Court Intervention

The courts may only intervene in the selection of arbitrators upon request of a party in the circumstances set out in **4.2 Default Procedures**. The court's decision on such matter is not subject to appeal (s 16(5) of the Act).

4.4 Challenge and Removal of Arbitrators

Sections 17 and 18 of the Act govern the challenge and removal of arbitrators. An arbitrator may be challenged "only if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence, or if he or she does not possess qualifications agreed to by the parties".

The parties are free to agree the procedure for challenging an arbitrator. Under the default procedure, the challenging party must send a written statement of the reasons for challenge to the arbitral tribunal within 15 days of the constitution of the tribunal or after becoming aware of the circumstances giving rise to the challenge. The arbitral tribunal shall decide on the challenge.

If the challenge is unsuccessful, the challenging party may request the High Court to decide on the challenge.

4.5 Arbitrator Requirements

The Act has adopted the Model Law requirement that a person who is approached in connection with appointment as an arbitrator must disclose any circumstances likely to give rise to justifiable doubts as to that person's impartiality or independence. An arbitrator also has an ongoing duty to disclose any such circumstances (s 17(1) of the Act). As set out above, an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence (s 17(2) of the Act).

5. Jurisdiction

5.1 Matters Excluded From Arbitration

Section 1(5) of the Act provides, consistently with the Model Law, that it shall not affect any other law of Fiji "by virtue of which certain disputes shall not be submitted to arbitration".

5.2 Challenges to Jurisdiction

Pursuant to Section 22(1) of the Act, an arbitral tribunal has the power to rule on whether it has jurisdiction to determine the particular dispute.

The tribunal may rule on the point as a preliminary question, or in an award on the merits (s 22(3)).

5.3 Circumstances for Court Intervention

There are three circumstances in which the High Court might address the question of jurisdiction and competence of an arbitral tribunal:

- When a question of jurisdiction is referred to it after a tribunal has already ruled on the point as a preliminary question. There is no appeal from such a decision of the High Court (s 22(4) of the Act).
- When a jurisdictional ruling is given in an award on the merits, the issue of jurisdiction may be considered by the Court in connection with setting-aside or enforcement proceedings (ss 52(2)(a)(i), (iii) and 54(1)(a)(i), (iii)).
- When deciding whether to stay court proceedings to allow an arbitration to proceed (s 12).

5.4 Timing of Challenge

If the arbitral tribunal rules on jurisdiction in a preliminary ruling, the parties have 30 days from notice of that decision to apply to the High Court to decide the question.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

While we are not aware of any decisions of the Fijian courts on this issue, it is likely that court review of jurisdiction would be on a de novo basis.

5.6 Breach of Arbitration Agreement

If a party commences court proceedings in breach of an arbitration agreement, it is for the opposing party to apply to have the court proceeding stayed while arbitration is in train. Any application for stay must be made before the applicant submits its first statement on the substance of the dispute (s 12 of the Act).

Sections 12(1) and (4) of the Act provide that the High Court must stay the proceeding and refer the parties to arbitration unless it finds that the agreement is null and void or inoperative or incapable of being performed.

As set out in **3.3 National Courts' Approach** and **5.2 Challenges to Jurisdiction**, the Fijian courts have confirmed that "courts give effect to arbitration agreements wherever possible" and that an arbitral tribunal "can rule upon its own jurisdiction" (Housing Authority v Top Symphony Sdn. Bhd HBC No. 328 of 2018 at [49]). In a recent judgment under the Fiji Arbitration Act 1965 (Uma Investments Pte Ltd v Grace Road Restaurant Pte Ltd HBC No. 242 of 2021), the High Court granted an application to stay court proceedings and refer the parties to arbitration. In doing so, the High Court followed the decision of the UK Supreme Court in Republic of Mozambique v Privinvest Shipbuilding SAL (Holding) [2023] UKSC 32, in relation to the identification of the "matter" that should be referred to arbitration (at [10]).

The Fijian courts have also considered the circumstances in which they ought to exercise the discretion to stay winding-up proceedings relating to a debt arising out of a contract that contains an arbitration clause. In Boat Shed Holdings Ltd v Toll Construction & Joinery (Fiji) Pte Ltd [2023] FJHC 671, the High Court referred to the judgments of the England and Wales Court of Appeal in Salford Estates, the Singapore Court of Appeal in AnAn Group, and the Hong Kong Court of First Instance in Lasmos and Dayang, and held that "[t]he common thread between the various approaches appears to be, that before the discretion [to stay the winding-up petition] becomes exercisable at all, the debtor must show either a genuine dispute, or a bona fides dispute, or a substantial dispute about the

alleged debt" (at [24]). That statement of the law is difficult to reconcile with the foreign judgments cited in Boat Shed. However, it is consistent with the recent judgment of the Judicial Committee of the Privy Council in Sian Participation Corp v Halimeda [2024] UKPC 16 – decided less than a year after the judgment of the High Court in Boat Shed – in which the Privy Council decided that winding-up petitions are not required to be stayed in favour of arbitration if there are no genuine and substantial grounds for disputing the debt, and directed the English courts no longer to follow Salford Estates.

5.7 Jurisdiction Over Third Parties

The Act does not allow an arbitral tribunal to assume jurisdiction over individuals or entities that are not party to the arbitration agreement. It would, however, be open to an arbitral tribunal to conclude that a non-signatory to the contract is nevertheless a party to the arbitration agreement (eg, on the basis of implied consent, or as a member of a group of companies or principal/agent).

6. Preliminary and Interim Relief

6.1 Types of Relief

The powers of an arbitral tribunal in Fiji to award preliminary or interim relief in an international arbitration are based on the Model Law, as amended in 2006, and set out in Sections 23-30 of the Act. Such relief is binding.

6.2 Role of Courts

A court has "the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of Fiji, as it has in relation to proceedings in the court" (s 33 of the Act).

The Act includes emergency arbitrators within the definition of an arbitral tribunal. Awards by emergency arbitrators are therefore binding and can be recognised and enforced under the Act.

6.3 Security for Costs

In relation to interim measures, the Act allows for the arbitral tribunal to require the requesting party to "provide appropriate security in connection with the measure" (s 28(1)). In relation to preliminary orders, the arbitral tribunal must require security unless it would be inappropriate or unnecessary to do so (s 28(2)).

7. Procedure

7.1 Governing Rules

The Act governs the procedure of international arbitration in Fiji.

The Act expressly covers certain matters of procedure, including the following:

- the date of commencement of arbitral proceedings (s 38);
- the language to be used in the proceeding (s 39);
- the form and timing of statements of claim and defence and the circumstances in which they may be amended or supplemented (s 40);
- the receipt and consideration of evidence and argument by the tribunal (s 41);
- the power of the tribunal to make or authorise a request for court assistance in taking evidence (s 44);
- the powers of the tribunal in the event of default of a party (s 42); and
- the power of the tribunal to appoint an expert or experts (s 43).

7.2 Procedural Steps

The parties are generally free to agree on the procedure to be followed by the arbitral tribunal (s 36(1) of the Act). Failing agreement, the arbitral tribunal is authorised to conduct the arbitration in such manner as it considers appropriate, including "the power to determine the admissibility, relevance, materiality and weight of any evidence" (s 36(2)).

Any procedure adopted by the arbitral tribunal must not conflict with: (a) the requirements of equality of treatment and full opportunity to present each party's case imposed by Section 35 of the Act; or (b) any other provision of the Act from which the parties may not derogate or the relevant public policy, which would have the effect of rendering an award susceptible to being set aside or being refused recognition or enforcement.

7.3 Powers and Duties of Arbitrators

The Act contains the same powers and duties of arbitrators as those set out in the Model Law. However, the Act also provides that an arbitrator "is not liable for anything done or omitted to be done by the arbitrator in good faith in his or her capacity as arbitrator" (s 21(1) of the Act).

7.4 Legal Representatives

There are no specific rules for legal practitioners acting in arbitration proceedings in Fiji.

8. Evidence

8.1 Collection and Submission of Evidence

As set out in **7.2 Procedural Steps**, in the absence of an agreement between the parties to the contrary, the arbitral tribunal has the power to conduct the arbitration in the manner it considers appropriate, including "the power to determine the admissibility, relevance, materiality and weight of any evidence" (s 36(2) of the Act). The arbitral tribunal thus has the power under the Act to order discovery/disclosure, address claims to privilege, require the provision of witness statements and allow cross-examination.

As for the specific rules that apply to the collection and submission of evidence in international arbitrations, see **8.2 Rules of Evidence**.

8.2 Rules of Evidence

In the absence of an agreement between the parties to the contrary, the arbitral tribunal has the power to conduct the arbitration in the manner it considers appropriate, including to determine the admissibility, relevance, materiality and weight of any evidence (s 36 of the Act).

While the point does not appear to have been tested before the Fijian courts, it appears to be at least arguable that, in making such determinations, the arbitral tribunal is bound by Fiji's Civil Evidence Act 2002, which among things contains rules regarding hearsay evidence, documentary evidence, expert and opinion evidence, and privilege. That is because the Civil Evidence Act applies to "civil proceedings", which are defined to include "an arbitration or reference, whether or not under an enactment" (s 2(1)). Consistent with this, "court" is defined "in relation to an arbitration or reference" to mean "the arbitrator or umpire".

On the other hand, it could be argued that international arbitrations under the Act are not "civil proceedings" because such proceedings do not include "civil proceedings in relation to which the strict rules of evidence do not apply" (s 2(1) of the Civil Evidence Act). The power conferred on the arbitral tribunal in Section 36(2) of the Act

to "conduct the arbitration in such manner as it considers appropriate" is arguably an indication that "the strict rules of evidence do not apply".

In our view, the better interpretation is that Section 36(2) does not displace the strict rules of evidence. That would require clearer words, such as those in Section 31 of the Trade Disputes Act ("A Tribunal or a Board, for the purpose of dealing with any matter referred to it under the provisions of this Act, shall be entitled to elicit all such information as in the circumstances may be considered necessary, without being bound by the rules of evidence in civil or criminal proceedings"). On the basis of Section 31, an arbitral tribunal constituted under the Trade Disputes Act held that the Civil Evidence Act "has no application to the Tribunal's proceedings for the very reason that the strict rules of evidence do not apply" (PAFCO Employees Union v Pacific Fishing Company Ltd [2007] FJAT 76; Award 78 of 2007). Not only does the Act not contain a similar form of words, but the Civil Evidence Act expressly refers to "an arbitration".

8.3 Powers of Compulsion

Arbitral tribunals do not have powers of compulsion to order the production of documents or require the attendance of witnesses. However, pursuant to Section 44 of the Act: "The arbitral tribunal or a party with the approval of the arbitral tribunal may request from the court assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence."

9. Confidentiality

9.1 Extent of Confidentiality

Section 45 of the Act provides for the confidentiality of arbitral proceedings and their constituent parts, unless the parties agree otherwise. In particular:

- All documents and materials relating to the arbitration are confidential.
- No party may disclose information relating to the arbitral proceedings or any awards in the arbitration.
- There are, however, limits on that prohibition. Disclosure may be made to protect or pursue a legal right or interest, to enforce or challenge the award, or to comply with a legal obligation to disclose information to a government or regulatory body or court or tribunal, or to a professional or other adviser.
- Disclosure may also be made pursuant to an order made by the arbitral tribunal, but such an order may only be made upon request, and after giving the parties an opportunity to be heard.

10. The Award

10.1 Legal Requirements

The formal requirements for a valid arbitral award are contained in Section 49 of the Act, which follows the Model Law. The award must be in writing, be signed by (a majority of) the tribunal, state reasons and include the date and place of the arbitration. The signed award must be delivered to each party after it has been made. There is no requirement that the arbitrators sign each page of the award.

Such formal requirements apply to substantive awards as well as corrections/interpretations of an award, and to any additional award made by the tribunal.

10.2 Types of Remedies

Subject to the application of the provisions of the Act on arbitrability, and the rules of setting aside or refusing recognition or enforcement of awards in conflict with public policy, the Act does not contain any limits on the types of remedies that an arbitral tribunal may award.

10.3 Recovering Interest and Legal Costs

The Act does not specifically address interest and legal costs, but these are generally recoverable under Fijian law.

In relation to interest, the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935 does not apply directly to arbitral tribunals, but parties could refer to this statute – which provides that judgment debts carry interest at the rate of 4% per annum from the time of entering judgment until the date of payment – in assessing the appropriate interest rate.

11. Review of an Award

11.1 Grounds for Appeal

The Act does not provide for the appeal of an arbitral award. The only recourse available to a party that is dissatisfied with an award is to apply to set aside the award (s 52 of the Act).

11.2 Excluding/Expanding the Scope of Appeal

The parties cannot agree to exclude or expand the grounds on which an arbitral award may be set aside. This follows from the text of Section 52(1) of the Act, which does not provide that the parties may agree otherwise, and which specifies that recourse to a court against an arbitral award "may be made only by an application for setting aside in accordance with subsections (2) and (3)".

11.3 Standard of Judicial Review

As set out in **11.1 Grounds for Appeal**, judicial review of the merits of an arbitral award by way of an appeal is not permitted under the Act.

12. Enforcement of an Award

12.1 New York Convention

Fiji signed and ratified the New York Convention on 27 September 2010. The long title of the Act confirms that it is intended to give effect to the Convention.

12.2 Enforcement Procedure

The recognition and enforcement of awards, whether made in Fiji or elsewhere, is governed by Sections 53 and 54 of the Act, which reflect the Model Law and New York Convention requirements.

If an award has been set aside by the courts at the seat of arbitration, the Fijian courts have discretion to refuse enforcement of that award (s 54(1)(a)(v)). While the point has not yet been tested in the Fijian courts, it seems likely that awards set aside by the courts of the seat will not be enforced in Fiji, unless the set-aside decision was procured by judicial corruption.

If an award is subject to ongoing set-aside proceedings, the Fijian courts have discretion to adjourn their decision on enforcement (and may require the payment of security) (s 54(2)).

12.3 Approach of the Courts

The approach of the Fijian courts to the recognition or enforcement of arbitral awards appears to be generally consistent with the policy of

supporting arbitration as a method of dispute resolution. As set out in **3.3 National Courts' Approach**, the Fijian courts have confirmed that "courts give effect to arbitration agreements wherever possible" (Housing Authority v Top Symphony Sdn. Bhd HBC No. 328 of 2018 at [49]).

Section 54(1)(b)(ii) of the Act provides that recognition and enforcement of an award may be refused if it would be in conflict with the public policy of Fiji. Section 55 clarifies that an award is contrary to the public policy of Fiji if it was induced or affected by fraud or corruption, or if a breach of natural justice occurred in connection with the making of the award. While there appear to be no decisions of the Fijian courts that interpret the public policy ground for refusal of recognition and enforcement, the Report on the Fiji International Arbitration Act 2017 cited a submission of the Fiji Chamber of Commerce and Industry, which stated that "public policy" should extend to the public interest in honesty and fair dealing, but not to violating a basic notion of Fijian law.

13. Miscellaneous

13.1 Class Action or Group Arbitration

The Act does not provide for class action or group arbitration.

13.2 Ethical Codes

There are no specific ethical rules that apply to counsel and arbitrators conducting arbitration proceedings in Fiji.

For admission to practise law in Fiji, foreign lawyers must be admitted to practice in an overseas jurisdiction which has reciprocal recognition of qualifications with Fiji. Lawyers who are admitted as a barrister or a solicitor in a Commonwealth country may be admitted to practise law in Fiji if they reside in Fiji for at least three months and have legal experience considered appropriate by the Chief Justice of Fiji.

13.3 Third-Party Funding

Third-party funding in Fiji may be restricted by the doctrines of champerty and maintenance, which were part of the English common law that applied at the time of Fijian independence in 1970. The Fijian courts do not appear to have addressed these doctrines and their continued application in Fiji.

13.4 Consolidation

There are no rules dealing with consolidation in the Act, which reflects the Model Law in this regard. The ability to consolidate proceedings would therefore likely depend on the applicable rules of arbitration.

13.5 Binding of Third Parties

As set out in **5.7 Jurisdiction Over Third Parties**, non-signatories may sometimes be regarded as parties to an arbitration agreement and therefore bound by any corresponding award. Third parties cannot otherwise be bound by an arbitration agreement or award.

The Fijian courts do have the ability to bind third parties in circumstances in which an arbitral tribunal cannot, eg, in making interim orders (s 33), or in making orders to assist in taking evidence (s 44).

FRANCE

Law and Practice

Contributed by:
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BDGS Associés

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BDGS Associés is one of France's leading independent law firms founded in 2013, renowned for handling clients' most strategic and complex matters. The practice includes members who are bilingual and dual-qualified, enabling them to work across borders. The firm's dispute resolution practice regularly handles major international arbitration matters for both French and international clients in a broad range of sectors, including energy and consumer products. The practice covers disputes under the rules of all key arbitral institutions in all the major arbitral seats. It also has significant experience and success in carrying out arbitration alongside leading independent law firms in all major jurisdictions.

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1. General

1.1 Prevalence of Arbitration

It has become widespread practice for parties to French law governed cross-border matters of significant value to submit their disputes to international arbitration, predominantly choosing the arbitration rules of the International Chamber of Commerce (ICC). This preference is driven by the possibility of keeping the arbitration proceedings confidential, the speed and digitalisation of arbitration proceedings compared to litigation, the flexibility offered in terms of appointment of arbitrators and choice of procedural rules, and the pro-arbitration nature of French law (ease of enforcement of the arbitration award before the French courts and relative non-interference of French courts in the arbitration process).

1.2 Key Industries

The key industries in France for international arbitration proceedings are construction, energy, industry and digital technologies. Disputes most often relate to contractual breaches or brutal termination of established commercial relationships.

1.3 Arbitration Institutions

The key arbitration institution in France is the International Chamber of Commerce's International Court of Arbitration (ICC). Apart from the ICC, France has other arbitration institutions such as the French Association for Arbitration (*Association Française d'Arbitrage*), the Regional Chamber of Arbitration (*Chambre Régionale d'Arbitrage*), the International Arbitration Chamber of Paris (*Chambre Arbitrale Internationale de Paris*, CAIP), the Paris Centre of Mediation and Arbitration (*Centre de Médiation et d'Arbitrage de Paris*, CMAP), and the European Court of Arbitration located in Strasbourg.

On 1 June 2024, the CAIP published new arbitration and mediation rules modernising the rules on plurality of contracts, third-party intervention and joinder of arbitrations and introducing a fast-track procedure and double-degree arbitration. The new rules will apply to requests for arbitration received on or after 1 June 2024.

Specialised arbitration institutions also exist in France: for example, the French Arbitration Centre for Reinsurance and Insurance (*Centre Français d'Arbitrage de Reassurance et d'Assurance*, CEFAREA), the Paris Maritime Arbitration Chamber (*La Chambre Arbitrale Maritime de Paris*) and Arbitration Chamber for mass retail (*Chambre Arbitrale de la grande distribution*, CAGD).

The Arbitration Chamber for mass retail was created on 18 June 2024, and has signed an exclusive partnership agreement with the CAIP.

1.4 National Courts

French law establishes a supporting judge, acting to ensure the efficiency of arbitral proceedings and resolve procedural difficulties, notably disputes relating to the constitution of the arbitral tribunal. Article 1505 of the French Civil Procedure Code (FCPC) specifies that, unless provided otherwise, in international arbitration, the supporting judge is the Chairman of the *Tribunal judiciaire* of Paris.

The International Commercial Chamber of the Paris Commercial Court and the Paris Court of Appeal (known as the "ICCP-CA"), created in 2018, are specialised chambers for international business disputes. The ICCP-CA has jurisdiction to handle set-aside proceedings and appeals against decisions refusing the enforcement of an international arbitral award issued in France (Article 1523 of the French Civil Procedure Code). The judges on the chamber are all

fluent in English, hearings may be conducted in English without translation and documents may be disclosed in English without translation.

Furthermore, Article 25 of the Act of 13 June 2024 (*loi n° 2024-537 du 13 juin 2024 visant à accroître le financement des entreprises et l'attractivité de la France*) introduced a new Article L. 311-16-1 into the French Judicial Organisation Code which will come into force on a date to be set by decree (Article 29 of the Act). This new article will grant the Paris Court of Appeal exclusive jurisdiction in international arbitration to hear set-aside requests against awards and appeal against decisions ruling on requests for exequatur of awards.

2. Governing Legislation

2.1 Governing Law

French arbitration law is mainly codified in Articles 1442 to 1527 of the French Civil Procedure Code and Articles 2059 to 2061 of the French Civil Code. The French Civil Procedure Code distinguishes between international arbitration (Articles 1504 to 1527 of the French Civil Procedure Code) and domestic arbitration (Articles 1442 to 1503 of the French Civil Procedure Code, as well as Articles 2059 to 2061 of the French Civil Code). Certain articles of the French Civil Procedure Code applicable to domestic arbitration are equally applicable to international arbitration, except if the parties agree otherwise (Article 1506 of the French Civil Procedure Code).

Arbitration is international if it involves "international trade interests" (Article 1504 of the French Civil Procedure Code). An arbitration is therefore deemed international when the underlying economic transaction does not unwind in one country only, regardless of the parties' nationality, the applicable laws, or the arbitration seat (*Cour de cassation*, First Civil Chamber, 26 January 2011, No 09-10.198; Paris Court of Appeal, 7 February 2023, No 20/08604).

French courts, notably the *French Cour de cassation* and the Paris Court of Appeal, also play a vital role in interpreting the arbitration-related legislation in France.

French arbitration law is not based on the UNCITRAL Model Law on International Commercial Arbitration. It largely pre-dates the UNCITRAL Model Law and differs from it in several aspects such as the following.

- The criteria for what constitutes international arbitration: while Article 1(3) of the UNCITRAL Model Law recognises an approach based on the place of business of the parties or on the parties' will, French law adopts a purely economic approach centred on the cross-border flow of capital, services, or assets (see above).
- The method to be followed by the arbitral tribunal in cases where the parties do not choose the substantive law applicable to their dispute: French law does not impose the application of conflict of law rules (Article 1511 of the French Civil Procedure Code), while Article 28 of the UNICTRAL Model Law does.
- The grounds for refusing the recognition and enforcement of an award: unlike the UNCITRAL Model Law (Article 36(i)(a)(v)), French law does not recognise the setting aside of an award by a court of the country in which it was made as a ground for refusing its recognition and enforcement in France (see **12.2 Enforcement Procedure**).

Nevertheless, there are important common principles contained in French Arbitration Law and in the UNCITRAL Model Law, such as the principles of "competence-competence" and of separability or autonomy of the arbitration clause from the main contract.

2.2 Changes to National Law

There have not been significant changes to French national arbitration law in the past year.

The creation of a code of international private law is currently being discussed. A draft code was submitted to public consultation by the Ministry of Justice up until 30 November 2022. Article 202 of the draft code contains one provision related to the possibility of seeking interim measures from French courts once the arbitral tribunal in an international arbitration is constituted:

"when the arbitral tribunal is constituted, but if it is not able to consider the request for such measures or does not have the power to order them, the French Courts have jurisdiction [to order them] if they are to be carried out in France and if the law applicable to the arbitral procedure does not provide the contrary […]".

If adopted, this provision would constitute an evolution of French law, which currently provides that interim measures can only be sought from French courts so long as the arbitral tribunal is not constituted (Article 1449 of the French Civil Procedure Code).

3. The Arbitration Agreement

3.1 Enforceability

There are no specific legal requirements for a valid arbitration agreement to be enforceable under French law. In domestic arbitration, an arbitration agreement must be in writing to be valid (Article 1443 of the French Civil Procedure Code). However, this article is not applicable to international arbitration.

3.2 Arbitrability

Under French law, the scope of matters that can be referred to arbitration has steadily expanded over the last 30 years. As a result of this evolution, it can be reasonably considered that any matter relating to economic interests can prime facie be referred to arbitration.

However, certain subjects remain "non-arbitrable". Article 2060 of the French Civil Code provides that arbitration is not possible in matters relating to personal status and capacity, divorce and legal separation, disputes concerning public bodies and institutions and, more generally, all matters relating to public order.

Nevertheless, the matters relating to public order that are not arbitrable are limited. They mainly concern criminal law in general, or tax-related matters. For example, disputes between the tax administration and a taxpayer concerning the determination of tax liability cannot be submitted to arbitration. In fact, many matters of public policy are "arbitrable" (transport law, intellectual property law, bankruptcy law, etc). An arbitral tribunal may hear disputes concerning infringements of competition rules (although it may not impose fines). An arbitration clause may be validly included in a company's articles of association.

The courts will review whether the arbitral tribunal has correctly applied public policy issues.

3.3 National Courts' Approach

Arbitration agreements are generally enforced by French courts. With respect to international arbitration, French courts have held that an arbitration clause is independent of the main contract. Subject to mandatory provisions of French law or international public policy, the validity and enforceability of an arbitration clause is assessed without reference to any national law (*Cour de cassation*, First Civil Chamber, 20 December 1993, Dalico). The rules of conflict of laws do not apply. Consequently, with respect to international arbitration, arbitration agreements are enforceable in France, provided that the parties have validly consented and that the agreements comply with mandatory international rules.

3.4 Validity

French law recognises the independence of arbitration agreements with respect to both domestic and international arbitration (Article 1447 of the French Civil Procedure Code for domestic arbitration, which applies to international arbitration unless otherwise agreed by the parties). Consequently, an arbitration clause is considered valid even if the rest of the contract containing it is invalid.

It should be noted that, from a French law point of view, international arbitration agreements are not governed by the law of the contract in which they are contained.

4. The Arbitral Tribunal

4.1 Limits on Selection

In international arbitration, the only limit on the parties' autonomy to select arbitrators is respect for the principle of equality of the parties in the constitution of the arbitral tribunal, which implies that each party has an equal opportunity to participate in the constitution of the arbitral tribunal (*Cour de cassatio* n, First Civil Chamber, 7 January 1992, No 89-18.708; Paris Court of Appeal, 3 July 2012, No 11/01974; Paris Court of Appeal, 14 December 2021, No 19/12417).

In domestic arbitration, Article 1450 of the French Civil Procedure Code provides a limit to the parties' autonomy in the selection of arbitrators by stating that only a natural person with full capacity to exercise their rights may act as an arbitrator.

For international arbitration, Article 1508 of the French Civil Procedure Code simply provides that the arbitration agreement may, either directly or by reference to arbitration rules or rules of procedure, designate the arbitrator(s) or provide for the terms and conditions of their appointment (Article 1508 of the French Civil Procedure Code).

While French law does not require arbitrators to have any specific qualifications or profession, the parties may, in the arbitration agreement, require the arbitrator to meet certain qualifications or conditions with regards to their profession, nationality or languages.

Nevertheless, it is worth noting that the exercise of certain professional activities is incompatible with the function of arbitrator. This professional incompatibility notably concerns magistrates (Article 8 of Ordinance No 58-1270 of 22 December 1958), officials, except for professors and those who have been authorised (Article 25-I and Article III of Law No 83-634 of 13 July 1983), members of parliament (Law No 2013-906 of 11 October 2013), and bailiffs (Article 20 of Decree No 56-222 of 29 February 1956).

4.2 Default Procedures

When the parties are unable to agree on the choice of arbitrator(s) or on the terms and conditions of their appointment(s), Article 1452 of the French Civil Procedure Code provides for a default procedure whereby:

- where there is a sole arbitrator, if the parties do not agree on the choice of arbitrator, the arbitrator shall be appointed by the person responsible for organising the arbitration or, failing this, by the supporting judge; or
- where there are three arbitrators, each party chooses one arbitrator and the two arbitrators thus chosen appoint the third; if one party fails to choose an arbitrator within one month of receipt of the other party's request to do so, or if the two arbitrators fail to agree on the choice of the third arbitrator within one month of acceptance of their appointment, the person responsible for organising the arbitration or, failing this, the supporting judge, makes the appointment.

This default procedure also applies in the case of multiparty arbitrations. Article 1453 of the French Civil Procedure Code provides that when more than two parties are involved in a dispute and they are unable to agree on how the arbitral tribunal should be constituted, the person responsible for organising the arbitration or, failing this, the supporting judge, appoints the arbitrator(s).

4.3 Court Intervention

The supporting judge can intervene in the selection of arbitrators when there is a dispute related to the constitution of the arbitral tribunal (Articles 1452 to 1454 of the French Civil Procedure Code), to the challenge or removal of arbitrators (Article 1456), or to their abstention, resignation or impediment (Article 1457 of the French Civil Procedure Code). Thus, the supporting judge has only a subsidiary role.

However, the jurisdiction of the supporting judge in international arbitration is limited to the following situations (Article 1505 of the French Civil Procedure Code):

- the seat of arbitration is in France;
- the parties have agreed that French procedural law applies to the arbitration;
- the parties have expressly given jurisdiction to French courts over disputes related to the arbitration proceedings; or
- one of the parties is at risk of a denial of justice.

Article 1505 of the French Civil Procedure Code provides that, unless otherwise agreed by the parties, the supporting judge is the Chairman of the *Tribunal judiciaire* of Paris.

The intervention of the supporting judge may be requested by a party or by the arbitral tribunal. The application is lodged by a writ of summons. An accelerated procedure will apply to this proceeding (Article 1460 of the French Civil Procedure Code). The judgment is normally not subject to appeal except for decisions on the nullity or manifest inapplicability of the arbitration agreement (Articles 1455 and 1460 of the French Civil Procedure Code).

4.4 Challenge and Removal of Arbitrators

Pursuant to Article 1458 of the French Civil Procedure Code, an arbitrator can only be removed with the agreement of all the parties. However, when the parties cannot agree on the removal of an arbitrator, the dispute is settled by the arbitral institution or, in its absence, by the supporting judge, within one month of the disclosure or dis-

covery of the contested fact (Article 1456 of the French Civil Procedure Code).

Article 1456 notably states that an arbitrator can be challenged on the ground of a lack of independence or impartiality (see **4.5 Arbitrator Requirements**).

4.5 Arbitrator Requirements

French arbitration law states that arbitrators must be independent and impartial and requires them to disclose any circumstances likely to affect their independence or impartiality (Article 1456 of the of the French Civil Procedure Code). The requirement of independence and impartiality, as set out in Article 1456 of the French Civil Procedure Code, has been defined by case law as follows.

- An arbitrator's independence is assessed on an objective approach that consists in identifying precise and verifiable factors external to the arbitrator that are likely to affect their freedom of judgment, such as personal, professional and/or economic ties with one of the parties.
- An arbitrator's impartiality presupposes the absence of prejudices or biases likely to affect their judgment, which may result from multiple factors such as the arbitrator's nationality, social, cultural or legal environment (Paris Court of Appeal, 2 May 2024, No 21/08610; Paris Paris Court of Appeal, 23 April 2024, No 22/20058; Paris Court of Appeal, 8 June 2021, No 19/02245; Paris Court of Appeal, 4 May 2021, No 18/14593).

An arbitrator's lack of independence may result in the set-aside of the award, notably on the grounds of improper constitution of the arbitration tribunal or on the ground of violation of international public policy (Article 1520(2) and (5) of the of the French Civil Procedure Code).

Moreover, the arbitrator, before accepting their assignment, must disclose any circumstances likely to affect their independence or impartiality (Articles 1456(2) of the French Civil Procedure Code). This obligation lasts throughout the arbitration proceedings. Thus, the arbitrator must disclose without any delay any circumstances likely to affect their independence or impartiality that may arise after acceptance of the assignment.

The scope of the disclosure obligation has been clarified by case law that considers that the arbitrator must reveal all circumstances likely to give rise to reasonable doubt in the minds of the parties as to the arbitrator's independence (*Cour de cassation*, First Civil Chamber, 16 March 1999, No 96-12.748; Paris Court of Appeal, 22 February 2022, No 20/08929).

This obligation of disclosure applies not only to relations between the arbitrator and the parties, but also to the relations between the arbitrator and the parties' lawyers or their law firms, whenever the facts considered are likely to affect, in the minds of the parties, the arbitrator's independence and impartiality.

Moreover, the duty of arbitrators to disclose, and to provide information to enable the parties to exercise their right to challenge, must be assessed considering the notoriety of the situation criticised and its impact on the arbitrator's judgment (*Cour de cassation*, Second Civil Chamber, 25 March 1999, No 94-18.976; Paris Court of Appeal, 18 September 2018, No 16/26009; Paris Court of Appeal, 25 February 2020, No 19/07575; Paris Court of Appeal, 22 February 2022, No 20/08929).

The principal arbitration institutions also require arbitrators to be independent and impartial and contain a duty of disclosure (Article 11 of the ICC Rules of Arbitration and Article 18 of CMAP's Arbitration Rules).

It should be noted that the IBA Guidelines on Conflicts of Interest in International Arbitration have been revised to introduce several changes to enhance the impartiality and independence of arbitrators. These updated Guidelines were published on 25 May 2024.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

See **3.2 Arbitrability**.

5.2 Challenges to Jurisdiction

Like most national laws, French law recognises the principle of competence-competence in both domestic and international arbitration, which is deemed to have a positive and a negative effect.

Positively, the principle allows the arbitral tribunal to decide on its own jurisdiction (Article 1465 of the French Civil Procedure Code, applicable to international arbitration unless otherwise agreed by the parties). This principle is widely recognised by the French courts.

Negatively, the principle prohibits a state court, in the presence of an arbitration agreement that is prima facie applicable, from ruling on the jurisdiction of an arbitral tribunal before the latter has heard the case (Article 1448, paragraph 1 of the French Civil Procedure Code). This means that, unless the arbitration agreement appears manifestly invalid or inapplicable, a state court will decline jurisdiction to hear the case and will let the arbitral tribunal rule on its own jurisdiction. This rule applies regardless of the seat of the arbitral tribunal.

However, a state court may not declare of its own motion that it lacks jurisdiction to hear the case (Article 1448, paragraph 2 of the French Civil Procedure Code, applicable to international arbitration unless the parties agree otherwise). One of the parties has to raise the jurisdiction of the arbitral tribunal.

It should be noted that the Brussels I bis Regulation No 1215/2012 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters does not apply to arbitration.

5.3 Circumstances for Court Intervention

In accordance with the principle of competence-competence, the French courts will give priority to the arbitral tribunal to decide on its jurisdiction (see **5.4 Timing of Challenge**).

5.4 Timing of Challenge

The parties may not challenge the jurisdiction of the arbitral tribunal before a state court until the arbitral tribunal has issued an award on its jurisdiction. The jurisdiction of the arbitral tribunal will be reviewed at the following stages:

- if the arbitral tribunal renders a partial award on its jurisdiction, this partial award may be challenged before the French courts – if the partial award confirms the jurisdiction of the arbitral tribunal, the challenge should not suspend the arbitration proceedings; or
- if the arbitral tribunal renders a final award on the merits of the case and on its jurisdiction, the court will examine the question at the stage of setting aside or enforcing the award.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

When French courts review the jurisdiction of the arbitral tribunal, they apply a de novo standard. The French *Cour de cassation* has held that the arbitrators' decision is subject to a full legal and factual review by the court (*Cour de cassation*, First Civil Chamber, 6 October 2010, No 08-20.563, Abela).

5.6 Breach of Arbitration Agreement

French law recognises the principle of competence-competence in both domestic and international arbitration. As a result, French courts have an obligation to decline jurisdiction if a party raises the jurisdiction of an arbitral tribunal, unless the arbitration agreement appears manifestly invalid or inapplicable.

5.7 Jurisdiction Over Third Parties

In principle, an arbitration agreement is binding only between the parties.

However, in international arbitration, French case law has gradually recognised the extension of the binding effect of an arbitration agreement to third parties who are directly involved in the performance of the contract containing the arbitration agreement and the disputes that may arise from it (*Cour de cassation*, First Civil Chamber, 27 March 2007, No 04-20.842, ABS).

Entities belonging to the same group may avail themselves of an arbitration agreement if they have participated in the negotiation, the conclusion, the performance or the termination of the contract containing the arbitration agreement (Paris Court of Appeal, 21 October 1983, Dow Chemicals).

It should be noted that, in general, an international arbitration agreement may be automatically transferred to a third party (without its express consent) as a result of a transfer of rights or contracts. The international arbitration agreement is binding on any party asserting the rights of one of its contracting parties (*Cour de cassation*, First Civil Chamber, 8 February 2000, No 95-14.330).

6. Preliminary and Interim Relief

6.1 Types of Relief

Unless otherwise agreed, the arbitral tribunal may order any protective or provisional measure it deems appropriate (Article 1468 of the French Civil Procedure Code). The arbitral tribunal may order several types of interim remedies, including to maintain or restore the status quo, preserve assets or evidence, or facilitate the future execution of the award. However, French courts have exclusive jurisdiction to order provisional seizures and judicial mortgages. Furthermore, the arbitral tribunal cannot order interim measures against third parties given the relative effect of the arbitration agreement between parties.

To ensure the efficiency of its decision, the arbitral tribunal may set a penalty triggered by non-compliance with interim measures. However, arbitral tribunals do not have coercive powers. Thus, the parties must seek enforcement of interim measures before the national courts (see **6.2 Role of Courts**).

6.2 Role of Courts

Before the constitution of the arbitral tribunal, the parties may apply to the French courts for interim measures, without such an application being deemed to be a waiver of the arbitration agreement (Article 1449 of the French Civil Procedure Code). The President of the Judicial Court or the President of the Commercial Court

– ruling in summary proceedings – may order the following:

- investigative measures aimed at obtaining evidence (including on an ex parte basis), provided that the requesting party meets certain conditions among which are the proportionality of the measure and the existence of a legitimate motive (Article 145 of the French Civil Procedure Code); and
- in urgent cases:
  (a) interim measures that do not raise any serious challenges or that the dispute justifies (Article 834 and 872 of the French Civil Procedure Code);
  (b) protective measures to avoid imminent damage or to stop a manifestly illegal nuisance (Article 835 and 873 of the French Civil Procedure Code); and
  (c) in certain cases, an interim payment or the performance of an obligation (Article 835 and 873 of the French Civil Procedure Code).

Usually, interim measures ordered by French courts are immediately enforceable and appeal against these decisions does not have suspensive effects. These interim measures are available if French courts have territorial jurisdiction, regardless of whether the arbitration agreement provides for a seat in France or abroad.

Once constituted, the arbitral tribunal has in principle exclusive jurisdiction to order interim measures (Article 1468 of the French Civil Procedure Code; see **6.1 Types of Relief**). Yet, the parties may seek the courts' assistance regarding interim measures that cannot be ordered by the arbitral tribunal, or the enforcement of interim measures ordered by the arbitral tribunal.

Even when the arbitral tribunal is constituted, French courts have exclusive jurisdiction to order provisional seizures and judicial mortgages and, upon authorisation of the arbitral tribunal, to order a third party to produce identified documents (Article 1469 of the French Civil Procedure Code).

French courts' assistance is also needed when a party does not comply with an interim measure ordered by the arbitral tribunal. However, there is a debate as to whether an interim decision qualifies as an arbitral award and is subject to the French law regime of awards enforcement.

Emergency arbitration provisions provided for by the rules of arbitral institutions are not incompatible with French law. For example, the ICC Arbitration Rules provide the following:

- an emergency arbitrator may be appointed before the constitution of the arbitral tribunal;
- the emergency arbitrator's decision is binding on the parties but cannot be enforced as an arbitral award; and
- an application for emergency arbitrator proceedings does not prevent a party from applying to national courts for any other urgent or conservatory measures.

6.3 Security for Costs

French law does not include any specific provisions concerning security for costs. However, security for costs may be ordered by arbitral tribunals or the French courts under the conditions set out above for interim measures (see **6.1 Types of Relief** and **6.2 Role of Courts**).

7. Procedure

7.1 Governing Rules

Pursuant to Article 1509 of the French Civil Procedure Code, the parties have freedom to agree the procedural rules applicable to their international arbitration proceedings. This is typically done by the parties incorporating a set of institutional rules that govern the arbitration procedure into the arbitration agreement. In the absence of an agreement between the parties, the arbitral tribunal shall set the applicable procedural rules (Article 1509 of the French Civil Procedure Code).

7.2 Procedural Steps

French law does not provide for mandatory procedural steps. Certain fundamental principles must, however, be observed irrespective of the procedural rules chosen by the parties, among which are the obligation for the arbitral tribunal to respect the adversarial principle (*principe du contradictoire*), to treat the parties equally and to conduct the proceedings in an expeditious and loyal manner (Articles 1464 and 1510 of the French Civil Procedure Code).

7.3 Powers and Duties of Arbitrators

Arbitrators are required to be independent and impartial (see **4.5 Arbitrator Requirements**). They have a general duty to conduct the arbitration proceedings fairly, efficiently and, if possible, swiftly, and to decide on the dispute by rendering an award.

French law largely grants autonomy to the parties as regards the power of the arbitrators, notably concerning the conduct of the arbitration proceedings. Notwithstanding, the French Civil Procedure Code sets forth key powers of arbitrators in international arbitration, unless otherwise agreed by the parties, including the following:

- the ability for arbitrators, according to the principle of competence-competence, to decide on their own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement (Article 1465 of the French Civil Procedure Code);
- the ability to order the production of documents by a party (Article 1467 of the French Civil Procedure Code, see **8.2 Rules of Evidence**); and
- the ability to order interim relief that the arbitral tribunal deems appropriate (Article 1468 of the French Civil Procedure Code, see **6.1 Types of Relief**).

7.4 Legal Representatives

There are no particular qualifications or other requirements for legal representatives appearing in an arbitration seated in France. For internal arbitration, the parties can appear in proceedings with or without representation by the person of their choice (Articles 18, 19 and 1464 of the French Civil Procedure Code).

Though there is no similar provision for international arbitration, it is admitted that the same rules apply.

8. Evidence

8.1 Collection and Submission of Evidence

French law grants parties and arbitrators broad discretion in the conduct of proceedings, including the collection and submission of evidence. Article 1509 of the French Civil Procedure Code empowers the arbitral tribunal to define the applicable procedural rules, unless otherwise agreed between the parties. Hence, an arbitral tribunal seated in France may conduct a US-

style discovery procedure, even though France is a civil law system.

In practice, the parties and arbitral tribunals having their seats in France routinely refer to the IBA Rules on the Taking of Evidence in International Arbitration, which is a balanced combination of the common law and civil law systems. In general, the parties produce documents upon which they intend to rely and then request documents by using the so-called Redfern Schedule (ie, a table detailing the parties' grounds and objections for each document requested). A party may also apply to French courts, with the authorisation of the arbitral tribunal, to compel a third party to produce identified documents (Article 1469 of the French Civil Procedure Code).

When witness statements are submitted, requests for conducting a cross-examination of the witness are usually granted. Pursuant to Article 1467 of the French Civil Procedure Code, the arbitral tribunal may call upon any person to provide testimony, but witnesses are not sworn in.

8.2 Rules of Evidence

As noted in **8.1 Collection and Submission of Evidence**, the arbitral tribunal is free to choose the rules of evidence, unless otherwise agreed between the parties. Irrespective of the rules of evidence chosen, the arbitral tribunal shall ensure that the parties are treated equally and must uphold the adversarial principle (Article 1510 of the French Civil Procedure Code).

Moreover, in domestic arbitration, the fundamental principles governing French court proceedings apply (Article 1464 of the French Civil Procedure Code). As a result, parties and arbitral tribunals have less leeway in defining the rules of evidence. For example, each party must prove the facts it relies on (Article 6 of the French Civil Procedure Code).

8.3 Powers of Compulsion

The arbitral tribunal may order a party to produce documents and set a penalty if a party does not comply with an injunction (Article 1467 of the French Civil Procedure Code). The arbitral tribunal may also draw adverse inferences from a failure to comply with a document production order. Upon authorisation of the arbitral tribunal, parties may apply to the French courts to compel a third party to produce documents (Article 1469 of the French Civil Procedure Code).

Neither the arbitral tribunal nor the French courts can compel witnesses to appear before the arbitral tribunal. However, the arbitral tribunal may draw adverse inferences from the non-appearance of witnesses.

9. Confidentiality

9.1 Extent of Confidentiality

Subject to legal obligations and unless the parties agree otherwise, domestic arbitration proceedings are confidential (Article 1464 of the French Civil Procedure Code). Such confidentiality applies to the parties and the arbitrators. It covers the documents exchanged during the proceedings, the hearings, the award and the existence of the proceedings.

Conversely, unless the parties agree otherwise, international arbitration proceedings are not confidential under French law. The parties can include a confidentiality provision in the arbitration agreement or seek an order from the arbitral tribunal that the proceedings be confidential.

10. The Award

10.1 Legal Requirements

The arbitral award must set forth the respective claims and arguments of the parties and be reasoned (Article 1482 of the French Civil Procedure Code). However, the absence of motivation does not in itself constitute a ground for the set-aside of an award.

The award must also indicate the identity of the parties and their counsel, of the arbitrators, its date, and the place where it was rendered (Article 1481 of the French Civil Procedure Code).

The award is rendered by a majority vote of arbitrators and signed by the arbitrators. However, if there is no majority, the award shall be made by the chairman of the arbitral tribunal alone. Moreover, if one of the arbitrators refuses to sign, it is mentioned in the award (Article 1513 of the French Civil Procedure Code).

10.2 Types of Remedies

French law does not provide specific rules governing or restricting the types of remedies that an arbitral tribunal may award. Thus, all types of remedies are available provided that they are not contrary to international public order.

In this regard, it should be noted that punitive damages are not per se contrary to international public order provided that the amount allocated is not "disproportionate regarding the damage suffered and the breach of contractual obligations" (*Cour de cassation*, First Civil Chamber, 1 December 2010, No 09-13.303; *Cour de cassation*, First Civil Chamber, 12 January 2022, No 20-16.189; Paris Court of Appeal, 25 February 2020, No 17/18001).

10.3 Recovering Interest and Legal Costs

French law does not provide any rules governing or prohibiting the recovery of interest and legal costs.

11. Review of an Award

11.1 Grounds for Appeal

In international arbitration, an award may not be appealed. International arbitration awards rendered in France can be set aside, except when the parties have waived their right to bring such action by special agreement (Articles 1518 and 1522 of the French Civil Procedure Code). However, international arbitration awards rendered abroad cannot be subject to set-aside proceedings in France.

The grounds for setting aside an award are set out exhaustively in Article 1520:

- the arbitral tribunal wrongly upheld or declined its jurisdiction;
- the arbitral tribunal was improperly constituted;
- the arbitral tribunal ruled without complying with the mission entrusted to it;
- the principle of adversarial proceeding was violated; or
- recognition and enforcement of the arbitral award is contrary to international public policy.

The set-aside request must be brought before the Court of Appeal in whose jurisdiction the award was made within one month of service of the decision (extended to three months for parties located abroad) (Article 1519 of the French Civil Procedure Code).

However, as stated above, the Paris Court of Appeal will have exclusive jurisdiction to hear set aside requests concerning awards rendered in international arbitration (Article L. 311-16-1 of the French Judicial Organisation Code) (see **1.4 National Courts**).

11.2 Excluding/Expanding the Scope of Appeal

Under French law, the parties may not derogate from the provisions governing arbitration appeals (*Cour de cassation*, First Civil Chamber, 13 March 2007, No 04-10.970). Thus, in international arbitration, parties cannot include a right to appeal the award in their arbitration agreement. Such a clause is deemed not written (*Cour de cassation*, First Civil Chamber, 13 March 2007, No 04-10.970).

Parties may waive their right to request to set aside the award by special agreement.

11.3 Standard of Judicial Review

As international arbitral awards cannot be appealed, French courts have applied the strict principle of non-revision of awards for many years.

The standard of judicial review in set-aside proceedings has recently been reinforced by the *Cour de cassation*, which stated that, while the mission of the Court of Appeal is limited to the examination of the defects listed in Article 1520 of the French Civil Procedure Code (incompetence of the arbitral tribunal; irregular constitution; non-compliance with the arbitral tribunal's terms of reference; breach of the adversarial principle; and conflict with international public policy), no limitation is placed on its power to investigate in law and in fact all the elements concerning the defects in question (*Cour de cassation*, First Civil Chamber, 7 September 2022, No 20-22.118).

As such, the *Cour de cassation* now considers that the review of the award's conformity with international public policy is not limited to the evidence submitted to the arbitrators and that the reviewing judge is not bound by the findings, assessments and qualifications made by the arbitrators (*Cour de cassation*, First Civil Chamber, 23 March 2022, No 17-17.981).

Thus, the standard of judicial review in set-aside proceedings seems to be closer to a de novo review, this review, however, being limited to the defects listed in Article 1520 of the French Civil Procedure Code.

12. Enforcement of an Award

12.1 New York Convention

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") was signed by France on 25 November 1958, ratified on 26 June 1959, and came into effect on 24 September 1959. France put forward one reservation upon ratifying the New York Convention, in relation to the principle of reciprocity: "France declares that it 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".

It should be noted that French law usually prevails over the New York Convention as permitted by its Article VII(1), since in many respects French law is more favourable regarding the recognition and enforcement of awards than the New York Convention itself. Thus, French courts rarely apply the New York Convention.

France is also a party to other international treaties containing provisions relating to the enforcement of awards, such as:

- European Convention on International Commercial Arbitration of 21 April 1961;
- Washington Convention on the Settlement of Investment Disputes of 8 March 1965; and
- Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (which created the International Centre for the Settlement of Investment Disputes (ICSID)).

12.2 Enforcement Procedure

Articles 1514 to 1517 of the French Civil Procedure Code govern the proceedings applicable to the enforcement of foreign arbitral awards and international arbitration awards. To be enforced in France, the award must receive an enforcement decision of exequatur issued by the competent court. This procedure is not adversarial.

The party seeking exequatur must submit an ex-parte application to the competent court and prove (i) the existence of the award by producing the original award and the arbitration agreement or duly certified copies thereof (together with a translation of these documents if they were not drafted in French), and (ii) that such enforcement is not manifestly contrary to French international public policy.

Conflict with French international public policy is the only ground for refusal of exequatur. French courts define French international public policy as the values and principles that cannot be disregarded, even in an international context (Paris Court of Appeal, 14 December 2021, No 19/12417).

In practice, French international public policy covers both substantive rules (principle of good faith in the performance of agreements, regulations governing foreign investment in France, certain principles of insolvency proceedings such as stay of individual proceedings against the debtor, international economic sanctions, prohibition of corruption and money laundering, etc) and procedural aspects (such as fair trials, equality of the parties, rights of the defence, fraud, etc).

Since conflict with French international public policy is the only ground for refusal of enforcement, French courts may confer exequatur even if the award has been set aside by the courts in the seat of arbitration since the setting aside of an award is not a ground for refusing it (*Cour de cassation*, First Civil Chamber, 23 March 1994, No 92-15.137; *Cour de cassation*, First Civil Chamber, 29 June 2007, No 05-18.053; Paris Court of Appeal, 1 April 2014, No 12/15479). Similarly, the existence of ongoing set-aside proceedings has no impact on the exequatur of the award.

When the exequatur decision relates to a foreign award, it may be appealed within one month of service of the decision (Article 1525 of the French Civil Procedure Code). In contrast, when the exequatur decision concerns an international arbitration award issued in France, a distinction is made according to whether the decision grants or refuses exequatur, as follows.

- A decision refusing exequatur of an international arbitration award rendered in France can be appealed (Article 1523 of the French Civil Procedure Code).
- A decision granting exequatur may not be appealed except in the cases provided for in Article 1520 of the French Civil Procedure

Code (incompetence of the arbitral tribunal, irregular constitution, non-compliance with the arbitral tribunal's terms of reference, breach of the adversarial principle, conflict with international public policy) (Article 1524s and 1522(2) of the French Civil Procedure Code).

Regarding the enforcement stage, sovereign states and their emanations benefit from immunity against enforcement of arbitral awards under the conditions set forth by the "Sapin 2" law of 9 December 2016 as follows.

- First, under French law, enforcement measures with respect to property belonging to a foreign state must be authorised by a judge as a result of an ex parte order (Article L. 111-1-1 of the Code of Civil Procedures of Enforcement).
- Secondly, for the judge to authorise the proceedings, these enforcement measures must either (i) be expressly consented to by the relevant state, (ii) concern property reserved by the state for the satisfaction of the claim subject to the proceedings, or (iii) concern property used or intended to be used by the relevant state other than for non-commercial public service purposes (Article L. 111-1-2 of the Code of Civil Procedures of Enforcement).
- Finally, with regards to property used or intended to be used as part of a diplomatic mission of a foreign state or of its consular post, the waiver of sovereign immunity must be express and specific for it to be effective (Article L. 111-1-3 of the Code of Civil Procedures of Enforcement).

12.3 Approach of the Courts

In general, French courts adopt a liberal approach regarding the enforcement of arbitral awards. As mentioned above, the existence of a conflict with French international public policy is the only ground for refusal of exequatur (see **12.2 Enforcement Procedure**).

13. Miscellaneous

13.1 Class Action or Group Arbitration

French law does not provide for class action or group arbitration. However, the French Civil Procedure Code refers to multiparty arbitration (Article 1453 of the French Civil Procedure Code).

13.2 Ethical Codes

French law does not provide any binding ethical codes or professional standards applicable to arbitrators. The only requirements are the independence and impartiality of arbitrators (Article 1456 of the French Civil Procedure Code). Nonetheless, parties and arbitrators may refer to non-binding ethical codes such as the International Bar Association Guidelines on Conflicts of Interest in International Arbitration. Moreover, French lawyers conducting arbitral proceedings must respect ethical principles, notably those set out in the Rules of Professional Conduct of the French Bar Association.

13.3 Third-Party Funding

French law does not provide specific rules governing or restricting third-party funding. However, it should be noted that, on 21 February 2017, the Paris Bar Council issued a resolution regarding third-party funding in arbitration proceedings. This resolution provides in essence the following recommendations:

- lawyers remain solely accountable to their client, not to the third-party funder;
- only the client (and not the lawyer) can communicate information about the case to the third-party funder; and

- lawyers should encourage their client to disclose the existence of third-party funding to arbitrators and warn their client about the possible consequences of non-disclosure (namely, a conflict of interest issue that may result in the nullity of the award).

13.4 Consolidation

French law does not provide specific rules regarding the consolidation of separate arbitral proceedings. However, when a judge and an arbitral tribunal, or two arbitral tribunals, are called upon to hear claims that may be heard together, the arbitral tribunal cannot unilaterally decide to dismiss the dispute as it might be considered to be a denial of justice, which is a violation of French international public policy.

Furthermore, arbitration rules of an arbitral institution may contain provisions relating to the consolidation of arbitral proceedings. For example, Article 10 of the ICC Rules of Arbitration and Article 15 of the CMAP Rules of Arbitration both state that the court may, at the request of a party, consolidate two or more arbitrations pending under the rules into a single arbitration, where:

- the parties have agreed to consolidation;
- all of the claims in the arbitrations are made under the same arbitration agreement or agreements; or
- the claims in the arbitrations are not made under the same arbitration agreement(s), but the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the court finds the arbitration agreements to be compatible.

13.5 Binding of Third Parties

Third parties may be bound by arbitration agreement in certain circumstances (see **5.7 Jurisdiction Over Third Parties**). Moreover, arbitral award is not res judicata regarding third parties. However, an award may be held against third parties and third parties can rely on the award (*Cour de cassation*, Commercial Chamber, 23 January 2007, No 05-19.523; Paris Court of Appeal, 6 February 2014, No 12/14466).

GERMANY

Trends and Developments

Contributed by:
Tanja Pfitzner and Fabian von Schlabrendorff
Pfitzner Legal

Pfitzner Legal is a specialised dispute resolution law firm in the heart of Frankfurt's Westend district. Pfitzner Legal offers enhanced expertise in the resolution of complex commercial, corporate and professional negligence disputes through a unique blend of litigation capabilities, international arbitration experience and conflict management skills spanning a wide range of sectors including financial services, energy, natural resources, construction, engineering, automotive, pharmaceutical, insurance and private equity. The firm, repeatedly mentioned in surveys as excelling in the quality of its services, is known for its capabilities in defending clients in class actions as well as in handling international arbitrations.

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PFITZNER LEGAL

Recent Developments in International Arbitration

Germany has a well-developed legal framework for international arbitration, modelled on the UNCITRAL Model Law and codified in the German Code of Civil Procedure (ZPO). Apart from mandatory provisions, parties to an arbitration may contractually agree to apply any institutional or other rules for the conduct of their arbitration proceedings. The German Arbitration Institute (DIS), for example, provides its own DIS Arbitration Rules, which were substantially modified in 2018 and offer internationally developed standards. Arbitration proceedings in Germany are also frequently conducted under other arbitration rules, such as those of the International Chamber of Commerce (ICC), and internationally recognised guidelines such as those of the International Bar Association (IBA) or the Prague Rules (2018), which are often agreed.

Reform of the German Arbitration Law

In February 2024, as part of its efforts to further strengthen Germany as a location for commercial disputes, the Federal Ministry of Justice (FMJ) presented a draft bill for the modernisation of German arbitration law, which among other things takes into account the revision of the arbitration rules of many arbitral institutions, the advancing digitalisation of procedural law and the practical experience with Sections 1025 et seqq. ZPO. Following consultation with interested parties, the draft law essentially proposes the following main reforms:

Informal agreements

In commercial transactions, parties shall in future be able to conclude arbitration agreements informally. This would correspond to the legal situation in Germany until 1997, and at the same time would also implement Option II of Article 7 UNCITRAL Model Law since 2006. At present, the arbitration agreement must either be concluded in writing or be documentable in some other way. In particular, this is intended to remove doubts about electronically agreed arbitration agreements, which may be particularly relevant in the context of smart contracts. The regulation would also allow for oral arbitration agreements in commercial transactions. For the sake of legal certainty, the draft bill provides that a party may request the other party to confirm an informal arbitration agreement in text form.

Validity of arbitration agreements

In the future, in the event of a party's application for a declaration of (in-)admissibility of the arbitral proceedings, the competent state court shall also be able to make a final decision on the existence or validity of the arbitration agreement

together with its decision on the admissibility of the arbitral proceedings.

Jurisdiction of the arbitral tribunal

Under the current German arbitration law, if an arbitral tribunal considers that it has jurisdiction, its decision may be challenged before the state courts. However, negative decisions on jurisdiction cannot currently be challenged in court. In the future, not only positive but also negative decisions of the arbitral tribunal on its jurisdiction shall be subject to review by the competent state court at the place of arbitration. This serves the purpose of procedural economy in parallel court and arbitral proceedings.

Appointment of arbitrators in multi-party proceedings

Many institutional arbitration rules contain provisions on the appointment of arbitrators in multi-party situations. In the future, the German arbitration law shall contain a dispositive provision for the substitute appointment of arbitrators in multi-party arbitrations if the parties on one side cannot agree on an arbitrator, which is an important guideline in particular for ad hoc proceedings.

Remote hearings

In recent years, many oral hearings have been conducted as remote or hybrid hearings, and this de facto development shall now also be legally anchored in the German arbitration law. In the future, arbitral tribunals shall have the right to hold oral hearings by videoconference, unless otherwise agreed by the parties. The law shall also regulate the recording of such videoconferences.

This is not new per se if the parties have agreed on a remote or hybrid hearing or to the applicability of the IBA Rules of Evidence 2020 or arbitration rules that provide for this possibility, such as the DIS Arbitration Rules. The provision in the DIS Arbitration Rules that the proceedings will be conducted by the arbitral tribunal once it is constituted gives the arbitral tribunal the power to decide whether hearings will be held in person or virtually.

However, the legal position in the event of a disagreement between the parties as to the holding of a virtual conference has not yet been clarified. According to an ICCA study published in 2022, of 78 jurisdictions surveyed, there are only two in which the arbitral tribunal is expressly empowered to order a virtual hearing. The proposed regulation clarifies that the right to be heard is generally also satisfied in a remote hearing.

According to the draft bill, the parties must be informed in good time of the organisation of a remote hearing. This will ensure that if there are objective reasons against a remote hearing, the parties will be able to present them to the necessary extent.

Even after this welcome legal clarification, arbitral tribunals should continue to take into account the existing case law on remote hearings. In particular, they should ensure compliance with the mandatory rules of the right to be heard and procedural equality of arms, which are part of the German procedural ordre public and the violation of which may lead to the setting aside of the arbitral award. A violation of the fundamental right to be heard may occur if a party does not have equal access to the technology necessary for a proper hearing, or if technical difficulties prevent a party from hearing the opponent's arguments or presenting its own. In particular, a poor internet connection or malfunctioning equipment may cause such a problem. Parties are advised to bring such issues to

the attention of the arbitral tribunal during the hearing, otherwise they risk not being able to challenge the award on these grounds at a later stage.

Arbitral awards

In the future, arbitrators shall be able to issue arbitral awards electronically by signing them with a qualified electronic signature provided that no party objects.

With the consent of the parties, arbitral awards may also be published in whole or in part in anonymised or pseudonymised form in order to promote transparency and the further development of the law. A party shall be deemed to have given its consent if it does not object within one month of receipt of the request for consent from the arbitral tribunal, provided that the party has been advised of this consequence in advance. The parties are free to make other arrangements.

The draft bill also clarifies that an arbitrator may issue a dissenting opinion in the arbitral award, unless otherwise agreed by the parties. This is the FMJ's response to a ruling by the Frankfurt Higher Regional Court in 2020, in which the court expressed doubts in an obiter dictum as to the admissibility of a publication of a dissenting opinion, which is alien to German civil procedural law.

Language in judicial assistance and setting aside/enforcement proceedings

The FMJ is also addressing the issue of language in several reform projects and is facilitating the conduct of arbitral proceedings under German arbitration law in English by permitting the necessary judicial assistance actions by German courts in English.

Arbitral awards and other documents from the arbitral proceedings may be submitted in English without translation in setting aside, enforcement and judicial assistance proceedings.

In the future, it shall also be possible to conduct the entire setting aside and enforcement proceedings in English. The legislator provides that the federal states may set up specialised commercial courts to hear major international commercial disputes, and the federal states may confer jurisdiction on the commercial courts for setting aside and enforcement proceedings. With the consent of the parties, proceedings before the commercial courts shall then be conducted entirely in English.

Enforcement of interim measures

The draft bill also clarifies that interim measures are enforceable in Germany even if the place of arbitration is in another country. Currently, it is at the discretion of the German court to grant the enforcement of such interim measures.

A number of points in the draft bill are likely to be debated in the further legislative process, so that it is to be expected that the bill will undergo further amendments before it is enacted, which we will report on in the next issue.

DIS Supplementary Rules for Third-Party Notices (DIS-TPNR)

In a 2018 survey conducted by Queen Mary University of London, 39% of the 1066 arbitration practitioners surveyed said that the issue of third-party involvement was one of the biggest disadvantages of arbitration. They said it was the third biggest disadvantage of arbitration in general, as commercial disputes often involve more than two parties in intertwined legal relationships.

Multi-party arbitration is, of course, possible. However, such proceedings require the consent of all parties to the dispute in the form of an arbitration agreement, which will rarely be obtained in interwoven multi-party disputes involving more than two parties. In this respect, the subsequent inclusion of other parties by way of joinder, which is provided for in many arbitration rules (eg, Article 19 DIS Arbitration Rules), only contributes to the effective participation of third parties to a limited extent, as the other party usually has no interest in involving a third party. The main reason for this is that the third party usually becomes a full party to the arbitration and can therefore assert claims against any party to the arbitration. Thus, if the respondent files a recourse claim against a third party, the third party may respond by filing a counterclaim against the respondent. The claimant normally has no interest in the associated delay of the arbitral proceedings and will therefore usually refuse to consent to the joinder of the third party. Two or more successive proceedings are therefore usually necessary to resolve multi-party disputes.

The DIS has addressed this issue and, through a practice group involving numerous practitioners, has developed Supplementary Rules for Third-Party Notices (DIS-TPNR). The DIS-TPNR will make it easier to bind third parties to the findings of an arbitral award. Parties may now agree on these supplementary rules in addition to the DIS Arbitration Rules. Based on the proven and successful model of the ZPO, these rules make it possible to issue a third-party notice, which is not otherwise provided for in German arbitration law. The ZPO allows a third-party notice where a party may have a right of recourse against a third party not involved in the legal dispute in the event of an unfavourable outcome of the legal dispute. This right of recourse usually also depends on the factual and legal findings in the original proceedings, and the third-party notice allows the court in the recourse proceedings to be bound by all factual and legal findings underlying the original decision. This avoids double litigation on the same issue and contradictory decisions.

As in state civil proceedings, the DIS-TPNR provide that the third party is not a party to the arbitration, but an intervener. The third party may therefore support one of the parties to the arbitration but may not assert its own claims against the parties. In addition, the DIS-TPNR ensure that the other party will not have to bear the costs of the third party and the arbitration fees if it is unsuccessful. By agreeing to the DIS-TPNR, the other party will therefore be more likely to agree to a possible third-party notice in the arbitration agreement.

At the same time, the DIS-TPNR ensure that the third party is involved in the constitution of the arbitral tribunal. In return, the third party is bound by the findings of the arbitral award. In addition, the third-party notice suspends the statute of limitations for any recourse claim against the third party.

For the first time, the DIS-TPNR provide a set of rules by which the admissibility of the third-party notice in any arbitration can be agreed with legal certainty when concluding the arbitration agreement. While the parties are otherwise forced to construct their own individual rules on the admissibility of third-party notices in extensive arbitration agreements, they can now refer to the DIS-TPNR. This applies not only if the subsequent proceedings are also DIS arbitrations, but also if they are arbitrations under other arbitration rules or state proceedings. In addition to the

DIS-TPNR rules, the DIS also provides a comprehensive Practice Note on its website.

Court Decisions

The most important decisions of the national courts regarding arbitration come from the higher regional courts, as they are competent to enforce and set aside awards, and at the appeal stage, from the Federal Court of Justice (BGH). In line with the decisions of past years, the German courts continue to recognise an arbitration-friendly environment that accepts and even favours arbitral proceedings.

One dispute stood out in particular last year. In a dispute between a German entrepreneur who, as managing director and shareholder of a Russian limited liability company, cooperated with a German-based group in connection with its market entry in Russia, arbitral proceedings were initiated before the International Commercial Arbitration Court at the Moscow Chamber of Commerce and Industry against several individual companies of the group and several former managers of group companies. This dispute has raised numerous issues in several jurisdictions in the past few years. In connection with the enforcement of the arbitral award, the BGH (I ZB 33/22) had to deal with several procedural issues.

Scope of arbitration agreement

One issue concerned the scope of the arbitration agreement, and the BGH confirmed that, under German law, the subjective scope of an arbitration agreement is generally limited to the contracting parties and their legal successors and that there is no extension of the arbitration agreement based on a group-of-companies doctrine.

Relationship between foreign setting aside proceedings and German enforcement proceedings

In the same decision, the BGH also held that a dismissing decision in setting-aside proceedings of the courts in the state of origin of an arbitral award is not binding on German courts in enforcement proceedings.

Pre-emptive actions against recognition and enforcement proceedings of foreign arbitral awards

In addition, the BGH held that an application for a declaration of non-recognition of a foreign arbitral award is permissible until enforcement proceedings are initiated. In contrast to national arbitral awards, where there is a three-month time limit for filing such an application, this application is not subject to a time limit.

Security deposit for the costs of the proceedings

In an earlier decision in the same legal dispute, the BGH reversed its previous case law and held that the provisions of the ZPO on the obligation to provide security for the costs of the proceedings apply to enforcement proceedings of domestic or foreign arbitral awards. Accordingly, claimants who do not have their habitual residence in a member state of the European Union or in a signatory state to the Agreement on the European Economic Area must provide security for the costs of the proceedings at the request of the respondent. In this particular case, a statutory exception applied as the request concerned a counterclaim.

M&A Disputes Before DIS Arbitral Tribunals

Strict confidentiality is a key reason for concluding arbitration agreements. Therefore, DIS arbitral awards cannot be published without the consent of the parties. However, since most

post-M&A disputes in Germany are conducted through arbitration, this means that most decisions in this important area are not available to the public. This makes it difficult for the parties and their counsel to predict the outcome of their dispute and also hampers the development of the law. A DIS working group recently evaluated more than 100 post-M&A arbitral awards and examined their potential for further developing the law. The evaluation of the arbitration awards has been published, contributing to greater transparency in this highly relevant area.

Investor-state Disputes

Germany is a signatory state of the EU Agreement for the Termination of Bilateral Investment Treaties between member states of the European Union. The Agreement is a consequence of the Achmea decision of the European Court of Justice (ECJ) of 6 March 2018 (C-284/16), which ruled that the investor-state arbitration clause in the Netherlands-Slovakia bilateral investment treaty was incompatible with EU law because it encroached on the exclusive jurisdiction of the ECJ to interpret EU law, thereby undermining the principle of autonomy of the EU. The Agreement entered into force on 29 August 2020. As it explicitly does not apply to proceedings under the ECT, stating that the member states will address this issue at a later stage, it remains to be seen how arbitral tribunals in pending and future arbitrations under intra-EU bilateral investment treaties will react to the Agreement.

In July 2023, the European Commission proposed a joint withdrawal of the EU and its member states from the ECT. Member states have followed this proposal to varying degrees. Germany – like France, Luxembourg and Poland – has already withdrawn from the ECT. Germany's withdrawal took effect on 20 December 2023. However, all investments covered by the ECT at the time of withdrawal will continue to be protected for 20 years.

In the context of investment arbitration, European states are making increasing use of the mechanism of Section 1032(2) ZPO, which provides that, until the arbitral tribunal is constituted, an application may be made to a state court for a declaratory decision on the (in-) admissibility of arbitral proceedings. In 2021, the Netherlands applied to the Cologne Higher Regional Court for a declaration that the ECT-based ICSID proceedings brought by UNIPER and RWE, respectively, in which the two energy companies seek compensation for the early phase-out of coal-fired power generation, are inadmissible. The rules of the World Bank agreement signed by Germany and the Netherlands to create ICSID provide for an autonomous dispute resolution system insulated from the intervention of state courts. Nevertheless, the Cologne Higher Regional Court (19 SchH 14/21 and 19 SchH 15/21) declared the state proceedings to be admissible under Section 1032(2) ZPO, emphasising the principle of the primacy of EU law and its protection. Shortly before, the Berlin Higher Regional Court (12 SchH 6/21) had taken a different approach, finding that Germany's international treaty obligations prevailed over EU law in intra-EU disputes.

These decisions were appealed to the BGH (I ZB 43/22, I ZB 74/22 and I ZB 75/22), which ruled in July 2023 that in intra-EU disputes between a Member State and an investor, an application under Section 1032(2) ZPO against ICSID proceedings initiated under Art. 26 ECT is admissible. The BGH held that the general blocking effect of ICSID arbitral proceedings against review by state courts does not apply to intra-EU investor-state arbitral proceedings due to the primacy of European Union law. Arbitral

proceedings in ICSID arbitral proceedings must be reviewable by European state courts, and this review can be bindingly anticipated in proceedings pursuant to Section 1032(2) ZPO. Furthermore, according to the case law of the ECJ, the arbitration clause in Art. 26 ECT is invalid due to a violation of the Treaty on the Functioning of the European Union (TFEU) and the arbitral proceedings initiated on this basis are inadmissible.

The BGH has thus confirmed that the ECJ's Achmea jurisprudence also precludes ICSID arbitrations and that EU law takes precedence over member states' obligations under the ICSID Convention. Disputes between member states or between a member state and an investor from a member state should not be removed from the jurisdiction of the ECJ in order to preserve the coherence and uniformity of Union law. This is consistent from an EU law perspective. In the decision, the BGH emphasised that this is a narrowly limited exception to the fundamental exclusivity of ICSID proceedings.

In a decision from October 2023 on the declaration of enforceability of an arbitral award issued in Geneva concerning the bilateral investment treaty between Germany and India, the BGH (I ZB 12/23) confirmed this narrow exception and held that the Achmea jurisprudence is not transferable to bilateral investment treaties between member states of the European Union and third countries (extra-EU BITs). Following the ECJ's Komstroy decision (C-741/19), the BGH held that arbitration clauses in extra-EU BITs are not contrary to EU law. The decision not only confirms the BGH's compliance with EU law, but also its pro-arbitration stance.

Conclusion

The continuously positive attitude of the German courts towards arbitration and the current reform efforts of the German legislator suggest a continued positive outlook for arbitration in Germany.

GREECE

Law and Practice

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Dryllerakis Law Firm was established in Athens in 1971 and numbers more than 35 partners and associates. The firm has one of the largest dispute resolution practices in Greece, with experience in managing disputes across all industry sectors and in handling high-stake commercial and investor-state arbitrations under the rules and procedures of all the major arbitral institutions. Members of the firm also serve as arbitrators. The arbitration team recently achieved a significant success in a multimillion-euro COVID-19-related arbitration under the LCIA Rules. Key clients of the firm's dispute resolution practice include major operators across a diverse range of industries, such as ELAIS-Unilever Hellas S.A., Aegean Airlines, Hellenic Electricity Distribution Network Operator S.A. (HEDNO S.A.), Helleniq Energy Holdings S.A., Mondelez Europe Services GmbH (Greek Branch), Burlington Books, Minoan Lines, Olympic Brewery (CARLSBERG Group), Lampsa S.A., Praktiker Hellas S.A. and Beiersdorf Group.

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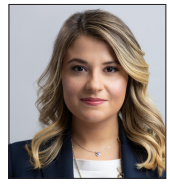

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1. General

1.1 Prevalence of Arbitration

Prevalence of International Arbitration

International arbitration in Greece has been steadily gaining popularity over traditional methods of resolving commercial disputes. Intricate, high-stakes or cross-border disputes are now more likely to be resolved through international arbitration. Other alternative dispute resolution methods like extrajudicial conciliation and mediation are also steadily increasing, albeit to a lesser extent.

Reasons Parties Opt for International Arbitration

Parties choose to include international arbitration clauses in complex and extensively negotiated contracts. This is particularly the case for foreign entities, which are more reluctant to resolve disputes with domestic entities before national courts, preferring the neutral forum of international arbitration instead.

Another reason parties choose arbitration over litigation is the tailored procedural framework of international arbitration, which offers flexibility in procedural matters like tribunal member selection and setting the timetable for arbitral proceedings.

Lastly, the enforceability of the arbitral awards is also of pivotal importance, given that international treaties and national laws establish relatively straightforward and largely uniform procedures for enforcing international arbitral awards.

Basis of Recourse to International Arbitration in Greece

In Greece, international arbitration is most frequently utilised as a dispute resolution method chosen by parties in agreements governed by Greek law. Although Greece is chosen as a seat for arbitration by domestic entities, it is not a preferred choice for foreign entities; venues such as Switzerland, France or the United Kingdom are frequently preferred as arbitration seats in agreements between domestic and foreign entities.

1.2 Key Industries

International arbitration clauses are commonly included in agreements within sectors such as construction, renewable energy and international trade. These industries typically involve complex and intricate agreements with significant financial stakes, such as share purchase agree-

ments. Moreover, arbitration agreements are incorporated in contracts with the state awarded under public procurement procedures, such as defence contracts or concession agreements.

International arbitration has increased significantly in such industries in the past years due to the fact that parties seek a neutral forum to avoid potential biases of domestic courts whilst also avoiding lengthy judicial procedures. Furthermore, the confidentiality of the proceedings is highly valued, particularly when business secrets are at stake.

1.3 Arbitration Institutions

Institutional arbitration is often favoured because it spares the parties the burden of creating their own rules and procedures. Instead, the parties can rely on the established rules of an arbitral institution, which also provides administrative support throughout the arbitration process.

To this aim, parties tend to opt for arbitral institutions of renowned status, such as the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the Stockholm Chamber of Commerce (SCC) and the Athens Mediation & Arbitration Organization (EODID).

It is also notable that Greek Law 5016/2023 on international arbitration has recently modernised the regulation of domestic arbitration institutions in Greece. It introduces specific standards for their establishment (minimum capital, etc), ensuring a minimum quality level for the services they provide. However, as far as is known, no new arbitral institutions have been established in Greece in 2024.

1.4 National Courts

There are no specific courts in Greece that are designated to hear solely matters related to international or domestic arbitration.

Law 5016/2023 on International Commercial Arbitration designates the single-member court of first instance as the competent authority for the appointment and replacement of arbitrators, hearing challenges regarding arbitrators and assisting with the taking of evidence.

The three-member court of appeals is the competent court for procedures relating to the setting aside of the arbitral award.

The single-member civil court of first instance is the competent authority for various matters of domestic arbitration, including – among others – the appointment of arbitrators, and also for hearing a party's appeal against the part of the arbitral award pertaining to the arbitrator fees.

2. Governing Legislation

2.1 Governing Law

International commercial arbitration in Greece is governed by the newly established Law 5016/2023, which replaced Law 2735/1999. In essence, Law 5016/2023, as explicitly stipulated in Article 2, was meant to integrate the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration of 2006 and its amendments, as well as the latest trends in international arbitration theory and practice.

Deviations From the UNCITRAL Model Law

Even though Law 5016/2023 integrated the amendments introduced in the UNCITRAL

Model Law of 2006 (the "Model Law"), it also contains the following deviations.

- Article 16 (multiparty arbitrations): the appointment of the arbitral tribunal in cases of more than one claimant and/or respondent is explicitly regulated. The Model Law contains no provision regulating multiparty arbitration proceedings.
- Article 19.2 (challenge procedure): the arbitrator under challenge shall not participate during the issuance of the decision accepting or declining such challenge, although they can express their views in this regard. The Model Law does not provide for the exclusion of the arbitrator under challenge from the relevant proceedings.
- Article 22 (arbitrators' liability): in exercising their duties, an arbitrator shall be liable only for intentional misconduct or gross negligence. No provision regulating the arbitrator's liability is included in the Model Law.
- Article 24 (joinder and consolidation): the arbitral tribunal not only has the power to accept a third party joining the arbitral proceedings (if bound by the arbitration agreement) but can also consolidate two disputes (under specific circumstances). The Model Law is silent on multiparty arbitration proceedings.
- Article 43.2 (action to set aside): new grounds for setting aside an award are introduced, which are the grounds justifying a petition for revision under Articles 544.6 (perjury and falsified/forged documents) and 544.10 (bribery) of the Greek Code of Civil Procedure. The Model Law does not provide for said grounds.
- Article 44.2 (res judicata and enforcement): an arbitral award may have effects on third parties only if such parties are bound by the arbitration agreement. The Model Law has no similar provision.

2.2 Changes to National Law

As explained in **2.1 Governing Law**, Law 5016/2023 has replaced Law 2735/1999, and was subsequently amended by Law 5026/2023 concerning Article 7. As far as is known, there is no pending draft legislation introducing changes to the framework for international and/or domestic arbitration in Greece.

3. The Arbitration Agreement

3.1 Enforceability

According to Article 10.1 et seq of Law 5016/2023, arbitration agreements may be in the form of an arbitration clause in a specific contract or in the form of a separate agreement, and shall be memorialised in a document the content of which has been agreed by the parties expressly or tacitly. Therefore, the arbitration agreement must be in writing; however, this requirement is not constitutive but is only for evidentiary purposes. As per Article 10.4, the parties' unreserved participation in the arbitral proceedings evidences the conclusion of an arbitration agreement.

The parties' legal capacity to enter into the arbitration agreement shall also be examined, as shall their representative authority, where applicable.

3.2 Arbitrability

Article 3.4 of Law 5016/2023 provides that any dispute is arbitrable, unless the law prohibits it. Under Greek law, penal disputes, family disputes, insolvency proceedings and enforcement proceedings are deemed non-arbitrable.

3.3 National Courts' Approach

Law 5016/2023 (Article 11) has adopted the principle of favorem validitatis of the arbitration

clause, according to which an arbitration agreement shall be regarded as valid if it is valid in accordance with the law chosen by the parties, or the law of the seat of arbitration, or the law governing the substantive agreement.

This approach ensures that the arbitration agreement will be upheld if it meets the criteria of any one of these legal frameworks, thus reflecting a pro-arbitration stance, which is also evident in the Greek courts' jurisprudence.

3.4 Validity

Law 5016/2023 adopts the fundamental principle of the separability of the arbitration clause, in Article 23.1. In essence, the Law provides that an arbitration clause included in a contract shall be considered an agreement independent of the other terms of the contract. The invalidity or termination of the contract does not automatically render the arbitration clause null.

4. The Arbitral Tribunal

4.1 Limits on Selection

Law 5016/2023 does not place significant limits on the parties' autonomy to appoint an arbitrator. In this context, Article 15.1 stipulates that the nationality of a person shall not be an impediment to their appointment as an arbitrator, unless otherwise agreed by the parties. Furthermore, the arbitrator shall be impartial and independent and, as per Article 18.1, a person proposed to be appointed as arbitrator shall declare any fact or circumstance that may give rise to reasonable doubts as to their impartiality or independence.

4.2 Default Procedures

If the parties' chosen method for selecting arbitrators fails, Article 15.4 of Law 5016/2023 provides for the following.

- In the case of a three-member tribunal, each party may appoint one arbitrator, and the two appointed arbitrators shall select the president of the tribunal. If a party fails to appoint an arbitrator or the selected arbitrators fail to appoint the president, then the civil single-member court of first instance shall proceed with the appointment following a request of any of the parties.
- In the case of a one-member tribunal, the arbitrator shall be appointed upon request of a party to the competent civil court.

In the case of a multiparty arbitration, the claimants or the respondents shall jointly appoint one arbitrator as per Article 16 of Law 5016/2023. Should they fail to do so, the relevant appointment shall be made by the civil single-member court of first instance.

Lastly, if for any reason an arbitral tribunal has not been appointed within 90 days of the submission of the request for arbitration, the civil single-member court of first instance may appoint all the members of the tribunal following a party's relevant request.

4.3 Court Intervention

The civil single-member court of first instance located in the region of the seat of the arbitration or in the district where the applicant is domiciled or, absent a domicile, the single-member Athens court of first instance is competent for the appointment, removal or replacement of arbitrators.

When appointing an arbitrator, the civil single-member court of first instance must consider the qualifications specified in the parties' agreement, ensure the arbitrators' independence and impartiality, and, in some instances, take into account the nationality of the parties involved.

Lastly, all decisions issued by said court in the context of these proceedings are not subject to means of recourse.

4.4 Challenge and Removal of Arbitrators

Article 18.2 of Law 5016/2023 puts forward the grounds to request a challenge of an arbitrator. A petition for the challenge of an arbitrator is valid whenever there is a circumstance giving rise to reasonable doubts as to the impartiality or independence of the arbitrator, or if the arbitrator does not possess the qualities agreed by the parties. An arbitrator may be challenged even by the party that appointed them if the grounds for challenge become known to said party after the appointment. Furthermore, Article 19 of the same law stipulates the procedure to be followed in case of a petition for challenge if the parties had not agreed in this regard.

With respect to the removal/replacement of arbitrators, Article 20.1 of Law 5016/2023 provides that an arbitrator's mandate is terminated if said arbitrator becomes de iure or de facto unable to perform their functions or for other reasons fails to act within a reasonable time.

Any arbitrator removed from their duties as per the provisions of Article 19 or Article 20 is replaced in accordance with the procedure set out in Article 21 of Law 5016/2023.

4.5 Arbitrator Requirements

Article 18 on the grounds of challenge of an arbitrator refers to "justifiable doubts of an arbitrator's independence and impartiality". The same holds for the rules of the principal arbitral institutions. Apart from the relevant case law, the updated IBA Guidelines on Conflicts of Interest in International Arbitration of the International Bar Association of 2024 provide useful guidance by listing specific circumstances (designated under "Red", "Orange" and "Green" Lists), with the aim of illustrating the General Standards, assisting arbitrators in making their disclosures and aiding parties in assessing whether disclosed information may be such as to create doubts with respect to the arbitrator's independence and impartiality.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

Greek case law and theory exclude certain matters from arbitration, such as penal disputes, marital disputes, disputes between parents and children, and issues related to insolvency or enforcement proceedings.

5.2 Challenges to Jurisdiction

Article 23.1.a of Law 5016/2023 explicitly provides for the competence-competence principle by stipulating that the arbitral tribunal shall rule on its jurisdiction and the existence or validity of the arbitration agreement.

5.3 Circumstances for Court Intervention

In general, Greek courts respect the jurisdictional rulings of arbitral tribunals while also intervening when necessary to correct jurisdictional overreach. The circumstances under which a state court can address issues of the arbitral tribunal's jurisdiction are as follows.

- Action before the civil courts: Article 12.1 of Law 5016/2023 provides that if an action is brought before a civil court in a dispute that is the subject of an arbitration agreement, then the court shall refer the dispute to arbitration following a party's relevant request, unless it holds that the arbitration agreement is invalid, ineffective or unenforceable.

- Set aside proceedings: Article 43.2.a.aa of Law 5016/2023 stipulates that an arbitral award may be set aside by the civil three-member court of appeals if such court holds that the arbitration agreement was invalid, that a party lacked capacity to execute such agreement or that the arbitral tribunal declined its jurisdiction notwithstanding a valid arbitration agreement.
- Enforcement proceedings: as per Article 43.7 of Law 5016/2023, even if a party has waived its right to set aside the arbitral award, it maintains the right to raise objections that constitute setting-aside grounds in the context of enforcement proceedings, including grounds relating to lack of jurisdiction.
- Petition for annulment of an administrative act before an administrative court: as per settled case law (based on judgment 24/1993 of the Supreme Special Court), whenever an administrative court is called to annul an administrative act on the basis of a relevant arbitral award, it shall also examine whether or not the arbitral tribunal issuing this award has exceeded its jurisdictional boundaries. In this respect, it should be noted that, in a series of judgments, the 2nd Chamber of the Hellenic Council of State held that such excess of jurisdictional boundaries may be established whenever an arbitral tribunal adjudicates an investment dispute that raises issues of interpretation and/or application of provisions of EU law.

5.4 Timing of Challenge

Article 23.2 of Law 5016/2023 stipulates that an objection to the lack of jurisdiction of the arbitral tribunal shall be raised no later than the lapse of the deadline for the submission of the statement of defence, unless this belated submission is deemed justified by the arbitral tribunal.

A distinction should be made with respect to the time limit within which the parties have the right to go to court to challenge the jurisdiction of the tribunal.

- If the arbitral tribunal ruled on its jurisdiction by a preliminary decision, the arbitral tribunal's preliminary decision upholding its jurisdiction may be challenged only as part of the award on the merits, unless the parties have agreed otherwise or the tribunal has consented to an action to set aside this preliminary decision. In this case, the challenge against the preliminary decision should be filed within 30 days of the tribunal's consent being given or the service of the award (whichever is later), in accordance with Article 23.4 of Law 5016/2023.
- If the arbitral tribunal ruled on its jurisdiction by its final award, an action to set aside shall be filed within three months from the service of the award to the party challenging said award, as per Article 43.3 of Law 5016/2023. If a request for the correction or interpretation of the award is pending, said deadline begins from the service of the relevant decision.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The standard of judicial review for questions of jurisdiction of the arbitral tribunal is not specified by Law 5016/2023. The court where an application to set aside is pending is not bound by the arbitral tribunal's decision regarding its own jurisdiction and has the right to conduct a full review of the arbitration agreement to determine the existence and validity thereof.

5.6 Breach of Arbitration Agreement

As per Article 12.1 of Law 5016/2023, a court before which an action is brought in a matter that is the subject of an arbitration agreement

shall refer the parties to arbitration if a party so requests not later than the first hearing, unless the court finds that the arbitration agreement is null and void, ineffective or incapable of being performed.

In this respect, Article 12.2 provides that arbitral proceedings may be commenced or continued, even if such an action is pending before the courts.

Overall, the approach of Greek courts towards parties who commence court proceedings in breach of an arbitration agreement is to uphold the arbitration agreement and refer the dispute to arbitration.

5.7 Jurisdiction Over Third Parties

The principle of the natural judge, as reflected in Article 8 of the Greek Constitution, stipulates that no one shall be deprived, without their consent, of the judge assigned to them by law. Consequently, only the parties executing an arbitration agreement are bound by it and are thus subject to the jurisdiction of the arbitral tribunal. However, there are limited circumstances where an arbitral tribunal may assume jurisdiction over individuals or entities that are not signatories to the arbitration agreement. For instance, such exceptional circumstance may be universal succession (eg, inheritance).

Furthermore, Article 24.1 of Law 5016/2023 stipulates that the arbitral tribunal has the power to accept that a party joins the arbitral proceedings at a later stage under the condition that this party is bound by the arbitration agreement. In fact, as per the explanatory memorandum, both permissive intervention (*prostheti paremvasi*) and intervention of a right (*kyria paremvasi*) are allowed under this new framework.

6. Preliminary and Interim Relief

6.1 Types of Relief

As per Article 25 of Law 5016/2023, unless otherwise agreed by the parties, the arbitral tribunal may, upon request of a party, order any interim measure it deems necessary regarding the subject matter of the dispute. The tribunal may also require the party against whom the measure is ordered to provide a form of security. In circumstances of extreme urgency, the tribunal may even issue a preliminary order to regulate the situation pending its decision on the interim measures.

The relevant decision may be rendered in the form of an award or in a different form, such as a procedural order.

Even if the arbitral tribunal has wide discretion regarding the selected interim relief, the following limitations apply:

- the tribunal must not order more interim measures than necessary;
- the tribunal should choose the least burdensome measure of the available options;
- the tribunal shall not impose interim relief that is contrary to international public policy; and
- the tribunal shall refrain from ordering interim relief to the extent that a civil court has already been involved in interim relief proceedings.

If the party to whom the application for provisional measures is directed does not comply with the arbitral award, intervention by a competent Greek court (either a single-member court of first instance or the civil district court of the locus executionis) is necessary, as stipulated by Article 25.5 of Law 5016/2023 and Articles 683.1 and 4 of the Greek Code of Civil Procedure.

The arbitral tribunal may, on its own initiative or upon request of a party, revoke, suspend or modify the interim measures and the security imposed by it. Any interim relief is binding upon the party against which it is imposed but is of a temporary nature only, and shall not influence the outcome of the main proceedings.

6.2 Role of Courts

Interim Relief by National Courts in Arbitral Proceedings

The role of the national courts in the context of granting preliminary/interim relief in arbitral proceedings is crucial. At the outset, Article 13 of Law 5016/2023 stipulates that the arbitration agreement does not prevent the parties from requesting any competent court to order interim measures regarding the subject matter of the agreement, before or even after the commencement of the arbitration.

Furthermore, Article 25.5 of Law 5016/2023 provides that the competent civil court will recognise and declare the interim relief and the security imposed by the arbitral tribunal as enforceable unless such measures are contrary to international public policy or unless interim relief proceedings for this case have already been initiated before it.

Under Article 36 in conjunction with Article 3.1 of Law 5016/2023, the civil courts may order obligatory measures to assist with the taking of evidence in foreign-seated arbitrations.

The "Emergency Arbitrator"

Greek law does not restrict the use of emergency arbitrators. In fact, Article 25.1 of Greek Law 5016/2023 suggests that the arbitral tribunal's authority to order interim or preliminary measures is a provision that the parties can opt to override. Therefore, parties may agree to opt for "emergency arbitrator" proceedings for urgent interim measures that cannot wait for the constitution of an arbitral tribunal.

Regardless of the appointment of an emergency arbitrator, it should also be underscored that, according to Article 13 of Greek Law 5016/2023, Greek national courts can order interim or preliminary measures regarding the subject matter of the dispute, either before or after the initiation of arbitral proceedings.

6.3 Security for Costs

Under Greek law 5016/2023, arbitral tribunals are allowed to order security for costs.

7. Procedure

7.1 Governing Rules

In principle, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. As the parties have the freedom to set their own procedural rules, they can also delegate this responsibility to an arbitral institution, as per Article 5.3 of Law 5016/2023, or choose to follow the rules of a specific institution, such as the ICC or the LCIA.

In the absence of any such agreement, the arbitral tribunal will define the procedure as per Article 27.2 of Law 5016/2023.

The parties' autonomy to decide on the procedure of the arbitration is subject to the rules of mandatory law of Law 5016/2023, which include the equal treatment principle under Article 26 and the right to be heard under Article 32.

7.2 Procedural Steps

Greek law does not provide for any specific procedural steps to be followed in terms of

international arbitral proceedings. Such steps are determined by the parties or a third party or the arbitrators in accordance with the analysis set out in **7.1 Governing Rules**. However, Law 5016/2023 includes certain default provisions in case no agreement has been concluded between the parties. Such default procedural steps pertain to the commencement date of the arbitral proceedings (Article 29), the deadlines for the submission of the respondent's answer to the claimant's request for arbitration (Article 31), and the appointment, replacement or challenging of the arbitrators (Articles 18 et seq).

7.3 Powers and Duties of Arbitrators

As explained in **7.1 Governing Rules**, in the absence of an agreement by the parties, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate. However, the principle of equal treatment of the parties shall be respected and the tribunal shall ensure that each party has an equal opportunity to present its claims and submit its evidence.

7.4 Legal Representatives

The law does not mandate specific qualifications for legal representatives appearing before an arbitral tribunal; any lawyer with an active licence is permitted to represent clients in arbitration.

8. Evidence

8.1 Collection and Submission of Evidence

The rules governing the collection and submission of evidence are determined by the tribunal in consultation with the parties. Law 5016/2023 does not include specific provisions for the collection and submission of evidence at the pleading stage and at the hearing of the cases, apart from:

- Article 30 on the language of evidence;
- Article 34 on the appointment of an expert by the arbitral tribunal;
- Article 35 on document production and the taking of evidence; and
- Article 36 on the possibility of the arbitral tribunal to request the civil court's assistance regarding the taking of evidence.

The parties also tend to adopt the IBA Rules on the Taking of Evidence in International Arbitration, which provide a structured approach to evidentiary matters.

8.2 Rules of Evidence

In accordance with Article 27 of Law 5016/2023, the parties may freely agree on the procedure. In this respect, the parties may, for example, adjust the level of certainty needed for the arbitral tribunal to make a judgment on specific issues, either by tightening or loosening it.

In the absence of an agreement on these issues, the arbitral tribunal may freely decide on the admissibility, materiality and weight of evidence.

8.3 Powers of Compulsion

In accordance with Article 35 of Law 5016/2023, unless otherwise agreed by the parties, the arbitral tribunal has the authority to compel the parties to produce documents or other evidence in their possession or control, that is likely to have a substantial impact on the outcome of the arbitration. Such power, however, is limited against the parties of the proceedings and not any third party.

The tribunal shall adopt the appropriate measures to facilitate the taking of evidence while ensuring that the parties' right to be heard is respected. In cases where the arbitral tribunal does not have the authority to compel the con-

duct of the taking of evidence or if the parties are not co-operating, the arbitral tribunal may request the assistance of the single-member court of first instance of the district of the place of arbitration or the district where the applicant is domiciled or, absent a domicile, has its habitual residence, or of the Athens single-member court of first instance in the absence of a habitual residence, in accordance with the provisions of Article 36. Naturally, if a party does not co-operate regarding the taking of evidence, the tribunal may draw adverse inferences from such failure against the non-complying party.

9. Confidentiality

9.1 Extent of Confidentiality

In accordance with Article 27.3 of Law 5016/2023, the parties can agree on whether the existence of the arbitration, the arbitral proceedings and the arbitral award will remain confidential. In the absence of an agreement by the parties regarding confidentiality, the arbitral tribunal will decide.

10. The Award

10.1 Legal Requirements

The legal requirements regarding the form and content of an arbitral award are set out in Article 40 of Law 5016/2023. At the outset, the arbitral award must be in writing and must be signed by the arbitrator or arbitrators. If there are multiple arbitrators, the signatures of the majority suffice, provided that the reason for any omitted signature is specifically indicated in the award.

The arbitral award shall also specify the date of its issuance and the place of arbitration, as stipulated according to Article 28.1. The award shall comply with any additional formal requirements under the arbitration agreement agreed by the parties or the procedural rules chosen by the parties.

Each party must receive one original copy of the arbitral award, but delivery may not be regarded as the formal service required for the running of the time limit stipulated in Article 43.3.

10.2 Types of Remedies

The question of potential limitations on the types of remedies an arbitral tribunal can award typically arises either during the hearing of a petition for set aside in Greek courts or in a petition for the recognition and/or enforcement of an award. In these instances, the Greek court will determine whether the recognition or enforcement of a specific remedy would contravene Greek public policy.

With respect to punitive damages, the Greek Supreme Court has ruled that enforcing a foreign court's decision awarding such damages is not inherently contrary to Greek public policy, provided the damages are not excessively disproportionate.

Regarding injunctions, in certain situations Greek law allows the injured party to request the court to order the cessation of the illegal act. Thus, in principle, the remedy of injunction is not generally considered to be against Greek public policy.

Regarding administrative acts, it is settled case law that an arbitral tribunal has the power to rule on the legality of a specific administrative act in a manner that is binding for the administrative courts (under the limitations set out in **5.3 Circumstances for Court Intervention**), but it does not have the power to annul it.

10.3 Recovering Interest and Legal Costs

Article 41.4 of Law 5016/2023 stipulates that, unless otherwise agreed by the parties, the arbitral tribunal shall decide on the allocation of the costs, having regard to the circumstances of the case, the proceedings and the outcome. That said, Law 5016/2023 adopts the principle of costs-follow-the-event (or the "loser pays" principle). Each party requesting to be compensated for its legal and arbitration costs shall simultaneously prove that such costs were reasonably incurred.

On the other hand, the awarding of legal interest (and/or interest on interest) does not fall under the scope of Law 5016/2023 but is rather regulated by the provisions of substantive law applicable to the case at hand. The arbitral tribunal may grant such types of interest, provided that the prerequisites set by law are met.

11. Review of an Award

11.1 Grounds for Appeal

Grounds for Setting Aside

The arbitral award cannot be appealed. It may only be challenged through an action for annulment/setting aside, according to the provisions of Article 43 of Law 5016/2023. The grounds for setting aside are limited. For an application to set aside to be successful, the applicant shall establish that:

- a party to the arbitration agreement lacked the capacity to conclude the agreement in accordance with the law governing its capacity, or the arbitration agreement is not valid, or the tribunal declined jurisdiction despite a valid arbitration agreement;
- it was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise prohibited from presenting its case for reasons not attributable to it;
- the award deals with a dispute that falls outside the scope of the arbitration agreement or contains decisions on claims that were not submitted to arbitration (in such case, only the part pertaining to those claims shall be set aside);
- the composition of the arbitral tribunal or the conduct of the arbitral proceedings was not in accordance with the agreement of the parties or with Law 5016/2023;
- there are grounds for a petition for revision (of a court judgment) under Article 544.6 (perjury or falsified/forged document) and Article 544.10 (bribery) of the Greek Code of Civil Procedure;
- the subject matter of the dispute is not arbitrable; or
- the award runs contrary to the international public policy of Greece in accordance with Article 33 of the Greek Civil Code.

In fact, the court of appeals before which an action to set aside was brought may determine on its motion that the last two grounds listed above exist, even if the applicant did not invoke such grounds.

Procedural Issues

The action for annulment must be filed before the civil three-member court of appeals of the district where the award was rendered, or Athens if said district cannot be determined, within three months of the date of formal service of the award to the applicant.

The court may, upon request or ex officio, refer the dispute back to the arbitral tribunal that

issued the arbitral award to remedy this defect, setting a deadline not exceeding 90 days, instead of annulling the arbitral award in whole or in part.

A party may not rely on its own actions/omissions as grounds to have an award set aside. Lastly, by an explicit, written and specific agreement, the parties may waive the action for the setting aside of the arbitral award at any time.

11.2 Excluding/Expanding the Scope of Appeal

The new Law 5016/2023 does not explicitly provide for the possibility of the parties to expand the scope of challenge of an arbitral award, as was stipulated in Law 2735/1999. However, according to Article 43.7 of Law 5016/2023, by express and specific agreement in writing, the parties may at any time waive their right to seek to set aside an arbitral award. Nevertheless, despite an explicit waiver the party may invoke grounds for annulment against the arbitral award during enforcement proceedings before the civil single-member court of first instance as per the same article.

As recognised by Greek jurisprudence reflecting domestic arbitrations and arbitrations under the previous framework of Law 2735/1999, parties can validly exclude or limit the scope of a petition for setting aside, provided that the agreement is ratified by law. When such exclusion or limitation is clearly stated in the agreement, the law ratifying the agreement and permitting the waiver will be regarded as lex specialis. This specific law will take precedence over the general provision that prohibits waiving the right to petition to set aside.

11.3 Standard of Judicial Review

The court of appeals is generally prohibited from proceeding with a de novo review of the merits of the case when ruling on an action for the setting aside of the arbitral award. In a similar vein, it is settled case law that, even in recognition proceedings of foreign arbitral awards, the Greek courts are not allowed to delve into the substance of the case by reviewing it anew.

12. Enforcement of an Award

12.1 New York Convention

Greece has ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) by virtue of Legislative Decree No 4220/1961 “Regarding the ratification of the Convention signed in New York on 10 June 1958 on the recognition and enforcement of foreign arbitral awards” (published in Government Gazette Journal A’ 173) (the “Legislative Decree”). The New York Convention entered into force on 14 October 1962.

Ratification of said convention proceeded under the reservations set forward in Article 1.3 in accordance with Article 2.1 of the Legislative Decree. These reservations entail that a foreign arbitral award may be recognised if the foreign seat of arbitration belongs to a jurisdiction that has signed the convention (“reciprocity”) and the dispute at hand is commercial (“commerciality”). It is noted, however, that Article 45.1 of Law 5016/2023 stipulates that the recognition and enforcement of foreign arbitral awards shall proceed in accordance with the New York Convention without reference to the existent reservations. As per the explanatory report of said law, “[i]t goes without saying that the reservations of reciprocity and commerciality do not apply”.

12.2 Enforcement Procedure

Recognition and Enforcement Proceedings

Article 3 of the New York Convention stipulates that each contracting state is obliged to recognise the validity of a foreign arbitral award and allow its enforcement in accordance with the procedural rules of the jurisdiction where enforcement is sought. Consequently, recognition and enforcement of foreign arbitral awards may be sought before the single-member court of first instance in accordance with Articles 903, 905 and 906 of the Greek Code of Civil Procedure.

Recognition and enforcement are also subject to the conditions outlined in Article 4 of the New York Convention – ie, the party seeking recognition and enforcement must submit an application along with a duly certified original arbitral award, or a copy of the award that meets the authenticity requirements of the New York Convention and the original arbitration agreement, or a copy that meets said authenticity requirements. If the previous supporting documents are in a foreign language, they should be accompanied by an official translation into Greek.

In accordance with Article 5.1.e of the New York Convention, the award may not be enforced if it has been set aside or suspended by the competent authority of the country where the award was issued (or in accordance with the law of which the award was issued), whereas Article 6 of the New York Convention provides that the court may suspend the proceedings if the setting aside of the award has been requested in the country where the award was issued (or in accordance with the law of which the award was issued).

State Immunity

According to Article 94.4.c of the Greek Constitution, enforcement proceedings may be validly initiated against the Greek State on the basis of court judgments. Arbitral awards can also be enforced against the Greek State; however, in both the aforementioned cases, only the state's private property can be the object of enforcement proceedings and not any property or bank accounts destined to serve a public purpose.

It is also noted that, pursuant to Article 923 of the Greek Code of Civil Procedure, any entity wishing to initiate enforcement proceedings against a foreign state shall not do so unless it has been granted prior permission from the Greek Minister of Justice.

12.3 Approach of the Courts

Generally, Greek courts refrain from recognising a foreign arbitral award as enforceable in Greece in cases where its enforcement would contravene fundamental political, moral, social, legal or economic perceptions that prevail in the country. Naturally, such perceptions change over time. This essentially means that such a contrast may not necessarily be established simply because the award to be recognised or enforced applied a foreign provision that is unknown or would be inapplicable under Greek law.

13. Miscellaneous

13.1 Class Action or Group Arbitration

Unlike some jurisdictions that explicitly allow for class actions or group arbitration, Greek arbitration law does not contain provisions that enable multiple parties to combine their claims into a single arbitration proceeding. There are mechanisms for collective redress in judicial or mediation proceedings, such as group actions under

consumer protection laws, but these mechanisms do not extend to arbitration.

13.2 Ethical Codes

Apart from the principles of impartiality and independence described in **4.1 Limits on Selection** and **4.4 Challenge and Removal of Arbitrators**, there are no mandatory ethical codes for arbitrators under Greek law. Soft law texts such as the 2024 IBA Guidelines on Conflicts of Interest in International Arbitration and the 2024 UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution provide useful guidance in this respect.

Counsel participating in arbitration proceedings are subject to the professional standards adopted by Law 4194/2013 (Greek Code of Lawyers).

13.3 Third-Party Funding

Law 5016/2023 provides no guidance on third-party funding. The possible usage of this scheme in arbitral proceedings in Greece has been the subject of debate, given that provisions to be potentially applied by analogy (eg, Article 60 of the Greek Code of Lawyers for "champerty") introduce limitations to the third-party funder fees.

13.4 Consolidation

As per Article 24.2 of Law 5016/2023, following a party's application, the arbitral tribunal may consolidate and adjudicate another dispute pending between the parties before the same arbitrators or before another arbitral tribunal (however, the latter is only possible upon the parties' express agreement). The decision to consolidate shall be issued following the arbitral tribunal's request to all interested parties to express their views, having regard to all circumstances.

13.5 Binding of Third Parties

See **5.7 Jurisdiction Over Third Parties** regarding the circumstances under which an arbitration agreement may be binding upon third parties. With respect to the res judicata effect of the arbitral award, Article 44.2.c of Law 5016/2023 explicitly stipulates that the arbitral award has such effect against third parties only if those parties are bound by the arbitration agreement.

Trends and Developments

Contributed by:
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Dryllerakis Law Firm was established in Athens in 1971 and numbers more than 35 partners and associates. The firm has one of the largest dispute resolution practices in Greece, with experience in managing disputes across all industry sectors and in handling high-stake commercial and investor-state arbitrations under the rules and procedures of all the major arbitral institutions. Members of the firm also serve as arbitrators. The arbitration team recently achieved a significant success in a multimillion-euro COVID-19-related arbitration under the LCIA Rules. Key clients of the firm's dispute resolution practice include major operators across a diverse range of industries, such as ELAIS-Unilever Hellas S.A., Aegean Airlines, Hellenic Electricity Distribution Network Operator S.A. (HEDNO S.A.), Helleniq Energy Holdings S.A., Mondelez Europe Services GmbH (Greek Branch), Burlington Books, Minoan Lines, Olympic Brewery (CARLSBERG Group), Lampsa S.A., Praktiker Hellas S.A. and Beiersdorf Group.

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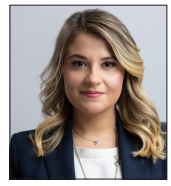

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International Arbitration in Greece: an Introduction

As investments grow in Greece in sectors such as tourism, real estate, energy and infrastructure, the likelihood of commercial disputes rises and, consequently, the need for a more efficient and more impartial mechanism such as arbitration. Therefore, international arbitration in Greece has steadily grown in popularity in comparison to traditional methods of dispute resolution. Indeed, both domestic and international stakeholders have increasingly turned to arbitration for its efficiency, confidentiality and overall neutrality. Legislative reforms have further reshaped the arbitration landscape, making Greece a more attractive venue for arbitration.

This article explores the latest trends and developments in Greek arbitration theory and practice, examining the evolving legal framework, the growing use of arbitration across various sectors and the respective implications for practitioners and parties involved in arbitration.

The Greek International Commercial Arbitration Act (Law 5016/2023)

The landscape of international commercial arbitration underwent significant transformation in 2023. The new Law 5016/2023 repealed the previous framework of Law 2735/1999 and provided a wholly novel framework with respect to international commercial arbitration. By incorporating the amendments of the 2006 UNCITRAL Model Law on International Commercial Arbitration, as well as the latest developments in international literature and the practice of arbitration, this new Act aspires to make international arbitration a more flexible dispute resolution framework which, in turn, would make Greece a preferred location for foreign investments, and an attractive seat for international arbitration.

The new Law 5016/2023 broke new ground by expanding the arbitrability criterion to all disputes, unless otherwise provided by law (Article 3.4). Furthermore, it ensured the "favor arbitrandum" principle by validating arbitration agreements based on multiple legal frameworks (Article 11), explicitly regulated the joinder of additional parties and the consolidation of proceedings (Article 24) and established the procedure and prerequisites for granting interim/interlocutory relief by arbitral tribunals (Article 25). These provisions are only a few examples of the innovations introduced with the new Law.

Energy arbitration

The transition to renewable energy sources has been steadily gaining momentum among Greek energy companies, which are gradually distancing themselves from traditional energy resources and actively embracing green energy by investing in new technologies and infrastructure. Such transition is quite evident, as more and more companies are aiming to expand their renewable energy portfolio by acquiring photovoltaic parks or wind farms.

While this shift to green energy is necessary, at the same time it introduces new challenges, such as infrastructure upgrades, high initial costs, technological limitations, regulatory hurdles and the need for reliable energy storage solutions. Compliance with environmental, social and governance (ESG) regulations may present additional hurdles. These challenges, along with frequent and extensive modifications in the legislative framework, are likely to result in disputes.

Agreements related to the energy sector, such as Development Services Agreements (DSAs), Power Purchase Agreements (PPAs), Share Purchase Agreements (SPAs) and Shareholder Agreements (SHAs), often include arbitration clauses. Consequently, arbitration in the energy sector is on the rise.

It is also notable that the Regulatory Authority for Energy, Waste and Water (RAEWW) has established a mechanism of permanent arbitration before which the following disputes may be heard and finally settled:

- disputes between entities involved in the energy sector;
- disputes between customers and companies engaged in energy activities;
- any dispute arising between the above entities from the application of the relevant national and European legislation;
- disputes between entities involved in the provision of water services;
- disputes between consumers and water service providers, as well as disputes between providers; and
- disputes between solid waste management bodies and local government organisations.

Agreements with the Greek state

A significant number of international arbitration cases in Greece arise from contracts between private entities and the Greek government or Greek state entities. Indeed, the Greek state (when acting as fiscus) and/or various state entities have concluded several contracts with private foreign or domestic entities in relation to the implementation of large-scale projects that pertain to the construction of significant projects, the supply of materials and the exploitation of its rights.

The state has opted for arbitration in all these contracts, taking into consideration foreign entities' preference for a neutral forum. In particular, ICC arbitration remains one of the top choices in contracts for the supply of military material, whilst arbitration under the rules and administration of the LCIA is often selected in agreements conceding rights of the state to private entities for a limited amount of time.

Construction arbitration

The construction sector in Greece saw a significant rise in the past year, with the Construction Production Index increasing by over 24% in 2022, marking the highest growth rate among EU 27 countries. Arbitration is frequently the preferred method of dispute resolution for construction disputes, which are characterised by

technical complexity, necessitating their adjudication by specialised arbitrators that have industry knowledge and are aware of the highly technical details. Arbitration is also preferred as it is capable of efficiently addressing the wide variety of claims from all parties involved in such large-scale projects.

Contractors, sub-contractors and suppliers often bring claims with respect to delays in payments and/or the provision of material or services, defective works and damages arising therefrom. Consequently, numerous arbitration cases arise, often leading to consolidated proceedings involving multiple agreements with identical arbitration clauses.

M&A disputes

M&A transactions are on the rise in Greece. As the country emerges from economic challenges, there has been a notable increase in both domestic and cross-border M&A activity. As a matter of fact, Greece is forecasted to accommodate M&A transactions of a value greater than EUR5.5 billion in 2024. Naturally, a fair share of such transactions pertains to the tourism and hospitality sector, upon which the Greek economy heavily relies. Groups of relevant companies are expanding their business by purchasing smaller hotels and proceeding with their reconstruction and/or renovation, aiming to be perceived as the next best tourist destinations.

Disputes are integral to hotel M&A transactions (as for any M&A transaction) and usually relate to a possible breach of a warranty or arise from a disagreement in relation to the consideration of the transaction.

Arbitration agreements are frequently included in these transaction contracts; consequently, several post-M&A disputes are adjudicated before arbitral tribunals that have a deep understanding of complex corporate law issues. Stakeholders in the hospitality sector also value the efficiency and confidentiality of the arbitral proceedings, as well as the enforceability of the arbitral award.

As M&A activity continues to thrive in Greece, international arbitration as an effective dispute resolution mechanism shall play a crucial role in sustaining investor confidence and facilitating economic growth.

Artificial intelligence (AI) in arbitration

Ever since the COVID-19 outbreak, there has been an ongoing trend of adopting smart technologies to improve the efficiency and quality of dispute resolution proceedings by reducing costs and accelerating proceedings. The most renowned arbitration institutions have already developed practices to integrate the use of AI. For instance, AI applications are already available to assist with the selection of arbitrators.

Moreover, AI is considered a helpful tool regarding the management and review of great volumes of documents, since it can map out the crucial information of each document or even draw up an exact chronology of the case by preparing a clear timeline of events or highlight the main points of the case. There have also been examples of tribunals using AI technology for the drafting and structuring of arbitral awards, especially with respect to the sections pertaining to the arguments put forward by the parties and the factual background of the case.

However, the usage of AI in arbitration not only grants benefits to the parties but may also pose significant risks to the integrity of the proceedings. For example, any hacking incident against AI or feeding of AI with falsified evidence could

influence the outcome of the proceedings in a rather negative manner.

In this respect, the European Parliament and the Council have adopted the "Artificial Intelligence Act" (Regulation(EU) 2024/1689), which provides for the regulation of AI systems used in economic activities with a likelihood of causing harm. The activities of arbitrators and their usage of AI is classified as a "high-risk" economic activity as per Recital 61, which provides that "AI systems intended to be used by alternative dispute resolution bodies [for the purposes of the administration of justice and democratic processes] should also be considered to be high-risk when the outcomes of the alternative dispute resolution proceedings produce legal effects for the parties".

Crypto arbitration

The cryptocurrency market has been hitting record highs. In Greece, a more structured regulatory framework regarding the taxation of cryptocurrency has been put in place, and many e-commerce businesses accept cryptocurrency as a form of payment from customers and companies.

Nevertheless, the risks involved in cryptocurrency can lead to so-called "crypto disputes". Such disputes may arise in various forms, including but not limited to breach of "smart contracts" (ie, self-executing agreements with terms directly formulated into code language), matters related to cryptocurrency exchanges (incidents of hacking/cyberattacks, etc), violation of the terms of crypto agreements, misrepresentation or fraud in the conclusion of crypto transactions.

Arbitration proceedings are rather well suited for transactions involving cryptocurrencies and smart contracts. At the outset, arbitration accommodates the user's need for certainty and provides a neutral forum for the adjudication of borderless transactions, such as those involved in the crypto market. Furthermore, the relevant disputes are highly technical, necessitating arbitrators with expertise and special knowledge to adjudicate on said matters.

Despite the advantages of using arbitration in crypto disputes, several challenges may arise. There may be issues regarding the validity of arbitration clauses, as smart contracts are written into code. Furthermore, enforcing awards on crypto-assets might encounter resistance, especially considering that courts in some jurisdictions have set aside awards, upholding that damages related to cryptocurrencies contradict their international public policy.

Standards of independence and impartiality

One of the primary reasons Greek parties favour arbitration is their ability to select arbitrators. This advantage, however, could be seen as a drawback if it does not adhere strictly to the fundamental principles of arbitrator impartiality and independence. The recent surge in social media usage, easy cross-cultural communication and the proliferation of various forms of media and entertainment have introduced numerous challenges concerning the maintenance of these principles.

To somewhat regulate said matters and provide a general guideline, while also ensuring the integrity of arbitration as a means of dispute resolution, the International Bar Association (IBA) recently updated its Guidelines on Conflicts of Interest in International Arbitration and incorporated some notable amendments. For instance, a mere relationship via social media of two persons (eg, an arbitrator and a party's counsel) shall not be deemed to create any con-

flict of interest (and is thus categorised under the updated "Green List").

Furthermore, the United Nations Commission on International Trade Law (UNCITRAL) recently issued an updated version of its Code of Conduct for Arbitrators in International Investment Dispute Resolution; said code is deemed to be rather innovative by establishing best practices whilst also explicitly posing limitations on the "double hatting" practice.

While Greece does not have its own code of conduct for arbitrators or counsel in arbitral proceedings, these developments in soft law texts are bound to influence the case law of the domestic courts and tribunals.

Arbitration agreements providing for arbitral proceedings seated in Greece to be conducted in the English language

Both private and state entities are increasingly opting to conduct arbitration proceedings in English, while at the same time choosing Greek law as the law governing the contract and Greece as the seat of arbitration.

Naturally, multinational corporations and foreign investors are more comfortable with English, which is regarded as the international language of business. Furthermore, the conduct of arbitration proceedings in the English language broadens the pool of qualified arbitrators who are fluent in English, ensuring a high standard of adjudication. Another reason that parties opt for the English language is because the language of the contract and supporting documentation is also English. In this way, the parties can reduce costs related to translation and interpretation services.

Recent case law

There have been three noteworthy judgments issued by Greek courts in recent years.

The 2nd Division of the Hellenic Council of State in the series of judgments nos 246-253/2022 dealt with a concession agreement concluded by the Hellenic Republic that provided for a beneficial taxation framework in favour of the Concessionaire and included an arbitration agreement. The Hellenic Republic issued tax assessments against the concessionaire, which the latter successfully challenged before the arbitral tribunal. In the proceedings for the annulment of said tax assessments before the administrative courts, the Hellenic Council of State ruled that the concession agreement qualifies as an investment agreement and that arbitral tribunals do not have jurisdiction over investment disputes relating to the interpretation and/or application of EU Law.

In judgment no 8/2023, the Thraki Three-Member Court of Appeals addressed the existence and validity of an arbitration clause within the articles of association of a partnership. The clause had been amended through a private agreement between the partners without meeting corporate law publication requirements. The court determined that both the original arbitration clause and its amendment were valid. It reasoned that, since the amendment pertained solely to internal matters without affecting third parties, public disclosure was unnecessary for its validity. However, the court clarified that an arbitration clause integrated into a company's articles of association may bind new partners, necessitating public disclosure for any amendments in such cases.

Lastly, another significant decision – judgment no 308/2023 of the Greek Civil Supreme Court (Areios Pagos) – dealt with the piercing of the

corporate veil of a subsidiary company concerning an arbitration clause. The Supreme Court concluded that piercing the corporate veil of a subsidiary extends the validity of the arbitration agreement to include its parent company as well.

Conclusion

These trends indicate a favourable trajectory for arbitration as the preferred method of dispute resolution in the country. However, arbitration practitioners in Greece must adapt to developments in energy disputes, construction matters, concession agreements and challenges arising from the evolving AI and crypto markets. In addition, further legislative adjustments are needed in order to address these challenges effectively. Looking ahead, stakeholders can expect continued refinement of legal principles and practices that will enhance Greece's reliability and appeal as a prominent arbitration seat on the global stage.

HONG KONG SAR, CHINA

Law and Practice

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Latham & Watkins LLP advises global companies, investors, state-owned enterprises, and states facing increasingly complex international disputes. Its International Arbitration Practice excels in resolving high-stakes issues and enforcement actions across borders, corporate structures, commercial contracts, jurisdictions, and treaties. Latham brings deep experience in international commercial arbitration, investment treaty arbitration, multi-jurisdictional disputes, and public international law. Its team has represented clients before all major arbitral institutions, including AAA, HKIAC, ICC, ICSID, LCIA, SIAC and under UNCITRAL rules, as well as in numerous ad hoc proceedings. With a global presence and deep experience, Latham delivers innovative strategies and seamless service, ensuring its clients maximise their chances of success in arbitration and enforcement actions.

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1. General

1.1 Prevalence of Arbitration

Arbitration is a popular mode of alternative dispute resolution in Hong Kong, used increasingly in cross-border commercial disputes and among international parties. In 2023, the Hong Kong International Arbitration Centre (HKIAC) recorded 281 new arbitration cases with a total amount of HKD92.8 billion (approximately USD12.5 billion) in dispute. Hong Kong was ranked as the third most popular arbitral seat worldwide in a 2021 survey by Queen Mary University of London. As one of the top international arbitration hubs, over 80% of administered arbitration submitted to HKIAC in the past three years was international in nature.

Notwithstanding the increasing prevalence of arbitration, litigation remains an important method of resolving commercial disputes. In the commercial context, it is often used in debt recovery, loan and security enforcement, fraud and asset-tracing, and restructuring and insolvency matters. With the increasing popularity of arbitration came a substantial increase in arbitration-related litigation, including applications to enforce and set aside arbitral awards.

1.2 Key Industries

According to the HKIAC's 2023 statistics, HKIAC's caseload comprises of disputes arising from a variety of sectors. The top five sectors include corporate, construction, commercial, maritime and banking and financial services, which together constituted 81.5% of the HKIAC's registered cases in 2023. Arbitration continues to be the most commonly used method of dispute resolution in the construction and shipping industries in Hong Kong, as an arbitration clause is a common feature of contracts in these industries. Commercial parties and private equity firms have also become more inclined to use international arbitration to resolve disputes, given various factors including the confidential nature and efficiency of the proceedings, as well as the growing incidence of cross-border M&A and other transactions, which increasingly tend to favour arbitration over domestic litigation. This accounts for the sustained uptick in international arbitration activity in Hong Kong, being one of Asia's leading international business and capital-raising centres.

1.3 Arbitration Institutions

The most commonly used institution for international arbitration in Hong Kong is the HKIAC. Other arbitral institutions which routinely administer Hong Kong-seated arbitrations include the International Chamber of Commerce (ICC), China International Economic and Trade Arbitration Commission (CIETAC), China Maritime Arbitration Commission (CMAC), South China International Arbitration Centre (SCIAHK) and AALCO Hong Kong Regional Arbitration Centre (AALCO-HKRAC).

1.4 National Courts

While Hong Kong does not have a standalone arbitration court per se, the Court of First Instance of the High Court (CFI) maintains a specialist list, the Construction and Arbitration List, which handles applications relating to arbitration made under the Arbitration Ordinance (Cap. 609) (AO) and Order 73 of the Rules of the High Court (Cap. 4A) (RHC). Arbitration-related claims are heard by a group of specialist judges presiding over the Construction and Arbitration List. Standard directions and practices set out in Practice Direction 6.1 are adopted in these proceedings.

2. Governing Legislation

2.1 Governing Law

International arbitrations in Hong Kong are governed by the AO, which largely applies the UNCITRAL Model Law (the "Model Law"), save for certain modifications and additions set out in the AO.

Some of the more significant differences from the Model Law include:

- Provisions relating to confidentiality and emergency arbitrators in Schedule 2 of the AO, which are not found in the Model Law.
- Provisions for promoting efficiency of arbitral proceedings: under Section 46 of the AO, parties are given a reasonable opportunity to be heard, as opposed to a full opportunity under the Model Law. Section 46 of the AO further empowers arbitrators to "use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving the dispute to which the arbitral proceedings relate".
- Availability of peremptory orders: if a party fails to comply with any order or direction without sufficient cause, Section 53 of the AO vests tribunals with the power to issue peremptory orders in addition to the default provisions in Article 25 of the Model Law.
- Default number of arbitrators: the AO does not provide for a default number of arbitrators, unlike Article 10(2) of the Model Law. Instead, the parties are at liberty to determine the number of arbitrators. If no prior agreement as to the number of arbitrators exists, this issue would be determined by the HKIAC.
- Enforcement of awards: Sections 84–98D of the AO set out more prescriptive enforcement provisions as compared to Articles 35 and 36 of the Model Law, which address awards from the People's Republic of China (PRC), Macau, countries which are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"), as well as awards that do not fall into these categories.
- Limitation of arbitrator liability: the AO contains provisions that limit the liability of arbitral tribunals and related parties, which is not dealt with in the Model Law.

2.2 Changes to National Law

The arbitration law in Hong Kong has not changed significantly in the past year.

The most recent key development in Hong Kong is the introduction of a new regime permitting outcome-related fee structures (ORFS) in arbitration and arbitration-related court proceedings, which came into force on 16 December 2022.

Under the new regime, legal practitioners are allowed to enter into ORFSs (including conditional fee agreements, damages-based agreements and hybrid damages-based agreements) with clients in arbitration and arbitration-related court proceedings.

3. The Arbitration Agreement

3.1 Enforceability

Consistent with the definition of an arbitration agreement in the Model Law, Section 19 of the AO defines an arbitration agreement as "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not".

An arbitration agreement can take the form of an arbitration clause in a contract or as a separate agreement, and must be in writing. Where an arbitration clause is used, it must be drafted using sufficiently clear, certain and identifiable terms, avoiding any internal inconsistencies (for example, also stating that the parties agree to submit to the exclusive jurisdiction of a domestic court) or to a non-existent arbitral institution. The requirement that an arbitration be in writing is satisfied if it is recorded in any form, communicated electronically, contained in exchange of statements of claim and defence in which its existence is not denied, or by reference to a written form of arbitration clause.

Other than that, there are no further requirements under Hong Kong law as to the contents of the arbitration agreement.

3.2 Arbitrability

In general, certain matters involving public interest elements or which affect the rights of third parties are not arbitrable. Examples of subject matters which are non-arbitrable include: personal bankruptcy or corporate insolvency, marriage and divorce, competition and antitrust, criminal charges and matters reserved for resolution by government agencies such as taxation, immigration and social welfare entitlements.

On the other hand, as clarified in an amendment to the Arbitration Ordinance in 2017, the arbitration of disputes relating to intellectual property rights will not be contrary to the public policy of Hong Kong.

Whether a dispute is arbitrable is a different question to whether an arbitral tribunal may award a relief that is sought. Thus, in Quiksilver Greater China Ltd v Quiksilver Glorious Sun Jv Ltd & Another [2014] HKCU 1750, while it was held that the tribunal could not order a winding-up of the company, it could decide the underlying basis on which a joint venture was to end and the decision could be used as the basis for a winding-up petition on just and equitable grounds in court. The same approach was adopted in a more recent case, Falcon Insurance Company (Hong Kong) Limited v Bing Lee Crane-Lorry Transportation Co, Limited And Another [2023] HKCU 1899.

3.3 National Courts' Approach

The relevant principles for determining the law governing the arbitration agreement were set out by the CFI in Klöckner Pentaplast Gmbh & Co Kg v Advance Technology (HK) Company Limited [2011] HKCU 1340 ("Klöckner"): if there is an express choice of law to govern the arbitration agreement, that choice will be effective, irrespective of the law applicable to the contract as a whole. If there is an express choice of law to govern the contract as a whole, the arbitration agreement will also normally be governed by that law (regardless of whether or not the seat of the arbitration is stipulated, and irrespective of the place of the seat).

The same approach has been adopted in the context of dispute resolution clauses more generally in China Railway (Hong Kong) Holdings Limited v Chung Kin Holdings Company Limited [2023] HKCFI 132, in which the Hong Kong court endorsed the approach by the English Supreme Court (Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb (2020) UKSC 38), and held that "generally an express choice of law clause applicable to the main contract will also apply to the [dispute resolution] clause".

The Hong Kong court adopts a pro-arbitration approach towards the enforcement of arbitration agreements, which is also underscored by

the decision in Klöckner. In Klöckner, the court held that "an arbitration clause should be construed in accordance with the presumption that the parties intended any dispute arising out of the relationship into which they had entered or purported to enter to be decided by the same tribunal, unless the language made it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction".

3.4 Validity

Section 34 of the AO (which incorporates Article 16 of the Model Law) recognises the principle of separability, which means that the arbitration agreement is considered to be separate from the underlying or substantive agreement between the parties in which it is found. Relevantly, it states that "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract".

4. The Arbitral Tribunal

4.1 Limits on Selection

Sections 23 and 24 of the AO (which incorporate Article 10 and 11 of the Model Law) provide that parties have the freedom to determine the number of arbitrators, which includes "the right of the parties to authorise a third party, including an institution, to make that determination". The parties are also free to agree on a procedure of appointing the arbitrator or arbitrators.

With regards to who can be appointed as an arbitrator, the law does not impose eligibility requirements on behalf of the parties. The only requirements are those specified in the arbitration agreement as decided by the parties, if any. If, however, existing circumstances give rise to justifiable doubts as to an arbitrator's impartiality or independence, or if they do not possess the qualifications agreed to by the parties, the arbitrator may be challenged under Section 25 of the AO (which incorporates Article 12 of the Model Law).

4.2 Default Procedures

In the absence of the parties' agreement on the procedure for appointing arbitrator(s), Section 24 of the AO (which incorporates Article 11 of the Model Law) contains a default appointment procedure.

- In an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two party-appointed arbitrators shall appoint the third arbitrator.
- In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, upon the request of a party, the arbitrator shall be appointed by the HKIAC.

Consistent with the above:

- for arbitrations with an even number of arbitrators, where the parties have not agreed on an appointment procedure, each party is to appoint the same number of arbitrators; and
- for arbitrations with an odd number of arbitrators greater than three, where the parties have not agreed on an appointment procedure, each party shall appoint the same number of arbitrators and the HKIAC must appoint the remaining arbitrators.

In any case, where a party fails to perform as agreed under an appointment procedure or within 30 days of receipt of a request from the other party to appoint an arbitrator or arbitrators, then the HKIAC must make the necessary appointment upon a request to do so from any party.

Similarly, where the parties' agreed appointment procedure fails, the HKIAC has the authority under the AO to appoint arbitrators as needed.

4.3 Court Intervention

Section 12 of the AO (which incorporates Article 5 of the Model Law) provides that the court's role in the arbitration process shall be limited, though there are exceptions to this approach. Such exceptions include rulings on challenges in the appointment process and extensions of time to commence arbitration in cases where an arbitral tribunal has yet to be appointed, which is elaborated upon in Sections 26 and 58 of the AO, respectively.

4.4 Challenge and Removal of Arbitrators

Section 25(2) of the AO (which incorporates Article 12 of the Model Law) states that an arbitrator may only be challenged in one of two scenarios: (i) if existing circumstances give rise to justifiable doubts as to his impartiality or independence; or (ii) if he does not possess qualifications agreed to by the parties. An arbitrator may only be challenged for reasons of which the challenging party becomes aware after the appointment has been made.

According to the challenge procedure in Article 13 of the Model Law, incorporated in Section 26 of the AO, the parties are free to agree on a procedure for challenging an arbitrator. If there is no such agreement, then:

- a party intending to challenge shall send a written statement of the reasons for the challenge to the arbitral tribunal within 15 days of becoming aware of the circumstances which led to the challenge;
- the arbitral tribunal would then decide on the challenge, except where the challenged arbitrator withdraws from their office or the other party to the arbitration also agrees to the challenge; and
- in case the challenge is unsuccessful, the challenging party may request the court to decide on the challenge. The party would have to issue such a request within 30 days of receiving notice of the decision to reject the challenge, and the court's decision would not be subject to appeal.

It is important to note that, while awaiting the court's decision, the challenged arbitrator may continue with arbitral proceedings and make an award.

4.5 Arbitrator Requirements

Section 25 of the AO (which incorporates Article 12 of the Model Law) provides that an arbitrator shall disclose, without delay, "any circumstances likely to give rise to justifiable doubts as to his impartiality or independence" not only when they are approached in connection with their possible appointment as an arbitrator, but also throughout the arbitral proceedings. The arbitrator may be challenged if such circumstances arise and there are justifiable doubts to their impartiality (or if they do not possess the qualifications agreed upon by the parties).

5. Jurisdiction

5.1 Matters Excluded From Arbitration

There are some matters that cannot be arbitrated, even if the parties agree to arbitrate the issue. The New York Convention provides for this, noting that the matter to be arbitrated must be capable of settlement by arbitration (Article 11(1)). Accordingly, Section 81 of the AO states that an award may be set aside if "the subject-matter of the dispute is not capable of settlement by arbitration".

With regards to which matters cannot be arbitrated, arbitration is considered to be widely available in Hong Kong, especially in the context of commercial disputes.

That said, Section 3 of the AO states that the parties' freedom to arbitrate certain issues is "subject to the observance of the safeguards that are necessary in the public interest". This brings about a degree of uncertainty associated to the arbitrability of certain issues. See **3.2 Arbitrability**. Some cases have provided persuasive authority on this point. For example, in Fulham Football Club (1987) Ltd v Richards [2012] EWCA Civ 855, the English Court of Appeal underscored the importance of considering whether the dispute engages third-party rights or involves public interest matters that cannot be settled within the bounds of a private contractual process. Generally speaking, criminal law, family law and certain administrative law matters are considered among those that are non-arbitrable.

5.2 Challenges to Jurisdiction

The principle of competence-competence is applicable in Hong Kong. The arbitral tribunal can rule on its own jurisdiction, including any challenges regarding the existence or validity of an arbitration agreement and decisions as to whether the tribunal is properly constituted or what matters have been submitted to arbitration in accordance with the agreement, as stated in Section 34 of the AO (which incorporates Article 16 of the Model Law).

5.3 Circumstances for Court Intervention

Hong Kong has long upheld its policy of supporting arbitration agreements and awards. As such, the courts tend to exercise judicial restraint and minimise their intervention, setting aside awards only on rare occasions.

As a starting point, therefore, under Section 34(4) of the AO (incorporating Article 16 of the Model Law), a ruling of the arbitral tribunal that it does not have jurisdiction to decide a dispute is not subject to appeal. If such negative ruling is rendered by the arbitral tribunal, the court must, if it has jurisdiction, decide on that dispute (Section 34(5) of the AO).

Subject to the above, under Section 81 of the AO (incorporating Article 34 of the Model Law), the court may set aside an arbitral award if:

- the party making the application provides evidence that:
  - (a) a party to the arbitration agreement was under some incapacity or said the agreement is not valid under the law to which the parties have subjected it;
  - (b) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings, or is otherwise unable to present their case;
  - (c) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; or
  - (d) the composition of the arbitral tribunal or procedure was not in accordance with the agreement of the parties; or
- the court finds that:
  - (a) the subject matter is not capable of settlement by arbitration under the law of Hong Kong; or
  - (b) the award is in conflict with the public policy of Hong Kong.

In any case, the limitations in Section 81 of the AO do not affect:

- the power of the court to set aside an arbitral award under Section 26;
- the right to challenge an arbitral award under Section 4 of Schedule 2 (if applicable); or
- the right to appeal against an arbitral award on a question of law under Section 5 of Schedule 2 (if applicable).

In the case of Pacific China Holdings Ltd (in liquidation) v Grand Pacific Holdings Ltd [2012] 4 HKLRD 576, the Hong Kong Court of Appeal held that, in an application to set aside an arbitral award, the court is concerned with the procedural fairness of the arbitration. For an arbitral award to be set aside, it must be shown that the arbitral tribunal's conduct was of a "serious, even egregious" nature, such that it could be said that a party has been denied due process. The court will not review the substantive merits of the dispute or the correctness of the arbitral award, whether concerning errors of fact or law. (In this case, leave to appeal to the Court of Final Appeal in an attempt to re-instate the arbitral award was refused.)

Even if procedural irregularities are identified, the court retains a residual discretion to refuse to set aside the award based on the circumstances of the case, such as where the procedural irregularity does not affect the "structural integrity" of the arbitration proceedings (China Property Development (Holdings) Ltd v Mandecly Ltd [2016] HKEC 1151).

5.4 Timing of Challenge

Section 34 of the AO (which incorporates Article 16 of the Model Law) states that challenges against the jurisdiction of the arbitral tribunal "shall be raised not later than the submission of the statement of defence", though late challenge may be admitted if the delay is considered justifiable. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, a party may request a court to decide the matter within 30 days after having received notice of that ruling.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

Questions of jurisdiction are subject to review by the court on a de novo basis. As in S Co v B Co [2014] HKCFI 1436, the court should therefore be satisfied that the arbitral tribunal indeed had jurisdiction. In R v A, B and C [2023] HKCFI 2034, it was affirmed that the court is entitled take into consideration any new evidence and arguments from the parties – even if these could have been introduced before the tribunal and had not been – while conducting a de novo review.

5.6 Breach of Arbitration Agreement

Under an arbitration agreement, a breach of contract would occur if a party were to commence litigation or bring proceedings in a forum other than the contractually agreed arbitral forum. A party alleging such breach is entitled to have the arbitration agreement enforced, and the court would ordinarily grant an injunction to restrain the pursuit of foreign proceedings brought in breach of an agreement for Hong Kong arbitration, unless there are strong reasons to the contrary (such as the party applying for the injunction failing to "come with clean hands" – eg, dishonest conduct). Applying this principle, in Ever Judger Holding Co Ltd v Kroman Celik Sanayii Anonim Sirketi [2015] 3 HKC 246, the Court of First Instance granted an anti-suit injunction against a party seeking to commence court proceedings in Turkey in breach of an arbitration clause under which the parties agreed to refer their disputes to "arbitration in Hong Kong in accordance with the Hong Kong Arbitration Ordinance".

Furthermore, if the subject matter of proceedings brought before the Hong Kong court falls within the scope of a valid arbitration agreement (providing for Hong Kong as the seat of arbitration), the Hong Kong courts are obliged to stay their proceedings under Section 20 of the AO (which incorporates Article 8 of the Model Law). More specifically, in determining whether a stay should be granted under Section 20 in favour of arbitration, the court will consider four questions.

- Is the clause in question an arbitration agreement?
- Is the arbitration agreement null and void, inoperative or incapable of being performed?
- Is there dispute or difference between the parties in reality?
- Does the dispute or difference between the parties fall within the ambit of the arbitration agreement?

In LS v FL [2022] HKCFI 1050, the court noted that, in applying the four-step test above, the applicant will need to prove a "prima facie or plainly arguable case" that the parties are bound by an arbitration clause which extends to the dispute in the subject matter of the action sought to be stayed. Unless the point is clear otherwise, the action will be stayed for the arbitral tribunal to decide whether it has jurisdiction over the dispute. In this case, the court found that the relevant agreement did not contain an arbitration clause as it was an oral agreement. Under Section 19 of the AO, an arbitration agreement must be made in writing. As the emails evidencing the oral agreement did not contain an arbitration agreement nor refer to any other written document containing an arbitration clause, the court found that there was no arbitration clause incorporated in the agreement between the parties.

Nevertheless, the case must still be supported by cogent and not dubious or fanciful evidence. In the case of A v C [2023] HKCFI 804, the reference to conditions in the main contract contained in documents identified in the sub-contract was sufficiently cogent evidence in favour of incorporating the arbitration clause contained in the main contract to the sub-contract. As such, the court proceedings were stayed in favour of arbitration.

Where the arbitration agreement mandates the parties to refer "any dispute" to arbitration, until all disputed matters under the underlying agreement are duly resolved, the arbitration agreement will remain operative even if the relationship that gave rise to the underlying agreement has discontinued. The fact that one dispute has already been referred to arbitration does not "discharge" the parties from their duty to resolve any other dispute falling within the ambit of the arbitration agreement by way of arbitration (T v TS [2014] 4 HKLRD 722).

5.7 Jurisdiction Over Third Parties

Hong Kong law recognises arbitration as a private, consensual process. The result is the inability to compel joinder of parties or consolidation of proceedings, other than by consent (Parakou Shipping Pte Limited v Jinhui Shipping And Transportation Limited & Ors [2010] HKCU 2096).

That said, under Section 12 of the Contracts (Rights of Third Parties) Ordinance (Cap. 623), a third party may be treated as a party to the arbitration agreement for the enforcement of an award, though this may be contracted out of when the parties enter an agreement. This would apply to foreign and domestic third parties if the agreement is governed by Hong Kong law.

6. Preliminary and Interim Relief

6.1 Types of Relief

Under Section 35 of the AO (which gives effect to Article 17 of the Model Law), an arbitral tribunal may grant interim measures at the request of a party. Generally, the party requesting an interim measure must satisfy the tribunal that (i) harm which cannot be adequately reparable by an award of damages would likely result if the measure is not ordered, and such harm outweighs the harm that is likely to result to the party against who the measure is directed (if granted); and (ii) there is a reasonable possibility that the requesting party will succeed on the merits of the case. Interim orders and directions made under Section 35 of the AO may be enforced in the same manner as an order or direction of the court, but only with leave of the court.

Interim measures include any temporary measure in the form of an award or another for the purposes of, inter alia, maintaining or restoring the status quo, taking actions to prevent current or imminent harm, preserving assets for the execution of the arbitral award and preserving dispute-related evidence (Section 35 of the AO).

6.2 Role of Courts

Pursuant to Section 21 of the AO, which incorporates Article 9 of the Model Law, the court has the power to grant interim measures, and the court will usually do so in emergency situations such as to restrain the destruction of documents or dissipation of assets. Meanwhile, the requirements concerning court-ordered interim measures are specifically illustrated in Section 45 of the AO, although Article 17J of the Model Law (empowering the courts to issue interim measures in relation to arbitration proceedings) is not directly applicable in Hong Kong. The court is empowered to grant interim measures, irrespective of whether the arbitral tribunal has exercised similar powers regarding the same dispute (Sections 45(2) and 45(3) of the AO).

Under Section 45(5) of the AO, with respect to the arbitral proceedings commenced in foreign jurisdictions, the court may grant an interim measure only if the following two conditions are satisfied: (i) the arbitral proceedings are capable of giving rise to an arbitral award (whether interim or final) that may be enforced in Hong Kong; and (ii) the interim measure falls under a type or description of interim measure that may be granted in Hong Kong in relation to arbitral proceedings by the court.

An emergency arbitrator mechanism is available in Hong Kong. Section 22A of the AO defines "emergency arbitrator" as an individual who deals with the parties' applications regarding emergency relief (eg, interim measures) prior to the formation of an arbitral tribunal. Specifically, a detailed Emergency Arbitrator Procedure is set out in Schedule 4 of the 2024 HKIAC Administered Arbitration Rules (the "2024 HKIAC Rules").

Decisions rendered by emergency arbitrators are binding on the parties (subject to the circumstances laid out in Section 18 of Schedule 4 of the 2024 HKIAC Rules) and shall have the same effect as an interim measure granted under Article 23 of the 2024 HKIAC Rules (Section 17, Schedule 4 of the 2024 HKIAC Rules). Emergency arbitrators generally have a wider discretion than the courts in respect of the type of relief they may order, although courts may be the more appropriate forum than an emergency arbitrator (and arbitration generally) when seeking relief against a third party or on an ex parte basis (eg, Mareva injunctions). Moreover, the emergency arbitrator's award, by its very nature,

is temporary pending the final award from the tribunal.

With regards to the enforcement of the emergency relief granted by the emergency arbitrator, Section 22B of the AO provides that only upon leave of the court can the emergency relief granted become enforceable in the same manner as an order of the court to the same effect, regardless of whether the emergency relief is granted by an emergency arbitrator within Hong Kong or overseas.

6.3 Security for Costs

Section 56(1) of the AO provides that an arbitral tribunal may order a claimant to give security for costs of the arbitration. Such an order can be enforced with the leave of the court.

Contrastingly, the power of the court to order security for costs is limited to applications or appeals against arbitral awards (where the opt-in provisions of Section 7 of Schedule 2 to the AO apply).

7. Procedure

7.1 Governing Rules

Arbitrations seated in Hong Kong are governed by the AO, which provides the fundamental legal framework for arbitration in Hong Kong. The detailed arbitration procedure is governed by the arbitration rules chosen by the parties (if any).

Please refer to the Hong Kong Arbitration FAQs, section on Procedural Laws and Rules (ie, 25–30) at this website.

7.2 Procedural Steps

There are no fixed procedures for arbitration proceedings required by law. The parties are free to choose their preferred arbitration rules to govern the arbitration procedure, which are usually stated in the arbitration agreement. If or to the extent that the parties have made no such agreement, the arbitral tribunal may, subject to the provisions of the AO, conduct the arbitration in the manner that it considers appropriate (Section 47 of the AO).

7.3 Powers and Duties of Arbitrators

When conducting arbitration proceedings or exercising any of the powers conferred on an arbitral tribunal by the AO, the tribunal must (i) treat parties with equality; (ii) act fairly and impartially and give them a reasonable opportunity to present their cases and deal with the cases of their opponent; and (iii) use procedures that are appropriate to the particular case and avoid unnecessary delay or expense, so as to provide a fair means for resolving the dispute to which the arbitral proceedings relate (Section 46 of the AO).

7.4 Legal Representatives

Legal representatives appearing in Hong Kong-seated arbitrations do not need to meet any particular qualifications or requirements. Typically, advocates in Hong Kong-seated arbitrations will be qualified to practise in a jurisdiction which is the governing law of the underlying dispute, but this is not a requirement nor a certainty in all cases.

8. Evidence

8.1 Collection and Submission of Evidence

As part of the general powers exercisable by an arbitral tribunal under Section 56 of the AO, a tribunal can direct the discovery of documents or the delivery of interrogatories or evidence to

be given by affidavit. Unless otherwise agreed by the parties, the tribunal may examine witnesses and parties on oath or affirmation, or direct the attendance before the tribunal of witnesses in order to give evidence or produce other evidence. No rules or requirements under the AO pertain to the approach to how evidence is collected, submitted and/or tested.

8.2 Rules of Evidence

As specified in Section 47(3) of the AO (which incorporates Article 19 of the Model Law), an arbitral tribunal is not bound by the rules of evidence in arbitration proceedings in Hong Kong. The arbitral tribunal may receive any evidence it considers relevant to the proceedings and give proper weight to it.

8.3 Powers of Compulsion

Under Section 55(1) of the AO (which incorporates Article 27 of the Model Law), the court may assist in taking evidence in arbitral proceedings within its competence and in accordance with the relevant rules. Specifically, Section 55(2) of the AO empowers the court to order a person to attend proceedings before an arbitral tribunal to give evidence or to produce documents or other evidence. The court may exercise such power, irrespective of whether the arbitral tribunal has exercised similar powers (Section 55(3) of the AO).

9. Confidentiality

9.1 Extent of Confidentiality

In Hong Kong, a statutory obligation of confidentiality applies under the AO. Sections 16 and 17 of the AO mandate the confidentiality of both arbitral proceedings in Hong Kong and arbitration-related court proceedings. Section 18 further states that "unless otherwise agreed by the parties", the publication, disclosure or communication of any information relating to arbitration proceedings and awards made in the proceedings is strictly prohibited.

Nonetheless, certain exceptions may apply. In addition to the agreements of both parties, Section 18(2) of the AO permits the disclosure of confidential arbitration-related information under the following circumstances: (i) in legal proceedings before a court for the protection of the disclosing party's legal right or interest, or the enforcement of the award; (ii) under the legal obligation to publish, disclose or communicate to a government body, regulatory body, court or tribunal; and (iii) made to a professional or any other adviser of either party.

Specifically, listed companies on the Hong Kong Stock Exchange (HKSE) are required to disclose "inside information" to the public as soon as reasonably practicable, in accordance with Part XIVA of the Securities and Futures Ordinance (Cap. 571) and Rule 13.09 of the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (the "Listing Rules"). This would include the commencement or existence of arbitration proceedings involving the relevant listed company, as an exception to Section 18(2) of the AO.

Some of the useful resources include the following.

- Arbitration in Hong Kong A Practical Guide, Fifth Edition, 2022, Chapter 1–7. Confidentiality.
- HKIAC Administered Arbitration 50 Questions & Answers.
- Kluwer Arbitration Blog.
- Are Arbitrations Private & Confidential in Hong Kong?

- How Confidential Are Arbitration Proceedings?

10. The Award

10.1 Legal Requirements

The required form and content for an arbitral award is set out in Section 67 of the AO (giving effect to Article 31 of the Model Law). The award shall:

- be made in writing;
- be signed by the arbitrator(s);
- state the reason upon which it is based (unless parties have agreed otherwise); and
- state the date and place of arbitration as determined in accordance with Article 20(1) of the Model Law.

In cases with more than one arbitrator, the signature of the majority of the arbitral tribunal is sufficient so long as the reason for any omitted signature is stated (Section 65 of the AO, giving effect to Article 29 of the Model Law).

Regarding time limits on delivery of the award, the tribunal is not subject to a time limit unless otherwise agreed upon by the parties. Nevertheless, even where the arbitration agreement imposes a time limit, the tribunal may extend the time limit. This extension of time limit can be granted regardless of whether the time has elapsed (Section 72 of the AO).

10.2 Types of Remedies

An arbitral tribunal is able to award any remedy or relief that could have been ordered by the court as if the dispute had been "the subject of civil proceedings in the Court" (Section 70(1) of the AO), and includes an order for specific performance (Section 70(2) of the AO). A tribunal is also able to grant interim measures (including injunctions) in the form of an award (Section 35 of the AO).

However, an arbitral tribunal's power as to relief is limited where the underlying contract relates to land or any interests in land (Section 70(2) of the AO) or when the types of remedies and relief are prescribed through agreement between the parties.

10.3 Recovering Interest and Legal Costs

Parties seeking to recover legal costs will typically see Hong Kong tribunals follow a "costs follow the event" approach, though there is no universal practice. Tribunals reserve the discretion to allocate the costs of arbitration as they see fit and may direct their award "to whom and by whom and in what manner the costs [of the arbitration proceedings] are to be paid" (Section 74(2) of the AO). The costs, however, must be "reasonable in all the circumstances" (Section 74(7)(a) of the AO).

Tribunal discretion is limited where the arbitration agreement provides that parties must pay their own legal costs. This limitation, however, does not apply where the dispute arose prior to the creation of the arbitration agreement (Sections 64(8) and 74(9) of the AO). A tribunal also has the power to require a claimant to give security for the cost of the arbitration, though this order cannot be made on the sole basis that the claimant is a foreign national or entity (Section 56(1) of the AO).

The details of remuneration and other associated costs are not regulated under Hong Kong law. For institutional arbitration, the institutional rules or fee schedule will be used to calculate or apportion the costs of the arbitration. The 2024

HKIAC Rules, for example, contain references to factors such as the relative success of the parties, the scale and complexity of the dispute, the conduct of the parties and any third-party arrangements when apportioning costs.

Tribunal discretion is also limited in cases where a party has entered into an outcome-based fee structure with its lawyers, as the tribunal cannot award costs to that party in excess of the amount that would have been awarded if no such agreement had been made (Section 98ZU of the AO). This applies unless there are exceptional circumstances.

An arbitral tribunal may "award simple or compound interest from the dates, at the rates, and with the rests that the tribunal considers appropriate" unless otherwise agreed by the parties (Section 79(1) of the AO). The interest is payable on money awarded by an arbitral tribunal from the date of the judgment rate, except when the award provides otherwise (Section 80 of the AO).

11. Review of an Award

11.1 Grounds for Appeal

Parties are not ordinarily entitled to "appeal" an arbitral award. Instead, the typical mode of challenge would be an application to set aside the award, with the permitted grounds for setting aside an arbitral award set out in Section 81 of the AO (please refer to **5.3 Circumstances for Court Intervention**).

An application to set aside an arbitral award must be made to the High Court within three months of receipt of the award through originating summons with a supporting affidavit (Section 81(3) of the AO and Order 73 of the RHC).

Though an award rendered in Hong Kong cannot ordinarily be appealed on the grounds of errors of fact of law (Section 81(3) of the AO), if parties would like to challenge an award on a question of law arising out of an award or on the ground of serious irregularity affecting the tribunal, they must expressly opt into the relevant provisions within Section 99 and Schedule 2 of the AO. These provisions enable, and set out the procedure for, a party to appeal on a question of fact or law either with the agreement of all the other parties to the arbitral proceedings, or with the leave of the court. Such an appeal cannot be brought unless the party seeking to appeal has first exhausted all means of challenge, including recourse under Section 69 of the AO (incorporating Article 33 of the UNCITRAL Model Law) and any available arbitral process of appeal or review.

Parties seeking to appeal an arbitral award on a question of law must first exhaust the recourse available under Sections 6 and 7 of Schedule 2 of the AO within the relevant time limit and obtain leave from the court within 30 days of the award being delivered (Order 73, Rule 5 of the RHC).

Subject to the above, recourse may generally be sought only by applying to the CFI for an order setting aside the award under one of the grounds set out in Section 81(1) of the AO. This provision incorporates Article 34 of the Model Law, which permits the court to set aside an award if a party was "unable to present" its case.

However, the exception in Section 81(1) of the AO only applies to awards that finally dispose of substantive issues, and not to interim orders made pursuant to the procedural discretion of the arbitral tribunal, which the court generally cannot and will not interfere with (G v N [2024] HKCFI 721). This is due to the interim order not

being a final award but an anti-suit injunction granted as an interim measure to Section 35 (giving effect to Article 17 of the Model Law).

Apart from Section 81(1) of the AO, an award may also be set aside where there has been a successful challenge to the validity of the arbitration agreement, the terms or scope of the submissions to arbitration, the application of the arbitral procedures to the parties' agreement or Hong Kong law or where the award conflicts with Hong Kong's public policy.

11.2 Excluding/Expanding the Scope of Appeal

Parties can agree to exclude certain grounds for setting aside an arbitral award as permitted by the AO. Parties, however, cannot exclude all grounds for challenge, especially those related to fundamental principles such as public policy.

Regarding the expansion of appeal of challenges, per Section 5 of Schedule 2 of the AO, parties can agree to allow an appeal to the court on questions of law arising out of an arbitral award. This, however, is an opt-in provision that parties need to expressly agree to in order to give effect to it. Opting into this provision allows for a limited expansion of the scope of judicial review, though the review remains limited to the questions of law rather than factual findings or merits of the case.

11.3 Standard of Judicial Review

In Hong Kong, the standard of judicial review of the merits of an international arbitration award is generally deferential. The courts in Hong Kong adopt a pro-arbitration stance, meaning they are reluctant to interfere with the decisions of arbitral tribunals.

The courts do not review the merits of the case de novo – they do not re-evaluate the evidence or re-assess the factual findings or legal conclusions of the arbitral tribunal. Instead, the review is deferential, focusing on whether the arbitration process was conducted fairly and in accordance with the agreed-upon rules and applicable laws.

12. Enforcement of an Award

12.1 New York Convention

While Hong Kong itself is not a signatory to the New York Convention, it enjoys New York Convention status as a Special Administrative Region of the PRC.

As such, Hong Kong is a New York Convention territory which bases its framework on the recognition and enforcement of arbitral awards (Part 10 of the AO) on the New York Convention. Generally, the courts are required to apply the standards under the New York Convention when it comes to the enforcement or the setting aside of an award (Sections 84, 87, 92 and 98A of the AO).

However, post-resumption of PRC sovereignty in 1997, Hong Kong is subject to the same reservations to the New York Convention as applied to the PRC – reciprocity and commercial reservations. As such, Hong Kong will only recognise and enforce arbitral awards arising from commercial disputes seated in member states which are signatories to the New York Convention.

The enforcement of PRC awards in Hong Kong and Hong Kong awards in the PRC is not governed by the New York Convention, as such awards are not considered to be "made in the territory of a State other than the State where the recognition and enforcement of such awards

are sought". Instead, the enforcement of PRC awards in Hong Kong and Hong Kong awards in the PRC are governed by the Arrangement Concerning Mutual Enforcements of Arbitral Awards between mainland China and Hong Kong SAR.

12.2 Enforcement Procedure

Enforcement of an award must be brought within six years from the date on which the cause of action accrued (Section 4(1)(c) of the Limitation Ordinance (Cap. 347)).

To enforce an award, the successful party must make an application supported by an affidavit which includes (Order 73, Rule 10(1) and (3) of the RHC):

- the name and usual/last known location of abode or business of the debtor and the applicant, respectively; and
- the fact that the award has not been complied with or the extent to which it has not been complied with as at the date of the application.

An affidavit filed by the enforcing party must exhibit the following:

- a duly authenticated original award (or a "duly certified copy", per the definition held in New Technology Import and Export Corp Jiangmen Branch v Chiu Shing [1991] 2 HKC 460);
- the original arbitration agreement (or a duly certified copy); and
- a translation of the documents certified by an official or sworn translator or by a diplomatic or consular agent if the award or agreement is not in either or both traditional Chinese and English.

Subject to compliance with the procedural requirements detailed in the AO and the RHC, the courts will grant an application to enforce an award unless there are grounds for doubting the validity of the award (Standard Civil Engineering Co v Attorney General [1986] HKLR 1142). The court may alternatively direct that an inter partes summons be issued after considering the ex parte application (Order 73, Rule 10(1) of the RHC).

Once the order for leave has been granted and served on the unsuccessful party, they have the standard 14 days (or longer, per the discretion of the CFI) to apply to set aside the order.

The award cannot be enforced until the stipulated period for the unsuccessful party to apply to set aside the enforcement order expires. Where the unsuccessful party applies within the period allocated to set aside the order, the award is unable to be enforced until after the application in question has been finally determined (Order 73, Rule 10(6) of the RHC).

Therefore, if a party fails to obtain leave to enforce an award (whether rendered in or outside Hong Kong) under Section 84 of the AO, a party can still enforce the award under common law by bringing an action on the award (Sections 87(1)(a), 92(1)(a) and 98A(1)(a) of the AO). In a common law enforcement action on a arbitral award, the enforcing court has the power to grant relief that is wider than that found within the original award.

In regard to foreign state immunity and PRC crown immunity, states/state entities (such as government departments) may be entitled to immunity from both the jurisdiction of Hong Kong courts and the enforcement and execution against their assets located in Hong Kong. However, state-owned enterprises that carry out commercial rather than sovereign activities will

generally be unable to claim immunity (foreign state and PRC crown).

Arbitrations seated in Hong Kong are typically unaffected by foreign state or PRC crown immunity because it does not involve the exercise of sovereign jurisdiction by a national court over a sovereign state. This is not to say that foreign state or PRC crown immunity is irrelevant to arbitrations seated in Hong Kong as it remains directly relevant to the enforcement and execution in Hong Kong of awards against states, regardless of whether it is rendered in Hong Kong or elsewhere.

12.3 Approach of the Courts

Hong Kong courts typically seek to uphold a party's right to prompt recognition and enforcement of arbitral awards, understanding that delay can prejudice a successful party's interest (Baosteel Engineering & Technology Group Co Ltd v China Zenith Chemical Group Ltd [2019] HKCFI 68).

Section 81 of the AO (incorporating Article 34 of the Model Law subject to Section 13(5) of the AO) lists several scenarios where an arbitral award may be set aside by the court, including where the court finds that the award is in conflict with Hong Kong public policy. This could include cases where the relevant agreement was "tainted by illegality" and was a sham arrangement to disguise what were in fact loans (Z v Y [2018] HKCFI 2342) or where the arbitrator failed to give adequate reasons for the award (A v B and others [2024] HKCFI 751). This appears to apply to foreign arbitral awards as well.

For arbitral awards which are either a Convention award, Mainland award or Macao award (as each defined under the AO), enforcement may not be refused except as provided under Division 2-4 of Part 10 of the AO.

For arbitral awards which are not a Convention award, Mainland award or Macao award, under Section 86 of the AO, the Hong Kong courts may refuse to enforce the award if:

- a party to the arbitration agreement was under some incapacity;
- the said agreement is not valid under the law to which the parties have subjected it or (if no indication of such law) under the law of the country where the award was made;
- the party making the application to deny enforcement was not given proper notice either of the appointment of the arbitrators or of the arbitral proceedings, or was otherwise unable to present their case;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or on matters going beyond the scope of application;
- the composition of the arbitral tribunal or arbitral procedure is not in accordance with the agreement of the parties or (if no such agreement) the law of the country where the arbitration took place;
- the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made; and
- the award is in respect of a non-arbitrable matter under Hong Kong law or it is contrary to public policy to enforce the award.

The court may also refuse to enforce an award "for any other reason the court considers just to do so".

13. Miscellaneous

13.1 Class Action or Group Arbitration

Hong Kong's arbitration framework does not explicitly provide for class action arbitration.

Group arbitration is permitted under Section 2 of Schedule 2 of the AO, which allows for the consolidation of arbitrations and the joinders of additional parties if all parties involved agree to such.

13.2 Ethical Codes

Arbitrators and the employees or agents of the appointing body are granted immunity from suit for failing to take reasonable care or to proceed with due diligence (Section 105 of the AO). Arbitrators are also entitled to the same immunity available to judges in respect of their decision-making in the process of arbitration, absent fraud or bad faith (Song Lihua v Lee Chee Hong [2023] HKCFI 1954).

Although immunity is provided for in relation to the acts listed above, arbitrators are expected to comply with the following duties under the AO which are mandatory and cannot be varied by the parties:

- treat all parties equally (Section 46(2) of the AO);
- be independent and not be swayed by profession or personal interests (Section 46(3)(a) of the AO);
- act fairly and impartially (Section 46(3)(b) of the AO); and
- adopt procedures that would avoid unnecessary delay or expenses (Section 46(3)(c) of the AO).

13.3 Third-Party Funding

Third-party funding of arbitration is now permissible in Hong Kong, following the Arbitration and Mediation Legislation (Third Party Funding) Amendment Ordinance 2017. The standards and practices with which a third-party funder is expected to comply are detailed in the Code of Practice for Third Party Funding of Arbitration.

Under Section 98U of the AO and Article 44 of the 2024 HKIAC Rules, a funded party is required to disclose to the arbitration body (including the arbitral tribunal, emergency arbitrator and HKIAC) and to all other parties that it has obtained such third-party funding. There is no obligation to disclose further details regarding the funding arrangements.

13.4 Consolidation

Under Section 2 of Schedule 2 of the AO (if applicable), the court may consolidate two or more arbitral proceedings on terms it thinks just if it appears to the court:

- that a common question of law or fact arises in both or all of them;
- that the rights to relief claimed in those arbitral proceedings are in respect of or arise out of the same transaction or series of transactions; or
- that for any other reason it is desirable to make such an order.

Where the HKIAC Rules apply under Article 28.1 of the 2024 HKIAC Rules, the HKIAC may consolidate two or more arbitrations pending under the 2024 HKIAC Rules where:

- the parties agree to consolidate;
- all claims in the arbitrations are made under the same arbitration agreement; or

- the claims are made under more than one arbitration agreement; a common question of law or fact arises in all of the arbitrations; the rights to relief claimed are in respect of, or arise out of, the same transaction or a series of related transactions; and the arbitration agreements are compatible.

13.5 Binding of Third Parties

Where a claimant has become entitled to enforce an obligation under a contract (containing an arbitration clause) but is not a party to it, the court is still able to intervene by granting an anti-suit injunction for the purpose of restraining such claimant from enforcing the obligation by way of court proceedings abroad instead of by arbitration.

In particular, the court may bind affiliates and associates of the contracting parties even if they were not a party to the contract containing the arbitration clause, as long as the language of the arbitration clause can be construed to cover claims against such third-party affiliates and associates. This is based on the presumption that, as rational businessmen, the contracting parties would have likely intended any dispute arising out of the contractual relationship to be resolved by the same tribunal, unless the language makes it clear that certain issues were intended to be excluded from the arbitrator's jurisdiction (GM1 and GM2 v KC [2019] HKCFI 2793). Moreover, the court may bind a third-party non-signatory that is seeking to enforce a contractual right conferred to it under the contract, on the basis that the arbitration agreement in the contract is a condition integral to such right (see Dickson Valora Group (Holdings) Company Ltd v Fan Ji Qian [2019] HKCFI 482).

HUNGARY

Law and Practice

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Oppenheim Law Firm has been providing legal services for more than three decades. Oppenheim consists of more than 40 lawyers and legal experts who advise on all areas of Hungarian business law. The firm's attorneys provide their legal expertise through a combination of specialised practice groups and sector experience, such as manufacturing, construction, energy, utilities, automotive, healthcare, media, IP/IT, capital markets, banking and financial services, and the services industry. Oppenheim's lawyers have expertise in providing high-level legal advice to a large variety of clients, including blue-chip companies, privately owned corporations, family businesses, start-up companies and private individuals. The firm has a branch office in Vienna, Austria. It has one of the most highly acclaimed litigation practices in Hungary. Its dispute resolution lawyers regularly advise the largest Hungarian and global market players on a wide range of litigation, arbitration and other contentious matters.

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1. General

1.1 Prevalence of Arbitration

For the time being, litigation is more common in Hungary than arbitration, but the popularity of the latter is constantly growing. Furthermore, Hungarian parties are also increasingly confident in the efficiency and speed of this dispute settlement method.

The recent reform of the Arbitration Act and the institutional system has also increased the popularity of arbitration in Hungary.

In addition, the latest changes to the Code of Civil Procedure, which have made litigation less effective and more rigid in many aspects, are also leading to a tendency for parties to opt for arbitration.

According to statistical data published on the website of the Hungarian Chamber of Commerce and Industry, 94 cases were initiated before the permanent arbitral tribunal attached to the chamber (ie, the Commercial Arbitration Court) in 2018, 67 cases in 2019, 85 cases in 2020, 81 cases in 2021, 66 cases in 2022 and 75 cases in 2023. About 20% of the cases in 2023 were between international parties, and in 80% all parties were Hungarian.

1.2 Key Industries

The key industries in which the parties have frequently used arbitration in the past year as an alternative dispute resolution method are the construction sector and long-term business leases. In the construction sector, disputes arising from large investments (roads, railways, etc) regulated by FIDIC-based contracts, as well as disputes arising from a lack of capacity, are the most common.

Given the lack of published statistics on the sectoral distribution of arbitration cases, the exact distribution between each industry and the exact involvement of the main industries cannot be determined.

1.3 Arbitration Institutions

Since the institutional reforms introduced in 2018, the Commercial Arbitration Court has had exclusive competence in almost all matters (except for disputes relating to agriculture, sports and concessions). Therefore, it is the Commercial Arbitration Court that is most used for international arbitration as well. According to the available statistics, about 16% of cases brought before the Commercial Arbitration Court since 2018 have been between international parties.

1.4 National Courts

For some of the court proceedings relating to arbitration proceedings, the Hungarian Arbitration Act designates the Budapest Metropolitan Court as the competent court. These proceedings include cases where the court acts as the appointing authority, when it decides on a motion to challenge an arbitrator, when it finds that the arbitrator's mandate has been terminated for any other reason, when it decides on an objection to the arbitration panel's competence, and in an action for the setting aside of the arbitral award.

In cases relating to the recognition and enforcement of arbitral awards or interim measures rendered by the arbitral tribunal, and to the assistance provided by the courts to the evidentiary procedure, the competent court is determined by the general Hungarian procedural rules on competence and national jurisdiction (such as the Civil Procedure Code and the Act on Judicial Enforcement).

2. Governing Legislation

2.1 Governing Law

The national legislation governing international arbitration in Hungary is Act LX of 2017 on Arbitration (Hungarian Arbitration Act, or Act), which is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration (Model Law) as amended in 2006. The Act expressly stipulates that it shall be interpreted subject to the explanations given in the 2006 version of the Model Law (Section 3 (3)).

However, the Hungarian Arbitration Act diverges from the Model Law in a few significant aspects. The Act regulates domestic and international arbitrations in a uniform manner; under the Act, the extraterritorial effect of the provisions listed in Article 1 (2) of the Model Law is confined to arbitral proceedings seated abroad but administered by a Hungarian permanent court of arbitration. Another divergence is the introduction of the possibility of retrial proceedings as a special legal remedy against arbitral awards.

2.2 Changes to National Law

The Hungarian Arbitration Act was passed by the Hungarian Parliament in 2017 and entered into force on 1 January 2018. While the previous Hungarian arbitration act (Act LXXI of 1994) was based on the 1985 version of the Model Law, the new Act mirrors the 2006 version of the Model Law.

In addition, the new Act abolished two of the formerly existing permanent courts of arbitration (the Permanent Court of Arbitration for Money and Capital Markets and the Permanent Court of Arbitration for Energy) and established a new permanent court of arbitration (the Commercial Arbitration Court, attached to the Hungarian Chamber of Commerce and Industry), which has exclusive competence in all domestic institutional arbitration cases seated in Hungary except for legal disputes relating to sports and agricultural matters. In order to maintain the enforceability of arbitration clauses, the Act provides that if the competence of the abolished arbitration courts was stipulated in an arbitration agreement concluded before 1 January 2018, the arbitration agreement shall be regarded as a provision for the jurisdiction of the Commercial Arbitration Court.

The rather unfortunate wording of the original version of Section 1 (1) of the Act defining the territorial scope of application was corrected in August 2018; thus, it is now clear that the Act applies in all cases where the seat of arbitration is in Hungary. However, the extraterritorial effect of certain provisions of the Act (such as Sections 9-10 on the role of courts in case of a dispute subject to an arbitration agreement; Sections 26-28 on the enforcement of interim measures rendered by the arbitral tribunal; Section 40 on court assistance in taking of evidence; and Sections 53-54 on the enforcement of arbitral awards) are confined to institutional arbitral proceedings where the seat of arbitration is outside of Hungary but the proceeding is administered by a Hungarian permanent court of arbitration.

3. The Arbitration Agreement

3.1 Enforceability

The validity and enforceability of an arbitration agreement is governed by Section 8 of the Hungarian Arbitration Act.

As a requirement regarding the content of an arbitration agreement, the Act stipulates that the arbitration agreement must define the – contractual or non-contractual – legal relationship of the

parties out of which disputes might arise in the future or out of which a specified dispute which they wish to arbitrate has already arisen.

As a formal requirement, an arbitration agreement, which can be a separate agreement or a clause forming part of the main contract, shall be in writing. According to Section 8 (3)-(5), an arbitration agreement is deemed to be in writing if:

- it is entered into by electronic communication (in particular by electronic data interchange, electronic mail (email), telegram, telex or fax) provided that the data contained in the electronic communication is accessible to the other party and is suitable for later reference;
- a party claims the existence of the arbitration agreement in its statement to the arbitral tribunal or in the submission of its claim and the other party does not contest it; or
- it is a reference in a written contract to a document containing an arbitration clause, provided that the clause contained therein forms part of the contract.

3.2 Arbitrability

The scope of disputes that can be arbitrated under the Hungarian Arbitration Act is broad.

The few exceptions from arbitrability are listed in Section 1 (3)–(4) of the Hungarian Arbitration Act. The Act stipulates that disputes arising out of a consumer contract (except for disputes relating to fiduciary asset management contracts), proceedings regulated in Chapter 7 of Act CXXX of 2016 on Civil Procedure (such as family law, public and private guardianship issues, as well as labour and enforcement disputes) and disputes falling within the scope of Act I of 2017 on Administrative Court Procedure are non-arbitrable.

3.3 National Courts' Approach

In general, Hungarian state courts are arbitration-friendly and enforce arbitration agreements except for cases where the invalidity or unenforceability of the arbitration agreement can be established prima facie.

Neither the Hungarian Arbitration Act nor the Hungarian international private law provides specific rules on the law governing arbitration agreements. If the parties do not expressly agree on the law applicable to an arbitration agreement, the Hungarian courts will most often consider the law applicable to the main contract to be applicable to the arbitration agreement as well.

If the law applicable to the main contract is not based on the agreement of the parties but on other rules of international private law, Hungarian courts may apply the law of the seat of arbitration to the arbitration agreement.

3.4 Validity

Hungarian law applies the rule of separability, which means that an arbitration agreement, even if it forms a part of the main contract, shall be treated as an independent agreement. Consequently, a decision of the arbitral tribunal on the non-existence, invalidity or unenforceability of the main contract shall not necessarily affect the existence and validity of the arbitration agreement and the competence of the arbitral tribunal. Section 17 (1) of the Hungarian Arbitration Act adopts the same concept as Article 16 (1) of the 2006 version of the Model Law.

4. The Arbitral Tribunal

4.1 Limits on Selection

Under Hungarian law, the parties have a broad autonomy to select the arbitrators, to determine the number of arbitrators (provided that they choose an odd number) and to determine the procedure for the selection of arbitrators.

In accordance with Section 12 (7) of the Hungarian Arbitration Act, the following persons cannot be nominated as arbitrators:

- persons under the age of 24;
- persons barred from public affairs by a final and binding judgment;
- persons who have been sentenced to imprisonment by a final and binding decision, until the conviction has been erased from their criminal record;
- persons who have been placed under guardianship or whose legal capacity is restricted;
- persons barred from any profession requiring a diploma in law;
- persons placed on probation by a final and binding judgment for the duration of the probationary period; and
- any person who formerly acted as a mediator, as a representative of one of the parties or as an expert in the dispute of the parties to be adjudicated by the arbitral tribunal or in a related dispute.

Section 40 (5) of Act CLXII of 2011 on the status and compensation of judges stipulates that sitting Hungarian judges are prohibited by law from accepting arbitrator mandates.

4.2 Default Procedures

The Hungarian Arbitration Act sets out the default mechanism for the appointment of arbitrators, which shall be applied if the parties did not choose a method for selecting arbitrators or the method chosen by the parties fails.

If the parties agreed that there would be a sole arbitrator, they shall jointly appoint the sole arbitrator. If no agreement can be reached regarding the nomination of a sole arbitrator, upon request of one of the parties, the sole arbitrator shall be appointed by the Budapest Metropolitan Court, or by the Board of the Commercial Arbitration Court if the dispute is administered by the Commercial Arbitration Court.

The default provisions for the appointment of a tribunal comprising three arbitrators stipulate that each party shall appoint one arbitrator within 30 days of a written request by the other party to do so, and the party-appointed arbitrators shall jointly nominate the chairperson within 30 days of their appointment. If either of the parties fails to appoint an arbitrator, or the party-appointed arbitrators fail to agree on the chairperson, upon request of either of the parties, the missing arbitrator shall be appointed by the Budapest Metropolitan Court, or by the Board of the Commercial Arbitration Court if the dispute is administered by the Commercial Arbitration Court.

The mechanisms stipulated for a three-member tribunal shall apply mutatis mutandis in case of a tribunal comprising more than three arbitrators, with the parties nominating arbitrators in equal proportions and the missing arbitrator being appointed by the majority vote of the other members of the tribunal.

The appointing authority must pay due regard to the arbitrator's professional qualifications and any other factors set out in the arbitration agreement, as well as to all other circumstances relevant to ensuring the appointment of an independent and impartial arbitrator. In cases where

the Board of the Commercial Arbitration Court acts as appointing authority, the arbitrator shall be appointed from the list of suggested arbitrators. However, if arbitrators from the list of suggested arbitrators do not satisfy the professional qualifications or other characteristics set out in the arbitration agreement, then the Board of the Commercial Arbitration Court shall not be confined to the list of suggested arbitrators.

Hungarian law does not provide a specific mechanism for the appointment of arbitrators in case of multi-party arbitrations.

4.3 Court Intervention

Hungarian courts intervene in the selection of arbitrators only if one of the parties so requests in line with the rules on default mechanisms for the selection of arbitrators (see **4.2 Default Procedures**).

4.4 Challenge and Removal of Arbitrators

In accordance with Section 13 of the Hungarian Arbitration Act, the appointment of an arbitrator may only be challenged if there are circumstances that raise justified doubts as to his or her impartiality or independence, or if he or she does not have the qualifications or fails to meet the other prerequisites agreed by the parties. A party may object to an arbitrator it has appointed only if the circumstances on which the objection is based first became known to the party after the appointment was made.

Parties are free to agree on a procedure for the challenge or removal of arbitrators, but cannot deviate from the rules of the Hungarian Arbitration Act on unsuccessful challenges.

If the parties do not set out a procedure for challenge or removal, the default mechanism of the Hungarian Arbitration Act shall apply. Section 14 of the Act stipulates that the party that wishes to challenge an arbitrator shall send a reasoned statement regarding the challenge to the arbitral tribunal within 15 days of becoming aware of the composition of the arbitral tribunal, or within 15 days of becoming aware of the underlying reasons for the challenge.

If the challenged arbitrator does not voluntarily withdraw from office, or if the other party does not agree to the challenge, it is up to the arbitral tribunal to decide on the motion for challenge.

If the challenge was unsuccessful using the procedures described above, upon request of the challenging party submitted within 30 days of the receipt of the decision on the rejection of the challenge, the challenge shall be decided by the Budapest Metropolitan Court, or the Board of the Commercial Arbitration Court if the dispute is administered by the Commercial Arbitration Court. If the Board of the Commercial Arbitration Court rejects the challenge, the challenging party may, within 30 days, request the Budapest Metropolitan Court to decide on the challenge.

The decision of the Budapest Metropolitan Court on the challenge is final and binding and cannot be appealed. Until the order is served, the arbitral tribunal, including the arbitrator concerned by the motion for challenge, may continue the proceedings and render its award.

According to the case law of the Hungarian Supreme Court, the failure of an arbitrator to disclose a circumstance that may give rise to doubts as to his or her impartiality is automatically considered a ground for setting aside the arbitral award (Gfv.30.141/2010/24).

4.5 Arbitrator Requirements

Under Section 13 (1) of the Hungarian Arbitration Act and Section 23 (1) of the Rules of Procedure of the Commercial Arbitration Court, an appointed arbitrator must disclose any circumstances that are likely to give rise to doubt as to his or her impartiality or independence, prior to accepting an appointment. The arbitrator shall comply with this obligation throughout the whole proceeding, that is to say, from his or her appointment up to the closing of the arbitration proceeding and the rendering of the arbitral award.

Under the Hungarian Arbitration Act the members of the Board of the Commercial Arbitration Court may only appear in arbitral proceedings as party-appointed arbitrators; they cannot be nominated by the Board of the Commercial Arbitration Court.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

The disputes that are excluded from the wide scope of subject matters that are capable of being resolved by arbitration are listed in **3.2 Arbitrability**.

5.2 Challenges to Jurisdiction

Hungarian law recognises the principle of competence-competence, which means that the arbitral tribunal may rule on its own jurisdiction, including a challenge to the existence or validity of the arbitration agreement (Section 17 (1) of the Hungarian Arbitration Act).

5.3 Circumstances for Court Intervention

In accordance with Section 17 of the Hungarian Arbitration Act, the arbitral tribunal may rule on an objection to its jurisdiction either as a preliminary issue or in its final award. In the former case, any party may, within 30 days after receiving notice of such a ruling, request the Budapest Metropolitan Court to rule on the jurisdiction of the arbitral tribunal. The arbitral tribunal may continue its proceeding and render an award until it is served with the ruling of the Budapest Metropolitan Court on the jurisdiction of the tribunal.

5.4 Timing of Challenge

An objection to the jurisdiction of the arbitral tribunal shall be raised no later than the time the statement of defence is submitted. The fact that a party has nominated or participated in the nomination of an arbitrator shall not preclude the party from raising an objection to the jurisdiction. An objection alleging that the arbitral tribunal has exceeded its competence shall be raised immediately in the event of an alleged excess of competence; however, the arbitration panel may accept an objection at a later stage if it considers the delay in the objection to be justified.

As elaborated in **5.3 Circumstances for Court Intervention**, parties have the right to go to court to challenge the jurisdiction of the arbitral tribunal if the arbitral tribunal bifurcated the proceedings and ruled on its own jurisdiction as a preliminary issue. If the arbitral tribunal rules on its jurisdiction in the final award, parties may only challenge the jurisdiction of the arbitral tribunal in setting-aside proceedings before the Budapest Metropolitan Court, which may be initiated after the final arbitral award has been rendered.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

Hungarian courts have the right to assess questions of both fact and law and undertake a full review of the arbitration agreement to determine its existence and validity. The court is not bound

by the arbitral tribunal's decision regarding its own jurisdiction.

5.6 Breach of Arbitration Agreement

The court seized of the matter which is the subject of an arbitration agreement shall terminate the proceedings if the respondent so requests at the latest in the respondent's written defence. The court shall not terminate the proceedings if it finds that the arbitration agreement does not exist or is invalid, void or unenforceable.

The extraterritorial effect of Article 9 of the Act obliging the Hungarian courts to terminate the proceedings upon request of the respondent if there is an arbitration agreement between the parties is confined to cases where the arbitral proceeding seated outside of Hungary is administered by a Hungarian permanent court of arbitration. This means that if a court is seized of an action in a matter of which the parties have made an arbitration agreement providing for an arbitral proceeding seated outside of Hungary and not administered by a Hungarian permanent court of arbitration, the Act does not call on Hungarian courts to terminate the proceedings upon request of the respondent. In the absence of such specific procedural provision, Hungarian courts shall refer the parties to arbitration by reference to Article II (3) of the New York Convention.

5.7 Jurisdiction Over Third Parties

The Hungarian Arbitration Act contains an explicit provision stipulating that both universal and single legal successors are bound by the arbitration agreement. The Act also recognises the parties' freedom to opt out of this provision and agree that the arbitration agreement applies only to disputes between them, and that their possible successor or successors may enforce the claim arising from the legal relationship only before an ordinary court.

The Hungarian Arbitration Act provides the possibility for the arbitral tribunal to adjudicate a claim filed by or against a person that is not a party to the arbitration agreement. This is possible if a claim by or against a person not party to the contract can only be adjudicated uniformly with the dispute which is the subject of the arbitration agreement. Another prerequisite is that such third party submits to the jurisdiction of the arbitral tribunal in a written declaration. The law does not specify when claims can be decided only uniformly; it must always be decided by the arbitral tribunal on the basis of substantive law, considering the circumstances of the specific case.

6. Preliminary and Interim Relief

6.1 Types of Relief

Unless the parties agree otherwise, the arbitral tribunal may, upon either party's request, make an order for interim measures. Along with the request for interim measures, the party may request the court to issue a preliminary order directing the other party not to frustrate the purpose of the interim measures requested. A preliminary order can be issued if the arbitral tribunal considers it an existing risk that the prior disclosure of the request for interim measures to the party against which the measures were requested would frustrate the purpose of the measures.

With an order for interim measures the arbitral tribunal may direct the parties to:

- maintain or restore a condition until the dispute is closed;

- take action or refrain from taking action to prevent probable loss, or prejudice to the arbitral process itself;
- make sure that assets that would serve to satisfy a subsequent award are available, or to provide collateral corresponding to their value; or
- preserve evidence that may be relevant in deciding the dispute.

In case of non-compliance with the interim measures ordered by the arbitral tribunal, interim measures and preliminary orders may be enforced by Hungarian courts in accordance with the rules on judicial enforcement (Act LIII of 1994 on Judicial Enforcement). Enforcement of the interim relief may be denied by the Hungarian courts (i) on the same grounds as those upon which the final award can be set aside (see **11.1 Grounds for Appeal**); (ii) if the arbitral tribunal's decision with respect to the provision of security in connection with the interim measures has not been complied with; (iii) if the interim measures have been rescinded or suspended by the arbitral tribunal; or (iv) if the interim measures are incompatible with the jurisdiction of the court.

Due to the unfortunate wording of Section 1 (2) of the Act on the extraterritorial effect of certain provisions, the Hungarian courts may only enforce interim measures rendered by arbitral tribunals if the seat of the arbitral proceeding is in Hungary or if the arbitral proceeding seated outside of Hungary is administered by a Hungarian permanent court of arbitration.

Preliminary orders are binding on the parties but cannot be enforced via judicial enforcement.

6.2 Role of Courts

The existence of a valid and enforceable arbitration agreement does not preclude the parties from requesting preliminary or interim relief from the Hungarian courts, provided that the Hungarian court has international jurisdiction to order such relief. Any party may seek interim or preliminary relief from Hungarian courts before or after the constitution of the arbitral tribunal.

Hungarian courts are also entitled to enforce interim measures ordered by the arbitral tribunal; however, preliminary orders of the arbitral tribunal cannot be enforced via judicial enforcement. Hungarian courts can enforce interim measures ordered by the arbitral tribunal even if the seat of arbitration is outside of Hungary, but only if the arbitral proceeding is administered by a permanent court of arbitration seated in Hungary.

The provisions of the Hungarian Arbitration Act permitting national courts to grant preliminary/interim relief in relation to arbitral proceedings have an extraterritorial effect, which means that they are applicable even if the seat of arbitration is outside of Hungary.

The Hungarian Arbitration Act does not contain any provisions on emergency arbitrators.

6.3 Security for Costs

Hungarian arbitration law does not contain any provision explicitly granting an arbitral tribunal the power to order security for costs.

7. Procedure

7.1 Governing Rules

The Hungarian Arbitration Act recognises the parties' freedom in determining the rules of procedure applicable to their arbitral proceeding; however, as a mandatory and fundamental principle it declares that the parties' right to

equal treatment and the right to be heard shall be granted in the arbitral procedure.

In the absence of an agreement by the parties regarding the procedural rules or a reference to a set of rules to be administered by an institution, it is up to the arbitral tribunal, subject to the Hungarian Arbitration Act, to determine the rules governing the arbitral procedure.

The framework of default procedural rules determined by the Hungarian Arbitration Act addresses, inter alia, the seat of arbitration, the commencement of the arbitral proceedings, the language of the proceedings, the statements of claim and defence, the oral hearings and the written proceedings, the intervention in the proceedings by a third party having legal interest, the consequences of a party's default, as well as the rules on expert evidence.

7.2 Procedural Steps

Because, under Hungarian arbitration law, party autonomy is the governing principle in the determination of the rules governing the arbitral procedure, the Hungarian Arbitration Act does not set out any mandatory procedural steps that are required by law.

7.3 Powers and Duties of Arbitrators

The arbitral tribunal has the power to decide on its own jurisdiction and, in the absence of the parties' agreement, on the law applicable to the merits of the case, as well as on the merits of the case and allocation of procedural cost. If the parties have authorised the arbitral tribunal to do so, it may render its decision based on principles of equity. The arbitral tribunal's competence also includes deciding on the admissibility, relevance and weight of evidence. If the parties did not agree otherwise, the arbitral tribunal has the power to issue interim measures and preliminary orders.

It is the arbitrators' duty to remain independent and impartial throughout the arbitral proceeding and to disclose any circumstance that might give rise to doubt as to their impartiality and independence. The arbitrators have the duty to treat the parties fairly, and must ensure that each party's right to be heard is observed. As regards the adjudication of the legal dispute, the Hungarian Arbitration Act stipulates that the arbitral tribunal shall in all cases make its decision in accordance with the terms of the contract and shall take into account the trade practices applicable to the transaction.

7.4 Legal Representatives

The Hungarian Arbitration Act does not stipulate any particular qualifications or other requirements for legal representatives appearing in arbitral proceedings. This means that legal representatives appearing in arbitral proceedings do not necessarily have to have a Hungarian legal qualification.

8. Evidence

8.1 Collection and Submission of Evidence

There is no specific provision in the Hungarian Arbitration Act dealing with the means of evidence the parties may use in the arbitral procedure.

Section 36 (5) of the Hungarian Arbitration Act declares that the arbitral tribunal shall not impose fines or other coercive measures on witnesses and experts.

Section 39 of the Hungarian Arbitration Act sets out default provisions in relation to the appointment of experts, which are to be applied unless agreed otherwise by the parties. In accordance with these rules, the arbitral tribunal may appoint one or more experts to provide an opinion on a matter identified by the arbitration panel for which the arbitration panel does not have the specific expertise to assess, and the arbitral tribunal may require either party to provide information to the expert or to present or make available an exhibit for the purpose of inspection. The expert may be requested to present a written or an oral expert opinion, and appear at the hearing in order to be questioned by the tribunal, the parties or other experts appointed by the parties.

8.2 Rules of Evidence

The Hungarian Arbitration Act does not stipulate specific rules of evidence that apply to arbitral proceedings. The general principle is the free evaluation of evidence.

In arbitral proceedings governed by the Rules of the Commercial Arbitration Court, Article 40 of the Rules contains specific procedural rules in relation to the taking of evidence. According to these rules, the arbitral tribunal is not bound by the parties' motions for the taking of evidence and may order the taking of evidence even without a motion from the parties to do so. The details of the method of taking witness testimony, with specific regard to written witness statements possibly to be filed in advance and the taking of oral testimony at a hearing, shall be established during the case management conference and in the procedural order recording the outcome thereof.

The IBA Rules on the Taking of Evidence in International Arbitration are in some cases referred to and used by tribunals as guidelines.

8.3 Powers of Compulsion

As declared in Section 36 (5) of the Hungarian Arbitration Act, the arbitral tribunal does not have any powers of compulsion to impose fines or other coercive measures on witnesses and experts.

The arbitral tribunal or, with its approval, a party may apply to the Hungarian courts for assistance in taking of evidence. In assisting the evidentiary procedure in an arbitral procedure, Hungarian courts are bound by the general Hungarian procedural law, which means that only the procedures for taking evidence provided for in the provisions of the Hungarian Civil Procedure Code on preliminary evidence are available. This provision of the Hungarian Arbitration Act applies only in arbitral procedures seated in Hungary, or in procedures seated outside of Hungary but administered by a Hungarian permanent court of arbitration.

9. Confidentiality

9.1 Extent of Confidentiality

The Hungarian Arbitration Act stipulates that arbitral proceedings are private and confidential, unless agreed otherwise by the parties.

It might be regarded as an exception to rule of confidentiality of arbitral proceedings that according to the Act it is the duty of the Board of the Commercial Arbitration Court to publish and make available an anonymised and searchable extract of any award or order terminating the proceedings in arbitrations administered by the Commercial Arbitration Court on the website of the Commercial Arbitration Court six months after it was rendered.

10. The Award

10.1 Legal Requirements

An arbitral award and an order terminating the proceeding shall be in writing, contain the date and place of arbitration and be signed by all of the arbitrators. However, if the order states the reason for the missing signatures, it is sufficient if the majority of the arbitrators sign the award.

Unless the parties agree otherwise, the arbitral tribunal shall make its decision by a simple majority of votes, and in the absence of a simple majority, it is up to the chair of the tribunal to make the decision.

The Hungarian Arbitration Act stipulates that the award must state the reasons on which it is based, unless based on a settlement between the parties.

If a party so requests, the arbitral award shall contain the decision on the costs of the proceeding and shall decide which party is to bear the costs or in what proportion the parties are to bear the costs.

There is no deadline stipulated by the Hungarian Arbitration Act by which the tribunal must render its decision; however, the Act provides that the arbitral tribunal shall make its decision as soon as possible.

In case of arbitral proceedings administered by the Commercial Arbitration Court under its Rules, the arbitral tribunal shall present the award to the Arbitration Court within 45 days from the closing of proceedings at the latest. The Arbitration Court may in exceptionally justified cases extend this time limit (Section 43 (3) of the Rules).

10.2 Types of Remedies

The types of remedies an arbitral tribunal may award depend on the remedies and the limits recognised by the law applicable to the merits of case. Hungarian arbitration law does not contain any provision on the types of remedies that can be awarded; thus, there are no limits or any other prescriptions provided for by the law.

Punitive damages as a potential remedy are alien to Hungarian law and therefore may be considered contrary to Hungarian public policy.

10.3 Recovering Interest and Legal Costs

Hungarian arbitration law does not contain any explicit provisions on whether the parties are entitled to recover interest. An arbitral tribunal is generally entitled to award default interest; however, the particularities depend on the relevant provisions of the law applicable to the merits.

The arbitral tribunal must render a decision on the costs (including the arbitration fees and the legal costs) and the allocation of such costs if either of the parties so requests. The decision on the costs and the allocation thereof shall be contained in the final award or the order terminating the proceeding.

The Hungarian Arbitration Act does not contain any express provision on cost allocation. In general, the costs are allocated by the arbitral tribunal in proportion to the relative success or failure of the parties.

In arbitral proceedings administered by the Commercial Arbitration Court under its Rules, the general rule for cost allocation is that the costs shall be borne by the unsuccessful party to the extent it was unsuccessful; however, the arbitral tribunal may deviate from this general rule

in justified cases. If it deviates from the general rule, the arbitral tribunal shall take into account especially the parties' conduct throughout the proceedings in fostering or hindering those proceedings and the settlement of the dispute.

11. Review of an Award

11.1 Grounds for Appeal

Under Hungarian arbitration law no appeal against the merits of the award is available.

The parties may request the arbitral tribunal, within 30 days from the receipt of the award and subject to the notification of the other parties, to correct a typographical or calculation error in the award, to provide an interpretation in relation to a specific part of the award, or to supplement the award with regard to a claim presented during the proceeding but which the arbitral tribunal failed to rule on.

An award rendered in an arbitral proceeding seated in Hungary may only be challenged by an application to set aside the award. The request for setting aside shall be submitted to the Budapest Metropolitan Court within 60 days from the receipt of the award by the requesting party. The court may set aside the award only if the party requesting the setting aside proves that:

- one of the parties to the arbitration agreement did not have legal capacity or capacity to act;
- the arbitration agreement is invalid according to the rules of the law to which it has been submitted, or in the absence of such submission it is invalid under Hungarian law;
- a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;
- the award was rendered in relation to a dispute that was not contemplated in or falls outside the scope of the arbitration agreement, provided that if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions not submitted to arbitration may be set aside; or
- the composition of the arbitral tribunal or the arbitral proceedings did not comply with the agreement of the parties, unless the agreement contradicts the mandatory rule of the Act, or in the absence of such agreement did not comply with the provisions of the Act.

The setting aside of the arbitral award can also be ordered if the Budapest Metropolitan Court finds that:

- the subject matter of the dispute is non-arbitrable under Hungarian law; or
- the award is contrary to Hungarian public policy.

The Hungarian Arbitration Act introduced a new type of remedy against an arbitral award, namely a retrial proceeding, which can be initiated up to one year following the receipt of the arbitral award. The party requesting the retrial proceeding shall refer to facts or evidence that it could not submit in the initial proceeding for reasons that were not its own fault, provided that the submission of such facts or evidence could have resulted in a more beneficial award. If the retrial is permitted, the reopened arbitral proceeding shall be limited to the scope of the request for retrial and the arbitral tribunal may maintain the award, or partially or fully revoke it and issue a new award. The parties may opt out of the provisions of the Hungarian Arbitration Act on retrial proceedings either in the arbitration agreement or at a later stage when determining

the rules applicable to the conduct of the arbitral proceeding.

11.2 Excluding/Expanding the Scope of Appeal

Under Hungarian arbitration law, parties can neither expand the list of grounds for challenge of an arbitral award nor exclude any of the grounds listed in the Hungarian Arbitration Act.

However, parties are free to opt out of the rules on retrial proceedings and thus they can exclude the possibility of a retrial.

11.3 Standard of Judicial Review

Hungarian courts are not entitled to review the merits of an award. In the setting-aside procedure the courts' entitlement to review the award is limited to the grounds listed in Section 47 of the Hungarian Arbitration Act.

12. Enforcement of an Award

12.1 New York Convention

Hungary ratified the New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards) on 5 March 1962, and the New York Convention was enacted into Hungarian national law by Statutory Decree No. 25 of 1962. Upon ratification of the Convention, in accordance with Section I(3), Hungary made the reservation of reciprocity and the commercial reservation.

Neither of the reservations have been withdrawn yet. However, in connection with the commercial reservation, a published court decision (BH 2004/369) in this regard stated that since the current Hungarian law does not recognise the concept of commercial relationship, the reservation to the New York Convention must be interpreted as meaning that all foreign arbitral awards must be recognised and enforced in Hungary, provided that the parties have lawfully concluded the arbitration agreement on which the proceedings are based in accordance with Hungarian law.

In addition, Hungary is a party to the Geneva Convention (European Convention on International Commercial Arbitration 1961) and the ICSID Convention (Convention on the Settlement of Investment Disputes between States and Nationals of Other States).

12.2 Enforcement Procedure

In case of arbitral proceedings seated outside of Hungary, the first step before the enforcement procedure is the recognition of the arbitral award pursuant to the New York Convention, if applicable in light of the reservation of reciprocity, or other multilateral or bilateral treaties.

The recognition of the arbitral award may be requested from the county court which has competence for the enforcement, that is, the county court located where the respondent has its seat or place of business or where it has sellable assets – or in the case of a foreign entity, the seat of its Hungarian branch or commercial representation. The application for recognition can be made together with the request for enforcement, and the courts will decide simultaneously on both requests. Once the foreign award is recognised, it is deemed to be enforceable in the same way as domestic awards, ie, it is equivalent to the judgment of Hungarian courts.

Arbitral awards are enforced by the county court located where the respondent has its seat or place of business or where it has sellable assets – or in the case of foreign entities, the seat of its Hungarian branch or commercial represen-

tation in accordance with the provisions of Act LIII of 1994 on Judicial Enforcement. The party requesting enforcement shall submit the original or a certified copy of the arbitration agreement.

12.3 Approach of the Courts

The approach of Hungarian courts towards the recognition and enforcement of arbitral awards is in general arbitration-friendly, and courts interpret the grounds for the rejection of recognition and enforcement very restrictively.

Rejection of recognition and enforcement of arbitral awards with reference to the violation of Hungarian public policy is especially rare and confined to cases where the enforcement of the arbitral award is deemed to be "manifestly" incompatible with fundamental principles of Hungarian law.

13. Miscellaneous

13.1 Class Action or Group Arbitration

Hungarian arbitration law does not contain any provisions on class-action arbitration or group arbitration.

13.2 Ethical Codes

Hungarian law does not provide a specific ethical code or other professional standards applicable to counsels and arbitrators in arbitral proceedings.

13.3 Third-Party Funding

Hungarian arbitration law does not contain any provisions on third-party funding, mainly because there is no established culture of third-party funding and third-party funders in Hungary, neither in the context of litigation nor in that of arbitration.

13.4 Consolidation

The Hungarian Arbitration Act does not contain any provisions on the consolidation of separate arbitral proceedings. As there is no mandatory provision of the Act prohibiting consolidation, parties to the arbitral proceedings at issue have the freedom to agree on the consolidation of the proceedings.

In arbitral proceedings administered by the Commercial Arbitration Court under its Rules, the Commercial Arbitration Court may consolidate several arbitral proceedings commenced before it if all parties to all of those arbitrations unanimously so request or consent to the consolidation. The arbitrations shall be consolidated into the arbitration that was first commenced, except when the parties have unanimously requested or consented to the consolidation of the arbitral proceedings into another arbitration.

13.5 Binding of Third Parties

See **5.7 Jurisdiction Over Third Parties**.

ISRAEL

Law and Practice

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Goldfarb Gross Seligman & Co is Israel's largest law firm, and is among the elite group of firms that deliver top-tier legal services at international standards. The professional hallmark of the firm, which traces its history back over 80 years, is the unrelenting pursuit of the highest professional and ethical standards in the service of its clients. Its attorneys have acquired extensive experience in conducting international arbitration proceedings. They represent foreign plaintiffs and defendants in legal proceedings in Israel, including proceedings for the enforcement of foreign verdicts, in addition to international arbitration, and assist foreign entities to receive temporary and permanent compensation from Israeli entities. They also represent Israeli plaintiffs and defendants in legal proceedings held in foreign courts. The acquaintance with foreign laws and understanding of the manner in which legal methods and systems outside Israel operate grant considerable advantage to the legal teams at the firm in conducting such proceedings (as parties to arbitration proceedings), to the benefit of their clients.

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1. General

1.1 Prevalence of Arbitration

In domestic disputes, public court litigation is the preferred method for the resolution of disputes by many commercial players. While domestic arbitration is not very common, international arbitration has gained prominence in the past decade in Israel. In February 2024 Israel adopted the International Commercial Arbitration Law, 2024 (the "ICA Law"), which is based on the UNCITRAL Model Law on International Commercial Arbitration.

1.2 Key Industries

There has been no increase in international arbitration activity in Israel in 2023–2024 in a specific industry. However, there is a growing number of complex international arbitrations in the energy and infrastructure sectors. Additionally, as many technology firms and start-ups are more and more involved in the international arena, there are more arbitrations involving technology disputes.

1.3 Arbitration Institutions

The leading arbitration institutions used in Israel in international arbitration are the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA). As Israeli players are not very well acquainted with all arbitral institutions, they usually opt for the most common choices – the ICC or the LCIA. Israeli parties opt less often for the International Centre for Dispute Resolution (ICDR) or the China International Economic and Trade Arbitration Commission (CIETAC) and feel more at ease with the ICC and the LCIA.

1.4 National Courts

The Israeli court system comprises three levels of courts:

- magistrate courts;
- district courts; and
- the Supreme Court.

The Supreme Court is the highest judicial instance in the country. In domestic arbitrations, the courts with jurisdiction are those with respect to such matters in court litigation. In international arbitration, Article 7 of the ICA Law provides that the court having jurisdiction is the court authorised to adjudicate the matter agreed to be submitted to arbitration, pursuant to any law. However, the article specifies that matters which are in the jurisdiction of the magistrate courts shall be within the jurisdiction of

the district courts. This means that any specialised courts, such as the labour court, may have jurisdiction with respect to matters concerning arbitration in cases for which they have jurisdiction, however, the magistrate courts will not have such jurisdiction, and the district courts will have the jurisdiction to hear and decide on matters of international arbitration instead.

2. Governing Legislation

2.1 Governing Law

The Arbitration Law, 1968 (the Arbitration Law) governs domestic arbitrations, and the ICA law governs international commercial arbitration.

2.2 Changes to National Law

The enactment of the ICA Law is a major change in Israeli arbitration legislation. Until the enactment, arbitration (both domestic and international) was regulated by the Arbitration Law. Now that there are two separate laws, it is expected that the courts will develop a case law on international arbitration.

3. The Arbitration Agreement

3.1 Enforceability

When a party files a claim before a state court in a dispute that is subject to an international arbitration agreement, the court will at first wait for the defendant's reply to see if it agrees to its jurisdiction or requests a stay of proceedings due to the arbitration clause. When a party does not object to the jurisdiction of the court, the court will hear the dispute submitted to it.

Article 9 of the ICA Law adopts the wording of the Model Law with respect to the enforcement of international arbitration agreements. The Article incorporates the enforcement provision of Article II(3) of the New York Convention, which, by implication, denies the court any discretionary power and directs it to "refer the parties to arbitration" unless it finds that any of the exceptions enumerated in the Article – that is, that the agreement "is null and void, inoperative or incapable of being performed" – exist.

Article 8 of the ICA Law requires that the arbitration agreement be in writing. The writing requirement may be satisfied when the agreement is entered into by way of an electronic message, as defined in the Electronic Signature Law 2001, and is deemed to have been made in writing if the message can be saved and retrieved. The Article further provides the incorporation by reference clause, according to which when a provision in a contract, by which provisions of a document which contains an arbitration clause shall apply to that contract, then, that contract constitutes a written arbitration agreement. By this way, Israel has adopted a broad definition of a written agreement which is in line with technological developments.

3.2 National Courts' Approach

There has not been any critical case law on the approach of courts in the enforcement of arbitration agreement under the ICA Law. It should be noted, however, that before the enactment of the ICA Law, the courts' approach in the interpretation of Article II(3) did not correspond to the wording of the Article. Despite broad international acceptance of the referral rule in Article II(3) of the New York Convention, Israeli courts have not fully recognised it. Although there are instances where a court's rhetoric suggests recognition of this principle, a close analysis of the case law reveals that, in fact, Israeli courts have failed to follow a uniform discourse on the issue and in some cases concerning the enforcement of

international arbitration agreements, the courts apply rules regarding domestic arbitration, thereby increasing their discretion in not staying proceedings. It is hoped now, as the International Arbitration Law is in force, that the courts will follow the wording of the Article strictly.

3.3 Validity

According to Article 17(a) of the ICA Law, an arbitration agreement shall be treated as independent of the other clauses of a contract, and the decision that the contract is null and void shall not affect ipso jure the invalidity of the arbitration agreement.

4. The Arbitral Tribunal

4.1 Limits on Selection

The parties are free to appoint any person they wish to the tribunal. They may agree on the method of selection of the tribunal. According to Article 11 of the ICA Law, the parties are free to determine the number of arbitrators in the tribunal.

4.2 Default Procedures

According to Article 11(c) of the ICA Law, when the parties have not agreed on the number of arbitrators, there shall be three arbitrators.

According to Article 12(b) of the ICA Law, when the parties do not agree on the procedure of appointing the tribunal, then in a tribunal with three arbitrators, each party shall appoint one arbitrator and the arbitrators appointed by the parties shall appoint the third arbitrator who shall serve as the presiding arbitrator. If a party fails to appoint an arbitrator within 30 days of the receipt of a request to do so, or if the two appointed arbitrators fail to agree on the third arbitrator within 30 days of their appointment, a party may apply to the court and request that it appoint the arbitrator.

4.3 Court Intervention

Unless requested by a party to appoint an arbitrator, the court cannot intervene in the appointment procedure.

4.4 Challenge and Removal of Arbitrators

Article 14(a) of the ICA Law provides that the parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of Article 14(c), according to which if a request for a challenge submitted under the agreed procedure is denied, the challenging party may request the court to decide on the challenge request within 30 days after having received notice of the decision rejecting the challenge.

Article 14(b) provides that when the parties have not agreed on a procedure for challenging an arbitrator, a party who intends to challenge an arbitrator, shall send a written statement of reasons for the challenge within 15 after becoming aware circumstances giving rise to a challenge. The arbitral tribunal then shall decide on the challenge, unless the challenged arbitrator withdraws, or the other party agrees to the challenge. Here again, if a the request for challenge is denied, the challenging party may request the court to decide on the challenge.

When a challenge is pending before the court, the arbitral tribunal may continue the proceedings and make the award.

A decision by the court on a challenge, may be subject to appeal if permission is granted from the court of appeal.

4.5 Arbitrator Requirements

Article 13 of the ICA Law requires an arbitrator to disclose any information on circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence in respect of the arbitral proceedings.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

Subject matters that cannot be subject to an agreement may not be referred to arbitration (see **3.2 Arbitrability**).

5.2 Challenges to Jurisdiction

Article 17 of the International Commercial Arbitration Law follows the wordings of the Model Law with regards to the competence of the arbitral tribunal to rule on its jurisdiction. However, unlike in the Model Law, when the tribunal decides the matter as a preliminary question and denies the challenge, any party may apply to the court to rule on the matter. The decision of the court may be appealed with leave from the court of appeal.

5.3 Circumstances for Court Intervention

See **5.2 Challenges to Jurisdiction**.

5.4 Timing of Challenge

According to Article 17(b) of the ICA Law, a challenge to the tribunal's jurisdiction shall be raised not later than the submission of the statement of defence in the arbitration. A challenge based on the tribunal's exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of the tribunal's authority is raised during the arbitral proceedings.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

According to Article 17(e), the tribunal may rule on its jurisdiction as a preliminary question or in the award on the merit. If the matter has been decided as a preliminary question and the tribunal denies the challenge, a party may request the court to decide the matter. If no such request has been submitted to the court, a challenge to the tribunal's jurisdiction may be raised only within the framework of an application to set aside the award.

A decision of the court may be subject to appeal if permission is granted from the court of appeal.

5.6 Breach of Arbitration Agreement

Israeli courts enforce arbitration agreements by way of staying the proceedings commenced before them in breach of an arbitration agreement (see **3.3 National Courts' Approach**).

5.7 Jurisdiction Over Third Parties

Israeli courts have recognised that an arbitration agreement may extend to third parties in the case that the interpretation of the arbitration agreement leads to the conclusion that these parties expressly or implicitly agreed to be bound by the agreement. Third parties may be bound by an arbitration agreement by way of assignment, or when the circumstances are such that the objection by the third party is formal and artificial.

6. Preliminary and Interim Relief

6.1 Types of Relief

Chapter E of the ICA Law provides extensive provisions regarding interim measures. The Chapter concerns, the tribunal's authority to grant interim measures (Section 1), recognition and enforce-

ment of interim measures (Section 2), and the court's power to order interim measures.

6.2 Role of Courts

According to Article 26 of the ICA Law, the court has the same power of issuing interim measures in relation to arbitration as it has in relation to court proceedings, whether the place of arbitration is in Israel or outside of Israel.

6.3 Security for Costs

Unless otherwise agreed by the parties, the tribunal may order security for costs.

7. Procedure

7.1 Governing Rules

The ICA Law provides in Article 28 that unless otherwise provided in the law the parties are free to agree on the rules of procedure and evidence to be followed by the tribunal in conducting the proceedings.

When the parties have not agreed on the rules of procedures and evidence, then the tribunal may conduct the arbitration in a manner as it considers appropriate.

7.2 Procedural Steps

Article 27 of the ICA Law requires the tribunal to treat the parties with equality and give them full opportunity of presenting their case.

7.3 Powers and Duties of Arbitrators

Unless otherwise agreed by the parties, the tribunal is empowered to order any procedural steps to be taken in the arbitration. The tribunal enjoys wide discretionary power in defining the conduct of the arbitration proceedings. It can issue procedural orders regarding the proceedings, as well as regarding steps to be taken by each of the parties. In conducting the proceedings, the tribunal is expected to act fairly to all the parties and grant them the right to be heard.

7.4 Legal Representatives

The Israeli Bar Association Law, 1961, provides that representation before courts, tribunals or arbitrators or any person or body having judicial or quasi-judicial authority has to be made by a qualified attorney in Israel. This requirement does not apply in arbitration proceedings in which one of the parties is non-Israeli or is a company registered outside of Israel. In such cases, the foreign party may be represented by a qualified attorney in the foreign party's country of residence.

8. Evidence

8.1 Collection and Submission of Evidence

See **7.1 Governing Rules**.

8.2 Rules of Evidence

See **7.1 Governing Rules**.

8.3 Powers of Compulsion

According to Article 36 of the ICA Law, the tribunal or a party, with the approval of the tribunal, may request from the court assistance in taking evidence.

9. Confidentiality

9.1 Extent of Confidentiality

The ICA Law does not provide any provisions regarding the confidentiality of arbitration; however, since arbitration proceedings are not public, they are considered confidential by their nature.

10. The Award

10.1 Legal Requirements

The ICA Law provides that an arbitration award shall be in writing and signed by the arbitrator or arbitrators who are members of the tribunal. In an arbitration with more than one arbitrator, the signatures of the majority of all members, is sufficient. Unless otherwise agreed by the parties, the award must be reasoned.

10.2 Types of Remedies

The tribunal may award a monetary relief and, unless otherwise agreed by the parties, it may grant a declaratory award, a prohibitive award, a specific performance award or any other relief that the court may grant in proceedings before it.

10.3 Recovering Interest and Legal Costs

Unless otherwise agreed by the parties, the tribunal is empowered to award costs, including legal fees, in addition to the tribunal's costs and fees. Generally, the tribunal will allocate legal costs to the prevailing party. While in public-court litigation the courts tend to award nominal costs, in arbitration tribunals, especially in complex international arbitrations, real costs tend to be awarded.

As for awarding interest, if parties agree on the interest to be awarded, the tribunal will be bound by the agreement. If the parties do not agree on the interest, under Israeli law the tribunal has the authority to award interest in accordance with the Ordering of Interest and Linkage Law, 1981.

11. Review of an Award

11.1 Grounds for Appeal

An award may be set aside only if one of the conditions set in Article 43(b) of the ICA Law applies.

An application for setting aside the award shall be made within 90 days of the date on which the party making the application had received a copy of the award.

11.2 Excluding/Expanding the Scope of Appeal

The parties cannot exclude the court's power to set aside the arbitration award and they may not expand it.

11.3 Standard of Judicial Review

The judicial review are limited to the conditions set in Article 43(b) of the ICA Law.

12. Enforcement of an Award

12.1 New York Convention

Israel is a signatory to the New York Convention. It ratified the Convention in 1959, and in 1974 it incorporated the provisions of the Convention by way of an amendment to the Arbitration Law. The provisions of the Convention have further been incorporated in the ICA Law, by way of adoption of the UNCITRAL Model Law.

12.2 Enforcement Procedure

To date no procedural regulations regarding the application of the ICA Law have been enacted. It is expected that they will be enacted soon.

12.3 Approach of the Courts

Generally, the Israeli courts are considered to take a pro-enforcement stand on arbitration awards.

13. Miscellaneous

13.1 Class Action or Group Arbitration

The ICA Law does not make any reference to class-action arbitrations and these do not tend to take place in Israel.

13.2 Ethical Codes

Israeli counsel are bound by the ethical rules of the Israel Bar Association. The courts have compared arbitrators to judges with regard to the ethical rules that should be applicable to them. Thus, the ethical rules applicable to judges apply also to arbitrators.

13.3 Third-Party Funding

There are no rules or restrictions on third-party funders. There are a number of funders active in Israel that provide funding both to public court litigation and to arbitration.

13.4 Consolidation

Consolidation can occur only with the consent of all parties.

13.5 Binding of Third Parties

The courts have recognised three "extension circles" to the arbitration agreement, which may each bind third parties to the arbitration agreement. The first circle includes parties which, by interpretation of the arbitration agreement and the contractual relationship between the parties, are understood to have agreed to be part of the arbitration. The second extension circle includes successors of the parties to the arbitration agreement, pursuant to Section 4 of the Arbitration Law. The third extension circle relates to those cases where it does not appear from the arbitration agreement that a party agreed to join the arbitration, and where that party is not a successor of the party in the arbitration. This circle includes parties that try to avoid, on formalistic grounds, participating in arbitration proceedings to which they have substantially agreed.

Trends and Developments

Contributed by:
Zvi Bar-Nathan and Daphna Kapeliuk
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Goldfarb Gross Seligman & Co is Israel's largest law firm, and is among the elite group of firms that deliver top-tier legal services at international standards. The professional hallmark of the firm, which traces its history back over 80 years, is the unrelenting pursuit of the highest professional and ethical standards in the service of its clients. Its attorneys have acquired extensive experience in conducting international arbitration proceedings. They represent foreign plaintiffs and defendants in legal proceedings in Israel, including proceedings for the enforcement of foreign verdicts, in addition to international arbitration, and assist foreign entities to receive temporary and permanent compensation from Israeli entities. They also represent Israeli plaintiffs and defendants in legal proceedings held in foreign courts. The acquaintance with foreign laws and understanding of the manner in which legal methods and systems outside Israel operate grant considerable advantage to the legal teams at the firm in conducting such proceedings (as parties to arbitration proceedings), to the benefit of their clients.

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Introduction

Traditionally, Israel's legal system has relied heavily on court litigation for the resolution of disputes. In domestic disputes, court litigation is the most common method of the settlement of disputes. However, in international commercial disputes, with the development of the global economy, the limitations of court-based litigation – such as lengthy procedures, jurisdictional issues, and enforcement challenges – have become more apparent. This has led to a gradual shift towards alternative dispute resolution (ADR) methods, with international arbitration being at the forefront.

Israel's accession to international conventions, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958, marked a significant step in this direction. The Convention was enacted into the legal system in 1974, by amending the Arbitration Law of 1968. The adoption into the law of the New York Convention has enabled the courts to enforce both arbitration agreements and foreign arbitral awards according to the Convention.

In February 2024, with a view to promoting international arbitration, Israel adopted the International Commercial Arbitration Law, 2024 (the "ICA Law"), which is based on the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006 and follows its text closely (with minor changes).

The Arbitration Agreement

According to the ICA Law, when a party files a claim before a state court in a dispute that is subject to an international arbitration agreement, the court will at first wait for the defendant's reply to see if it agrees to its jurisdiction or requests a stay of proceedings due to the arbitration clause. When a party does not object to the jurisdiction of the court, the court will hear the dispute submitted to it.

The ICA Law adopts the wording of the Model Law with respect to the enforcement of international arbitration agreements. The Article incorporates the enforcement provision of Article II(3) of the New York Convention, which, by implication, denies the court any discretionary power and directs it to "refer the parties to arbitration" unless it finds that any of the exceptions enumerated in the Article – that is, that the agreement "is null and void, inoperative or incapable of being performed" – exist.

The ICA Law requires that the arbitration agreement be in writing. The writing requirement may be satisfied when the agreement is entered into by way of an electronic message, as defined in the Electronic Signature Law 2001, and is deemed to have been made in writing if the message can be saved and retrieved. The Article further provides the incorporation by reference clause, according to which, when a provision in a contract requires parts of a document containing an arbitration clause to apply to that contract, that contract constitutes a written arbitration agreement. In this way, Israel has adopted a broad definition of a written agreement which is in line with technological developments.

According to the ICA Law, it shall not affect any other law by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only in accordance with the provisions of that law or as prescribed thereunder.

The ICA Law provides that an arbitration agreement shall be treated as independent of the other clauses of a contract, and the decision that the contract is null and void shall not affect ipso jure the invalidity of the arbitration agreement.

The Courts

There has not been any critical case law on the approach of courts in the enforcement of arbitration agreements under the ICA Law. It should be noted, however, that before the enactment of the ICA Law, the courts' approach in the interpretation of Article II(3) did not correspond to the wording of the article. Despite broad international acceptance of the referral rule in Article II(3) of the New York Convention, Israeli courts have not fully recognised it. Although there are instances where a court's rhetoric suggests recognition of this principle, a close analysis of the case law reveals that, in fact, Israeli courts have failed to follow a uniform discourse on the issue and in some cases concerning the enforcement of international arbitration agreements, the courts apply rules regarding domestic arbitration, thereby increasing their discretion in not staying proceedings. It is hoped now, as the International Arbitration Law is in force, that the courts will follow the wording of the Article strictly.

Opportunities and Challenges in the Adoption of the ICA Law

The adoption of the ICA Law has opened various opportunities for Israel and the Israeli legal system.

First, the adoption law could make Israel a more attractive venue to foreign investors who look for a predictable and stable legal environment that follows international standards. By adopting the ICA Law, Israel has signalled its commitment to providing a reliable and efficient dispute resolution mechanism, which can boost investor confidence and encourage foreign direct investment.

Second, it is hoped that adoption of the UNCITRAL Model Law will promote legal certainty and stability by providing a clear and predictable legal framework for arbitration. Parties entering into international contracts will have greater confidence in the dispute resolution process, knowing that the rules governing arbitration are well-established and recognised internationally. This legal certainty is crucial for fostering trust in international commercial transactions.

Third, it is expected that by aligning its legislation with the Model Law, Israel could create a more predictable and consistent legal environment for international arbitration. This could reduce the uncertainties associated with cross-border disputes, as parties can be assured that the rules

governing their arbitration proceedings will be similar, regardless of the jurisdiction. However, this all depends on the way the courts in Israel will apply the ICA law.

Fourth, it is hoped that the ICA Law will promote the efficiency of arbitration proceedings by emphasising party autonomy, minimising court intervention, and providing clear guidelines on procedural matters. This would allow for a more streamlined arbitration processes, reducing the time and cost associated with resolving disputes. Additionally, the efficiency gained through the adoption of the ICA Law could make arbitration a more attractive option compared to traditional litigation.

Fifth, as the text of the Law provides a compatible framework with the New York Convention, it is hoped that it will enhance the enforceability of both arbitration agreements and arbitral decisions. This facilitation of cross-border enforcement is a key benefit for parties engaged in international commerce.

While the adoption of the ICA Law provides great opportunities to Israel, it also comes with challenges.

Fires, one of the main challenges in adopting the ICA Law is the need to adapt it to the specific legal traditions and practices of Israeli legal tradition. While the Law provides a general framework for international arbitration, it may not align perfectly with the legal culture and norms of the state.

Second, the application of the Law may encounter resistance from legal professionals and the courts, who are accustomed to existing legal practices under the Arbitration Law 1968. This could stem from a reluctance to adopt new procedures, concerns about the loss of judicial control over arbitration, or scepticism about the benefits of the Law. Overcoming this resistance requires education, training, and advocacy to demonstrate the advantages of adopting the Law.

Third, while the Model Law aims to harmonise arbitration laws, its effectiveness depends on how it will be interpreted and applied by the courts in Israel. There is a risk that the courts will interpret the provisions of the Model Law differently, leading to inconsistencies and undermining the goal of harmonisation. To address this challenge, it is important for courts to consider international jurisprudence and best practices when interpreting the Model Law.

Fourth, for the successful adoption and implementation of the Law, it is essential to build the capacity of legal professionals, arbitrators, and judges. This includes providing training on the principles and procedures of the Law, as well as developing expertise in international commercial arbitration. While Israel is moving towards this direction, there is still a lot to be done.

Conclusion

The adoption of the ICA Law presents both significant opportunities and challenges for jurisdictions around the world. By harmonising legal frameworks, attracting foreign investment, enhancing the efficiency of arbitration proceedings, and promoting legal certainty, the ICA Law offers substantial benefits for international commerce. However, this of course, will depend on the way the courts apply the law.

ITALY

Law and Practice

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LCA Studio Legale is an independent, full-service law firm, specialised in providing legal assistance to companies worldwide. Its offices are in Italy (Milan, Rome, Genoa, Treviso), Belgium (Brussels), and the United Arab Emirates (Dubai), where they operate in an International Partnership with IAA Middle East Legal Consultants LLP. Its growing dispute resolution practice, fielding over 50 lawyers (including ten partners), is significantly active in high-value, complex, and industry-shaping commercial and corporate litigation, often on a cross-border basis. The team is particularly expert in arbitration, both ad hoc and administered by Italian and foreign institutions, and alternative dispute resolution procedures (mediation, structured negotiation, and dispute boards). The practice represents major, multi-industry clients active in construction and real estate, energy and infrastructure, financial services, healthcare/life sciences, advertising, media, sports, manufacturing, fashion, and technology. Among them are Snam Rete Gas, Genoa CFC, Valentino, Fremantle, Marcegaglia, Siram S.p.A., Etihad, Volkswagen, Acea, and H&M.

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1. General

1.1 Prevalence of Arbitration

International arbitration is not the prevailing method of dispute resolution in Italy. However, domestic parties increasingly consider deferring their disputes to arbitration as a more rapid and efficient instrument than ordinary court proceedings.

The recent reform of civil proceedings, which will be addressed below, tried to make arbitration a more attractive dispute resolution method and set a more transparent and valuable system.

The narrow limits applying to the recognition and enforcement of arbitral awards are an additional element which makes the Italian system arbitration-friendly.

1.2 Key Industries

Italy has a long history of resolving corporate disputes through arbitration. Areas like construction and post-M&A transactions have experienced significant international arbitration activity, too. This is likely due to the involvement of entities from various countries. For the same reason, contracts governed by the CISG often include an arbitration clause.

1.3 Arbitration Institutions

The Milan Chamber of Arbitration (CAM) is the most used arbitral institution for international arbitration in Italy. The reason is that CAM has the resources and background to handle international arbitration procedures and is aligned with international best practices in administering arbitral proceedings.

Some Italian bar associations have established arbitral institutions that deal mainly with local arbitral procedures.

Also, Italy has a long tradition of ad hoc arbitration, in which parties do not rely on pre-established rules of arbitral institutions. These proceedings are governed by the Italian Code of Civil Procedure (CCP) only.

1.4 National Courts

In Italy, the Courts of Appeal (ie, the courts of second instance) are the courts designated to:

- hear disputes on the appeal of domestic arbitral awards;
- decide on the recognition of foreign awards and on the subsequent challenge.

All judgments of the Courts of Appeal can be further appealed to the Supreme Court (*Corte di Cassazione*).

Domestic courts of first instance might be involved in arbitral proceedings when provided by the law – eg, for the appointment or challenge of an arbitrator or in case of enforcement of domestic awards.

2. Governing Legislation

2.1 Governing Law

The CCP is the primary legal framework for arbitration in Italy.

Articles 806 to 832 of the CCP outline the key procedural rules for arbitration proceedings held in Italy, without prejudice to relevant international conventions in force. Articles 839 and 840 of the CCP focus on the recognition and enforcement of foreign arbitral awards in Italy.

Italy's arbitration law is not based on the UNCITRAL Model Law on international commercial arbitration but shares many core principles.

The recent "Cartabia reform" (see **2.2 Changes to National Law**) has filled the biggest gap between Italian legislation and the UNCITRAL Model Law concerning the possibility for arbitrators to grant interim measures.

2.2 Changes to National Law

On 28 February 2023, the so-called "Cartabia reform" for the reform of civil proceedings, introduced by the Italian Legislative Decree No 149 of 2022, entered into force and, among other things, introduced some changes to the national arbitration law.

The main, and most keenly awaited, innovation is the introduction of the arbitrators' power to grant interim measures. This was a significant factor that differentiated Italy from other major jurisdictions and was thought to be an obstacle to the growth of international arbitration in Italy. It must be added that such power must be conferred on the arbitral tribunal by the parties in writing, in the arbitration clause or by a specific agreement. However, a reference to the rules of an arbitral institution granting this power satisfies the condition.

Other significant innovations are:

- the addition of a new ground for the challenge of arbitrators for "serious reasons of convenience";
- the obligation upon each arbitrator to declare all circumstances that might compromise their impartiality and independence. Failure to disclose causes the invalidity of the acceptance of their appointment;
- the explicit provision that the decree declaring the effectiveness of a foreign award is immediately enforceable, although the term to submit the appeal to challenge the decree has not yet expired;
- the regulation of the "translatio iudicii" from arbitration proceedings to ordinary proceedings and vice versa; and
- the time limit to challenge an arbitration award through annulment proceedings, which has been shortened from one year to six months (however, the 90-day deadline to challenge an award upon service by the other party remains unchanged).

3. The Arbitration Agreement

3.1 Enforceability

The CCP, in Articles 807 and 808, establishes two ways in which parties can agree to settle disputes through arbitration (both hereinafter referred to as "Arbitration Agreement"):

- the arbitration clause (*Clausola Compromissoria*), included within an agreement to handle future disputes that may arise from that specific agreement;
- the arbitration agreement (*Compromesso*), which represents a separate agreement formed after a dispute has arisen, designed to submit that particular dispute to arbitration.

A key difference between the two is that the arbitration agreement must explicitly identify and clarify the specific dispute being submitted to arbitration.

By contrast, both the arbitration clause and the arbitration agreement must be in writing to be valid. In this regard, agreements entered into by telegraph, telex, fax are considered to have been made in writing. So is an agreement entered into by the so-called "certified email" (a particular email system widely used in Italy).

Furthermore, should one party unilaterally insert an arbitration clause into its general terms and conditions (if governed by Italian law), the clause must be specifically accepted in writing by the other party – ie, an acceptance of the overall general terms is not sufficient. Otherwise, according to Article 1341 of the Italian Civil Code, the arbitration clause will be deemed null and void.

3.2 Arbitrability

Whether a dispute can be settled through arbitration depends on the nature of the rights involved: according to Article 806 of the CCP, disputes concerning "non-disposable" rights (rights that are considered fundamental and essential to a person or society and that cannot be freely given up, transferred or inherited – eg, those commonly found in criminal law, personality rights and family law) are not arbitrable.

In this regard, the nature of a right (ie, if it is or is not disposable) is usually stated by the law itself or clarified by case law.

Disputes concerning individual employment agreements can be settled through arbitration only if provided by law or by the relevant national collective bargaining agreement (*contratto collettivo nazionale di lavoro*).

In addition, Article 808-bis of the CCP introduced the possibility of referring to arbitral jurisdiction even future disputes concerning one or more relationships, including non-contractual relationships, as long as they are specified and as long as the legal relationships referred to the arbitrators concern disposable rights.

3.3 National Courts' Approach

Arbitration agreements are mostly enforced by Italian courts. If a valid arbitration clause exists, both parties are obligated to use arbitration to settle disputes until a final award is issued.

As regards the law governing the Arbitration Agreement, before the Cartabia reform, the most common approach was to apply the conflict of laws rules (ie, Law 218 of 31 May 1995, without prejudice to the application of international conventions). Thus, the law governing the arbitration agreement was, by default, the one chosen by the parties – often the same one applicable to the agreement in which the arbitration clause was included. It should also be noted that, according to conflict of laws rules, agreements can be drafted to have separate legal rules apply to different sections of the same agreement. This means the law governing the arbitration clause might differ from the law that applies to the remainder of the agreement.

Under the revised Article 822 of the CCP, parties to an arbitration agreement have more flexibility in choosing the law that will govern their arbitration. They can now specify this law in two ways: (i) within the arbitration agreement itself, or (ii) through a separate written document entered into before the arbitration proceedings begin.

3.4 Validity

Article 808 of the CCP separates the validity of the arbitration clause from the validity of the agreement. This means that even if the agreement is found to be invalid, the arbitration clause can still be considered valid and enforceable.

4. The Arbitral Tribunal

4.1 Limits on Selection

In the arbitration agreement, the parties can decide how the arbitrators will be appointed. The only limitation that exists concerns the number

of arbitrators, which can be one or more, but always an odd number to avoid deadlock situations.

In this respect, Article 809 of the CCP provides that if an even number of arbitrators is indicated, an additional arbitrator shall be appointed by the president of the court competent for the arbitral seat.

While there may not be mandatory qualifications for arbitrators, choosing someone with expertise in the specific dispute benefits all parties. For the arbitrators, professional ethics dictate that they should decline the appointment if they lack the skills and knowledge necessary to deliver a fair award.

4.2 Default Procedures

According to Article 809 of the CCP, if the arbitration agreement does not specify the number of arbitrators and the parties are unable to agree, the arbitrators will then be three and will be appointed by the president of the court of the seat of the arbitration.

The competent court also appoints arbitrators if the appointing authority chosen by the parties to select arbitrators fails to do so.

The same provision also applies in case of multiparty arbitrations.

4.3 Court Intervention

In addition to what explained in **4.2 Default Procedures**, the court can also get involved in choosing arbitrators if one party fails to appoint their own (Article 810 of the CCP). In this case, the party who appointed its party-appointed arbitrator can file a motion to the court president. The president will then make the appointment, as long as the arbitration agreement seems valid and does not clearly provide for foreign arbitration.

Following the recent update of Article 810 of the CCP, the appointing authority shall ensure criteria of transparency, rotation and efficiency in the appointment of the missing arbitrator(s).

4.4 Challenge and Removal of Arbitrators

There are three main reasons why a party might challenge an arbitrator in a case (Article 815 of the CCP).

- Lack of qualifications – the arbitrator does not have the specific skills or experience that the parties originally agreed upon.
- Conflict of interest – the arbitrator has a financial stake in the outcome of the case, or a personal relationship with one of the parties or their lawyers.
- Lack of impartiality – while not explicitly stated, impartiality is ensured by allowing the parties to challenge the arbitrators for being related to a party or having ongoing legal disputes with them, for having assisted or represented a party in a previous phase of the dispute.

An important update to Article 815 of the CCP introduced by recent civil procedure reform (Cartabia reform) allows parties to challenge arbitrators for "serious reasons of convenience". This provides more flexibility in situations where an arbitrator might be perceived as biased but would not meet the traditional tests of conflict of interest or lack of qualifications. While the exact definition of "serious reasons of convenience" is not explicitly defined, it will likely be determined on a case-by-case basis. This means courts will consider the specific circumstances to determine if the reasons are significant enough to lead to replacing the arbitrator.

This addition brings the CCP more in line with international arbitration rules, which often have broad clauses for challenging arbitrators due to impartiality concerns.

A party cannot challenge an arbitrator they appointed unless they discover grounds to do so after the time of the appointment. Even then, they only have ten days to file a challenge with the court at the arbitration seat, starting from either the appointment date or when they discover the grounds for challenge.

The party that appointed the removed arbitrator may choose the substitute. If the arbitrator was chosen by an appointing authority, that authority will be responsible for finding a substitute.

4.5 Arbitrator Requirements

Upon acceptance of appointment, arbitrators are required to declare any circumstances that might raise doubts about their neutrality or independence. This declaration is mandatory and failure to do so may result in the removal of the arbitrator. The parties have ten days from the acceptance of the arbitrator or the discovery of the undeclared information to request the arbitrator's removal.

According to the rules of professional conduct, a lawyer must not assume the function of arbitrator when they have, or have had in the last two years, professional relations with one of the parties. The same applies to partners of the arbitrators and other lawyers who share the same premises as the arbitrators. The lawyer appointed as an arbitrator shall also disclose in writing to the parties any additional circumstance that may affect their independence.

Similar rules are provided in the arbitration rules of the Milan Chamber of arbitration. Indeed, Article 20 provides that the appointed arbitrators shall submit their statement of independence within a predetermined time limit. In the statement, the arbitrator shall disclose, specifying the time and duration:

- any relationship with the parties, their counsel and any other person or entity involved in the arbitration, even on a financial relationship basis, which may affect their impartiality or independence;
- any personal or economic interest, either direct or indirect, in the dispute; and
- any bias or reservation as to the subject matter of the dispute.

The statement shall be repeated in the course of the proceedings, if necessary, in case of supervening circumstances.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

Disputes concerning non-disposable rights cannot submitted to arbitration, save as otherwise provided by the law. For example, the right to life, integrity and privacy, or issues concerning personal status are non-disposable rights.

5.2 Challenges to Jurisdiction

In Italy, the principle of competence-competence applies, meaning arbitral tribunals have the authority to decide on their own jurisdiction.

This is confirmed by Article 817 of the CCP, which grants arbitrators the power to assess both their jurisdiction and the validity, scope, and content of the arbitration agreement.

To this purpose, any challenge to the arbitral tribunal's own jurisdiction shall be raised no later

than the first procedural activity following the arbitrators' acceptance of their appointment.

Article 819-ter strengthens this principle by stating that the jurisdiction of arbitrators is not excluded by the pendency of the same case before the court, or by the connection between the dispute referred to them and a case pending before the court. Moreover, during arbitration proceedings, national courts cannot determine the validity of the arbitration agreement.

5.3 Circumstances for Court Intervention

A court can address issues of jurisdiction of an arbitral tribunal only if the arbitration is not pending yet.

Pending arbitration proceedings, the court can address issues of jurisdiction only after the award is pronounced (see **11.1 Grounds for Appeal** on grounds for nullity).

Article 828 No 10 of the CCP offers a potential avenue to challenge negative rulings on jurisdiction by arbitral tribunals. This provision allows an appeal of the award if it fails to decide the merits of the dispute, even though the arbitral agreement mandated the arbitrators to do so.

5.4 Timing of Challenge

Parties have the right to go to court to challenge the jurisdiction of the arbitral tribunal only after an award has been rendered.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The standard of judicial review for questions of admissibility and jurisdiction is de novo.

5.6 Breach of Arbitration Agreement

When a valid arbitration agreement exists, and the respondent challenges the court's jurisdiction in their first defence, national courts must decline to hear the case on the merits. If the respondent fails to challenge the court's jurisdiction in time, the arbitral tribunal will no longer have jurisdiction over the dispute. Moreover, under Article 808 quater of the CCP, in case of doubts, arbitration agreements must be interpreted as to extend to all disputes connected with the agreement or the legal relationship concerned.

It follows that the courts do not allow proceedings in breach of arbitration agreements.

5.7 Jurisdiction Over Third Parties

Article 816-quinquies of the CCP regulates how additional parties that are neither parties to an arbitration agreement nor signatories to the contract containing the arbitration agreement can join an ongoing arbitration. The "original" parties involved in the arbitration, the arbitrators and the third party itself must agree for this to happen.

A third party is entitled to join either voluntarily or upon the request of another party. However, any third party with an interest in the outcome of the dispute can join the proceedings to support the position of an existing party; similarly, the original parties can always require the involvement of any necessary co-party in the proceedings.

Concerns have been raised in this regard. Since the third party cannot appoint an arbitrator of its choice, some argue that this might undermine the integrity of the arbitral tribunal. This issue is still unresolved.

The rules of the Milan Chamber of Arbitration delegate any decision on the joining of a third party to the arbitral tribunal, which will consider the position of all parties involved and the specific circumstances of the case to take a decision.

6. Preliminary and Interim Relief

6.1 Types of Relief

Overcoming the restriction established by the old Article 818 of the CCP, the new Article 818 authorises arbitrators to grant provisional measures. This is an innovation for the Italian legal framework, which had remained "de facto" isolated from other European legal systems that have long recognised such power. This means that the arbitrators will now have the power to issue any sort of interim measure depending on the law applicable to the arbitration proceeding.

The parties can grant the arbitrators such power in two ways: (i) by explicitly stating it in the arbitration agreement or in a subsequent written deed prior to the commencement of the arbitration proceedings, or (ii) by referencing a set of rules that grant arbitrators the power to issue interim measures. Since most major arbitration institutions already have such rules, it is clear that this simplifies the process in most of the arbitration proceedings.

In addition, Article 816-bis(3) of the CCP empowers the arbitrators to issue a preliminary award and a preliminary order on all matters involved in the arbitration proceedings, which can be reviewed and potentially modified by the arbitrators later in the proceedings.

6.2 Role of Courts

Article 818 of the CCP introduces exclusivity for arbitrators in issuing interim measures. If the parties grant this power to arbitrators, courts can only intervene pre-emptively – meaning before the arbitrator officially accepts the appointment, without such an application being deemed to be a waiver of the arbitration agreement. Once the arbitrator takes on the case, the court's authority to issue these measures is permanently lost.

Parties may appeal interim measures issued by arbitrators before the court of appeal. However, appeals are limited to the specific grounds stated in Article 829(1) of the CCP or if the measures violate the public order.

While appeals are handled by the court of appeals, the implementation of the interim measures shall, instead, be carried out under the supervision of the ordinary court of first instance. In this respect, new Article 818-ter provides that interim measures granted by arbitrators shall be enforced under the control of the court in whose district the arbitration seat is located. If the seat of arbitration is not in Italy, the competent court will be that of the place where the interim measure must be implemented.

6.3 Security for Costs

Italian law does not include any specific provisions concerning security for costs.

However, some scholars argue that security for costs may be ordered by arbitral tribunals under the conditions provided by the law applicable to the arbitration proceedings (ie, provided that the parties have expressly granted arbitrators the power to issue interim measures or have referred to an institutional regulation in the Arbitration Agreement that expressly gives the arbitrators such power, including the power to grant security for costs).

7. Procedure

7.1 Governing Rules

The CCP acts as the primary source for both litigation and arbitration procedures. Articles 806 to 832 of the CCP specifically govern arbitral proceedings that have their seats within Italian territory, without prejudice to any relevant inter-

national conventions. The "Cartabia reform" moved the regulation of corporate arbitration into new Articles 838-bis to 838-quinquies. Articles 839 and 840 of the CCP address the recognition and enforcement of foreign arbitral awards.

The CCP grants parties flexibility in shaping the arbitration process. They can either:

- establish the rules – this involves explicitly outlining the specific procedures to be followed in the arbitration agreement. Parties can also reference existing national laws or established arbitration rules from institutions; or
- empower the arbitrators – parties can choose to grant the arbitrators the authority to determine the procedural rules. This includes the power to address any unforeseen situations not covered by the existing legal framework.

The Italian legal system recognises a distinction between free arbitration (*arbitrato irrituale*) and the standard contractual arbitration (*arbitrato rituale*). In standard arbitration, the resulting award carries the weight of a judgment, with specific grounds for challenge. *Arbitrato irrituale*, on the other hand, deems the arbitrator's decision as a binding agreement, subject to different legal considerations.

Special provisions apply to arbitration proceedings involving labour law, and arbitration proceedings involving individuals and/or companies on one hand and public entities on the other.

7.2 Procedural Steps

Article 816-bis of the CCP establishes a key principle for Italian arbitration proceedings. In the absence of a specific agreement between the parties, either outlined in the arbitration agreement or established prior to the commencement of the proceedings, arbitrators hold the authority to determine the appropriate procedures. However, this freedom comes with a crucial safeguard: the "adversarial principle" (*principio del contraddittorio*). This principle ensures that both parties receive a fair and equal chance to be heard throughout the arbitration proceedings.

7.3 Powers and Duties of Arbitrators

Considering the freedom granted by the CCP, arbitrators have wide-ranging powers throughout the arbitration proceedings, including the specific powers explored in this Guide (see, for example, **6.1 Types of Relief** and **8.1 Collection and Submission of Evidence**).

In 2006, a comprehensive set of rules governing arbitrators' duties was established. Among others, an arbitrator must:

- uphold independence and impartiality – arbitrators must be and remain free from any influence or bias towards either party throughout the arbitration;
- ensure fairness and good faith – the arbitration process must be conducted in a just and equitable manner, adhering to the principles of good faith;
- maintain confidentiality – all aspects of the arbitration, including information and arguments presented, must be kept confidential by the arbitrators; and
- deliver a reasoned and timely award – the arbitrators are obligated to issue a well-reasoned decision within the designated timeframe.

If an arbitrator fails to comply with the aforementioned duties, they may be held liable for any damages suffered by the parties. The same liability also applies in the event that an arbi-

trator withdraws from office without reasonable grounds.

7.4 Legal Representatives

Although Italian law does not require legal representation during arbitration, it is strongly recommended. Ideally, the representative chosen should have expertise in both Italian law and international arbitration.

The rules on representative mandate apply to the party-defendant relationship, which can be established either with individuals registered as lawyers or with individuals who have no special professional qualifications. In the event that they are appointed, defence attorneys are now granted extended powers to any procedural action, even without express indication of the parties, including the waiver of claims and the determination or extension of the time limit for the pronouncement of the award (Article 816-bis of the CCP).

By contrast, legal representation by an Italian qualified lawyer becomes mandatory in the event that the dispute moves to the Italian courts, including the appeal of arbitration awards.

8. Evidence

8.1 Collection and Submission of Evidence

According to Article 816-bis of the CCP, the parties may agree on the procedural rules that the arbitrators shall follow in the proceedings. Failing an agreement by the parties, the arbitrators can proceed in the manner that they deem most suitable, provided that the parties' right to be heard is respected.

Arbitrators generally approach the collection and submission of evidence by replicating the instruments provided by the CCP. Therefore, there is very limited disclosure. Also, expert witnesses are appointed by tribunals and the parties can appoint a party's witness expert who will discuss the technical issues with the arbitral tribunal's appointed expert.

Sometimes, however, arbitrators might be more willing to adopt international standards in the collection of evidence, allowing the use of witness statements and cross-examination.

8.2 Rules of Evidence

The rules of evidence follow the same principles mentioned in **8.1 Collection and Submission of Evidence**.

8.3 Powers of Compulsion

Arbitrators in Italy lack the power to compel a witness to appear before them. However, they can apply to the court to obtain a compelling order.

If the parties have not set different rules, the arbitrators have the power to order the production of documents by the parties.

9. Confidentiality

9.1 Extent of Confidentiality

Italian arbitration legislation is silent on confidentiality. This means there is no legal requirement for confidentiality by default.

However, strong confidentiality safeguards exist in practice. These come from two key sources:

- arbitral rules – many arbitral institutions, like the Milan Chamber of Arbitration (CAM),

have their own rules that often include robust confidentiality provisions. Parties choosing these institutions would be bound by such rules; and
- professional conduct regulations – arbitrators themselves are typically subject to professional codes of conduct that emphasise confidentiality obligations.

As a result, while not mandated by law, confidentiality is generally a hallmark of arbitration proceedings seated in Italy.

Information used in arbitral proceedings cannot be disclosed in subsequent proceedings, unless the parties involved agree.

10. The Award

10.1 Legal Requirements

The award is determined by a majority vote of the arbitrators. It must be a written document including the following information:

- names of the arbitrators;
- seat of the arbitration proceedings;
- details of the parties involved in the dispute;
- reference to the arbitration agreement and the parties' final claims;
- reasoning behind the decision;
- verdict of the arbitral tribunal; and
- signatures of the arbitrators and award date.

The majority of arbitrators must sign the award, explicitly stating if any other arbitrators were unable or unwilling to do so. The award becomes effective upon the final signature and must be delivered to both parties within ten days.

In the absence of a specific timeframe established by the parties, the arbitrators have 240 days to issue the award, starting from the constitution of the arbitral tribunal. This period may be automatically extended by another 180 days under certain circumstances, including:

- collection of testimony;
- appointment of an expert by the tribunal;
- issuance of a partial or provisional award; and
- replacement of an arbitrator.

The time limit may also be extended by order of the court, at the request of the arbitrator or one or all parties, or by agreement.

10.2 Types of Remedies

If the matter is arbitrable, the arbitrators may grant any remedy provided by law.

Although arbitral tribunals in Italy generally have broad discretion in determining the appropriate remedy under the applicable law, there are some limitations.

In this regard, all awards must conform to Italian public policy. This means that the award cannot contain elements that substantially contradict Italian legal principles. Awards that violate public policy risk being set aside by the competent Court of Appeal.

Punitive damages, for instance, may be considered compatible with Italian public policy on the basis of past rulings of the Italian Supreme Court (*Corte di cassazione civile, Sezioni Unite, sentenza*05/07/2017 No 16601).

10.3 Recovering Interest and Legal Costs

As long as the matter is arbitrable, arbitrators may award interest in accordance with the applicable law.

The allocation of legal costs, as a procedural matter, is governed by the arbitration agreement. The agreement may refer to specific institutional rules governing the allocation of legal fees and the costs of the arbitration.

If the arbitration agreement is silent on the subject and both parties seek reimbursement of legal fees, it is generally considered that they have implicitly agreed on the allocation of costs. However, if neither party seeks an award for legal fees, the court cannot award them because they have not been requested.

In most cases, arbitral tribunals follow a proportional approach. The allocation of costs reflects the relative success of the parties on the merits of the case. Sometimes other factors, such as the conduct of the parties during the proceedings, may also be taken into account when determining the final allocation of costs.

11. Review of an Award

11.1 Grounds for Appeal

In Italy, challenging an arbitration award on the merits is uncommon. The parties generally have to opt in to appeal on the merits, but this is rare.

Instead, challenges are mainly limited to the formal grounds specified in Article 829 of the CCP, known as "grounds for nullity". These grounds include:

- invalid arbitration agreement – the agreement outlining the arbitration process is not legally valid;
- improper appointment of arbitrators – the arbitrators were not appointed according to established procedures;
- lack of capacity of arbitrators – the arbitrators did not have the necessary legal qualifications to hold the position;
- overstepping the scope – the award addressed issues beyond the scope of the originally agreed arbitration;
- lack of components of the award – the award lacks essential elements such as the grounds, rulings, or signatures of the arbitrators;
- violation of timeframe – the award was issued after the deadline had expired;
- procedural violations – failure to comply with mandatory procedural steps outlined in the arbitration agreement, if not remedied;
- conflict with previous rulings – the award contradicts a previous final and binding judicial decision or an arbitration award submitted during the proceedings; and
- unequal opportunity to present the case – one or both parties were denied a fair opportunity to present their arguments.

Although "grounds for nullity" are the main grounds for challenging an award, there are some exceptional circumstances: (i) revocation due to fraud – if a party discovers evidence of fraud committed by the other party or an arbitrator after the award has been issued, revocation may be sought; (ii) revocation due to newly discovered evidence – similarly, if a party discovers crucial documents previously hidden by the actions of the other party, this too may be grounds for revocation; (iii) opposition by third parties – in rare cases, a third party not involved in the arbitration may challenge the award if it significantly impairs its legal rights.

A party seeking to have an award declared null and void must file a summons with the court at the arbitration's seat within 90 days of receiving the award. If formal service of the award never occurred, the deadline is extended to six

months from the date of the last arbitrator's signature. For challenges based on revocation due to fraud or newly discovered evidence, or third-party opposition, the deadline is stricter. The interested party has 30 days from the date they become aware of the circumstances triggering the challenge to file with the court.

11.2 Excluding/Expanding the Scope of Appeal

An agreement entered into by the parties for the purpose of excluding/extending rights to appeal will not be valid.

However, the party who caused the ground for nullity, or waived it, or who has not objected in the first subsequent application or request to a violation of a rule governing the conduct of the arbitral proceedings, cannot challenge the award on that ground.

11.3 Standard of Judicial Review

Article 830 of the CCP aims to balance two competing interests. On the one hand, it seeks to uphold the arbitrator's authority to decide on the substance of the case. On the other hand, it aims to prevent an unreasonable delay in resolving the dispute if the Court of Appeal decides on the merits.

The Article outlines the court's actions upon upholding an appeal for nullity of the award. If the grounds for nullity fall within a specific category, the Court of Appeal will issue a judgment setting aside the award. However, for a different set of nullity reasons outlined in the same Article, the Court of Appeals will itself decide the merits of the dispute, unless the parties have a prior agreement – either in the original arbitration agreement or a subsequent one – specifying otherwise.

Moreover, if one of the parties, as of the date of signing the arbitration agreement, resides or has its actual place of business abroad, the court of appeal shall decide the dispute on the merits only if the parties have so determined in the arbitration agreement or agree to do so.

12. Enforcement of an Award

12.1 New York Convention

Italy signed the New York Convention without reservations.

12.2 Enforcement Procedure

Articles 839 and 840 of the CCP govern the recognition and enforcement of a foreign award. These Articles replicate the content of Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

In the first phase of the proceedings, the party seeking enforcement of an international award in Italy shall resort to the president of the Court of Appeal where the counterparty resides. If the counterparty resides outside of Italy, the competent Court of Appeal shall be that of Rome. The party seeking enforcement must file the award with the competent court, along with the arbitration agreement. The court will only check if the award meets the formal requirements provided for by law and provides (or denies) the declaration of enforceability by decree.

In the second (potential) phase, one party can challenge the decree.

If the award has not yet become binding or has been set aside or suspended by a competent authority of the state of the seat or of the law under which it has been issued, the Court of Appeal denies its enforcement. If a party

requested the annulment or the suspension of the validity of the foreign award to the foreign competent authority of the seat, the Court of Appeal may stay the proceedings for the recognition or enforcement of the award; upon request by the party concerned, it may, in the event of a stay, order that the other party give an appropriate security.

A foreign state can invoke sovereign immunity to object to the enforcement of arbitral awards and shield its property and assets used to perform its sovereign functions. On the other hand, property and assets related to private functions can be subject to enforcement proceedings.

12.3 Approach of the Courts

Italian courts tend to recognise and enforce arbitral awards.

Domestic courts refuse to enforce arbitral awards on public policy grounds by referring to international public policy, avoiding the implementation of values incompatible with the Italian legal system's inspiring principles, as provided by the Constitution and all those laws equated with it.

13. Miscellaneous

13.1 Class Action or Group Arbitration

The CCP does not contain provisions that allow for class-action arbitration or group arbitration.

However, Article 816-quater of the CCP does allow for combining multiple claims into a single arbitration case, provided that (i) the arbitration agreement devolves the appointment of arbitrators to a third party, (ii) the arbitrators are appointed by agreement of all the parties, or (iii) the other parties, after the first party has appointed their arbitrator or arbitrators, appoint by agreement an equal number of arbitrators or entrust a third party with the appointment of arbitrators.

13.2 Ethical Codes

There is no ethical code in Italy specifically intended for counsel and arbitrators conducting proceedings. However, if admitted to practice law in Italy, counsel and arbitrators are subject to the provisions of the code of professional ethics.

Moreover, some arbitral institutions have their own code of ethics for arbitrators (eg, the code of ethics for arbitrators of the Milan Chamber of Arbitration is an annex to the arbitration rules).

13.3 Third-Party Funding

There are no rules in Italy applicable to third-party funding and there is no legal obstacle to use it in arbitration. However, it is still uncommon in Italy.

13.4 Consolidation

While the CCP does not explicitly address consolidating separate arbitration proceedings, it is generally considered permissible under certain conditions. In particular, all parties involved in the separate proceedings must consent to consolidation and the arbitration agreements, involved parties, and arbitral tribunal for the separate proceedings must be the same.

In practice, many arbitral institutions' rules provide guidance on consolidation. For instance, the Milan Chamber of Arbitration empowers its arbitrators to decide whether to consolidate multiple proceedings connected to the same dispute.

13.5 Binding of Third Parties

In Italy, arbitration agreements typically only bind the parties who signed them.

Arbitration agreements can extend to third parties if provided for by law, either expressly or pursuant to interpretation by the courts.

For example, Article 838 bis of the CCP provides that the arbitration clause included in the company's by-laws is binding for shareholders and corporate bodies. It can be argued that shareholders implicitly accepted the arbitration clause included in the articles of association. However, this argument is weaker for members of the corporate bodies, which simply accept an appointment.

JAPAN

Law and Practice

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TMI Associates is one of Japan's leading law firms in dispute resolution, having handled hundreds of cases involving commercial disputes, intellectual property, tax, administrative disputes and other types of matters worldwide. TMI is able to look at the nature of each case and form legal teams staffed with lawyers who are also qualified as specialists in related fields, including medical doctors, architects, accountants and patent attorneys with diverse technological backgrounds. To develop TMI's litigation strategy, the firm draws on advice from TMI attorneys with distinguished backgrounds in public service, including former judges (including retired Supreme Court Justices) and prosecutors (including a former Prosecutor General) to assimilate their viewpoints to the clients' advantage. TMI lawyers also have significant experience in international arbitration cases before arbitral institutions including the ICC, LCIA, AAA and JCAA, in the role of both counsel and arbitrator.

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1. General

1.1 Prevalence of Arbitration

According to a 2019 survey commissioned by the Ministry of Justice (MOJ), 85% of the Japanese companies involved in international transactions responded that they have an arbitration clause in their contracts. While Japanese companies recognise the importance of international arbitration for the resolution of cross-border disputes, they are not frequent users of international arbitration. The Japan Commercial Arbitration Association (JCAA) received only 9 international arbitration cases in 2023. Since 2017, the Japanese government has taken initiatives to promote international arbitration in Japan along with Japanese practitioners in the arbitration community. According to a government document from June 2024, it is not necessarily considered appropriate to use the number of arbitration cases as a key indicator in promoting measures to activate international arbitration in Japan. Instead, it is deemed important to spread international arbitration in regions with close economic ties to Japan and to aim for the inclusion of more arbitration clauses that designate Japan as a place of arbitration and hearing.

1.2 Key Industries

While there is no publicly available data to demonstrate whether any industry has experienced significant changes in its international arbitration activity, the majority of arbitration cases handled by the JCAA involve disputes arising from sales or distributor contracts.

1.3 Arbitration Institutions

The JCAA is the arbitral institution most used in Japan to resolve business-related disputes. The Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange Inc. is used to handle maritime arbitrations.

1.4 National Courts

Under Japan's Arbitration Act (Act No 138 of 2003) ("Arbitration Act"), the following three district courts have exclusive jurisdiction with respect to any court procedures contemplated under the Act: (i) the court agreed by the parties, (ii) the court presiding over the place of arbitration, and (iii) the court having jurisdiction over the location of the general venue of the respondent (such as residence or headquarter office). Furthermore, to establish courts specialised in handling disputes related to international arbitration, the amended Arbitration Act, which was promulgated on 21 April 2023 and came into effect on 1 April 2024 ("Amended Arbitration Act"), grants concurrent jurisdiction over such disputes to the district courts in Tokyo and Osaka (see **2.2 Changes to National Law**).

2. Governing Legislation

2.1 Governing Law

The law governing international arbitration seated in Japan is the Arbitration Act, which is based on the UNCITRAL Model Arbitration Law on International Commercial Arbitration ("Model Law") of 1985. However, compared with the Model Law, the following provisions are unique to Japan.

- For the convenience of parties having difficulty obtaining materials to prove the delivery of a notice in arbitration proceedings, a party may request a court's assistance to serve written notices.
- The arbitral tribunal or the arbitrator(s) may facilitate a settlement only "with the consent of both parties". Settlement is frequent in Japanese arbitration practice. This provision clarifies the requirement to do so.

- In the absence of an agreement by the parties, the arbitral tribunal shall decide arbitrator remunerations. Under Japanese law, an arbitrator's contract is interpreted as a contract of mandate (or one similar to it), and under the Civil Code of Japan, a mandatary cannot claim remunerations in the absence of any special agreements. Since it is not in line with the actual practice to pay remunerations to arbitrators, this provision was stipulated.
- To protect consumers, the Arbitration Act provides a special provision that allows consumers to terminate, without cause, arbitration agreements regarding future civil disputes that may arise between a consumer and a business entity.

2.2 Changes to National Law

In 2017, the Japanese government adopted a policy to revitalise international arbitration in Japan and develop the judicial infrastructure necessary for its promotion. As part of this policy, the MOJ established the Arbitration Act Subcommittee of the Legislative Council in October 2020 in an effort to align the Arbitration Act with the Model Law, as amended in 2006. The Amended Arbitration Act, which came into effect on 1 April 2024, offers amendments to the rules regarding an arbitral tribunal's interim measures (see **6. Preliminary and Interim Relief**) and relaxing the "in writing" requirement of an arbitration agreement (see **3.1 Enforceability**). In addition, the Amended Arbitration Act offers changes to the rules on arbitration-related court cases by (i) granting concurrent jurisdictions to the district courts in Tokyo and Osaka to concentrate expertise to handle arbitration-related cases, and (ii) allowing the court to exempt the parties from submitting translations of the arbitral award and other documentary exhibits prepared in languages other than Japanese in certain cases to reduce the parties' burden.

3. The Arbitration Agreement

3.1 Enforceability

An arbitration agreement shall be in writing, such as in the form of a document signed by all the parties, or letters or telegrams exchanged between the parties (including those sent by facsimile device or other communication measures for parties at a distance which provide the recipient with a written record of the communicated content).

If an arbitration agreement is made in an electromagnetic record recording the contents thereof, such arbitration agreement shall be deemed to be in writing.

The Amended Arbitration Act provides that if a contract that is not in writing refers to a document or electronic data containing an arbitration agreement and incorporates it as forming part of such contract, then the requirement that the arbitration agreement be in writing is deemed to have been met.

3.2 Arbitrability

An arbitration agreement shall be effective only when the subject thereof is a civil dispute (excluding disputes concerning divorce or the dissolution of an adoptive relation) which can be settled between the parties.

In addition, arbitration agreements covering individual labour-related disputes are currently considered invalid. Furthermore, currently, from the point of view of consumer protection, consumers may cancel consumer arbitration agreements concluded with a business entity.

3.3 National Courts' Approach

The governing law of the arbitration agreement shall be determined by agreement of the parties

and, in the absence of agreement of the parties, the law of the place of arbitration.

Japanese courts can be said to be "pro-arbitration". For example, in its decision of 1 August 2018, the Tokyo High Court stated: "In interpreting the Arbitration Act... we should bear in mind an interpretation common to the arbitration laws of other countries, an interpretation that is internationally accepted." In the case of a request to set aside an arbitral award, it is not permissible to conduct a substantive review of the arbitral award. The national court of the place of arbitration may not intervene in an arbitral award and set it aside merely based on erroneous fact-finding or legal judgment (which does not constitute grounds to set aside an arbitral award).

Statistics between 2004 and 2016 indicate that out of 34 cases filed at the Tokyo District Court, approximately 70% were granted an execution order. The proceedings at the Tokyo District Court required less than six months for approximately 50% of the cases, and less than a year for an additional 25%.

Furthermore, statistics during the same period indicate that of 23 petitions to set aside an arbitral award in the Tokyo District Court, only one case was granted, while 17 other cases were either denied, dismissed or withdrawn (four cases were still pending at the time, and one case settled).

3.4 Validity

Even if clauses of the contract other than the arbitration clause are invalid due to nullity, rescission or for any other reasons, it does not render the arbitration clause invalid. The Arbitration Act recognises the doctrine of separability of arbitration clauses.

4. The Arbitral Tribunal

4.1 Limits on Selection

The Arbitration Act does not require any specific qualifications for an arbitrator to be selected by the parties.

In Japanese practice, academic experts who are not qualified as lawyers have acted as arbitrators in areas such as commercial arbitration, maritime arbitration and construction arbitration.

Where the parties to an arbitration agreement have agreed on qualifications required of the arbitrators (eg, lawyers, industrial experts or former judges), such requirements will be upheld.

4.2 Default Procedures

Under the Arbitration Act, if there are two parties, and an agreement on the number of arbitrators has not been reached, there shall be three arbitrators. If there are two parties and the number of arbitrators is three, and the procedure to appoint an arbitrator has not been agreed, the parties shall each appoint one arbitrator, and the two arbitrators appointed by the parties shall appoint the third arbitrator.

In either of the following cases where there will be three arbitrators, the court will appoint the arbitrator upon the petition of one of the parties:

- if one party fails to appoint an arbitrator within 30 days from the day on which it received a demand to appoint an arbitrator from the other party that has already appointed an arbitrator; or
- if the two arbitrators appointed by the parties fail to appoint the third arbitrator within 30 days from their appointment.

If the parties agreed to have one arbitrator but are unable to reach an agreement for the appointment, the court shall appoint the arbitrator, upon the petition of one of the parties.

If there are three or more parties, and the number of arbitrators has not been agreed, the court will decide the number of arbitrators, upon the petition of a party. In this case, the court will appoint the arbitrator upon the petition of a party if the procedure for the appointment of arbitrators has not been agreed, or if the agreed-upon appointment procedure does not result in the appointment of an arbitrator.

If it is no longer possible to appoint arbitrators in accordance with the procedure agreed by the parties (for example, a third party entrusted by the parties to appoint the arbitrators passes away before making the appointment), then one of the parties may file a petition to have the court appoint the arbitrator.

4.3 Court Intervention

Please refer to **4.2 Default Procedures** for cases where the court appoints an arbitrator.

In appointing an arbitrator, the court must consider the following:

- the requirements for the arbitrator as provided by the agreement of the parties;
- the impartiality and independence of the person to be appointed; and
- in cases involving an appointment of a sole arbitrator or the third arbitrator to be appointed by two party-appointed arbitrators, whether it is appropriate to appoint a person whose nationality is different from those of both parties.

However, it is not possible to appeal against the court's appointment decision.

4.4 Challenge and Removal of Arbitrators

A party may challenge the appointment of an arbitrator if the arbitrator fails to satisfy the requirements provided by the agreement of the parties, or there are reasonable grounds to doubt the impartiality or independence of the arbitrator.

A party may file a petition to the court to dismiss an arbitrator if the arbitrator has become de jure or de facto unable to perform his or her duties, or the arbitrator unjustly delays the performance of his or her duties.

4.5 Arbitrator Requirements

A person who has been requested to become an arbitrator must disclose all facts that would be likely to give rise to doubts as to his or her impartiality or independence before accepting the nomination.

Furthermore, during the arbitration proceedings, an arbitrator must, without delay, disclose to the parties all facts that would be likely to give rise to doubts as to his or her impartiality or independence.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

Under the Arbitration Act, civil disputes which can be settled between the parties are considered arbitrable, except as otherwise provided by law. Disputes concerning divorce or the dissolution of an adoptive relation cannot be referred to arbitration. In addition, for protection of employees, individual labour-related disputes arising in the future are also not arbitrable. Furthermore, to protect consumers, consumers may terminate

an arbitration agreement for civil disputes which may arise in the future between the consumer and a business entity, even if the agreement has been already concluded between them.

5.2 Challenges to Jurisdiction

An arbitral tribunal may rule on its own jurisdiction.

5.3 Circumstances for Court Intervention

If the arbitral tribunal has ruled that it has jurisdiction in its independent decision made before an arbitral award, a party may petition a court to rule on whether the tribunal has jurisdiction without waiting for a final award. In addition, if the tribunal has made an arbitral award based on the assumption that it has jurisdiction, a party may file a petition with the court to set aside the award.

Among the published Japanese court precedents, none has set aside an arbitral award on the grounds that the arbitral tribunal lacked jurisdiction. In this sense, Japanese courts are generally reluctant to intervene in arbitral proceedings.

On the other hand, if the arbitral tribunal denies its own jurisdiction, whether in its "independent decision before an arbitral award" or as part of the final award, a party may not petition the court to challenge the tribunal's ruling on its jurisdiction.

5.4 Timing of Challenge

If a party files a petition with a court to challenge an "independent decision before an arbitral award" in which the arbitral tribunal affirmed its own jurisdiction, the party may file such a petition only within 30 days after receiving notice of the decision.

If a party requests the court to set aside an arbitral award, the party may file such a petition within three months from the date of notification of the award; provided, however, that the petition may not be filed after the execution order of the arbitral award has become final and binding.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The court will review the arbitral tribunal's jurisdiction ruling de novo, without being bound by the arbitral award or the independent decision before the arbitral award.

5.6 Breach of Arbitration Agreement

If an action is filed for a civil dispute which is subject to an arbitration agreement, the court must dismiss the action without prejudice, upon the petition of the defendant. However, the action cannot be dismissed in the following cases:

- if the arbitration agreement is not valid due to nullity, rescission or for any other reasons;
- if it is impossible to carry out an arbitration procedure based on an arbitration agreement; or
- if said petition was filed after the defendant presented oral arguments on the merits or made statements on the merits in preparatory proceedings.

5.7 Jurisdiction Over Third Parties

The Arbitration Act does not provide under what circumstances a person or entity that is neither a party nor a signatory to an arbitration agreement is bound by the arbitration agreement. Please refer to **13.5 Binding of Third Parties**.

6. Preliminary and Interim Relief

6.1 Types of Relief

Unless otherwise agreed by the parties, the Amended Arbitration Act provides that an arbitral tribunal may, upon the petition of one party, order the following five categories of interim measures which the tribunal deems necessary with respect to the subject matter of the dispute.

- Prohibiting the disposal or alteration of assets necessary for the payment of a monetary claim when there is a risk that the claim may become difficult to enforce or encounter significant difficulty in doing so.
- Prohibiting the disposal or alteration of a property that is the subject of a non-monetary claim when there is a risk that the claim may become difficult to enforce or encounter significant difficulty in doing so.
- Taking measures necessary to prevent significant damage or imminent danger to the petitioning party concerning the property or rights involved in the dispute or restore the status quo thereof.
- Prohibiting conduct that interferes with arbitration proceedings.
- Prohibiting the destruction, erasure or alteration of evidence necessary for arbitration proceedings.

6.2 Role of Courts

In Japan, before the commencement of or during arbitral proceedings, parties to an arbitration agreement may petition a court to issue a provisional order under the Civil Provisional Remedies Act. There are two kinds of provisional order: provisional seizure (an order to provisionally seize a debtor's property in order to preserve a monetary claim) and provisional disposition (an order to preserve the status quo of the subject matter in dispute or establish an interim relationship between the parties). A court may issue a provisional order even if the seat of arbitration is outside of Japan or undetermined, so long as the asset to be provisionally seized or the disputed subject matter is located in Japan.

Under the Amended Arbitration Act, a party may enforce an arbitral tribunal's order for interim measures by obtaining an execution approval order from a competent court regardless of the place of the seat of arbitration. A court may not refuse to issue an execution approval unless there are exceptional grounds for refusal, which are similar to the grounds for setting aside an award (see **11.1 Grounds for Appeal**). If an execution approval order is obtained for an order for interim measures under category (c) described in **6.1 Types of Relief** above, a party may enforce the final and binding execution approval order pursuant to the Civil Execution Act. For other categories described in **6.1 Types of Relief** above, a competent court may issue an order allowing to issue an order for payment of penalty to an offending party if the court finds that the offending party violates or is likely to violate the order for interim measures. Upon the petition of the party that filed for the order for interim measures, a competent court may issue an order for payment of penalty. A competent court may issue an execution approval order and order for payment of penalty at the same time. The amount of the penalty shall be determined by the court, taking into consideration the nature and content of the interest to be impaired by the violation of the order for interim measures and the manner and extent of such impairments.

A party may enforce the execution approval order and order for payment of penalty pursuant to the Civil Execution Act if the said orders are final and binding.

The Arbitration Act does not provide rules concerning emergency arbitrators. The Amended Arbitration Act does not offer any new rules with respect to emergency arbitrators.

6.3 Security for Costs

In issuing an order for interim measures by an arbitral tribunal, the tribunal may order provision of appropriate security if the tribunal finds it necessary. The Amended Arbitration Act provides that the tribunal may order a party that filed the petition for an order for interim measures to provide appropriate security.

As for a court's provisional order, the court may also require a requesting party to provide security when issuing one.

7. Procedure

7.1 Governing Rules

The Arbitration Act stipulates that the rules of the arbitral proceedings to be followed by the arbitral tribunal shall be agreed upon by the parties. However, the rules cannot violate the provisions of the Act concerning public policy. Provisions concerning public policy are construed to mean mandatory provisions. Whether a provision is considered mandatory is judged on a case-by-case basis according to the wording and purpose of each provision of the Act. For example, equal treatment of the parties and the guarantee to provide full opportunity for each party to present its case are considered mandatory.

In the absence of such agreement, the arbitral tribunal may conduct the arbitral proceedings in such manner as it considers appropriate, unless it is contrary to the provisions of the Act.

7.2 Procedural Steps

The Arbitration Act requires the following procedural steps to be taken:

- An arbitral tribunal may hold an oral hearing for the purpose of having the parties submit evidence or state their opinions. However, if a party files a request for an expert witness to appear or otherwise petitions to hold an oral hearing, the tribunal must hold the oral hearing at an appropriate time in the arbitral proceedings.
- An arbitral tribunal must notify the parties the date, time and place of the oral hearing reasonably in advance of the actual date of the hearing.
- If a party has provided an arbitral tribunal with a written allegation, documentary evidence or any other records, the party must ensure that the other party is aware of their contents.
- An arbitral tribunal shall take steps to enable all the parties to know the content of the expert's report and other evidentiary materials which form the basis of the tribunal's decision.

With the exception of mandatory provisions, parties may agree otherwise regarding the above procedures (see **7.1 Governing Rules**).

7.3 Powers and Duties of Arbitrators

Powers of Arbitrators

The powers given to arbitrators under the Arbitration Act include the following.

- An arbitral tribunal may rule on whether or not it has jurisdiction.
- Unless otherwise agreed between the parties, the arbitral tribunal may, on application of either party, order interim measures or provisional measures as the tribunal deems necessary for the subject matter of the dispute.

- An arbitral tribunal may order that all documentary evidence be accompanied by a translation into the language to be used in the arbitral proceedings as agreed upon by the parties or as determined by the decision of the arbitral tribunal (or, where there is a language to be used for the translation, in that language).
- An arbitral tribunal may appoint one or more expert witnesses, have them give expert opinions on necessary matters, and have them report the results in writing or orally.
- An arbitral tribunal or a party may petition a court to commission an investigation, examine witnesses, designate an expert to provide testimony, order production of documents, and perform inspection pursuant to the Code of Civil Procedure, which the arbitral tribunal finds necessary.
- If a settlement agreement is reached between the parties during the course of an arbitral proceeding, the arbitral tribunal may, upon motion from both parties, decide to render the content of the agreement as an arbitral award.
- The arbitral tribunal may, upon motion of a party or sua sponte, correct any mistake in the calculation, any clerical error or any other similar error in the arbitral award.

Duties of Arbitrators

The main duties of arbitrators under the Arbitration Act include the following.

- Arbitrators must treat the parties equally and give full opportunity to present the case.
- Arbitrators must prepare a written arbitral award and sign it as the arbitrators making the award. However, where the arbitral tribunal is a panel, it suffices to have the signatures from the majority of the arbitrators constituting the tribunal and state the reasons for lacking the signature from the other arbitrator.
- An arbitrator shall, during the course of the arbitral proceedings, disclose to the parties, without delay, all facts that may raise doubt as to his or her impartiality or independence.

7.4 Legal Representatives

A *bengoshi* (a lawyer admitted to practice in Japan) is qualified to provide representation in arbitration, whether domestic or international. A certified judicial scrivener may also provide representation in an arbitration case if the amount in controversy does not exceed JPY1.4 million. In addition, a patent attorney is qualified to provide representation in certain arbitration cases involving intellectual property disputes conducted by an organisation designated by the Minister of Economy, Trade and Industry.

Foreign lawyers may provide representation in an "international arbitration case" as defined under the Act on Special Measures Concerning the Handling of Legal Services by Foreign Lawyers (the "Gaiben Act").

In 1996, the Gaiben Act was amended to liberalise representation in international arbitration proceedings. However, "international arbitration case" was limited to cases where some or all of the parties had their address, principal office or head office in a foreign country. Therefore, foreign lawyers were unable to provide representation in an arbitration case where all of the parties had head offices in Japan, even if one party was a subsidiary wholly controlled by an entity outside of Japan.

As part of the policy to promote international arbitration in Japan, the Gaiben Law was amended in 2020 to expand the scope of an "international arbitration case", which is now defined as a civil

arbitration case which falls under any of the following cases:

- some or all of the parties have their address, principal address or head office in a foreign country, including cases where more than 50% of the voting shares (or equivalent) of a party is owned by a person or an entity having an address, principal office or head office in a foreign country;
- the law governing the arbitral award as agreed by the parties is not Japanese law; or
- the seat of arbitration is in a foreign country.

It must be noted that even under the amended Gaiben Act, a foreign lawyer who is not a *gaikokuho-jimu-bengoshi* (registered foreign lawyer in Japan) is only permitted to represent an international arbitration case that he or she has been requested to undertake or undertook in a foreign country.

8. Evidence

8.1 Collection and Submission of Evidence

There are no specific provisions in the Arbitration Act concerning the collection and submission of evidence or the procedures to examine evidence. Accordingly, an arbitral tribunal is to observe any agreement of the parties concerning the above (which may not violate the public policy of Japan). In the absence of such an agreement, the tribunal has discretion to determine procedures concerning evidence in a manner it finds appropriate. The tribunal may determine the admissibility, relevance and probative value of evidence.

Therefore, although the Japanese legal system itself generally follows the civil law tradition, evidentiary issues in international arbitration, such as the scope of discovery or treatment of privileges, are greatly affected by the background of the parties and the arbitrators, as the procedures for collecting evidence are left to the agreement of the parties or the discretion of the arbitral tribunal. In practice, the parties and the tribunal often adopt the IBA Rules on the Taking of Evidence in International Arbitration as a guideline to resolve these matters.

8.2 Rules of Evidence

Rules of evidence provided under the Code of Civil Procedure, which applies to litigation in Japan, do not apply to arbitral proceedings seated in Japan. As explained in **8.1 Collection and Submission of Evidence**, there are no specific provisions in the Arbitration Act concerning the collection and submission of evidence or the procedures to examine evidence. The parties may agree on such procedures to be followed by the arbitral tribunal, and in the absence of such agreement, the tribunal has the power to determine the admissibility, relevance and probative value of evidence.

8.3 Powers of Compulsion

The Arbitration Act does not authorise an arbitral tribunal to compel submission of documents or appearance of witnesses.

However, unless the parties agree otherwise, the Act allows the tribunal (or the party that obtained the tribunal's consent) to petition the court for its assistance to obtain evidence from a third party, if the arbitral tribunal finds it necessary. Evidence may be obtained through the commission of investigation, examination of witnesses, obtaining expert opinion or documentary evidence, and conducting inspection under the provisions of the Code of Civil Procedure; however, exami-

nation of a party is excluded from the scope of this assistance from the court.

9. Confidentiality

9.1 Extent of Confidentiality

The Arbitration Act does not stipulate the obligation of secrecy. If the arbitration rules referenced in the arbitration clause and adopted by the parties stipulate a confidentiality obligation, it will be binding upon the parties. However, even if such rules do not provide for a confidentiality obligation, the parties may agree to enter into a confidentiality agreement and the scope of the confidentiality obligation.

Article 42-2 of the Commercial Arbitration Rules (2021) of the JCAA and Article 42-2 of the Interactive Arbitration Rules (2021) are examples of arbitration rules providing a confidentiality obligation.

10. The Award

10.1 Legal Requirements

Under the Arbitration Act, an arbitral award shall (i) be made in writing, (ii) be signed by the arbitrator who rendered the arbitral award (if the arbitral tribunal is a panel, the award shall be signed by a majority of the arbitrators and shall state the reasons for the absence of the signatures of the other arbitrator(s)), (iii) state the reasons (except where the parties agree that this is unnecessary), (iv) state the date of preparation; and (v) state the seat of arbitration.

The Arbitration Act does not regulate the time limit for notifying the parties of an arbitral award, which is left to the agreement of the parties and the rules of the arbitral institution.

10.2 Types of Remedies

The Arbitration Act does not establish rules limiting the types of remedies that an arbitral tribunal may award. However, arbitral awards that are contrary to public policy in Japan may be set aside or refused recognition by the court.

For example, punitive damages are not allowed in Japan, and an arbitral award ordering excessive, punitive damages may be set aside or refused recognition by a court for violation of public policy for that part of the award.

10.3 Recovering Interest and Legal Costs

In Japanese practice, it is normal for the claimant to request the other party to pay the statutory or agreed-upon delinquent interest until the payment is completed, and the Arbitration Act does not limit the request for delinquent interest. However, arbitration awards that allow excessive delinquent interest may be considered offensive to public policy, and may be set aside by the court or refused approval.

The Arbitration Act stipulates that the costs of arbitration proceedings shall be borne by the parties by agreement, if any, or by each party in the absence of agreement. If the parties agree, the arbitral tribunal may, in accordance with that agreement, determine how the costs must be shared between the parties or the amount to be reimbursed by one party to the other in an arbitral award or an independent decision.

11. Review of an Award

11.1 Grounds for Appeal

The parties may not appeal against an arbitral award. Where the seat of arbitration is Japan, a party may apply to a court for the setting aside

of an arbitral award in order to dispute the validity of the award, but as explained below, the grounds for setting aside an arbitral award are limited.

The grounds for setting aside an arbitral award in the Arbitration Act correspond to the grounds for refusal of recognition and enforcement in the Model Law and the New York Convention on which it is based. These grounds can be categorised into three major types.

The first type relates to arbitration agreements. Since the basis for the binding effect of an arbitral award lies in the arbitration agreement, it is permissible to set aside an arbitral award when this basis is lacking. Specifically, a court may set aside an arbitral award if (i) the arbitral agreement is not valid due to the limitations on the parties' capacity to act or other grounds pursuant to applicable laws, (ii) the arbitral award contains a decision on a matter beyond the scope of the arbitral agreement or the request in the arbitral proceedings, or (iii) the composition of the arbitral tribunal or arbitral proceedings violates the agreement between the parties.

The second type concerns the procedural guarantees of the parties in arbitral proceedings. Where procedural safeguards are lacking, the arbitral award will not be recognised as legitimate and it will be permissible to set aside the arbitral award. Specifically, a court may set aside an arbitral award if (i) the party making the application to set aside did not receive the notice required by Japanese law or the agreement between the parties in the appointment of the arbitrators or in the arbitral proceedings, or (ii) it was impossible for such party to defend itself in the arbitral proceedings.

The third category relates to Japanese law and public policy: (i) where the composition of the arbitral tribunal or the arbitral proceedings violates Japanese law; (ii) where the request in the arbitral proceedings relates to a dispute that, according to Japanese law, cannot be the subject of an arbitration agreement; and (iii) where the content of the arbitral award is contrary to public policy in Japan.

Even where these grounds exist, the court may, at its discretion, dismiss the request to set aside the arbitral award.

Turning to the procedure, in order to seek the setting aside of an arbitral award, the parties need to file a petition with the court within three months from the date of receipt of a copy of the arbitral award. The court must set at least one hearing date before reaching a conclusion. How long the hearing lasts is on a case-by-case basis, and statistics show that the court's review period in the court of first instance ranges from six months to two years. A party dissatisfied with the decision of the court of first instance may appeal to a higher court and then to the Supreme Court.

These hearings are held in private. Only the parties or interested persons may access the court records.

11.2 Excluding/Expanding the Scope of Appeal

As explained in **11.1 Grounds for Appeal**, the grounds for setting aside an arbitral award under Japanese law are limited, but the law does not make any provision as to whether or not grounds for set-aside can be added or excluded by agreement between the parties.

Some legal scholars argue that it is possible to add grounds for set-aside by agreement between the parties, or that an appeal against an arbitral award can be filed with the court based on such agreement. However, no court has ever ruled on whether such an agreement is valid or not. Thus, it is safe to assume that, at least in practice, such an agreement cannot be made between the parties.

11.3 Standard of Judicial Review

As explained in **11.1 Grounds for Appeal**, the grounds for setting aside arbitral awards under Japanese law are in line with international standards and are limited to cases where the arbitral award lacks the basic requirements of arbitral proceedings. The basic idea of the Japanese courts is that there should be no substantive re-examination of arbitral awards. Therefore, even if there is an error in the decision on the merits, the arbitral award will not be set aside unless it amounts to being against public policy.

Japanese courts have expressed repeatedly that courts must respect the judgment of the arbitral tribunal on the merits. For example, the decision of the Tokyo District Court on 28 July 2009 explains that setting aside an arbitral award by a court is not permitted if the factual finding or legal judgment by the arbitral tribunal is merely found to be unreasonable. A decision of the Tokyo High Court on 1 August 2018 reaffirmed that, other than the international standard of basic principles to be observed in arbitral proceedings, precise interpretations of the Code of Civil Procedure and court precedents of the seat of arbitration (ie, Japan) relating to domestic civil litigation proceedings will not be taken into account in whether to set aside an arbitral award.

In general, it is extremely rare for a Japanese court to set aside an arbitral award. Looking at the statistics, between 2004 and 2016, there were 23 petitions to set aside arbitral awards filed with the Tokyo District Court, of which only one petition was granted (see **3.3 National Courts' Approach**).

12. Enforcement of an Award

12.1 New York Convention

Japan ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1961. When Japan ratified the Convention, it made a reservation of reciprocity to the effect that the Convention would apply only to arbitral awards rendered in countries that are parties to the Convention (Article 1(3) of the Convention), but since Articles 45 and 46 of the Arbitration Act permit the recognition and enforcement of all foreign arbitral awards under almost identical conditions to those of the New York Convention, this reservation has effectively been withdrawn.

Prior to that, Japan had already ratified the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. In addition, Japan has ratified the ICSID Convention and has concluded bilateral treaties individually with about 20 other countries.

12.2 Enforcement Procedure

To enforce an arbitral award, it is necessary to file a petition with the court and obtain an execution order. Upon receiving this petition, the court must make an execution order to allow enforcement unless there are grounds for refusing recognition of the award under the Arbitration Act. Therefore, the grounds for refusing recognition and enforcement are the same. The above

grounds for refusing recognition and enforcement are basically the same as the grounds for setting aside arbitral awards described in **11.1 Grounds for Appeal**.

If an arbitral award has been set aside by the courts in the seat of arbitration, this will be one of the grounds to deny enforcement under the Arbitration Act. Therefore, such an arbitral award may not be enforced. However, there is also a view that if a court decision setting aside an arbitral award in the country of the seat of arbitration would be contrary to public order in Japan, the arbitral award should be considered as not having been set aside and be enforceable.

Where a party files a petition at the seat to set aside an arbitral award or suspend its effect, the court in Japan may, if necessary, suspend the procedures for its recognition and enforcement. In this case, the party requesting to suspend the recognition and enforcement procedures may be required to provide security.

According to the Act on the Civil Jurisdiction of Japan with respect to Foreign States, foreign states are, in principle, immune from the civil jurisdiction of Japan. However, no such sovereign immunity is granted in civil execution proceedings for property used solely for commercial purposes. Sovereign immunity also does not apply where a foreign state has given express consent to civil execution against its property, although merely executing an arbitration agreement in and of itself does not mean that this consent has been given. Foreign central banks are deemed to be a foreign state and are accorded with the same immunity. Furthermore, unlike foreign states, foreign central banks are immune from the proceedings of a provisional order or a civil execution against their property that are held for commercial purposes.

12.3 Approach of the Courts

Japanese courts respect the validity of arbitral awards to the maximum extent possible, at their enforcement stage as well. As explained in **12.2 Enforcement Procedure**, enforcement of an arbitral award requires an execution order from the court, which will be given unless there are exceptional grounds for refusing recognition. If the content of the arbitral award is contrary to public policy in Japan, this would be one of the grounds whereby recognition is refused.

The mere fact that a foreign law is different from Japanese law does not in and of itself mean that it is against Japan's public policy. However, if, for example, excessive, punitive damages are ordered, it is likely that approval will be refused for that part of the award, as explained in **10.2 Types of Remedies**.

13. Miscellaneous

13.1 Class Action or Group Arbitration

The Arbitration Act does not provide for class-action or group arbitration.

13.2 Ethical Codes

The Arbitration Act requires that an arbitrator must disclose all facts that would likely give rise to doubts as to his or her impartiality or independence, before accepting appointment as well as during the arbitration proceedings.

The Supreme Court ruled in 2017 that, in order for an arbitrator to have breached a duty to disclose facts that may give rise to doubts on his or her impartiality or independence, it is necessary for the arbitrator to have been aware of such facts, or to have been able to discover them through a reasonable investigation before the conclusion of arbitration proceedings.

A counsel who is an attorney licensed in Japan as a *bengoshi* or registered foreign lawyer must follow the respective ethical codes (Basic Rules on the Duties of Practising Attorneys or Basic Rules on the Duties of Registered Foreign Lawyers) and other rules and regulations promulgated by the Japan Federation of Bar Associations. The Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers provides that a foreign lawyer who is not a registered foreign lawyer in Japan may act as counsel in an international arbitration case only if the case has been undertaken in the foreign jurisdiction where the lawyer is qualified, provided that the lawyer is not suspended from practising by a disciplinary action under the laws and regulations of that foreign jurisdiction.

13.3 Third-Party Funding

Japanese law does not expressly prohibit or authorise third-party funding, and it is not commonly used in commercial dispute resolution in Japan.

There is a possibility that a third-party funding may be considered illegal and void depending on the structure, although the debate is still ongoing. Some argue that third-party funding violates the Attorney Act prohibiting unauthorised provision of legal services and engaging in legal procedures to pursue rights assigned by others, and the Trust Act prohibiting the creation of a trust to have a trustee litigate a settlor's claim.

The use of third-party funding was listed as one of the possible policy measures to promote international arbitration by the Japanese government in its announcement on 25 April 2018.

13.4 Consolidation

The Arbitration Act does not provide whether an arbitral tribunal seated in Japan or a Japanese court may consolidate separate arbitral proceedings.

However, the JCAA Commercial Arbitration Rules permit an arbitral tribunal to consolidate separate arbitral proceedings if (i) all parties have agreed to do so in writing, (ii) the claims to be consolidated arise under the same arbitration agreement, or (iii) the claims to be consolidated arise between the same parties, concern a similar question of fact or law and are capable of being conducted in a single proceeding under the applicable rules at the JCAA considering multiple issues governed by the respective arbitration agreements.

13.5 Binding of Third Parties

The Arbitration Act itself does not stipulate whether an arbitration agreement (and the arbitral award given based upon it) can bind a third party, whether domestic or foreign, that is not named as a party to the agreement. Whether a third party can be bound by an arbitration agreement is subject to interpretation based on the reasonable intentions of the parties. There have been cases where courts in Japan ruled that a representative director of a corporation is also bound by an arbitration agreement into which the company entered as one of the parties.

Trends and Developments

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Mori Hamada & Matsumoto (MHM)

Mori Hamada & Matsumoto (MHM) Mori Hamada & Matsumoto is widely recognized as an elite law firm in Japan and throughout Asia. MHM has a market-leading international arbitration practice, regularly acting as lead counsel and winning tough, complex cases in international disputes. The international arbitration team, which includes numerous international lawyers recruited from leading global law firms, has experience on international arbitrations at all major global institutions, including ICC, SIAC, ICSID, JCAA, KCAB, LCIA, THAC, VIAC, and CIETAC, among others. MHM's team members also regularly sit as arbitrator. Particular areas of substantive expertise among MHM's team include joint ventures, licensing, intellectual property, construction, trade, and investment treaty arbitration. Experience spans all key sectors of the global economy, including energy, natural resources, renewables, pharmaceuticals, insurance, chemicals, automotive, and retail, as well as bleeding-edge areas such as space, cryptocurrency, semiconductors, and AI.

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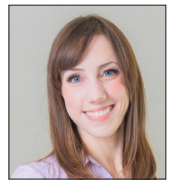

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After a year of substantial developments in the Japanese arbitration space, the past year has also been a year of positive evolution, albeit perhaps better characterised by a degree of consolidation. Positively, Japan and Japan-based institutions have continued to make strides in providing the legal superstructure that the international arbitration community (both homegrown and adopted) needs in order to effectively grow. As described in more detail below, the Japanese government remains keen to bolster the desirability and image of arbitration in Japan for both its domestic and international users, and institutions there continue to innovate to compete globally. The past year has seen studies and capacity building, the implementation of important new amendments to Japan's laws (including its Arbitration Act), and Japan joining the Singapore Convention.

Yet challenges, too, are visible. While some Japanese law firms have expanded their capabilities, others have consolidated their arbitration offering, and, in a few cases, practitioners have left Japan or retired without replacement. Overall, as Japan-based companies derive an ever-increasing proportion of their earnings from overseas sources, enthusiasm endures among international arbitration practitioners, but further development and growth remains essential.

Amendments to Japan's Arbitration Act Come into Force

Japan's Arbitration Act (Act No 138 of 2003; the JAA) became law in 2003, drawing inspiration from the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (UNCITRAL) as it existed at the time. However, although the Model Law was amended in 2006 (the "Amended Model Law"), corresponding amendments to the JAA were not then made. Seeking to modernise Japanese arbitration law and realign Japan with other Model Law jurisdictions, on 21 April 2023 Japan's Diet (being the national legislature) passed an amendment to the JAA, putting in place numerous important reforms, including those relating to the enforceability of interim measures ordered by arbitral tribunals. This Amended Arbitration Act came into force on 1 April 2024.

Enforceability of Interim Measures Ordered by Arbitral Tribunals

Until the passage of these amendments, the JAA did not have any specific provisions about the enforcement of interim measures ordered by arbitral tribunals; rather, the JAA provided that an arbitral award could not be enforced in Japan unless it was both "final and binding". Therefore, it was generally understood that interim orders rendered by arbitral tribunals would not be enforceable in Japan. Although voluntary performance of the parties was not unusual under the previous incarnation of the JAA, and could even be reasonably expected, the lack of a clear rule requiring enforcement was considered by many to potentially increase uncertainty in a party's legal position, particularly in cases where the validity of an arbitration agreement or the jurisdiction of the arbitral tribunal itself was in dispute.

The Amended JAA, by contrast, sets out the categories of interim measures available to arbitral tribunals in Article 24(1), and then provides for a scheme whereby a party to an arbitration who obtained an interim order from an arbitral tribunal may file a petition with the competent Japanese court for an order approving enforcement. The grounds for the court to reject such a petition are indicated in Article 47(7) of the JAA, and, in principle, mirror the grounds for the rejection of arbitral awards under Article 45(2) of the JAA; in

other words, as with arbitral awards, legitimate grounds for the denial of enforcement of interim orders by arbitral tribunals are quite limited, and are unlikely to be found to exist except in cases of serious procedural injustice, or where there has been a violation of Japanese public policy.

One point of nuance is that, even under the Amended JAA, some categories of interim measures are not perfectly suited to direct access to Japan's enforcement system. Categories limited in this way include interim orders to take measures for asset preservation and to preserve necessary evidence. These types of orders cannot be enforced except through indirect compulsory execution, although it bears noting that indirect compulsory execution for such categories frequently and historically is not granted in Japan. The Amended JAA provides that, where interim measures of this nature have been granted by an arbitral tribunal, the enforcement court may first order the payment of a penalty for the violation (or the likelihood of violation) of such interim measures ordered by an arbitral tribunal, and then the court's monetary payment order can be the subject of an action for direct compulsory execution.

Changes to Japanese Courts' Jurisdiction Also Implemented

With regard to the jurisdiction of Japanese courts over arbitration-related cases, Article 5(1) of the old JAA granted jurisdiction only for (a) those district courts agreed upon between the parties, (b) the district court which has jurisdiction over the place of arbitration, and (c) the district court which has jurisdiction over the location of the general venue of the respondent in an arbitration case. In the Amended JAA, in light of the specialised nature of arbitration-related cases, Article 5(2) provides for the parallel jurisdiction of the Tokyo District Court and Osaka District Court and Article 47(1) extends the jurisdiction of Japanese courts to enforce interim measures within Japan, even when the seat of arbitration is outside of Japan.

The Singapore Convention Enters into Force for Japan

Background to the Singapore Convention

Mediation tends to receive praise for its potential time and cost efficiency, but a common critique concerns a lack of easy enforceability of the resulting settlements. In December 2018, the UN General Assembly helped to address such critiques by adopting the United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention"). The signing ceremony held on 8 August 2019 saw 70 countries represented. However, this did not include Japan. Japan has since become the 12th country to deposit its instrument of accession, and on 21 April 2023 Japan's Diet passed an act to implement the Singapore Convention, and on 1 April 2024 the Singapore Convention entered into force for Japan.

The Singapore Convention is a multilateral treaty aimed at addressing the enforceability critique by offering a uniform and efficient framework for the enforcement of international settlement agreements resulting from mediation. If there were no convention, a party to a settlement agreement generally would need to bring proceedings for breach of contract to enforce (or invoke as a defence) a settlement agreement (typically in accordance with the dispute resolution provisions of the settlement agreement itself), and then would need to try to enforce the resulting decision. The Singapore Convention's major innovation is that it allows the direct enforcement (or invocation) of the terms of a mediated settlement agreement in convention states (without the need for fresh proceedings).

The convention's advocates envisage a future similar to that enjoyed by arbitration as a form of dispute resolution, the use of which has been greatly enhanced by the presence of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention 1958) which facilitates the enforcement of arbitral awards throughout much of the world.

Application in Japan

The relatively short implementing act sets out conditions for its application and also exclusions therefrom. The Act does not apply to international settlement agreements inter alia:

- concluded with natural persons (rather than businesses), unless the individual(s) in question is (are) a party to the relevant contract or transaction for business purposes or as a business;
- that have been approved by foreign courts or concluded in the course of proceedings before Japanese or foreign courts; or
- that have the effect of an enforceable arbitral award.

The Act does apply to international settlement agreements where, inter alia:

- the parties have agreed that the agreement may be enforced through execution based on the Singapore Convention (or laws and regulations implementing the Singapore Convention) (Article 3);
- the agreement is reached on or after the date the implementation act came into force; and
- the settlement agreement is "international", as defined.

If prima facie able to utilise the Implementation Act, in order to process civil execution in Japan based on an international settlement agreement a party must (pursuant to Article 5(1) and 5(2)) file a petition with the court for an execution order, include a copy of the settlement agreement, and include a document prepared by the mediator certifying that the international settlement agreement resulted from mediation.

If the foregoing conditions are satisfied and the requisite documents are filed, a party's ability to resist enforcement is circumscribed by the Act, which requires that the court make the execution order following a hearing (Article 5(13)), unless (at Article 5(11)) one of several grounds can be demonstrated, including incapacity of a party, extinguishment of obligations, a serious breach by the mediator of laws or regulations or irregularity, or that execution would be contrary to Japan's public policy.

Future developments

Although the legislation passed by the Diet is clear and efficient, there remain areas which will naturally develop over time both in terms of rule-making and in terms of interpretation. Particular areas of interest include the following.

- Certain areas of the Implementation Act have the potential to be developed through judicial interpretation. For example, one of the grounds for refusing enforcement is that there was a "serious" breach by the mediator of applicable standards, and that the breach "affects the conclusion" of the settlement agreement. The content and definition of a "serious" breach is not determined in the Implementation Act, nor, for that matter, does this provision have, unlike some of the other grounds, a comparable provision in the New York Convention 1958 which might provide guidance directly or through case law.

- The Implementation Act is, in any event, not exactly the same as the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018 ("Model Law 2018") developed alongside the convention by UNCITRAL, nor is it exactly the same as the convention text itself. As a result, differences between the Model Law 2018/the convention and the Implementation Act may mean that parties are less able to draw upon jurisprudence from other jurisdictions that have also implemented the convention, and that there is greater scope for development through interpretation by Japan's courts.

Overall, the entry into force of the Singapore Convention is to be welcomed as still more evidence of Japan's commitment to modernising its ADR landscape and contributing to a world-class toolkit available to its business community.

The Practical Research Group on the Steady Promotion of the Use of International Arbitration Issues Summary Report of its Findings

In August 2020, the Japanese government established the Practical Research Group on the Steady Promotion of the Use of International Arbitration in Japan (the "Research Group") to review past efforts to promote international arbitration in the country, and to explore more effective measures for the future. After a series of hearings from various stakeholders, including domestic and foreign arbitration practitioners, corporate representatives, foreign arbitration institutions, and academic experts, the Research Group issued a report summarising its findings in January 2024 (the "Report", available only in Japanese as at the time of publication).

The Report notes that, despite initiatives undertaken in recent years, such as the amendment of the Arbitration Act in April 2020 and the commissioning of the International Dispute Resolution Center (often called JIDRC, as further detailed below), the use of international arbitration in Japan remains low compared to the scale of the country's international economic footprint. The Report emphasises that national policies promoting international arbitration serve the public interest by providing Japanese companies and foreign investors with a reliable dispute resolution process, thereby promoting economic and industrial development.

The Report examines four main areas of focus for future measures: (1) making the international arbitration environment in Japan more attractive to international users; (2) publicity activities; (3) human resource development; and (4) the establishment of arbitration hearing facilities.

The first area focuses on ensuring that domestic and international companies view arbitration services in Japan as prompt, fair and appropriate, including strengthening the international recognition and reputation of the Japan Commercial Arbitration Association. The Research Group interviewed various overseas arbitral institutions, and found that those institutions that have established international reputations have done so increasing their international appeal by inter alia appointing internationally renowned arbitrators, thereby creating a "face" of the institution that appeals to users in countries other than the country where the arbitral institution is located, strengthening case management functions, and appointing court members from diverse backgrounds. The Report recommends following the example of successful institutions in other countries in order to improve recognition of Japan and of its reputation as an arbitral seat.

For the second area, publicity activities, the Research Group recommended focusing in the short term on encouraging Japanese companies to include international arbitration clauses (with a place in Japan listed as the seat) in international contracts. Long-term measures would concentrate on encouraging international market participants to select Japan as a (neutral) third-country arbitral seat for transactions between foreign companies outside of Japan, including by demonstrating leadership in improving the convenience of international arbitration throughout Asia and by increasing the number of international arbitration practitioners in Japan who can play an active role in the global community. In addition, the Research Group pointed out that, in order to increase trust in and recognition of Japan's legal system among foreign users, it is important to disseminate Japanese court decisions on international arbitration in English to foreign users. The third area, human resource development, would relatedly involve training programmes in cooperation with arbitration-related organisations outside of Japan.

In the fourth and final area, the Research Group emphasised the importance of establishing arbitration facilities to facilitate the hearing of arbitration cases, to promote publicity and personnel training, and to serve as a symbol of Japan's commitment to promoting international arbitration. There was some debate over whether government funding should be used to support such establishment; however, in a departure from past studies, the Research Group generally agreed that it would be ideal for the national government to involve itself in securing a dedicated arbitration facility in Japan. As set out below in respect of the JIDRC, however, this has not yet occurred, nor is it clear that the political will is present.

The report concludes by emphasising the need for close cooperation among the public and private stakeholders involved in international arbitration.

Organic Growth and Updates in Japan's Arbitral Institutions

2024 has also been a year of growth and change in Japan's arbitral institutions as they strive to compete with regional and global institutions such as the Singapore International Arbitration Centre and the International Chamber of Commerce. Commanding a high profile among these Japanese institutions is the Japan Commercial Arbitration Centre (JCAA), which revised its Commercial Mediation Rules (specifically, Articles 26.2 and 12.2.4(e)) in 2024 in light of Japan joining the Singapore Convention and to bolster the enforceability of settlement agreements. The JCAA, which is a Certified Dispute Resolution Business Operator under the ADR Promotion Act, has already seen several mediation cases make use of these new rules since their revision in April 2024.

The JCAA has also, mindful of Japan's 2023 amendments to the JAA and evolving global practice, set up a rules revision committee in 2024. This committee is tasked with reviewing and revising both the commercial arbitration rules 2021 and the interactive arbitration rules 2021, with an eye on any necessary or desirable revisions arising from the JAA revisions, and with a focus on the continued refinement of arbitration to encourage speediness and cost effectiveness.

Other Japanese institutions have also continued to exhibit organic growth and change, including through the entry into force of the new Arbitration Rules (effective 1 April 2024) of the Tokyo Maritime Arbitration Commission of the Japan

Shipping Exchange (commonly called TOMAC), as well as new Expediated Arbitration Rules of the International Arbitration Center in Tokyo (adopted 12 February 2024). Other institutions, such as the Japan Intellectual Property Arbitration Center (or JIPAC), continue also to evolve (having also amended both their Mediation and their Arbitration rules in response to the above-described legislative changes), albeit with an arguably stronger domestic focus.

Changes to JIDRC Strategy and Arbitral Hearings Venue Availability in Japan

In 2018, the Japanese government established an organisation entitled the Japan International Dispute Resolution Center (JIDRC) to raise awareness of international arbitration domestically, and to attract international interest in Japan as an arbitral seat. As a part of this mandate, the JIDRC established physical hearing facilities in Osaka in 2018 and in Tokyo in 2020. Commissioned to operate by the Ministry of Justice, the JIDRC boasted state-of-the-art facilities, including interpretation booths, AI transcription services, and virtual meeting facilities. In December 2021, JIDRC signed a cooperation agreement with ICSID and appeared poised for continued growth.

Unfortunately, the JIDRC's operations were interrupted by the COVID-19 pandemic and subsequent migration to online arbitral proceedings. Since this time, the JIDRC Tokyo facility was shuttered in April 2023, and the Osaka JIDRC facility suspended its operations in March 2024. Today the JIDRC does not itself offer hearing facilities but instead provides information about alternatives in different parts of Japan, including in the Osaka International Convention Center (which is where the JIDRC facility was located), and a new bespoke private facility in Tokyo: the Tokyo Facilities for Arbitration Hearings. Users of the JCAA Commercial Arbitration Rules are also able (pursuant to Article 8(2)) of those rules, to request the JCAA's assistance in making hearing arrangements.

Increased Interest in Investor-State Dispute Settlement Emerges

An exciting new trend that has developed over the past year is an increased level of interest in investment treaty arbitration, and a corresponding increase in the attention paid to the Japan market by third-party litigation funders. The increase interest in these areas has been spurred by, among other things, the potential for investment treaty claims by Japanese investors against Switzerland, arising out of the March 2023 takeover of Credit Suisse, which resulted in a full write-down of Credit Suisse's Additional Tier 1 (AT1) bonds. Japanese investors are in an unusually favourable position to seek redress, as they are protected by the Japan-Switzerland Economic Partnership Agreement, which allows for ICSID arbitration, and firms, including the authors', are known to be coordinating funding for and the bringing of such claims.

KENYA

Law and Practice

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Oraro & Company Advocates is a leading African law firm, established in 1977, specialising in dispute resolution and corporate and commercial law. The firm has 45 lawyers and over 80 staff members, with several of its top lawyers consistently ranked in Chambers Global and other legal directories. It offers specialist legal services in areas such as arbitration, banking and finance, corporate and commercial, and tax, serving local and foreign clients across various sectors. The firm provides local and cross-jurisdictional services through relationships with leading firms globally, including Tanzania's MWEBESA LAW GROUP, and is a full affiliate member of AB & David Africa (ABDA). This affiliation helps the team offer seamless cross-jurisdictional legal advice. Oraro & Company Advocates is committed to quality legal services through a partner-led approach, combining local knowledge with global perspectives.

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1. General

1.1 Prevalence of Arbitration

Increased activity in infrastructure projects, mainly implemented under public-private partnership (PPP) arrangements, as well as the mining, oil and gas, and renewable energy sectors, have increased the prevalence of international arbitration as a mode of resolving disputes in Kenya. This is mainly because the legislation, bilateral agreements or contracts governing projects in these sectors provide for arbitration as a dispute resolution mechanism. There has also been a considerable increase in international arbitration activity, arising from the construction industry and technology and finance, owing to increased foreign and bilateral investment.

Most of the contracts in respect of the aforesaid sectors and projects have foreign counterparties who prefer to have disputes resolved by international arbitration for various reasons, including the perception that international arbitral tribunals are likely to be neutral and impartial, the final nature of arbitral awards, international arbitration's appreciation and accommodation of diverse legal cultures, the willingness of courts in Kenya to enforce foreign awards, and the perceived backlog of cases in Kenyan courts.

Domestic Parties

Domestic parties prefer to resolve disputes through litigation in local courts mainly because of the perceived high cost of international arbitration. While they are generally not averse to domestic arbitration, they rarely implement international arbitration clauses due to the perceived high cost.

International Arbitration

It is very common to find international arbitral awards being enforced in Kenya, as the attitude of the Kenyan courts in this regard has so far been fairly positive and supportive.

Historically, international arbitrations have hardly been seated in Kenya. Both domestic and foreign parties seem to prefer foreign seats such as Dubai and London, with the latter being particularly popular. However, given the recent establishment of international arbitration centres in Kenya, Rwanda and Tanzania, and the high cost of arbitration that is associated with foreign seats, there is some growth in locally seated international arbitrations. The Nairobi Centre for International Arbitration (NCIA), a government-sponsored international arbitration centre, stated in the NCIA 2023 Annual Report that 2.4% of cases instituted before it in the 2022–2023 financial year represented international arbitrations. It is anticipated that in future more international arbitrations will be seated in East Africa.

1.2 Key Industries

As stated in **1.1 Prevalence of Arbitration**, Kenya has seen significant international arbitration activity in infrastructure projects, and PPPs in particular. The construction, mining, oil and gas, renewable energy, technology and finance sectors have also seen an increase in international arbitration activity owing to increased foreign and bilateral investments.

1.3 Arbitration Institutions

Kenya has had some investor-state disputes referred to the International Centre for Settlement of Investor Disputes (ICSID) owing to the fact that Kenya is a party to the ICSID Convention and has entered into a number of bilateral investment treaties (BITs).

Other commonly used arbitration centres are the International Chamber of Commerce (ICC), the

Chartered Institute of Arbitrators (Ciarb) and the London Court of International Arbitration (LCIA).

Increasingly, parties are selecting the NCIA as a preferred arbitration institution and, given the popularity of the Kigali International Arbitration Centre (KIAC), more Kenyans are likely to be referring disputes to it in future.

1.4 National Courts

There are no specific designated arbitration courts in Kenya. The jurisdiction to determine disputes related to or arising from domestic and international arbitration is conferred on the High Court of Kenya. Such disputes are primarily brought before the Commercial and Tax Division of the High Court at Nairobi, Kenya's capital and commercial and financial hub. Nonetheless, all High Courts in Kenya may hear and determine disputes related to arbitration under their unlimited original jurisdiction over civil and criminal matters.

In some circumstances, such disputes may proceed on appeal to the Court of Appeal, which has limited appellate jurisdiction. In rare cases, a further appeal may proceed to the Supreme Court of Kenya if a matter is adjudicated to be of general public importance or relating to the interpretation of the Constitution of Kenya.

2. Governing Legislation

2.1 Governing Law

Kenya is among 93 states and 126 jurisdictions around the world where legislation based on the UNICTRAL Model Law has been adopted (see Goodison Sixty-One School Limited v Symbion Kenya Limited [2017] eKLR). Arbitration in Kenya is governed by three primary pieces of legislation:

- the Constitution of Kenya, 2010 – Article 159 of the Constitution explicitly recognises the need for courts and tribunals to encourage and promote alternative forms of dispute resolution, including arbitration;
- the Arbitration Act supplemented by the Arbitration Rules 1997 – the Arbitration Act is modelled entirely on the UNCITRAL Model Law, and except for the limitations set out in the Act, it applies to both domestic and international arbitrations; and
- the Nairobi Centre for International Arbitration Act – this Act establishes the NCIA to promote, facilitate and encourage the conduct of international and domestic arbitration.

These statutes are supplemented by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), which Kenya ratified in 1989. The New York Convention is part of domestic law in Kenya by virtue of Article 2(6) of the Constitution which states that any treaty or convention ratified by Kenya will form part of the laws of Kenya.

Section 36(2) of the Arbitration Act further complements the New York Convention by providing that an international arbitral award will be recognised as binding, and enforced in accordance with the provisions of the New York Convention or any other convention to which Kenya is a signatory.

Finally, Kenya has also ratified the ICSID Convention, which is the legal framework applicable to dispute resolution and conciliation between international investors and states.

Kenya's arbitration legislation does not depart from the UNCITRAL Model Law in any significant way. The laws reflect most of the UNCITRAL Model Law principles, including the finality

of arbitral awards, limited court intervention or interference, and principles such as separability and *kompetenz-kompetenz* (competence-competence).

2.2 Changes to National Law

There have been no amendments to the Arbitration Act in the past year, nor is there pending legislation before parliament to amend the Act.

3. The Arbitration Agreement

3.1 Enforceability

An arbitration agreement under Kenyan law, like any contract, must satisfy the essential requirements of a contract – validity, capacity and form. In particular, Section 35(2)(1) of the Arbitration Act empowers the court to set aside an award if it is proved that one of the parties to the arbitration agreement did not have the capacity to sign the agreement. In addition, parties to an arbitration must ensure that the agreement they are entering into is valid under the laws of Kenya or the laws under which the parties have subjected it, otherwise courts in Kenya may refuse to enforce it pursuant to Sections 6(1)(a) and 37(1)(a)(ii) of the Arbitration Act. Finally, pursuant to Section 4 of the Arbitration Act, an arbitration agreement must be writing.

3.2 Arbitrability

There is no statutory list of non-arbitrable matters in Kenya. However, the courts do consider some matters as non-arbitrable disputes, including rights and liabilities arising from criminal offences, and insolvency and winding-up proceedings.

The general consideration is whether a dispute raises issues of public interest or issues that concern public policy. An example is criminal matters that are considered as an affront against the state, in which the state has a vested interest and would be reluctant to allow to be referred to an arbitral forum or other private forum.

Generally, disputes relating to dissolution of marriage, custody and maintenance have been regarded as being excluded from arbitration, however, the decision of the Court of Appeal in TSJ v SHSR [2019] eKLR held that there is nothing in the Arbitration Act that would prevent disputes "of a personal nature" – involving matrimony, custody and the maintenance of children – from being referred to arbitration, and upheld a decision of the Aga Khan Shia Imami Ismailia National Conciliation and Arbitration Board, dissolving an Islamic marriage and making orders as to custody and maintenance.

3.3 National Courts' Approach

Article 159(2)(d) of the Constitution of Kenya expressly recognises alternative forms of dispute resolution, such as arbitration. As such, the attitude of the courts in Kenya is generally very supportive and, more often than not, the courts are willing to enforce an arbitration agreement.

However, the courts may decline to stay a suit pending arbitration if the arbitration agreement is invalid or inoperable. Further, the courts have drawn a distinction between disputed and undisputed claims. Where a dispute exists and the parties agreed to arbitration, the courts will generally stay any proceedings filed in court in breach of an arbitration agreement and refer the parties to arbitration. However, if the claim is undisputed – for instance, where there has been a clear admission of liability – the court will decline to enforce the arbitration agreement or to refer the dispute to arbitration on the grounds that no dispute exists to be referred to arbitra-

tion (see Niazsons (K) Ltd v China Road & Bridge Corporation Kenya [2001] eKLR).

Further, whereas the courts in Kenya are generally willing to enforce arbitration agreements, it is incumbent upon a party seeking to enforce an arbitration agreement to apply to have a dispute that has been filed in court in breach of an arbitration agreement referred to arbitration at the earliest opportunity. An indolent party or one that has acquiesced or participated in court proceedings is likely to be barred from subsequently referring the dispute to arbitration (see Eunice Soko Mlagui v Suresh Parmar & four others [2017] eKLR).

Arbitration agreements are usually enforced in Kenya, save for instances where the arbitration agreement is considered null and void, inoperative or the dispute is not within the matters agreed to be referred to arbitration (see also **3.1 Enforceability**).

3.4 Validity

Section 17(1)(b) of the Arbitration Act provides that "a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause". This means that the invalidity of an agreement does not render the arbitration clause or contract invalid, since the two are treated as separate contracts.

The Court of Appeal affirmed this position in Kenya Anti-Corruption Commission & another v Nedermar Technology BV Limited [2017] eKLR when it declared "the arbitration clause in a contract is considered to be separate from the main contract, and as such it survives the termination of the contract".

As discussed above, the separability rule is enshrined under Section 17(1)(a) of the Arbitration Act. Arbitration clauses contained in an invalid agreement do not therefore suffer the invalidity of the main contract.

4. The Arbitral Tribunal

4.1 Limits on Selection

There are no limits under Kenyan law on a party's right to select arbitrators. Section 11 of the Arbitration Act provides that parties are free to determine the number of arbitrators in their dispute, and failing such agreement, the number of arbitrators will be one.

The court in Nyoro Construction Company Limited v Attorney General [2018] eKLR expounded on this when it said: "As a general rule, since Arbitration is based on a contract, the parties are in principle free to choose their arbitrator. They can appoint anyone with legal capacity to act as an arbitrator. Party autonomy is thus the principal controller of the appointment process [...] Alternatively, the parties can agree on appointment procedure by submitting their dispute to arbitration rules which provide for the appointment of arbitrators."

However, the provisions of Section 12(9) of the Arbitration Act are relevant. These require that when the High Court is appointing an arbitrator, it is to be guided by the qualifications required of an arbitrator by the agreement of the parties. In addition, the High Court should take into account considerations that are likely to secure the appointment of an independent and impartial arbitrator as affirmed by the High Court in Edward Muriu Kamau & four others all t/a Muriu, Mungai & Co Advocates v John Syekei Nyandieka [2014] eKLR.

4.2 Default Procedures

In the event that the parties' chosen method for selection of an arbitrator fails, the default procedure is outlined under Section 12 of the Arbitration Act. In summary:

- in an arbitration with three arbitrators, each party will appoint one arbitrator and the two arbitrators so appointed will appoint the third arbitrator;
- in an arbitration with two arbitrators, each party will appoint one arbitrator; and
- in an arbitration with one arbitrator, the parties will agree on the arbitrator to be appointed.

Section 12(3) of the Arbitration Act further stipulates that where one party to an arbitration indicates that it is unwilling to appoint an arbitrator, or fails to do so within the time allowed under the arbitration agreement (and where there is no time limit under the arbitration agreement, within 14 days), then the party that has duly appointed an arbitrator may give notice to the party in default that they propose to appoint the chosen arbitrator to act as a sole arbitrator.

Multi-party arbitrations have not been expressly dealt with under the Arbitration Act. As such, the parties are free to come to an agreement in such cases. However, the NCIA Rules, 2015 (the "NCIA Rules") stipulate that the NCIA takes the reins where there are multiple claimants and/or respondents who are unable to agree on an arbitrator(s).

In particular, Rule 7(10) of the NCIA Rules states that where there are multiple claimants or multiple respondents, and where the dispute is to be referred to three arbitrators, the parties are to jointly nominate an arbitrator for confirmation. However, where this is deemed impossible by virtue of the parties failing to agree, Rule 7(12) dictates that the arbitration agreement will, for all purposes, be considered as an agreement by the parties for the appointment of a three-member arbitral tribunal by the NCIA. In such a case, the NCIA will be free to appoint each member of the tribunal and designate one of the members to act as president of the tribunal.

4.3 Court Intervention

Under Section 12(5) of the Arbitration Act, the High Court can intervene and set aside the appointment of an arbitrator where a sole arbitrator was appointed in default of one party participating in the appointment (see **4.2 Default Procedures**). The High Court may intervene to set aside the appointment of the arbitrator only if it is satisfied that there was good cause for the failure or refusal of the party in default to appoint an arbitrator in good time. It is important to note, however, that the decision of the High Court in this respect is final and not subject to appeal (see Section 12(8) of the Arbitration Act).

Section 12(9) of the Arbitration Act requires that when the High Court is appointing an arbitrator, it is to be guided by the qualifications required of an arbitrator by the agreement of the parties. In addition, the High Court should take into account considerations that are likely to secure the appointment of an independent and impartial arbitrator. (see **4.1 Limits on Selection**).

4.4 Challenge and Removal of Arbitrators

Pursuant to Section 13(3) of the Arbitration Act, an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality and independence, or if the arbitrator does not have the qualifications agreed to by the parties, or if the arbitrator is physically or mentally incapable of conducting the proceedings, or there are justifiable doubts

as to their capacity to do so. Also, a party may only challenge an arbitrator appointed by them, or in whose appointment that party has participated, for reasons of which the party becomes aware after the appointment. A determination by the High Court on a challenge to an arbitrator's appointment is final and is not appealable.

4.5 Arbitrator Requirements

Section 13 (1) of the Arbitration Act requires arbitrators to disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence. From the time of their appointment and throughout the arbitration proceedings, arbitrators are required to disclose any such circumstances without delay to the parties, unless the parties have already been informed by said arbitrator. Similar rules on the disclosure of conflicts and/or any circumstances that may give rise to justifiable doubts on impartiality and independence exist under Rule 14 of the Ciarb Rules and Rule 8 of the NCIA Rules.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

As previously discussed in **3.2 Arbitrability**, matters of a criminal nature, disputes relating to insolvency and winding-up proceedings may not be referred to arbitration.

5.2 Challenges to Jurisdiction

The principle of *kompetenz-kompetenz* is provided for under Section 17(1) of the Arbitration Act, which affirms the arbitral tribunal's power to rule on its own jurisdiction.

5.3 Circumstances for Court Intervention

In general, the courts in Kenya are reluctant to intervene in matters that are subject to arbitration save where such court intervention has been expressly sanctioned in the Arbitration Act.

However, where the arbitral tribunal rules, as a preliminary question, that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court within 30 days of having received notice of the ruling, to decide the matter. The High Court's decision in such cases is final and is not subject to appeal.

It should also be noted that while an application on the jurisdiction of an arbitral tribunal is pending before the High Court, the parties may commence, continue and conclude arbitration proceedings, but no award in such proceedings may take effect until the application is decided, and such award will be void if the application is successful.

5.4 Timing of Challenge

A party challenging the jurisdiction of an arbitral tribunal to hear a dispute ought to do so at the earliest opportunity and in any event not later than the submission of the statement of defence (Section 17(2) of the Arbitration Act).

However, a party aggrieved by the decision of the arbitral tribunal on jurisdiction may apply to the court within 30 days of receipt of the notice of the ruling. A party therefore approaches the court only after an award has been rendered by the arbitral tribunal on the question of its jurisdiction.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The courts have generally interpreted their role as supporting the arbitration process and have shied away from dealing with the merits of disputes that are subject to arbitration. In this

regard, the courts in Kenya will generally defer to the findings of an arbitral tribunal.

However, with regard to issues of jurisdiction and admissibility, it appears that the court will exercise its jurisdiction de novo as the applicable standard of review. This was evidenced in the case of Assumption Sisters of Nairobi Registered Trustee v Stanley Kebathi & Another [2008] eKLR where the court began its inquiry into the arbitrator's jurisdiction to hear and determine the dispute by considering whether there existed an agreement between the parties by virtue of which the arbitrator could vest themselves of authority and or jurisdiction to arbitrate on the matter.

5.6 Breach of Arbitration Agreement

Courts in Kenya will generally stay or suspend court proceedings that have been commenced in breach of an arbitration agreement. This power is provided under Section 6 of the Arbitration Act. In order for the court to stay or suspend the proceedings, the party seeking to have the dispute referred to arbitration has to apply to the court not later than the time of entering appearance, otherwise they may be deemed to have submitted to the jurisdiction of the court (see also **3.3 National Courts' Approach**).

There is a general reluctance on the part of Kenyan courts to allow court proceedings to continue where parties agreed to refer the dispute to arbitration. However, there is a duty on the other party to object to the court proceedings before entering appearance in the matter. If a party has delayed in raising an objection with respect to the court proceedings, the court may find that such party has waived its right to contest the jurisdiction of the court.

Additionally, stay of court proceedings may be declined where the claim is undisputed, for instance, where there has been a clear admission of liability, and the court holds that there is no dispute to be referred to arbitration (see also **3.3 National Courts' Approach**) or where the arbitration agreement is considered null and void, inoperative or the dispute is not within the matters agreed to be referred to arbitration (see also **3.1 Enforceability**).

5.7 Jurisdiction Over Third Parties

There is no express legislation that permits third parties to be joined to arbitration proceedings. However, there are rare instances where the rights and obligations of a party to the arbitration can be assumed by a third party with the result that the arbitral tribunal would assume jurisdiction over the third party concerned. These include cases where a personal representative of a deceased party takes the place of the deceased party, or where a trustee is appointed in relation to a bankrupt party.

With respect to agency, the court in Kenya National Highways Authority v Masosa Construction Limited & another [2015] eKLR observed that a principal (as a third party) may be bound to an arbitration agreement if evidence is produced to show that they authorised or ratified the arbitration agreement.

Except as discussed above, an arbitral tribunal cannot assume jurisdiction over third parties. Parties aggrieved with the conduct of a third party can only seek recourse in a court of law.

6. Preliminary and Interim Relief

6.1 Types of Relief

Arbitral tribunals in Kenya are permitted to grant preliminary and/or interim relief under both the Arbitration Act and institutional rules applicable within the Kenyan jurisdiction:

- Section 18(1)(a) of the Arbitration Act – An arbitral tribunal can order a party to take such interim measures of protection as it deems necessary or appropriate.
- Rule 18(2)(i) of the Ciarb Arbitration Rules: An arbitral tribunal has jurisdiction to make one or more interim awards, including injunctive relief and conservatory measures.
- Rule 27(1) of the NCIA Rules 2015: An arbitral tribunal, subject to the agreement between the parties, can issue a range of interim or conservatory orders in the arbitration.

An interim award made pursuant to the Ciarb and NCIA Arbitration Rules is final and binding upon the parties pursuant to the Arbitration Act and the institutional rules, which define an "arbitral award" to include any award by an arbitral tribunal, including an interim award.

There is no automatic right of appeal against a decision allowing an application for security for costs brought under Section 18 of the Arbitration Act. A party may only appeal such a decision on a point of law that arises within the arbitration or stems from an award to the High Court (under Section 39 of the Arbitration Act). This recourse, however, is only available where parties have reserved their right of appeal. In the absence of such an agreement by the parties, an arbitral award is final and binding and can only be set aside, or its enforcement challenged, on the basis of the limited grounds set out under Sections 35 and 37 of the Act.

There is no express limit on the types of interim relief that can be awarded by an arbitral tribunal. The Arbitration Act stipulates that a tribunal can order a party to take whatever interim protection measures it deems necessary pertaining to the subject matter of the dispute. In the case of Safaricom Limited v Ocean View Beach Hotel Limited & two others [2010] eKLR: "Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the Court or the tribunal."

6.2 Role of Courts

Interim Measures

Section 7(1) of the Arbitration Act provides that the High Court may allow applications for interim measures when so moved by either of the parties. The primary objective of the courts when intervening is to ensure that the subject matter of the arbitration proceedings is not jeopardised before an award is issued, thereby rendering the entire proceedings of no value. This purpose was well elaborated in the case of CMC Holdings Limited v Jaguar Land Rover Exports Limited [2013] eKLR: "In practice, parties to international arbitrations normally seek interim measures of protection. They provide a party to the arbitration an immediate and temporary injunction if an award subsequently is to be effective. The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings. The court must be satisfied that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection."

Interim relief in foreign-seated arbitrations

The existing law in Kenya is unclear on whether courts can grant interim relief in foreign-seated arbitrations, as there are conflicting decisions on the matter. In some cases, the courts have found that they have jurisdiction to grant interim relief, while in other cases, the courts have declined to grant interim relief when there is a foreign governing law clause or jurisdiction clause and a foreign seat.

The Kenyan courts had occasion to consider an application under Section 7 of the Act in the case of Skoda Export Limited v Tamoil East Africa Limited [2008] eKLR. Despite the fact that the subject matter of the contracts was in Kenya, the courts upheld the defendant's preliminary objection to the jurisdiction of the High Court on the basis that the proper law of the contract was the Law of England and Wales, and that the seat of the proposed arbitration was London, England. In declining to issue any interim relief, the courts held that: "The idea of the place and law applicable to the dispute between the parties was mooted and mutually agreed between the parties and having mutually agreed to refer any dispute arising between them to International Arbitration, none of them has any recourse to any Municipal court like ours."

Despite this principle, there have been instances where the Kenyan courts have accepted jurisdiction notwithstanding an exclusive foreign jurisdiction clause.

Section 7 of the Arbitration Act is silent on the types of interim measures, the conditions for granting these measures and the scope of the measures that can be granted, leaving the courts with wide discretion to make orders that preserve the subject matter of a dispute.

Emergency Arbitrators

There is no reference to emergency or expedited arbitration in the Arbitration Act, Arbitration Rules or the Ciarb's Arbitration Rules. However, the NCIA Rules are modelled on international arbitration institution rules and contain provisions governing both expedited and emergency arbitrations. Rule 10 of the NCIA Rules states that in exceptional circumstances, prior to or on the commencement of the arbitration, a party may apply to the NCIA for the expedited formation of an arbitral tribunal. The application must be made in the prescribed form provided under the NCIA Rules. Rule 28 of the NCIA Rules allows a party to make an application for the appointment of an emergency arbitrator prior to the appointment of an expedited arbitral tribunal, which application is to be made in accordance with the procedure set out in the Second Schedule to the NCIA Rules. Under Rule 28(4), upon expedited formation of the arbitral tribunal, the emergency arbitrator will have no further power to act in the dispute. Under Rule 28(6) of the NCIA Rules, an order or award made by the emergency arbitrator is binding on all the parties upon being issued. However, under Rule 28(5), an order or award made by the emergency arbitrator will cease to be binding where:

- the arbitral tribunal is not constituted within 90 days of the order/award;
- the arbitral tribunal proceeds to make a final award; or
- the claim is withdrawn.

Furthermore, Rule 28(8) allows the arbitral tribunal, upon formation, either on an application by one of the parties or on its own motion, to vary, discharge or revoke in whole or in part an award of the emergency arbitrator (except an award referring to the arbitral tribunal). There is no provision in the Arbitration Act or institutional rules

that sanctions court intervention once an emergency arbitrator has been appointed. There also do not appear to be any decisions on the matter. It appears that the courts would treat an award of an emergency arbitrator like any other arbitral award. As such, a party aggrieved by such an award could apply to set it aside on the limited grounds set out in the Arbitration Act, or appeal it on points of law where parties have agreed to reserve their right of appeal.

6.3 Security for Costs

Section 18(1)(c) of the Arbitration Act allows the arbitral tribunal to award security for costs as an interim measure of protection. Similarly, Rule 18(2)(j) of the Ciarb Arbitration Rules and Rule 26(1) of the NCIA Rules make provision for security for costs.

In determining the merits of an application for security for costs, the court will consider the following matters:

- the prospects of success of the claimant's case as against the prospects of success of the defence raised by the respondent;
- the risk that an award of costs made in favour of a respondent will not be satisfied; and
- whether it is fair in the circumstances of the case to require the claimant to pay security for the costs of the arbitration.

7. Procedure

7.1 Governing Rules

The Arbitration Act, the NCIA Rules and the Ciarb Arbitration Rules are the commonly applied rules that govern the procedure of arbitration in Kenya. Under Section 20 of the Arbitration Act, the applicable procedural rules are as follows:

- the tribunal will follow the procedure as agreed upon by the parties;
- in the absence of consensus between the parties, the tribunal will conduct the arbitration as it deems appropriate while affording parties a fair arbitration proceeding and while availing reasonable opportunities to be heard;
- the power of arbitral tribunals includes the determination of the admissibility, relevance, materiality and weight of any evidence so as to determine the substantive details of the proceeding;
- similar privileges and immunities will be afforded to every witness and advocate giving evidence in proceedings before an arbitral tribunal as in court; and
- the tribunal has a mandate to give directions to the effect that a party or witness will be examined on oath and can administer or take the necessary oath or affirmation.

While the rules under the Arbitration Act automatically apply to arbitrations that are governed by Kenyan law or are seated in Kenya, the NCIA or the Ciarb rules would only apply if adopted by the parties or provided in the contract in question. This notwithstanding, pursuant to the principle of party autonomy, parties are at liberty to choose the applicable laws and rules for their arbitration. In the event that parties fail to agree on the rules and laws, the arbitral tribunal may proceed with the arbitration in a manner it considers appropriate, having regard to cost, time and fairness. This power extends to the tribunal determining relevance, admissibility, materiality and weight of evidence.

7.2 Procedural Steps

There are no codified procedural steps that are required to be followed in arbitration proceedings conducted in Kenya.

7.3 Powers and Duties of Arbitrators

Parties are encouraged to agree on the powers of the arbitrator(s). Otherwise, an arbitrator will generally have the power to:

- determine the applicable rules where parties have failed to do so (Section 20 of the Arbitration Act);
- order interim measures of protection (Section 18 of the Arbitration Act);
- order provision of security for the claim or amount in dispute (Section 18 of the Arbitration Act);
- order provision of security for costs (Section 18 of the Arbitration Act);
- seek court assistance in exercising the above-mentioned powers (Section 18 of the Arbitration Act);
- award interest (Section 32C of the Arbitration Act); and
- determine the place of arbitration (Section 21 of the Arbitration Act).

An arbitral tribunal also has the power to impose sanctions for non-compliance with an order. Section 26 of the Arbitration Act enables the tribunal to make a peremptory order requiring compliance within a prescribed period of time. Section 26(g) sets out a range of other (limited) sanctions for non-compliance with a peremptory order. As such, the tribunal may:

- direct that the party in default will not be entitled to rely on any allegation or material that is the subject matter of the order;
- draw such adverse inferences from the non-compliance as the circumstances justify;
- proceed to an award on the basis of such materials as have been properly provided to it;
- make such order as it thinks fit regarding the payment of costs of the arbitration incurred as a result of the non-compliance.

7.4 Legal Representatives

There are no specific qualification requirements for representatives appearing on behalf of parties to an arbitration conducted in Kenya. Parties may appear or act in person or may be represented by any other person of their choice. However, in respect of applications to the High Court arising from the arbitration, representatives appearing for parties in Kenya must be a qualified advocate. The Advocates Act defines a qualified advocate as:

- one who is admitted as an advocate;
- one whose name is on the roll; and
- one who has a valid practising certificate.

With respect to foreign legal representatives, the Attorney General has the power to admit an advocate from a Superior Court of the Commonwealth (Section 11 of the Advocates Act). The foreign advocate must pay the prescribed admission fee and must appear with an advocate.

8. Evidence

8.1 Collection and Submission of Evidence

Section 20 of the Arbitration Act gives parties the freedom to decide on the procedure to be adopted by the arbitral tribunal in the conduct of proceedings. This agreement should entail how evidence is brought before the tribunal and all the rules that should be put in place to govern it. There is no requirement that mandates parties to disclose particular documents; the documents only need to be relevant to the arbitration.

Section 20(4) of the Act states that every witness giving evidence and appearing before the arbitral tribunal will have the same privileges and immunities as witnesses and advocates in proceedings before the court. Furthermore, Section 10(5) – while not addressing the rules pertaining to cross-examination per se – states that the arbitral tribunal may direct that a party or witness be examined on oath or affirmation, and may for that purpose administer such oath or affirmation.

The Arbitration Act itself does not make specific provision for, or rules governing, the discovery of documents or disclosure. However, Rule 9(3) of the Ciarb Arbitration Rules also allows the arbitral tribunal, at any time during proceedings, to order parties to produce documents, exhibits or evidence it deems necessary or appropriate.

8.2 Rules of Evidence

Section 20(3) of the Arbitration Act gives the arbitral tribunal the power to determine the admissibility, relevance, materiality and weight of any evidence, and to determine at what point an argument or submission in respect of any matter has been fairly and adequately put or made.

Whereas domestic matters in Kenya are governed by the Evidence Act (Chapter 80, Laws of Kenya), Section 2(1) of the Evidence Act explicitly states that it does not apply to proceedings before an arbitrator.

8.3 Powers of Compulsion

Section 28 of the Arbitration Act makes provision for court assistance in taking evidence. It states that the arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the High Court assistance in taking evidence, and the High Court may execute the request within its competence and according to its rules on taking evidence.

In considering an application brought under Section 28 of the Act, the Court in Premji & another v Virunga Limited & another (Miscellaneous Civil Application E237 of 2021) [2022] KEELC 3342 (KLR) (23 May 2022) (Ruling) declined to uphold a request for assistance in taking evidence where the tribunal previously dismissed the request and no approval was obtained to seek the intervention of the High Court. In doing so, the High Court emphasised that Section 28 is couched in mandatory terms – that the approval of the tribunal is necessary when seeking the intervention of the court.

Where a party seeks assistance from the High Court under Section 28 of the Act, the court has the power to compel and/or order the production of evidence from a non-party to an arbitration.

9. Confidentiality

9.1 Extent of Confidentiality

There are no express legal provisions for confidentiality of arbitrations other than those set out in Rule 34 of the NCIA Rules. As stated above, the NCIA Rules only apply if parties have agreed to adopt them. Parties are, however, free to agree on the degree of confidentiality of the proceedings, pleadings, documents and award. Nonetheless, the courts have generally held that arbitration processes, whether international or domestic, are absolutely confidential (see Nedermar Technology BV Ltd v Kenya Anti-Corruption Commission & Another [2006] eKLR). Where parties have agreed that the arbitration process should remain confidential, the same cannot be disclosed in subsequent proceedings.

10. The Award

10.1 Legal Requirements

Under Section 32 of the Arbitration Act, an award must meet specific requirements for it be valid and binding. The award must be in writing, signed by the arbitrator, dated, and it must state the juridical seat. Additionally, an award must provide the reasons upon which it is based, unless:

- the parties have agreed that no reasons are to be given; or
- the award arises from a settlement recorded by the parties.

Unless the parties impose a time limit within which an award should be delivered, there are no specific or prescribed timelines under the Arbitration Act for the delivery of an arbitral award. However, some arbitration institutions impose time limits for the delivery of awards. For instance, under Article 29 of the NCIA Arbitration Rules, an award must be made within three months from the date of close the hearing.

10.2 Types of Remedies

There are no express limits to the types of remedies an arbitral tribunal may award. However, Section 35(2)(a)(iv) of the Arbitration Act provides that an award cannot deal with a dispute not contemplated within the terms of reference to arbitration, or address issues beyond the scope of reference to arbitration. In addition, Section 35(2)(b)(ii) of the Arbitration Act provides that the remedy must not conflict with public policy in Kenya. Accordingly, should the arbitral tribunal award remedies to the contrary, the High Court may, upon an application by a party, set aside the remedy.

10.3 Recovering Interest and Legal Costs

The general approach in Kenya is that costs follow the event in the absence of any extenuating circumstances. Under Section 32B of the Arbitration Act, unless the parties agree otherwise, the legal costs will be determined by the arbitral tribunal in its award, failing which, each party will be deemed responsible for their own legal and other expenses, and for an equal share of the arbitral tribunal's fees and expenses.

On interest, Section 32C of the Arbitration Act provides that unless parties agree otherwise, and to the extent that the rules of the applicable law permit, an arbitral award may include provisions for the payment of interest calculated from such date at such rate and with such rests as may be specified in the award.

11. Review of an Award

11.1 Grounds for Appeal

Unless otherwise agreed by the parties, arbitral awards are considered final and binding with no recourse to appeal. However, where parties have adopted the provisions of Section 39 of the Arbitration Act, which permits parties to appeal an award, an aggrieved party may approach the High Court for recourse on points of law only.

The procedure for appealing entails filing an application to the High Court to set aside the award by way of originating summons made returnable for a fixed date before the judge in chambers, to be served on all parties at least 14 days before the return date. However, the application may only be made if:

- the award dealt with a dispute that was not within the terms of reference to arbitration;

- the award contains decisions on matters beyond the scope of reference to arbitration;
- the award was induced by fraud, bribery, undue influence and corruption;
- the arbitration agreement was invalid under the applicable law or laws of Kenya;
- the party to the arbitration agreement was under some incapacity;
- the tribunal's composition or its procedure was not as agreed by the parties;
- the applicant was not given proper notice of an arbitrator's appointment, the proceedings or was unable to present their case;
- the award conflicts with public policy; and
- the dispute cannot be settled by arbitration under the law of Kenya.

On whether the finding of the High Court is also subject to appeal, the Kenyan Supreme Court in Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators – Kenya Branch (Interested Party) [2019] eKLR held that since there was no express bar to appeals under Section 35 of the Arbitration Act, an unfair determination by the High Court should not be absolutely immune from appellate review on such unfairness. Therefore, if it is found in review of the award that the High Court stepped outside the grounds set under Section 35 and arrived at a decision which is manifestly wrong, an appeal against such a decision would lie to the Court of Appeal.

11.2 Excluding/Expanding the Scope of Appeal

Parties cannot enter into an agreement to exclude or expand the grounds for challenging an award beyond those specified under Section 35 of the Arbitration Act. An agreement to the contrary would be contra-statute and hence, unenforceable by the court. While the Arbitration Act remains silent on the scope of appeal in international arbitration, Section 39 allows parties in domestic arbitration to agree on the right of appeal to the High Court on a question of law arising during the arbitration or out of the award. Further appeal to the Court of Appeal against the High Court's decision is permissible only if the parties agreed prior to the award, or the Court of Appeal grants leave to appeal on the basis that the appeal raises points of law of general importance.

The only express recourse provided to parties in international arbitration is to set aside the arbitral award on the grounds specified under Section 35 of the Arbitration Act.

11.3 Standard of Judicial Review

Court Support of Arbitration

Generally, Kenyan courts adopt a supportive role in arbitration matters, intervening only when expressly allowed by the Arbitration Act. Section 10 of the Arbitration Act discourages court intervention in arbitration disputes. In the cases of Kangethe & Company Advocates v Kenya Pipeline Company Limited Civil Appeal No 211 of 2006 [2011] eKLR it was explained that: "In Kenya the role of court is limited by section 10 of the Arbitration Act and its role or intervention must remain as specified in the Arbitration Act. Indeed, the aim of the Act is to drastically reduce the extent of the Court intervention in the arbitral process. In practice this must in turn involve balancing the right of party autonomy against abuse of process which may occur in the hands of the arbitral tribunals. Court and arbitration must of necessity remain close partners in the situation such as those described in this matter for reasons which include, inter alia, the observation by Lord Mustill in the Kenyan originated case of Coppee Lavalin S A Ren Ken Chemicals and Fertilizers Ltd [1995] 1 AC 38 at 64:- 'It is only a court with coercive powers that

would rescue an arbitration which is in danger of foundering.'"

Court Reluctance to Intervene in an Arbitral Award

Regarding application to set aside arbitral awards, the High Court would be reluctant to exercise its jurisdiction de novo and defers to findings of fact and conclusions of law reached by an arbitral tribunal. For instance, in the case of Brookside Dairy Limited v Limuru Milk Processor Limited & another [2020] eKLR, the court observed that: "Taken as a whole the gravamen of the Applicant's argument is that the Arbitrator misconstrued the evidence and misapprehended the law. The Applicant is clearly dissatisfied with the findings of fact made by the Arbitrator and claims that the award reached by the Arbitrator is not supported on the evidence presented in Arbitral proceedings. These are arguments which would typically be made by a party in support of an appeal. The Applicant is in effect asking this court to re-examine the evidence placed before the Arbitrator and arrive at a different conclusion. A court sitting on appeal can do this but Section 35 does not authorize the High Court to sit on appeal over an Arbitral Award. The High Court under Section 35 is only concerned with the propriety of the Arbitral process and must restrict itself to the specific grounds for setting aside an Arbitral Award as specified in Section 35. To do otherwise would mean this court would be exceeding its mandate under the Arbitration Act."

Court Acceptance of the Fact-Finding of Arbitrators

Likewise in the case of Kenyatta International Convention Centre (KICC) v Greenstar Systems Ltd [2018] eKLR, the court observed that: "The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. [...] Parties who submit their disputes to arbitration bind themselves to agreement to honour the arbitrators' award on the facts, the principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact."

12. Enforcement of an Award

12.1 New York Convention

Kenya ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention" or the "Convention") on 10 February 1989. Pursuant to Article I(3) of the Convention, Kenya acceded to it with the reciprocity reservation that the Convention applies only to the recognition and enforcement of awards made in the territory of another contracting state. In line with Article 2(6) of the Constitution of Kenya, 2010, which states that any treaty ratified by Kenya will form part of Kenyan law, the Convention is now incorporated into domestic law in Kenya. Additionally, Section 36(2) of the Arbitration Act reinforces reliance on the Convention for matters related to international arbitration.

12.2 Enforcement Procedure

Section 36 of the Arbitration Act provides that a domestic arbitral award is binding and will be enforceable upon an application in writing to the High Court. An international arbitration, on the other hand, will be recognised as binding and enforced in accordance with the provisions of

the Convention or any other convention relating to arbitral awards to which Kenya is a signatory. The procedure for enforcing an award in Kenya entails making an application to the High Court by summons in chambers and providing the High Court with:

- the original arbitral award or a duly certified copy of it; and
- the original arbitration agreement or a duly certified copy of it.

A certified translation of the award or arbitration agreement must be supplied if the said documents are not written in the English language.

Article V(1)(e) of the Convention provides that the recognition and enforcement of an award may be refused if there is proof that the award was set aside or suspended by a competent authority of the country in which, or under the law of which, it was made. The Kenyan courts apply this provision. In general, enforcement courts have the discretion under Article V(1) of the Convention to refuse to recognise and enforce an award if (conditions are a replica of Section 35 of the Arbitration Act):

- the parties were, under the law applicable to them, under some incapacity;
- the agreement is not valid under the law to which the parties subjected it or under the law of the country where the award was made;
- the applicant was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was unable to present their case;
- the award deals with a difference not contemplated within the terms of the submission to arbitration or has decisions on matters beyond the scope of the submission to arbitration;
- the composition of the arbitration authority or the procedure was not in accordance with the agreement of the parties or was not per the law of the country where the arbitration took place;
- the award has not yet become binding on the parties;
- the subject matter of the difference cannot be settled by arbitration under the law of Kenya; or
- the recognition or enforcement is contrary to the public policy of Kenya.

Under Article VI of the Convention, a court has discretion to adjourn its decision on the enforcement of an award which is the subject of pending set-aside or suspension proceedings. The court may, however, on the application of the party seeking enforcement, order the other party to give suitable security in the meantime. In Glencore Grain Ltd v TSS Grain Millers Ltd [2012] eKLR, it was held that the Arbitration Act provides for a new approach to the enforcement of international awards and that the Convention may be invoked to stay such enforcement pending a ruling on set-aside. This power of the court is however discretionary.

Arbitral Awards and the State

Section 41 of the Arbitration Act provides that the Kenyan government will be bound by the provision of the Act, including Section 36 on recognition and enforcement of an award. Similarly, the court in Tononoka Steels Limited v Eastern and Southern Africa Trade Development Bank [1999] eKLR held that where a state engages in purely commercial activities, it would be prejudicial and contrary to public policy to uphold sovereign immunity.

This notwithstanding, Section 4 of the Privileges and Immunities Act (Chapter 179 of the Laws of Kenya) imports certain provisions of the Vienna Convention on Diplomatic Relations which accords immunities and privileges to diplomatic missions or consular posts and to persons connected with such missions or posts. Further, the doctrine of sovereign and diplomatic immunity is recognised in Kenya as a principle of international law and provides as a general principle that states are immune from legal suits in other states.

However, the court in Ministry of Defence of the Government of the United Kingdom v John Ndegwa [1983] eKLR held that this immunity is not absolute but restrictive. According to the court "the test is whether the foreign or sovereign government is acting in a governmental capacity, under which an action may be brought against it".

12.3 Approach of the Courts

Generally, the courts in Kenya recognise and enforce both domestic and international awards upon an application by a party under Section 36 of the Arbitration Act. However, Section 37 of the Arbitration Act sets out a list of the following grounds on which a Kenyan court may decline to recognise or enforce an arbitral award, namely:

- the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya;
- the subject matter of the dispute cannot be settled by arbitration under the law of Kenya;
- a party to the arbitration agreement was under some incapacity;
- the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made;
- the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceeding or was otherwise unable to present their case;
- the award deals with a dispute not contemplated by or not falling within the terms of reference to the arbitration;
- the composition of the arbitral tribunal or its procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place;
- the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or
- the making of the award was induced or affected by fraud, bribery, corruption or undue influence.

In defining public policy, the court in Rwama Farmers Co-operative Society Limited v Thika Coffee Mills Limited [2012] eKLR held that an award would be against public policy if it is immoral, illegal or violates the basic moral principles in Kenya.

In addition, the court in Kenyatta International Convention Centre (KICC) v Greenstar Systems Limited [2018] eKLR observed that public policy is an indeterminate and fluid principle which fluctuates depending on time and circumstances. However, precedents confirm that an award would contravene public policy if it is inconsistent with the constitution, the laws in Kenya or national interest, or contrary to justice and morality in Kenya.

13. Miscellaneous

13.1 Class Action or Group Arbitration

The Arbitration Act does not explicitly allow for class action arbitration. However, it is arguable that where class members have consented to submit their disputes to arbitration, there should be no basis to exclude such a class of disputes from arbitration unless allowing it would violate other contractual, statutory or constitutional interests. This view is informed by the US Supreme Court decision in Oxford Health Plans LLC v Sutter, 133 S.Ct. 2064 (2013). Accordingly, class action arbitration is not available in Kenya unless clearly permitted under the express terms of the arbitration agreement.

13.2 Ethical Codes

There are no specific ethical codes and professional standards for arbitrators under the Arbitration Act. Arbitrators are, however, mandated under Section 19 of the Arbitration Act to treat all parties equally.

However, various arbitration institutions have established codes of conduct that specifically apply to arbitrators appointed within their purview. For instance, the NCIA expects arbitrators appointed by it to observe the ethical standards outlined in the NCIA Code of Conduct for Arbitrator, 2021.

Where the arbitrators and/or counsels are Kenyan-qualified advocates, or where parties have adopted Kenya law as the governing law or seat of the arbitration, they shall be subject to the provisions of the Advocates Act, Advocate Practice Rules, 1966, and the Code of Standards of Professional Practice and Ethical Conduct, 2016, which frameworks sustain ethical conduct in the legal profession.

13.3 Third-Party Funding

While there are no specific rules or restrictions on third-party funders in arbitration, advocates must adhere to certain conditions under the Advocates Act such as avoiding champertous arrangements. Section 46 of the Advocates Act prohibits retention agreements where payment is contingent on the success of the suit. Additionally, advocates are prohibited from purchasing interests or parts of a client's claim (Section 45 of the Advocates Act).

13.4 Consolidation

Although the Arbitration Act is silent on the issue of consolidation, parties may by consent agree to consolidate proceedings. The court in exercising its supervisory power, cannot intervene and order consolidation where parties have not expressly consented to this (see Hanif Sheikh v Alliance Nominees Limited & 17 others [2014] eKLR). Courts in Kenya have generally been reluctant to grant consolidation of arbitration proceedings in instances where the arbitral agreement is silent on consolidation (see World Vision International v Synthesis Limited & another [2019] eKLR).

13.5 Binding of Third Parties

See **5.7 Jurisdiction Over Third Parties**. Courts in Kenya can intervene and grant interim measures against foreign third parties as provided under Sections 7 and 10 of the Arbitration Act.

Trends and Developments

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Oraro & Company Advocates is a leading African law firm, established in 1977, specialising in dispute resolution and corporate and commercial law. The firm has 45 lawyers and over 80 staff members, with several of its top lawyers consistently ranked in Chambers Global and other legal directories. It offers specialist legal services in areas such as arbitration, banking and finance, corporate and commercial, and tax, serving local and foreign clients across various sectors. The firm provides local and cross-jurisdictional services through relationships with leading firms globally, including Tanzania's MWEBESA LAW GROUP, and is a full affiliate member of AB & David Africa (ABDA). This affiliation helps the team offer seamless cross-jurisdictional legal advice. Oraro & Company Advocates is committed to quality legal services through a partner-led approach, combining local knowledge with global perspectives.

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Arbitration in Kenya has seen significant growth and evolution, reflecting the dynamic nature of the country's economic and legal landscape. In particular, the sectors that have especially driven this trend are construction, finance and technology. The construction sector has witnessed a surge in large-scale infrastructure projects, involving international contractors and state-owned agencies. This has led to a rise in construction-related disputes, arising out of delays in project completion, variations in the scope of work, cost overruns and default from the parties.

Although the use of arbitration in lieu of the courts to resolve disputes has been prevalent in the construction industry for many years, in Kenya, the rise of construction arbitration cases has transformed the process and expanded its scope of application further and further. As a result, professionals are able to better assess the risks and opportunities presented by recent developments.

Concurrently, exponential industry growth in the finance and technology sectors, driven by Kenya's reputation as a global leader in mobile money and digital finance and a regional finance hub, has introduced novel legal challenges and resulted in numerous new disputes. Arbitration, with its capacity for confidentiality and adaptability to technical nuances, has become a critical tool for managing these disputes.

The trends below underscore the evolving role of arbitration and the legal framework governing arbitration in fostering a stable and predictable business environment in Kenya.

The Principle of Finality and the Court of Appeal's Jurisdiction to Hear Appeals from High Court Decisions on Setting Aside and Enforcement of Arbitral Awards

The High Court of Kenya has been consistent in promoting the finality of arbitral awards as enshrined in, among others, Sections 10 and 35 of the Kenyan Arbitration Act. This has been the case where the court exercises its jurisdiction to set aside or enforce arbitral awards such as in Christ for all Nations v Apollo Insurance Co. Ltd. (2002) EA 366 where the court, in refusing to set aside an arbitral award, held that "the public policy of Kenya leans toward finality of arbitral award and parties to arbitration must learn to accept awards, warts and all, subject only to the right of challenge within the narrow confines of section 35 of the Arbitration Act".

However, the question of whether appeals to the Court of Appeal from decisions of the High Court touching on arbitration ought to be entertained has remained a longstanding thorny issue. In a recent Court of Appeal decision in Nyutu Agrovet Limited v Airtel Networks Kenya Ltd (Civil Appeal (Application) 61 of 2012) [2024] KECA 523 (KLR) (9 May 2024) (Judgment) the Court lamented that despite the departure of arbitration "from formalities often associated with traditional litigation, offering a simple, more flexible, expedient, cost-effective and confidential avenue for conflict resolution" […] "the practice and experience in this country is a far cry from, and a veritable repudiation of, the ideal situation. Arbitration has morphed into a complex, costly, protracted, catastrophic nightmare for many a party".

That case involved 17 years and counting of litigation, initially culminating in a Supreme Court decision in 2019 Nyutu Agrovet Ltd. v Airtel Networks Kenya Ltd. & another [2019] eKLR (the "Nyutu 2019 Supreme Court Case") where the Apex Court conclusively held that there existed a limited right of appeal to the Court of Appeal

from High Court decisions setting aside an arbitral award. However, the right of appeal was restricted solely to exceptional circumstances to remedy obvious injustices. The court highlighted possible grounds for such appellate intervention to include "where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said Section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties". Prior to this decision, there were conflicting decisions issued by the Court of Appeal on whether or not a right of appeal existed, leading to uncertainty and protracted and costly litigation on this issue.

Over the last year or so, courts have continued to clarify the Court of Appeal's appellate jurisdiction from High Court decisions on arbitration. In Nyutu Agrovet Limited v Airtel Networks Kenya Ltd (Civil Appeal (Application) 61 of 2012) [2024] KECA 523 (KLR) (9 May 2024) (Judgment), the protracted litigation between Nyutu and Airtel returned once again to the Court of Appeal. This time the court sought to determine whether Nyutu had met the threshold for appeal set out in the Nyutu 2019 Supreme Court Case (Supra). The Court of Appeal reiterated the Supreme Court's previous caution that appellate jurisdiction should be exercised carefully, so as not to open a floodgate of appeals, undermining the very essence of arbitration. The court ultimately declined appellate jurisdiction, holding that the High Court, in setting aside the arbitral award in question, had confined itself to the grounds for setting side set out in Section 35 of the Arbitration Act (which mirror the UNICTRAL Model Law). The award was properly set aside on account of the arbitrator exceeding his jurisdiction and determining matters that were not contemplated by the arbitration agreement.

In Cape Holdings Limited (Under Administration) v Synergy Industrial Credit Limited (Civil Appeal (Application) 81 of 2016) [2023] KECA 1497 (KLR) (8 December 2023) (Ruling) the court was further categorical that a party was not permitted to introduce new allegations on appeal that an arbitral award should be set aside for conflicting with the public policy of Kenya where such arguments were not made before the High Court.

On the question of whether a subsequent appeal lies to the Supreme Court, in Geo Chem Middle East v Kenya Bureau of Standards; SC Petition No 47 of 2019, [2020] eKLR (Geo Chem Case), it was held that where the Court of Appeal accepts appellate jurisdiction and issues a substantive judgment, no further appeal lies to the Supreme Court. The court further clarified that, as a matter of practice, leave to appeal a judgment of the High Court relating to arbitration to the Court of Appeal could only be granted by the Court of Appeal, and not the High Court, and such leave can only be granted after interrogating the substance of the intended appeal.

Finally, the Geo Chem Case (Supra) further limited the Court of Appeal's appellate jurisdiction by holding that the appellate court does not have the power to interrogate the merits of an arbitral award where the High Court had declined jurisdiction to entertain an application to set aside an arbitral award. In such circumstances, the Court of Appeal must remit the matter back to the High Court for reconsideration and is not permitted to itself determine whether or not to set aside the arbitral award.

Despite initial uncertainty and conflicting determinations, Kenyan courts have, in the past few years, introduced a measure of certainty in clarifying the limited appellate jurisdiction of the Court of Appeal to entertain appeals from decisions

of the High Court on setting aside and enforcement of arbitral awards. The line of authorities discussed above indicates the courts' commitment to upholding the principle of finality of arbitral awards by minimising avenues for appeal. This will only serve to promote arbitration as a simple, flexible, expedient, cost-effective and confidential dispute resolution avenue.

Court Attitudes Towards Interim Measures of Protection Pending Arbitral Proceedings and Alternatives in Emergency Arbitration

The growing recognition and use of arbitration especially in construction disputes has augmented the number of cases that warrant the intervention of courts in arbitral proceedings, including by way of issuing interim measures of protection.

An interim measure of protection is an order given by either the court or an arbitral tribunal with a view to preserving the status quo or preventing the dissipation of assets pending the resolution of the arbitral dispute. These measures have been traditionally sought before courts, usually before the tribunal proceedings have commenced. However, the court's attitudes towards granting such interim measures of protection, especially in foreign-seated arbitrations, have highlighted the crucial role arbitral tribunals can play (as discussed further below) in issuing urgent interim measures, through Emergency Arbitration Proceedings, in lieu of court action.

Notably, the granting of interim measures of protection is discretionary. It is not as a matter of right, but it is predicated on various conditions being met before a tribunal or a court can grant them. This is particularly important before the courts. The rationale behind this is to ensure that there is caution in the exercise of the courts' discretion so as not to usurp the role of the arbitral tribunal. One contentious area that arises in this context is court intervention in foreign-seated arbitrations.

The existing law in Kenya is unclear on whether courts can grant interim relief in foreign-seated arbitrations, as there are conflicting decisions on the matter. In some cases, courts have found that they have jurisdiction to grant interim relief, while in other cases, courts have declined to grant interim relief when there is a foreign governing law clause or jurisdiction clause and a foreign seat. At times, Kenyan courts have adopted the position in the case of Skoda Export Limited v Tamoil East Africa Limited [2008] eKLR, in which the courts considered an application brought under Section 7 of the Arbitration Act (on interim measures of protection). Despite the fact that the subject matter of the contracts were in Kenya, the courts upheld the defendant's preliminary objection to the jurisdiction of the High Court on the basis that the proper law of the contract was the law of England and Wales, and that the seat of the proposed arbitration was London, England. Interim measures were therefore best sought in courts at the seat of arbitration.

In Polyphase Systems Limited v Sterling & Wilson Solar Limited; Malindi Solar Group Limited (Interested Party) [2021] eKLR, the High Court was confronted with an application under Section 7 of the Arbitration Act, where the underlying contract contained a foreign-seated arbitration clause with the governing law specified as that of England and Wales. Although the court ultimately declined to grant the interim measures of protection on the grounds that the applicant failed to meet the required threshold, it notably did not refute its jurisdiction to issue such measures. In fact, the court affirmed its authority to hear and determine the application under Section 7 of the Arbitration Act, notwithstanding

the fact that the governing law of the contract in dispute was that of England and Wales.

More recently, the High Court of Kenya in Civicon Limited v Fuji Electric Company Limited & 2 others (Civil Suit E359 of 2022) [2023] KEHC 21373 (KLR) (Commercial and Tax) (15 August 2023) (Ruling) (in which the authors represented Fuji Electric Co. Limited) dismissed two applications seeking interim measures of protection restraining a bank from paying Fuji Electric Co. Limited the proceeds of a USD2.314 million performance bond issued in its favour. In response thereto, Fuji raised a preliminary jurisdictional issue that the court, having stayed the proceedings and directed the parties to submit their dispute to arbitration, was now functus officio and cannot make any further orders in the matter. The court's ruling agreed with the arguments preferred by Fuji, specifically that the court, having already rendered its decision referring the dispute to arbitration, is now bereft of jurisdiction and cannot make any further orders.

These decisions indicate that while the Kenyan courts have not conclusively settled their position on granting interim relief in foreign-seated arbitrations, there is a discernible trend towards limiting judicial intervention, particularly after arbitration proceedings have been initiated.

This evolving judicial approach underscores the importance of clear contractual provisions and the growing emphasis on respecting the autonomy of the arbitration process. These developments have emphasised the key role to be played by emergency arbitration proceedings in obtaining interim relief pending substantive arbitration proceedings.

Emergency arbitration provides an avenue for parties to urgently approach an arbitral tribunal for interim relief prior to the formal empanelment of an arbitral tribunal to hear and determine the substantive dispute. An emergency arbitrator is usually appointed to hear an application for interim relief pending the substantive arbitration. Key advantages of emergency arbitration over seeking interim measures from courts include maintaining the confidentiality of the proceedings, avoiding the jurisdictional pitfalls in seeking court intervention highlighted above and, in some cases, assuaging the concerns of parties that are apprehensive of obtaining justice from local courts, especially in the case of foreign parties seeking remedies against national governments and their institutions.

There has been increasing interest in emergency arbitration proceedings in Kenya which have seen the adoption of emergency arbitration processes by both the Nairobi Centre for International Arbitration (NCIA) and the Kenya Chapter of the Chartered Institute of Arbitrators (CIArb). CIArb's rules require an emergency arbitrator to be appointed on application within two days with the emergency arbitrator deciding the issues raised in an application for interim measures as soon as possible, and preferably within 15 days of appointment. However, the emergency arbitrator is required to ensure all parties are afforded, on reasonable notice, an opportunity to be heard.

The NCIA Arbitration Rules (as revised) equally require an emergency arbitrator to be appointed within two days who is required to establish a schedule for considering the emergency arbitration within two days and make an order or award within 15 days from appointment, subject to any extensions as may be agreed by the parties.

It is expected that, going forward, parties will increasingly adopt emergency arbitration in seeking interim measures of protection.

Third-Party Funding

Over the years, international arbitration has been the preferred mode of dispute resolution due to its time and cost efficiencies. However, there is a growing concern that this is not always the case. Lately, the exorbitant cost of sustaining international construction arbitration has become a thorny issue precipitating discussion on alternative financing methods such as "third-party funding".

Third-party funding is a financing arrangement where a disputant agrees to receive financial support for litigation costs from a third party (funder) who has no prior interest in the litigation. In return, the funder receives a percentage of damages awarded to the disputant as consideration.

In Kenya, the law does not explicitly recognise third-party funding, nor do the various institutional rules. Related arrangements such as champerty are, however, barred under Section 46 of the Kenyan Advocates Act and the Law Society of Kenya Code of Standard of Professional Practice and Ethical Conduct. Accordingly, the legal status of third-party funding remains untested in Kenya. Nonetheless, it arguable that an international investment dispute involving Kenya and a foreign investor under the purview of the International Centre for Settlement of Investment Disputes (ICSID) would permit third-party funding as it is explicitly considered under Rule 14 of the ICSID Rules.

In contrast, regional and comparative jurisdictions like Nigeria have recognised third-party funding through the Nigerian Arbitration and Mediation Act, 2023, viewing it as both an investment opportunity and a catalyst for access to justice. Given Kenya's progressive Constitution, it is arguable that the country is ready to expressly recognise and enforce third-party funding arrangements, if the right to access justice under Article 48 of the Constitution and fair hearing under Article 50 of the Constitution is anything to go by.

This method of financing has, however, received criticism. Some critics argue that its recognition in Kenya could undermine the very foundation of practice of law in Kenya, which is not seen as a business or investment opportunity, but rather a profession. Others worry that third-party funding could lead to the monetisation of legal claims at the expense of justice, potentially incentivising unmeritorious arbitral claims.

These concerns, in our view, could be addressed through regulation as was emphasised by the Supreme Court of the United Kingdom in R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others [2023] EWCA Civ 299. The court stated that third-party funding arrangements must meet the mandatory legal requirements to be valid and enforceable. Rather than rejecting third-party funding entirely, we believe that it should be embraced, subject to development of a policy or a code of conduct for the funders to guide its implementation in Kenya.

LEBANON

Law and Practice

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Alem & Associates is a regional law firm with offices in Beirut, Dubai, Abu Dhabi and Riyadh, designed to provide state-of-the-art legal services blended with knowledge of the local heritage. With more than 60 seasoned practitioners in its four offices, Alem & Associates regularly represents and advises clients throughout the world, with a focus on the Middle East, in relation to issues including corporate, regulatory, mergers and acquisitions, real estate, capital markets, banking and finance, energy and environment, aviation, franchising, agency and distribution, and construction. The firm also has an excellent reputation for its litigation and arbitration work, and serves its clients with an in-depth understanding of their industry, coupled with insight into the markets at hand.

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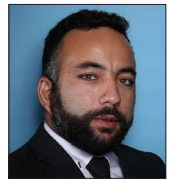

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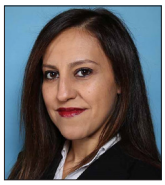

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ALEM
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1. General

1.1 Prevalence of Arbitration

Over the years, Lebanon has established itself as a reliable seat for international arbitration, ranking high on the list of the most frequently considered seats in the Middle East and North Africa (MENA) region.

This is partly due to the fact that there are a number of skilled and experienced arbitration practitioners in Lebanon who have a deep understanding of different legal systems, including French civil law and English common law, which contributes to promoting Lebanon as an arbitration-friendly jurisdiction and a trustworthy seat.

In addition, Lebanon has a sophisticated and dependable legal framework. The current Lebanese Arbitration Law, codified in the new Civil Procedure Code (NCPC) (Articles 762 to 821), is largely inspired by the 1981 French arbitration law, which preceded the current French legislation of 2011, and is considered to be pro-arbitration. The NCPC ensures that arbitral proceedings are conducted in a flexible and timely manner and that arbitral awards are promptly recognised and enforced.

In addition, the Beirut Chamber of Commerce and Industry established the Lebanese Arbitration and Mediation Center (LAMC) in 1995, to provide administrative and supervisory services for arbitration in Lebanon. The LAMC have recently undertaken a comprehensive overhaul of their arbitration rules in order to align with the latest trends and best practices in the field of arbitration. Arbitrations initiated in Lebanon are also often referred to international and regional arbitration institutions, such as the International Chamber of Commerce (ICC) and the Dubai International Arbitration Centre (DIAC), the rules of which Lebanese courts are familiar with.

For all these reasons, Lebanon is considered one of the most arbitration-friendly jurisdictions in the Middle East, where arbitration is considered a standard method of settling disputes.

Trends in Arbitral Decisions in Lebanon

In recent years, there have been a number of pro-arbitration decisions confirming the liberal approach of the Lebanese courts to arbitration.

Arbitration arising from commercial representation agreements

The first issue that has received some attention concerns the arbitrability of disputes arising from commercial representation agreements. By way of background, Decree-Law 34/67 (DL 34/67) of 5 August 1967 governs commercial representation in Lebanon. Article 5 of DL 34/67 grants Lebanese courts jurisdiction to settle disputes arising from commercial representation agreements, which has traditionally been considered exclusive, with the aim of protecting the interests of Lebanese agents/commercial representatives against those of their foreign principals. Accordingly, disputes arising from commercial representation agreements have historically been considered non-arbitrable.

In a recent decision, the Court of First Instance of Beirut concluded that Article 5 of DL 34/67 granted exclusive jurisdiction to Lebanese courts at the expense of other state judicial bodies, as opposed to non-state bodies such as arbitral tribunals (Court of First Instance of Beirut, 14 July 2015, Decision 376/74/2013). According to the Court of First Instance of Beirut, the provisions of Article 5 of DL 34/67 thus aim to prevent parties from settling disputes arising from commercial representation agreements only before foreign

state courts only, but not before arbitral tribunals. Such an exclusion is particularly relevant in the context of anti-suit injunctions. It follows that the jurisdiction conferred on Lebanese courts by Article 5 of DL 34/67 would not have the effect of rendering disputes arising out of commercial representation agreements non-arbitrable.

Interpretation of arbitration agreements

Another interesting development in the sphere of Lebanese arbitration law is the increasingly liberal interpretation of arbitration agreements and their validity by Lebanese courts.

A telling example is a decision rendered by the Court of First Instance of Beirut, which held that an invalid term contained in an arbitration agreement does not have the effect of nullifying the entire arbitration agreement (Court of First Instance of Beirut, 5 June 2013, Decision 24/63).

Similarly, the same Court of First Instance of Beirut held that insolvency proceedings do not lead to the nullity of arbitration agreements entered into by the insolvent debtor, and that the liquidator is obliged to enforce arbitration agreements in the same manner as any other act of disposition or agreement entered into by the debtor prior to the declaration of the debtor's bankruptcy (Court of First Instance of Beirut, 13 February 2013, Decision 9/51).

In the same decision, the Beirut Court of First Instance held that the absence of an express reference to the number of arbitrators does not lead to the nullity of the arbitration agreement.

In addition, the Beirut Court of Appeal recently reaffirmed a well-established jurisprudential trend that qualifies an arbitration agreement as an administrative act that falls within the scope of the day-to-day management of a company and therefore does not require prior special approval by the company's board of directors.

Extension of arbitration to non-signatories

Finally, with regard to the extension of arbitration agreements to non-signatories, the Court of First Instance of Beirut reaffirmed that a non-signatory is bound by an arbitration agreement if it has participated in the negotiation and/or implementation of the underlying agreement, so as to confirm its intention to be bound by it (Court of First Instance of Beirut, 14 January 2013, Decision 2/44).

1.2 Key Industries

The industries in which arbitration is the predominant method of dispute resolution are essentially construction, banking and finance, real estate, telecommunications and franchising.

In addition, following the signing of offshore oil and gas exploration and production agreements in Lebanon during 2018, and given that these agreements include an ICC arbitration clause, it is reasonable to expect that arbitration will be used as the prevailing dispute resolution method in the newly formed oil and gas industry.

1.3 Arbitration Institutions

The LAMC (see **1.1 Prevalence of Arbitration**) is the main institution administering domestic arbitration in Lebanon. The Rules of Arbitration of the LAMC have been substantially revised and the new version entered into force on 1 July 2024. These new Rules reflect the latest trends and practices in the field of international arbitration and are inspired by the new rules adopted by regional arbitration centres such as the Cairo Regional Centre for International Commercial Arbitration (CRCICA) and the DIAC.

In addition, the Beirut Bar Association established the Lebanese and International Arbitration Centre of the Beirut Bar Association (LIAC-BBA) in 2014 to administer domestic and international arbitrations. The LIAC-BBA has issued its own arbitration rules, but has not yet published the number of cases currently registered.

In addition to the LAMC, the ICC is widely used to administer domestic arbitrations in Lebanon and is also the leading institution to administer international arbitrations seated in Lebanon.

Other regional arbitral institutions are also used in Lebanon, particularly when the parties to the dispute are based in Middle Eastern countries. These institutions include the DIAC, the CRCICA, the Abu Dhabi International Arbitration Centre (ADIAC) and the Bahrain Chamber for Dispute Resolution (BCDR-AAA).

No new arbitral institutions were established in Lebanon in 2023–24.

1.4 National Courts

There are no specific courts in Lebanon that are designated to hear disputes relating to international arbitrations and/or domestic arbitration.

With respect to setting aside of arbitral awards, as discussed in **11.1 Grounds for Appeal**, the application for setting aside should be filed with the court of appeal of the place where the arbitral award was rendered (Article 819(3) of the NCPC).

Regarding the enforcement of arbitral awards, as explained in **12.2 Enforcement Procedure**, it is the President of the Court of First Instance of Beirut who issues the order granting exequatur to international arbitral awards.

2. Governing Legislation

2.1 Governing Law

As mentioned in **1.1 Prevalence of Arbitration**, the Lebanese Arbitration Law is found in Articles 762 to 821 of the NCPC. The Lebanese Arbitration Law is not based on the UNCITRAL Model Law, but rather on the former French Arbitration Law of 1981, with some variations that mainly relate to domestic arbitration.

The Lebanese Arbitration Law distinguishes between domestic arbitration, which is governed by Articles 762 to 808 of the NCPC, and international arbitration, which is governed by Articles 809 to 821 of the NCPC. According to Article 809 of the NCPC, an arbitration is international in nature if it concerns international commercial interests. In light of the definition set forth in Article 809 of the NCPC, Lebanese case law considers that the criteria determining the nature of an arbitration are economic (Court of Appeal of Beirut, 21 March 2001, Decision 492/2001) and that an arbitration is international in nature if the underlying dispute involves a cross-border flow of goods or funds (Lebanese Court of Cassation, 27 April 2006, Decision 98/2006).

Compared to domestic arbitration, international arbitration is more flexible and liberal in that the parties are free to choose procedural rules other than those contained in the NCPC (Article 811 of the NCPC). However, where Lebanese law is applicable to an international arbitration, Articles 762 to 792 of the NCPC, which govern domestic arbitration, apply unless the parties expressly agree otherwise (Article 812 of the NCPC).

2.2 Changes to National Law

There have been no recent major reforms to the Lebanese Arbitration Law. However, the current

Lebanese Arbitration Law has been amended on a few occasions since its promulgation in 1983.

In June 1996, paragraph 2 of Article 804 of the NCPC (applicable to international arbitration) was amended to allow for the challenge of decisions of the court of appeal in matters of annulment before the Court of Cassation.

In July 2002, further amendments to the Lebanese Arbitration Law were introduced, mainly concerning state participation in arbitral proceedings. The 2002 amendments clarified which administrative disputes are arbitrable and which disputes fall under the exclusive jurisdiction of the Lebanese administrative courts. It was also clarified that arbitration clauses and arbitration agreements (*compromis d'arbitrage*) entered into by the state, by state organs and/or by legal persons under public law are now subject to prior approval similar to that required for administrative contracts.

3. The Arbitration Agreement

3.1 Enforceability

While the provisions of the NCPC governing domestic arbitration provide that arbitration agreements must be in writing and contain the appointment of arbitrators or a method for such appointment (Article 763 of the NCPC) in order to be valid, the section of the NCPC governing international arbitration contains no specific or formal requirements for the validity of arbitration agreements.

In addition, as mentioned in **2.1 Governing Law**, parties to international arbitrations may agree, pursuant to Article 812 of the NCPC, to exclude the application of the provisions of the NCPC governing domestic arbitration.

In recent years, the Court of First Instance of Beirut has held that the rules of validity applicable to domestic arbitration are not applicable in the context of international arbitration (Court of First Instance of Beirut, 28 April 2010, Decision 12/42). This approach seems to be constantly reiterated by this court (Court of First Instance of Beirut, 30 December 2014).

3.2 Arbitrability

The section of the NCPC dealing with international arbitration does not contain any provision defining the arbitrability ratione materiae of disputes, nor has there been any case law providing guidance on the criteria to be applied in identifying matters that cannot be submitted to arbitration.

In domestic arbitration, Articles 762 and 765 of the NCPC exclude arbitration in matters that cannot be the subject of a transaction.

Article 1037 of the Lebanese Civil Code – also known as the Code of Obligations and Contracts (COC) – defines matters that cannot be the subject of a transaction as follows:

- personal status matters, including marriage, divorce, custody of children and inheritance;
- matters of public policy; and
- personal rights that are not commercial.

Public Policy and Social Issues

With respect to public policy issues, Lebanese courts generally refrain from excluding the arbitrability of a matter solely on the basis that it involves a public policy issue (Court of Appeal of Beirut, 19 December 2000, Decision 1417/2000; Court of First Instance of Mount Lebanon, 25 June 2001, Decision 25/2001).

Other matters that may not be referred to arbitration in Lebanon include those that fall under the exclusive or mandatory jurisdiction of state courts, such as commercial representation agreements. However, as indicated in **1.1 Prevalence of Arbitration**, Lebanese case law has in certain cases accepted the arbitrability of disputes arising from commercial representation agreements.

Similarly, maritime contracts may fall under the exclusive or mandatory jurisdiction of state courts. Pursuant to Article 212-1 of the Lebanese Code of Maritime Commerce, any clause which directly or indirectly seeks to derogate from the jurisdiction of the Lebanese courts in matters relating to bill of lading is null and void.

Article 79 of the Lebanese Code of Labour subjects all labour and social security disputes to the exclusive jurisdiction of the Labour Arbitration Boards, which are state courts composed of a presiding judge, an employers' representative and an employees' representative. Lebanese courts have interpreted the jurisdiction of the Labour Arbitration Boards as a matter of public policy, thereby ruling in favour of the exclusivity of this jurisdiction at the expense of the parties' agreement to arbitrate (Lebanese Court of Cassation, 26 April 2012, Decision 79/2012). It should be noted that the non-arbitrability of labour disputes does not apply to collective labour agreements.

Bankruptcy

With respect to bankruptcy matters, according to Article 490 of the Lebanese Code of Commerce and Article 108 of the NCPC, the courts of first instance of the jurisdiction in which the bankrupt business/merchant is domiciled have exclusive jurisdiction to declare bankruptcy and to hear the disputes arising therefrom. However, as mentioned in **1.1 Prevalence of Arbitration**, the liquidator is obliged to enforce arbitration agreements that were concluded prior to the bankruptcy and in respect of disputes not related to the bankruptcy.

Arbitrating Disputes

Regarding the arbitrability ratione personae of disputes, prior to the 2002 amendment to the NCPC (see **2.2 Changes to National Law**), the principle of the arbitrability of public contracts in general – and administrative contracts in particular – was not generally observed. With the 2002 amendment, Article 762(2) of the NCPC explicitly recognised the arbitrability of domestic public contracts. Article 762(3) of the NCPC also required that arbitration agreements contained in administrative contracts be approved by the Council of Ministers. The principle of arbitrability of international public contracts was enshrined in Article 809 of the NCPC, as amended in 2002.

3.3 National Courts' Approach

Lebanese courts tend to apply classic conflict-of-law rules to determine the law governing the arbitration agreement, regardless of the place of arbitration. In this context, the Court of Cassation held that "the proof of the arbitration agreement and its continuity over time, ie its extension, is governed in Lebanon either by the law applicable to the effects of this agreement or by the law of the place where the agreement was concluded, in accordance with Article 139 para. 1 of the NCPC", which codifies the conflict-of-law rules (Lebanese Court of Cassation, 17 June 1999, Decision 77/99).

Regarding the approach of the national courts with respect to the enforcement of arbitration agreements, the NCPC does not contain any provision requiring state courts to decline their jurisdiction when a party invokes an arbitration

agreement, whether in domestic or international arbitration.

Nevertheless, it is a well-established practice in Lebanese case law that state courts refer parties to arbitration if one of the parties objects to their jurisdiction (Court of First Instance of Mount Lebanon, 31 July 2003, Decision 20/2003; Court of First Instance of North Lebanon, 15 January 2004, Decision 28/2004; Court of First Instance of Beirut, 16 October 2008, Decision 10221/2007). This position is consistent with the provisions of Article II (3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

3.4 Validity

The principle of the separability of arbitration agreements is not expressly provided for in the NCPC, but Lebanese courts have consistently held that "in arbitration, the arbitration agreement is independent of the underlying contract in which it is contained [...]" (Court of Appeal of Beirut, 3 April 2003, Decision 464/2003). Consequently, the invalidity of a main contract does not entail the invalidity of the arbitration agreement contained therein (Court of Appeal of Beirut, 20 May 2008, Decision 767/2008).

4. The Arbitral Tribunal

4.1 Limits on Selection

Article 810 of the NCPC provides for a clear and unrestricted right to appoint arbitrators or to agree on the method of their appointment directly or by reference to specific arbitration rules. In this respect, Lebanese courts have consistently confirmed that parties may bring their disputes to the knowledge of a legal entity (Court of Appeal of Beirut, Decision 464/2003; Court of First Instance of Beirut, 25 January 1999, Decision 43/1999; and Court of First Instance of Beirut, 5 March 2007). In any event, arbitrators will always be natural persons, even if they sometimes settle disputes on behalf of the institution that administers and supervises the arbitration.

Moreover, the NCPC does not require arbitrators to have any special qualifications, so parties have complete freedom to choose whomever they wish. It is generally accepted in Lebanese case law that members of the judiciary may act as arbitrators without any restrictions (Lebanese Court of Cassation, 9 November 2004, Decision 150/2004).

While the NCPC provisions governing domestic arbitration require arbitral tribunals to be composed of an uneven number of arbitrators (Article 771 of the NCPC), this is not the case in international arbitration, as Article 810 of the NCPC allows for the appointment of arbitrators by reference to specific arbitration rules, which, in turn, may provide for the formation of an arbitral tribunal composed of an even number of arbitrators. This has been confirmed by the Lebanese courts, which have repeatedly granted exequatur to international arbitral awards rendered by tribunals composed of an even number of arbitrators (Court of First Instance of Beirut, 17 July 1991, Decision 197/3; Court of Appeal of Beirut, 16 May 2012, Decision 832/2012).

4.2 Default Procedures

Pursuant to Articles 810 and 774 of the NCPC, if the parties fail to appoint arbitrators and the arbitral institution administering the arbitration does not intervene to appoint the arbitrator(s), or if there is no such institution and no alternative appointing authority (as is the case in ad hoc arbitrations), the President of the Court of First Instance acting in support of the arbitration, may intervene and appoint the arbitrator(s).

The decision of the President of the Court of First Instance must be made in a timely manner and cannot be challenged. However, parties may lodge an appeal against the decision of the President of the Court of First Instance refusing to appoint arbitrator(s) on the grounds that the arbitration agreement is null and void or insufficient.

Moreover, the NCPC does not provide for a specific procedure applicable to multi-party arbitrations. However, in a decision issued on 19 October 2010, the Court of Appeal of Mount Lebanon held that, where different respondents have separate legal personalities and interests, they should not be forced to choose only one arbitrator, in accordance with the principle of the equality of parties in the appointment of arbitrators, which the court qualified as a principle of public policy.

4.3 Court Intervention

State courts only intervene in the selection of arbitrators only when the method of appointment chosen by the parties fails (see **4.2 Default Procedures**), or when arbitrators are challenged and removed in ad hoc arbitrations (see **4.4 Challenge and Removal of Arbitrators**).

4.4 Challenge and Removal of Arbitrators

If an arbitrator is challenged in an institutional arbitration, the parties must follow the procedure set out in the institutional rules.

With respect to ad hoc arbitration, the NCPC section governing international arbitration does not provide a specific procedure for challenging and removing arbitrators. This has led Lebanese courts to follow the procedural rules set forth in the NCPC provisions governing domestic arbitration in matters of challenge of arbitrators (Court of Appeal of Beirut, 10 December 2001, Decision 1778/2001).

Pursuant to Article 770 of the NCPC, which governs the challenge and removal of arbitrators in domestic arbitration, arbitrators may only be removed with the unanimous consent of the parties.

Challenges to the arbitrator(s) must be based on grounds that have come to the parties' attention after the appointment of the arbitrator(s). It should be noted that, pursuant to Article 769(2) of the NCPC, the arbitrators are obliged, upon their appointment, to disclose possible grounds for their challenge. It follows that the grounds for challenge may arise from facts that predate the appointment of the arbitrator(s).

Pursuant to Article 770(2) of the NCPC, the grounds for challenging an arbitrator are the same as those for challenging a judge. These grounds are set out in Articles 120 and 130 of the NCPC, and must be interpreted restrictively and pertain essentially relate to the personal ties of the arbitrator(s), including:

- kinship ties with a party or with another arbitrator;
- personal interest of the arbitrator(s) with one of the parties or in relation to the case;
- prior knowledge of the case in the capacity of authorised representative, legal counsel or arbitrator; and
- enmity or friendliness with one of the parties to an extent that is likely to affect their impartiality.

Pursuant to Article 770(3) of the NCPC, the parties may challenge against the arbitrator(s) before the competent court of first instance within 15 days from the discovery of the ground for

challenge. However, pursuant to Article 787(2) of the NCPC, the parties may not challenge the arbitrator(s) after the closing of the proceedings. Moreover, if a party has grounds to challenge an arbitrator and fails to do so within the time limit set by the arbitral institution in the case of institutional arbitration or by the NCPC in the case of ad hoc arbitration, that party is deemed to have waived its right to challenge the arbitrator at a later stage of the proceedings, including in the annulment proceedings (Court of Appeal of Beirut, 21 February 1994).

If the competent court of first instance decides to recuse the challenged arbitrator(s), it is well established in Lebanese case law that such decision does not lead to the annulment of the arbitration agreement (Lebanese Court of Cassation, 28 February 2002, Decision 29/2002). However, such a decision to disqualify the arbitrator(s) would have the effect of retroactively revoking the arbitrator's mandate and annulling any award that was rendered by the challenged arbitrator in a related case (Lebanese Court of Cassation, 1 April 2004, Decision 60/2004).

Finally, pursuant to Article 770(3) of the NCPC, there is no remedy (whether by way of appeal or otherwise) are available against the decision of the competent court of first instance regarding the challenge of arbitrators.

4.5 Arbitrator Requirements

Arbitrators must be impartial and independent, or they may be challenged and removed (Court of Appeal of Beirut, 27 December 1993, Decision 766/93). As explained in **4.4 Challenge and Removal of Arbitrators**, the standards developed by Lebanese case law to assess the independence and impartiality of an arbitrator are similar to those allowed for the challenge of judges, and are enacted on an exhaustive basis with no possibility of extension (Court of First Instance of Beirut, 5 April 2006, Decision 12/48).

It is in the light of these standards that Article 769(2) of the NCPC obliges arbitrators to disclose any information that might lead a party to doubt the impartiality or independence of the arbitral tribunal.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

Disputes in Lebanon are generally arbitrable. However, certain subject matters are considered non-arbitrable, and are subject to the exclusive jurisdiction of state courts under the provisions of the NCPC governing domestic arbitration (see **3.2 Arbitrability**). The criteria for determining the arbitrability of certain subject matters are set forth in the Lebanese Civil Code (Article 1037 of the COC). These provisions apply to international arbitration when the parties submit the arbitration to Lebanese law.

5.2 Challenges to Jurisdiction

Article 785 of the NCPC expressly recognises the principle of competence-competence, which applies only to domestic arbitration but is generally extended to international arbitration in Lebanon. This has been increasingly confirmed by Lebanese courts (see, for example, Lebanese Court of Cassation, 25 January 2014, Decision 14/2014). It follows that arbitral tribunals have exclusive jurisdiction to hear challenges to their jurisdiction.

5.3 Circumstances for Court Intervention

As mentioned in **5.2 Challenges to Jurisdiction**, the Lebanese Arbitration Law recognises the principle of competence-competence. However, the NCPC does not specify the scope of

competence-competence, nor does it contain any provisions regarding state courts dealing with jurisdictional issues before arbitral tribunals.

Domestic Arbitration

With regard to domestic arbitration, Article 764 of the NCPC limits the review of arbitration matters by state courts to the assessment of arbitration agreements that are manifestly null and void or incapable of authorising the appointment of the arbitrator(s).

International Arbitration

In matters of international arbitration, Lebanese courts almost always rule on the validity of arbitration agreements, regardless of any prior jurisdiction granted to arbitrators or limitations on the scope of review of state courts (Court of Appeal of Beirut, 2 February 1999; Court of First Instance of Beirut, 27 March 1997, Decision 117/97).

In light of the shortcomings of the Lebanese Arbitration Law, particularly in relation to international arbitration, it has been suggested that Lebanese courts refer to Article II(3) of the New York Convention (ratified by Lebanon in 1998), which requires state courts seised of matters governed by an arbitration agreement to decline their jurisdiction unless they find that the arbitration agreement is null and void, inoperative or incapable of being performed.

As a result, Lebanese courts have tended to apply Article II(3) of the New York Convention in order to extend the application of Article 764 of the NCPC to international arbitration, thereby limiting the state courts' review to the mere verification of the manifest invalidity of arbitration agreements (Court of First Instance of Beirut, 26 February 2014, Decision 194/2014).

As for negative decisions on jurisdiction, there are no provisions in the NCPC or precedents in Lebanese case law that prohibit state courts from reviewing such decisions, but as far as is known, no such review has taken place.

5.4 Timing of Challenge

The Lebanese Court of Cassation, in reviewing the admissibility of a challenge to arbitrators' decision on jurisdiction, held that the provisions of Article 615 of the NCPC – which sets out the decisions that may be challenged during the course of proceedings – must be transposed to arbitration. This is due to the fact that Article 804 of the NCPC subjects appeal and applications to set aside arbitral awards to the procedural rules governing recourse to the court of appeal. Moreover, since Article 615 of the NCPC does not list the challenge to arbitrators' decision on jurisdiction among the decisions that can be appealed during the proceedings, the Lebanese Court of Cassation considers that such recourse is inadmissible before the arbitral award is issued (Lebanese Court of Cassation, Decision 13/2007). This approach is followed by the lower courts (Court of Appeal of Mount Lebanon, 4 March 2010, Decision 28/2010).

Considering that Article 804 of the NCPC is also applicable to international arbitration by reference to Article 821 of the NCPC, challenges to arbitrators' decisions on jurisdiction in international arbitration is also not admissible prior to the issuance of the arbitral award.

It follows from the above that parties have the right to challenge the jurisdiction of an arbitral tribunal before state courts only after an award has been rendered, at the enforcement or annulment stage (Articles 817 and 819 of the NCPC). It should be noted that the Lebanese case law

is silent on the issue of recourse against partial arbitral awards.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

Jurisdictional issues at the annulment or enforcement stage are reviewed de novo by the court of appeal.

However, parties who fail to raise jurisdictional objections during the course of arbitral proceedings on grounds of which they were aware at the time are deemed to have waived their right to challenge the award on those grounds (Lebanese Court of Cassation, Decision 142/2001).

As to questions of admissibility, as indicated in **5.3 Circumstances for Court Intervention**, Lebanese courts almost always rule on the validity of arbitration agreements, notwithstanding any prior jurisdiction conferred on arbitrators or limitations on the scope of review by state courts. Lebanese courts have only recently begun to move towards a mere prima facie review of the validity of arbitration agreements.

5.6 Breach of Arbitration Agreement

As noted under **3.3 National Courts' Approach**, while the Lebanese Arbitration Law is silent on the principle that state courts must decline jurisdiction when a party invokes an arbitration agreement, but this principle is well established in Lebanese case law.

Neither the NCPC nor the case law allows state courts to raise their lack of jurisdiction ex officio, as the right of a party to object to jurisdiction of the court is not a matter of public policy (Lebanese Court of Cassation, 22 March 2006, Decision 61/2006).

Instead, Lebanese courts require that the arbitration agreement to be invoked in limine litis (Court of First Instance of Beirut, 18 February 2004), failing which the parties are deemed to have waived their right to bring the dispute before an arbitral tribunal (Court of Appeal of North Lebanon, 19 January 2006, Decision 24/2006).

5.7 Jurisdiction Over Third Parties

The Lebanese Arbitration Law does not preclude the application of the principle of extension ratione personae of the scope of an arbitration agreement to persons (natural or legal) who have not signed it.

Thus, notwithstanding the requirement that arbitration agreements be made in writing (Articles 766 and 763 of the NCPC), the Lebanese Court of Cassation held that a non-signatory company was bound by an arbitration agreement by virtue of the economic unity that existed between that company and the signatories to the arbitration agreement. In this decision, the Lebanese Court of Cassation did not require the non-signatory's participation in the drafting of the agreement or the execution of the contract, nor did it require the non-signatory's knowledge of the existence of the arbitration agreement (Lebanese Court of Cassation, 25 January 2014, Decision 14/2014).

Similarly, the President of the Court of First Instance of Beirut upheld a request for the appointment of an arbitrator on behalf of recalcitrant sellers who had not signed the contract for the sale of a property that was the subject of arbitration proceedings. The judge reasoned that the arbitration agreement signed by some of the sellers could be extended to other sellers if they were involved in the conclusion and execution of the sale contract, which would result in an economic unity between all the sellers (Court of First Instance of Beirut, 27 June 2011).

In another case, the President of the Court of First Instance of Beirut ruled that the participation of a non-signatory in the negotiation or execution of a contract constituted sufficient evidence to consider that it wishes to be a party to the contract, with the effect of being bound by the arbitration agreement contained therein (Court of First Instance of Beirut, 19 June 2013, Decision 34/272).

6. Preliminary and Interim Relief

6.1 Types of Relief

Following the 2002 amendment of the NCPC (see **2.1 Governing Law**), Article 789 expressly grants the arbitrator the same powers as a court judge to order interim or conservatory measures. These measures include sealing, inventory of assets, sequestration, forced sale of perishable goods, and description of the state of affairs (Article 589 of the NCPC).

In practice, interim or conservatory measures cannot be sought ex parte from arbitral tribunals without giving the opposing party an opportunity to be heard.

6.2 Role of Courts

While the case law on the role of state courts in preliminary or interim relief appears to be inconsistent, Lebanese courts generally tend to consider that the arbitrator's power to issue such measures is concurrent with the jurisdiction of the judge of expedited matters (Judge of expedited matters of Beirut, 7 September 1984, Decision 777/84).

However, with regard to interim payments, the concurrent jurisdiction of the judge of expedited matters has often been rejected on the grounds that interim payment decisions require an examination of the merits of the dispute and may even concern the entire claim, which, if transferred to state courts, would be tantamount to depriving the arbitration of its substance (Court of Appeal of Beirut, 30 July 2009, Decision 1100/2009; Judge of expedited matters of Beirut, 12 February 2002, Decision 554/2002).

In addition, it is established in Lebanese case law that, where arbitral tribunals are yet to be formed, state courts have jurisdiction to order preliminary or interim relief despite the existence of an arbitration agreement, unless the parties have agreed otherwise (Lebanese Court of Cassation, 19 January 1996, Decision 8/2006; Court of Appeal of Beirut, 30 July 2009, Decision 1100/2009).

In addition to the above, state courts also act in support of the enforcement of measures ordered by arbitral tribunals, particularly as the latter lack coercive powers.

6.3 Security for Costs

The Lebanese Arbitration Law does not contain any provisions regarding the power of arbitral tribunals to order security for costs. Nevertheless, arbitral tribunals issue such orders in practice.

With respect to state courts, Article 866 of the NCPC provides that enforcement judges have the power to order protective measures for the purpose of seizing the debtors' funds as security for the debt. It can be argued that such measures include orders for security for costs.

7. Procedure

7.1 Governing Rules

According to Article 811 of the NCPC, the choice of procedural rules is left to the agreement of

the parties or, in the absence of any such agreement, to the arbitral tribunal.

The parties may choose their own procedural rules, either directly or by reference to the rules of an arbitral institution, although it should be noted that, pursuant to Article 812 of the NCPC, Articles 762 to 792 of the NCPC, which apply to domestic arbitrations, apply to international arbitrations, unless the parties expressly agree otherwise.

Pursuant to Article 813 of the NCPC, if the arbitration agreement is silent on the procedural rules governing the arbitration, the arbitral tribunal has the discretion to choose or formulate the rules as it deems appropriate, taking into account business practices and customs.

7.2 Procedural Steps

The Lebanese Arbitration Law does not provide for any mandatory procedural steps for arbitration proceedings.

7.3 Powers and Duties of Arbitrators

As noted in **5.2 Challenges to Jurisdiction**, **6.1 Types of Relief** and **7.1 Governing Rules**, arbitrators have broad powers under Lebanese law with respect to matters relating to their jurisdiction, the applicable procedural matters, and the interim measures and remedies that may be granted.

With respect to their duties, arbitrators must remain impartial and independent at all times, failing which they may be challenged and disqualified (see **4.5 Arbitrator Requirements**). As a result, arbitrators have a duty to disclose to the parties any information that might cast doubt on their impartiality (see **4.4 Challenge and Removal of Arbitrators** and **4.5 Arbitrator Requirements**).

In addition, arbitrators are required to comply with the provisions of international public policy and the fundamental principles of civil procedure, in particular those related to due process, the reasoning of a judgment, and the applicable rules of the arbitral institution (Article 777 of the NCPC). Arbitrators are also expected to conduct the proceedings to their conclusion, unless there is a legitimate reason not to do so (Article 769(3) of the NCPC). They are also obliged to render a final award within the time allotted and in accordance with the terms of their mandate (Article 817 of the NCPC).

Finally, given the contractual nature of the relationship between the arbitrators and the parties, the arbitrators may be held liable for damages for non-performance or improper performance in application of the common law conditions set forth in the Lebanese Civil Code.

7.4 Legal Representatives

According to Article 378 of the NCPC, each party must be represented by a lawyer in cases where the value of the dispute exceeds LBP1 million, or in cases where there is no quantification of damages, or in all other cases where the law requires the assistance of a lawyer. Parties cannot waive their obligation to be represented by a lawyer.

While some commentators believe that the above provisions apply equally to domestic and international arbitration, a distinction should be made between the two categories of arbitration. As explained in **7.1 Governing Rules**, unlike domestic arbitration, which is always governed by the provisions of the NCPC, the choice of procedural rules in international arbitration is left to the agreement of the parties. Accordingly, in international arbitration, parties often deviate from the NCPC and thus from the obligation to

be represented by a lawyer. It follows that no particular qualification is required for legal representatives appearing in international arbitration in Lebanon.

8. Evidence

8.1 Collection and Submission of Evidence

As is generally the case in civil law countries, Lebanon has an inquisitorial system in which the court has the role of investigating rather than delegating the control of the adversarial process to the parties.

The NCPC provides a wide range of evidence that may be used, such as the production of documents, the use of testimony (whether oral or in writing) and the use of experts. In commercial disputes, evidence can be brought by any means.

However, Lebanese procedural rules are based on the principle that no one can produce evidence for themselves. As a result, documentary evidence prevails over witness testimonies, which, in any case is often produced by third parties unconnected to the party who collected it. Moreover, due to the inquisitorial nature of the Lebanese system, witnesses are usually questioned only by the judge and very rarely by the lawyers.

Furthermore, discovery procedures are not permitted under Lebanese law, as the parties' request for discovery must be specific and subject to restrictive conditions, while the judge has wide discretion to grant or deny the request.

In the context of international arbitration, arbitration practitioners have generally embraced the balance between the procedural rules of the civil law tradition and those of common law systems. It is therefore not uncommon for parties to international arbitrations to refer to the IBA Guidelines on the Taking of Evidence in International Arbitration in the terms of reference.

8.2 Rules of Evidence

Arbitrators can use a wide range of measures to gather evidence Lebanese seated arbitrations.

They can order the parties to disclose any evidence in their possession (Article 780 of the NCPC) and also have the power to hear witnesses without putting them under oath (Article 779(2) of the NCPC). Arbitrators also have the power to rule on allegations of the inauthenticity of signed (or handwritten) documents (Article 783(1) of the NCPC). More generally, arbitrators are expected to investigate the case (Article 779(1) of the NCPC), which includes taking all necessary steps, including the appointment of experts, unless their mandate does not allow for it.

8.3 Powers of Compulsion

Arbitrators in Lebanon do not have coercive powers and therefore have very limited powers of compulsion.

The NCPC is silent on the power of arbitrators to compel parties to produce documents. While Article 780 of the NCPC refers to the arbitrators' power to order the production of documents, it does not mention the measures available to the arbitrators in the event that the requested evidence is not produced. This does not mean, however, that arbitrators cannot draw negative inferences from a party's refusal to produce the requested evidence.

With respect to the attendance of witnesses, while arbitrators do not have the power to order a witness to attend a hearing, they may rely on the assistance of state courts to impose penalties on recalcitrant witnesses (Article 779(3) of the NCPC). Similarly, arbitrators may request the competent state courts to issue a letter rogatory for the purpose of hearing the case (Article 779(3) of the NCPC).

9. Confidentiality

9.1 Extent of Confidentiality

The Lebanese Arbitration Law does not expressly confirm the obligation of confidentiality in arbitral proceedings.

However, it is well established in Lebanese case law that Article 553 of the NCPC, which governs the issuance of awards, does not require arbitral awards to be made public, as is the case with state court judgments, given the private and inherently confidential nature of arbitration (Court of Appeal of Beirut, 9 October 2003, Decision 1404/2003).

Moreover, according to Article 788 of the NCPC, the deliberations of the arbitrators must remain secret. There is no corresponding provision in the section of the NCPC governing international arbitration.

10. The Award

10.1 Legal Requirements

Article 790 of the NCPC lists the formal information that an arbitral award must contain, including the following:

- the name of the arbitrator(s) who issued the award;
- the place and date of issuance of the award;
- the names of the parties, their capacities, and the names of their representatives;
- a summary of the facts, claims and evidence submitted by the parties; and
- the reasons for the award and its operative part.

According to Article 791 of the NCPC, the arbitral award must be signed by the arbitrator(s) or by the majority of the arbitrators who made the award.

While non-compliance with most of the above requirements may constitute grounds for challenging an award in domestic arbitration (Article 800(5) of the NCPC), this is not necessarily the case in international arbitration. Nevertheless, it is advisable to comply with these minimum formal requirements to ensure that the award is not vulnerable to annulment on other grounds, such as international public policy.

With regard to the time limits for the delivery of the award, Article 773 of the NCPC provides that if the arbitration agreement does not specify a time limit for the arbitral proceedings, the arbitrators shall complete their mandate within six months from the appointment of the last arbitrator, although this six-month period may be extended by the agreement of the parties or by a decision of the President of the Court of First Instance, upon the request of one of the parties or the arbitral tribunal.

10.2 Types of Remedies

The Lebanese Arbitration Law does not limit the powers of an arbitral tribunal in awarding remedies. Moreover, it is widely accepted in Lebanese jurisprudence that arbitral tribunals, in

resolving contractual disputes, have the power to issue any decision regarding the specific performance of the underlying contract or regarding the consequences of non-performance of the contract (Lebanese Court of Cassation, Decision 132/2002). This means that arbitral tribunals have complete discretion in awarding any of the remedies available under Lebanese law. These generally include orders to pay damages, injunctive or declaratory reliefs, awards of interest (see **10.3 Recovering Interest and Legal Costs**), and awards of moral damages.

The only type of remedy that arbitral tribunals may not award is punitive damages, as such remedies are not provided for under Lebanese law.

10.3 Recovering Interest and Legal Costs

Lebanon does not prohibit the application of interest (Article 767 of the COC). Furthermore, and considering that Lebanese law does not set any limit on the calculation of interest in commercial matters, Lebanese courts held that the award of interest by arbitral tribunals is not subject to review in the context of annulment proceedings (Court of Appeal of Beirut, 29 November 2011, Decision 1725/2001). The Lebanese Court of Cassation also confirmed that interest awarded by arbitral tribunals may exceed the value of legal interest as determined by Lebanese law (Lebanese Court of Cassation, 27 April 2006, Decision 98/2006).

With respect to legal costs, the general rule set forth in the NCPC is that the losing party shall bear the legal costs incurred by both parties (Article 541(2) of the NCPC). In certain circumstances, the successful party may be ordered to pay all or part of the legal costs of the other party, in particular if that party's procedural conduct has caused prejudice to the other party (Article 542 of the NCPC).

In the context of international arbitration, arbitral tribunals tend to refer mainly to the applicable rules of the arbitral institution, most of which provide guidance on the apportionment of costs.

11. Review of an Award

11.1 Grounds for Appeal

International arbitral awards rendered in Lebanon may be challenged by way of an application for annulment (Article 819 of the NCPC), but, unlike awards rendered in domestic arbitrations, they cannot be appealed (Lebanese Court of Cassation, Decision 163/2001).

On the other hand, enforcement orders for international arbitral awards rendered outside Lebanon may be appealed (Article 817 of the NCPC).

The challenge of an international arbitral award rendered in Lebanon and the appeal against an enforcement order of an international arbitral award rendered outside Lebanon may be based on the same five grounds, namely:

- if the award was made in the absence of an arbitration agreement or on the basis of an agreement that is null or void due to the expiration of the time allotted for making the award;
- if the award was made by arbitrators who were not appointed in accordance with the law;
- if the arbitrators have failed to comply with the mandate given to them;
- if there has been a violation of due process; or

- if the award is contrary to Lebanese international public policy.

The application for annulment should be filed with the court of appeal of the place where the arbitral award was rendered (Article 819(3) of the NCPC). The application for annulment may be filed as soon as the award is made, but in any event no later than 30 days after the notification of the order recognising the award or granting it exequatur (Article 819(4) of the NCPC). Annulment proceedings generally lead to the suspension of the enforcement, unless the contested award contains summary judgments (Article 820 of the NCPC).

11.2 Excluding/Expanding the Scope of Appeal

International arbitral awards are not subject to appeal in Lebanon; they may only be challenged by way of an application to set aside on the limited grounds set out in **11.1 Grounds for Appeal**. The Parties may not modify or exclude any of these grounds, nor may they add new grounds.

For this reason, the Lebanese Court of Cassation has held that parties may not seek the annulment of an arbitral award on the ground of violation of public policy based on alleged misinterpretation of the applicable law (Lebanese Court of Cassation, 31 October 2002, Decision 136/2002). The Lebanese Court of Cassation also refused to annul an arbitral award where one of the parties claimed that evidence and arguments presented in the challenged award had been misinterpreted or that the principle of equality had been violated, without such violation amounting to a violation of due process (Lebanese Court of Cassation, Decision 141/2001).

11.3 Standard of Judicial Review

It is well established in Lebanese case law that an action to set aside an arbitral award should not be confused with an appeal to review the legality of the challenged award (Lebanese Court of Cassation, 18 December 2007, Decision 159/2007).

Therefore, it is settled case law that Lebanese courts must refrain from reviewing the merits of international arbitral awards (Court of Appeal of Beirut, 21 December 2011, Decision 1786/2011). Similarly, it is widely accepted that the review of an action to set aside an arbitral award may not entail any review of the grounds on which the challenged award was made or of its compliance with the applicable law (Court of Appeal of Beirut, 18 June 2014, Decision 890/2014; Court of Appeal of Beirut, 26 March 2009, Decision 454/2009).

Nevertheless, on a few occasions, some Lebanese courts have failed to respect the above principle. For example, the Court of Appeal of Beirut examined an arbitrator's application of the law agreed upon by the parties, on the basis of the court's authority to review the arbitrator's compliance with the terms of his mandate (Court of Appeal of Beirut, 3 March 2011, Decision 308/2011). However, such decisions remain the exception.

12. Enforcement of an Award

12.1 New York Convention

Lebanon ratified the New York Convention on 11 August 1998, declaring that it would apply the New York Convention to the recognition and enforcement of awards made only in the territory of another contracting state, on the basis of reciprocity.

In accordance with Article VII(1) of the New York Convention, Lebanese courts consider that the New York Convention is applicable only if its provisions are more favourable than national law (Lebanese Court of Cassation, 29 November 2001, Decision 146/2001). Accordingly, Lebanese courts tend to consider that the NCPC provides a more favourable regime than the New York Convention with respect to the recognition and enforcement of awards. In particular, Article 814 of the NCPC excludes the recognition and enforcement of awards that are manifestly contrary to international public policy, whereas Article V(2)(b) of the New York Convention excludes awards that are contrary to public policy of the country in which recognition and enforcement are sought, which is much broader than international public policy.

12.2 Enforcement Procedure

The enforcement of international arbitral awards is subject to the same rules that govern the enforcement of domestic arbitral awards following the express reference found in Article 815 of the NCPC to Articles 793 to 797 of the NCPC.

Pursuant to Article 795 of the NCPC, as clarified by the Lebanese courts, the President of the Court of First Instance of Beirut is responsible for issuing the order granting exequatur to international arbitral awards. If the dispute is of an administrative nature, the enforcement order must be issued by the President of the Lebanese State Council (Article 795(2) of the NCPC).

The party requesting an enforcement order has the sole burden of proving the existence of the arbitral award for which the order is requested (Article 814 of the NCPC). For this purpose, the party must submit originals or authenticated copies of the award and the arbitration agreement. There are no other formal requirements.

Enforcement orders are issued by Lebanese judges, unless the arbitral award for which the order is sought is manifestly contrary to international public policy (Article 814(1) of the NCPC).

Set-Aside Proceedings

With regard to the impact of the annulment procedure in the seat of arbitration on the enforcement of awards in Lebanon, although there is not yet a judicial decision similar to the French Hilmarton decision accepting that an arbitral award can be enforced notwithstanding its annulment in the seat of arbitration, the conditions for such a solution are said to be already present in Lebanese jurisprudence (M. Maamari, *L'exécution des sentences arbitrales étrangères et des sentences rendues localement en droit libanais*, page 19).

In view of the foregoing, it is reasonable to assume that Lebanese courts would not readily be prepared to stay enforcement proceedings pending resolution of the seat proceedings. However, the position may vary depending on the proximity of the award to the seat of the arbitration.

Moreover, since Article 796(2) expressly refers to Article 800 of the NCPC, it can be argued that in order to be granted exequatur, the arbitral award for which exequatur is sought must not violate any of the grounds for annulment mentioned under **11.1 Grounds for Appeal**, and must contain all mandatory information, including the claims of the parties and the reasons and means in support thereof, the name(s) of the arbitrator(s), the reasoning and the operative part, the date, and the signature of the arbitrator(s). The reference to Article 800 of the NCPC may also justify that the arbitral award for which the order is sought must comply with the rules of public policy. However, this may

conflict with Article 814(1) of the NCPC, which refers only to a manifest violation of international public policy as the sole test for justifying the grant or refusal of exequatur for an international arbitral award. As discussed in **12.3 Approach of the Courts**, Lebanese case law has mitigated the inconsistency arising from the provisions of Article 796(2) of the NCPC.

Enforcement Orders

Once an enforcement order has been issued for an international arbitral award rendered outside Lebanon, the award debtor may appeal against the order before the court of appeal. International arbitral awards are subject only to annulment proceedings (see **11.1 Grounds for Appeal**).

In any case, if the enforcement order has been refused, the applicant may appeal against the order before the court of appeal (Article 816 of the NCPC).

12.3 Approach of the Courts

As indicated in **12.2 Enforcement Procedure**, the reference made in Article 796(2) of the NCPC to Article 800 of the NCPC has the effect of making it possible to examine all the grounds that may be raised against a domestic award when considering the application for exequatur of an international arbitral award.

Fortunately, the Lebanese courts have remedied the deficiency found in Article 796(2) of the NCPC, with the Court of First Instance of Beirut ruling that the exequatur judge is not actually required to review the merits of the arbitral award (Court of First Instance of Beirut, 16 July 1991, Decision 197/3). Similarly, the Beirut Court of Appeal held that the exequatur judge's review should be limited to verifying only the manifest conformity with international public policy (Court of Appeal of Beirut, 21 December 2011, Decision 1786/2011). A decision of the Court of First instance of Mount Lebanon held that the exequatur is a purely administrative act that requires a simple summary review (Court of First Instance of Mount Lebanon, 12 October 1995, Decision 123/95).

In light of the above, international arbitral awards (whether rendered locally or abroad) are generally granted recognition and exequatur in Lebanon, while there are very few cases in Lebanese case law of exequatur being denied.

13. Miscellaneous

13.1 Class Action or Group Arbitration

Class actions are not available under Lebanese law.

However, pursuant to Article 811 of the NCPC, Lebanese law recognises that parties may agree to institutional international arbitration, whose rules provide for multi-party arbitration, as is the case with the arbitration rules of the ICC and the DIAC.

13.2 Ethical Codes

The code of ethics for lawyers conducting proceedings in Lebanon is found in Law No 42 of 1991 organising the legal profession in Lebanon.

There is no code of ethics or other professional standards specifically applicable to arbitrators. However, the NCPC contains a number of provisions that provide guidance as to the ethical standards expected of arbitrators. For example, Article 769 of the NCPC provides that once arbitrators have accepted their mandate, they may not resign without good cause, failing which the arbitrators shall be liable for damages. Article 770 of the NCPC further provides that the chal-

lenge of an arbitrator may only be based on the same grounds that justify the recusal of judges.

13.3 Third-Party Funding

Lebanese law does not contain any provisions governing or restricting third-party funders.

13.4 Consolidation

Lebanese law does not address the consolidation of separate arbitral proceedings.

However, pursuant to Article 811 of the NCPC, Lebanese law accepts that parties may agree to institutional international arbitration, the rules of which may provide for the consolidation of different arbitral proceedings.

13.5 Binding of Third Parties

As indicated in **5.7 Jurisdiction Over Third Parties**, it is well established in Lebanese jurisprudence that third parties who participate in the negotiation or execution of a contract are deemed to be bound by the arbitration agreement contained therein.

With respect to the binding effect of an arbitral award on third parties, it is generally accepted under Lebanese law that judicial decisions may be binding on third parties to the extent that the performance of such decisions may require the participation of the third parties, but without affecting their property. This is the case, for example, with the withholding of the award debtor's funds held by a third party. The same applies to arbitral awards, as Lebanese law does not distinguish between judicial decisions and arbitral awards in this respect.

Trends and Developments

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Alem & Associates is a regional law firm with offices in Beirut, Dubai, Abu Dhabi and Riyadh, designed to provide state-of-the-art legal services blended with knowledge of the local heritage. With more than 60 seasoned practitioners in its four offices, Alem & Associates regularly represents and advises clients throughout the world, with a focus on the Middle East, in relation to issues including corporate, regulatory, mergers and acquisitions, real estate, capital markets, banking and finance, energy and environment, aviation, franchising, agency and distribution, and construction. The firm also has an excellent reputation for its litigation and arbitration work, and serves its clients with an in-depth understanding of their industry, coupled with insight into the markets at hand.

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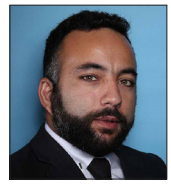

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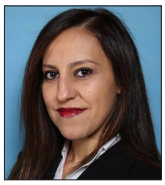

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Disputes Arising From the Economic and Financial Crises

During recent years, Lebanon has experienced one of the most severe economic and financial crises the world has seen in over 150 years, according to the World Bank.

In October 2019, amidst a notable increase in the illegal-market exchange rate (of Lebanese pounds to the US dollar) and an unprecedented two-week closure of Lebanese commercial banks following mass demonstrations, a liquidity crisis directly affected the Lebanese commercial banks and their depositors. There followed restrictions on depositors' access to their funds that were imposed by Lebanese banks in the absence of an official capital control.

Due to informal capital controls imposed by Lebanese banks since October 2019, cheques can no longer be cashed out and are instead sold on the market at heavy discounts, meaning that if a creditor is paid by cheque, they will lose a large portion of the face value of the debt they are owed.

A number of disputes have arisen as a result of the informal capital control measures that have been implemented by Lebanese banks since October 2019. These disputes include issues regarding (i) the rights of depositors to withdraw their deposits and/or transfer their funds out of Lebanon; (ii) the rights of debtors to pay their debts using banker's cheques; and (iii) the rights of debtors to pay their foreign currency denominated debt using Lebanese pounds, and if so, at what rate.

Owing to the fact that these disputes often involve banks and/or financial institutions and that the latter have historically included arbitration clauses in their standard agreements, which they request their clients to sign, a large portion of the disputes arising from the economic and financial crises is currently settled by arbitration. The resulting arbitral decisions are generally covered by confidentiality and are not made public.

At the same time, several decisions rendered by Lebanese, French, and UK courts, applying Lebanese law, have addressed issues related to the economic and financial crises.

In recent months, there seems to have been a trend in case law that banks are required to make available to their clients deposited funds either in cash or by international transfer. It appears that cheques are no longer accepted as a means of payment that relieves debtors from their debt.

One of the most recent decisions rendered to date is the March 2022 ruling of the UK High Court in the case of Vatche Manoukian v Société Générale De Banque Au Liban and Bank Audi. In that case, Mr Manoukian alleged that the defendant banks had refused to execute his instructions to make international transfers of sums which Mr Manoukian had deposited with them. The defendant banks' position was that they were under no obligation to make the requested transfers. Justice Picken found that there exists under Lebanese law a customary international transfer right under which international transfers are part of the expected services to be received by the clients from their bank on the opening of an account.

In his conclusion, Justice Picken held that "as a matter of Lebanese banking custom, a bank's obligation to effect a transfer pursuant to a client's request is not subject to a loose concept of 'legitimate reason' which would entitle a bank to refuse to comply with a transfer request which would risk a run on that bank and other banks".

In other words, banks, under Lebanese law, are under the obligation to transfer the funds of their clients outside Lebanon if so requested or ordered.

Moreover, Justice Picken held that tendering and making a deposit in Lebanon in application of Article 822 of the Lebanese Code of Civil Procedure cannot be used as an alternative to the banks' obligation to make international transfers at the request of their clients. A similar conclusion was reached by the Tribunal Judiciaire of Paris in November 2021 in Decision No 21/10243.

Disputes Arising From Lebanon's Sovereign Default

In March 2020, Lebanon defaulted for the first time in its history on debt payments. Lebanon's sovereign default consisted of failing to repay a USD1.2 billion Eurobond (Lebanese government bonds issued in foreign denominated currency such as US dollars) that had been issued ten years earlier.

The base prospectus of the USD22 billion Global Medium-Term Note Program under which the March 2020 Eurobond was issued includes Collective Action Clauses (CACs) pursuant to which the terms of the Eurobond (including payment terms and amounts payable) may be amended by a meeting of holders representing 75% of the total value of the bond issued. Any resolution passed at such meeting would be binding on all bondholders.

The CAC included in the March 2020 Eurobond, therefore, aims at preventing holdout creditors, ie, groups of creditors that refuse to participate in a restructuring process, but who, instead, opt to enforce the terms of the bond against the sovereign debtor through any means (including through the commencement of legal proceedings).

Whilst it transpires from the foregoing that CACs may be relied upon in amicable settlement settings prior to the occurrence of a sovereign default event, it could, however, be envisaged that CACs may be triggered after a sovereign default event takes place.

Following Lebanon's default on the March 2020 Eurobonds, two possible outcomes could be envisaged: either (i) Lebanon succeeds in negotiating with 75% of the bondholders a post hoc restructuring that is binding to all bondholders; or (ii) Lebanon faces legal proceedings initiated by its creditors.

To be noted that Eurobonds issued by Lebanon are generally governed by the laws of the State of New York, and that these bonds also typically provide for the non-exclusive jurisdiction of "any New York State or federal court sitting in the City of New York in the Borough of Manhattan" to settle any dispute arising between the Lebanese Republic and a bondholder.

However, legal remedies available to holdout creditors in national courts are generally ineffective and creditors are often unable to enforce judgments against the defaulting state. This may be the case for Lebanon which has a very limited number of assets abroad and, in addition, can invoke sovereign immunity to frustrate enforcement of decisions favourable to creditors/bondholders.

Indeed, Article 860(1) of the Lebanese Code of Civil Procedure prohibits enforcement against all assets owned by the state or by any other public legal person. In practice, this means that any decision obtained by bondholders in the

New York courts is unlikely to be enforced in Lebanon. As clearly stated in the 2020 March Eurobond, "Investors should therefore be aware that the waiver of immunity is likely to be ineffective in respect of the attachment of assets and properties located in the Republic [of Lebanon]."

Given the setbacks experienced in judicial proceedings before national courts, another emerging option has come to light in the wake of the 1998–2002 Argentine Great Depression: investment arbitration.

In order to prevail in an investment arbitration against a defaulting state, the sovereign default must qualify as a failure by the respondent state to abide by its international obligations to protect foreign investments made on its territory.

In particular, it is necessary to determine whether the purchase of sovereign bonds can be characterised as a "foreign investment" made in the defaulting state. Although there is not yet unanimity in international arbitration jurisprudence, an increasing number of decisions have ruled in favour of qualifying the purchase of bonds as a foreign investment that should be protected in the host state as is the case for any other recognised foreign investment.

Over the past two decades, numerous arbitral proceedings were initiated by foreign bondholders against defaulting states, such as Argentina, Venezuela, and, more recently, Greece and Cyprus. These arbitrations often involved several thousand bondholders who were regrouped as claimants in what could be regarded as class action proceedings.

Thus, in a recent decision rendered in February 2020, an arbitral tribunal has upheld jurisdiction over a claim by 956 Greek investors against Cyprus to recover EUR300 million in bonds and bank deposits that were confiscated as part of the state's financial bailout by European institutions. This decision is in line with a previous decision rendered against Argentina and pursuant to which an arbitral tribunal decided, by majority, that it had jurisdiction to hear "mass claims" brought by over 60,000 Italian bondholders.

The forum of choice for commencing an investment arbitration is the International Centre for Settlement of Investment Disputes (ICSID), an international arbitration institution that is part of the World Bank Group and which was established in 1966 by virtue of what is known as the Washington Convention. At the latest count, 153 contracting member states (including Lebanon) agreed to enforce and uphold arbitral awards in accordance with the ICSID Convention.

Adherence of states to the ICSID convention is generally coupled with Bilateral Investment Treaties (BITs) entered into between two contracting states of the ICSID Convention. The BIT establishes the terms and conditions for private investment by nationals and companies of one state (the home state) in another state (the host state). It is by virtue of these BITs that the home and host states express their consent to settle any dispute arising from the investment of the foreign investor by way of arbitration. At this time, Lebanon has entered into BITs with around 50 different states such as Switzerland, France, Italy, the UK, Germany, Kuwait and the UAE, among others.

Thanks to the substantive protection and the forum selection choices included in BITs, the BIT framework gives bondholders an alternative forum to enforcing their debts before national courts. This alternative has been preferred, on

occasion, over the option of resorting to national courts because of the easier enforceability of ICSID awards against defaulting states.

In fact, a party that seeks enforcement of an ICSID award may do so in any ICSID contracting state, and may simultaneously do so in more than one state. Historically, compliance of states with ICSID awards has been high because of reputational risks, pressure from the World Bank, as well as diplomatic and political pressure to pay what is awarded to the investors. Thus, when Argentina refused to comply with ICSID awards rendered against it, the US suspended its trade status under the United States' Generalized System of Preferences legislation and threatened to block an agreement with the members of the Paris Club to restructure Argentina's debt. Additionally, the World Bank and the Inter-American Development Bank blocked the extension of loans. These measures compelled Argentina to enter into settlement agreements with several award creditors.

In conclusion, given that Lebanon has a limited number of assets against which enforcement is possible outside of Lebanese territory, it is likely that non-Lebanese bondholders will resort to ICSID arbitration against Lebanon in the coming years. In this case, investment arbitrations would allow foreign bondholders to pressure Lebanon to enforce the resulting arbitral awards.

LIECHTENSTEIN

Law and Practice

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Schurti Partners Attorneys at Law Ltd advises its clients on the Liechtenstein aspects of multi-jurisdictional disputes, and the firm's civil litigation and arbitration team is also often engaged to co-ordinate the steps to be taken in other jurisdictions. Over several decades, the firm has built up excellent working relations with foreign law firms that are also specialised in litigation/arbitration and with barristers – a great asset in this context. Further, most members of Schurti Partners' civil litigation and arbitration team are qualified in multiple jurisdictions, which is also a benefit in multi-jurisdictional disputes. The firm's main areas of civil litigation and arbitration are disputes in trust and foundation matters, asset tracing, asset protection, disputes in corporate matters, directors'/trustees' liability matters, disputes in insurance matters, disputes arising out of banking and finance transactions, and general commercial disputes.

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1. General

1.1 Prevalence of Arbitration

Liechtenstein is well known for its fiduciary industry (eg, Liechtenstein foundations, and Liechtenstein trusts) and for its strong banking and finance sector.

Arbitration clauses in trust deeds and foundation statutes are becoming increasingly popular in Liechtenstein. As a result, more and more disputes in foundation and trust matters are resolved in arbitration proceedings. Most of these trust and foundation matters are international in nature since the settlors, founders, beneficiaries, and creditors of such Liechtenstein private asset structures are often from abroad.

The banking and finance sector in Liechtenstein also heavily relies on arbitration clauses in all kinds of agreements. The main reason for the popularity of arbitration in the banking and finance field is that Liechtenstein does not enforce foreign judgments (apart from Austrian and Swiss judgments and child support judgments), and likewise Liechtenstein judgments are not enforceable in many foreign jurisdictions.

However, Liechtenstein is a member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Therefore, unlike ordinary Liechtenstein judgments, Liechtenstein arbitral awards are enforceable in most foreign jurisdictions and, unlike foreign ordinary judgments, most foreign arbitral awards are enforceable in Liechtenstein. Another reason for the increasing popularity of arbitration as a means of dispute resolution in the banking and finance sector is the confidentiality of arbitral proceedings.

Further, Liechtenstein's highly export-orientated manufacturing industry also regularly relies on arbitration clauses in agreements with foreign suppliers and customers.

Apart from the arbitration matters which stem from the Liechtenstein fiduciary industry, the Liechtenstein banking and finance sector and the manufacturing industry, Liechtenstein has, over the years, established itself as an attractive place for international arbitration in matters which have, aside from the arbitration itself, no link to Liechtenstein.

Domestic Parties' Use of International Arbitration

As mentioned above, the Liechtenstein trust industry, the Liechtenstein banking and finance sector, and Liechtenstein's manufacturing industry rely on arbitration as a means of dispute resolution.

Basis of International Arbitration

It is difficult to tell under which basis international arbitration is used most in Liechtenstein. All three areas of application (ie, method of dispute resolution chosen by domestic parties, enforcement of foreign arbitral awards in Liechtenstein, and Liechtenstein as the seat of arbitration) can be found in practice.

1.2 Key Industries

The Liechtenstein banking and finance sector, as well as the heavily export-orientated manufacturing industry, heavily rely on arbitration in all kinds of agreements. Further, arbitration in relation to trust and foundation matters has become very common in the past few years. There has not been a noticeable decrease in arbitration proceedings concerning any particular industries due to the COVID-19 pandemic.

Liechtenstein has also established itself as a neutral jurisdiction for international commercial arbitration in which neither of the involved parties has a connection to the Principality.

1.3 Arbitration Institutions

The Liechtenstein Chamber of Commerce and Industry (LCCI), together with the Liechtenstein Arbitration Association (LIS), published a set of arbitration rules in 2012 (the Liechtenstein Rules).

A peculiarity of the Liechtenstein Rules is the absence of an actual administration. The LCCI – contrary to most other arbitral institutions – does not maintain a permanent (and costly) body with regard to arbitration. Rather, the LCCI merely appoints a secretary for arbitral proceedings who has minimal duties. The activity of the secretary is limited to the appointment of a commissioner upon application of a party to arbitral proceedings. The duties of the commissioner are to decide on the appointment or dismissal of arbitrators and to review the costs of arbitral proceedings upon request of a party.

In fact, the function of the commissioner, according to the Liechtenstein Rules, is similar to that of an arbitration commissioner or a secretary general of a typical institutional arbitration. Consequently, it is possible to conduct arbitral proceedings without the involvement of the secretariat and the appointment of a commissioner. If any problems arise and the support of a third party is required, the Liechtenstein Rules provide for a mechanism to appoint an independent person who in turn is subject to a legal confidentiality obligation.

This is a major advantage of the Liechtenstein Rules, since the benefits of institutional arbitral proceedings and of ad hoc proceedings (that is, flexibility, cost-efficiency, and confidentiality) are combined. The fact that the LCCI does not maintain any expensive permanent infrastructure with regard to arbitration is in line with one of the most important goals of the Liechtenstein Rules – namely, to provide for cost-efficient high-quality arbitration.

1.4 National Courts

The Liechtenstein Court of Appeal has exclusive jurisdiction to set aside an arbitral award, and a decision of the Court of Appeal setting aside an arbitral award, or dismissing an action for the award to be set aside, cannot be appealed. However, a complaint to the Constitutional Court is possible in case of a violation of constitutional rights.

The Liechtenstein District Court has exclusive jurisdiction to order judicial auxiliary measures during pending arbitration proceedings (ie, default procedures, and preliminary and interim relief).

2. Governing Legislation

2.1 Governing Law

If Liechtenstein is the seat of the arbitration, the arbitration proceedings are governed by the Liechtenstein Arbitration Law set forth in the Liechtenstein Civil Procedure Code (Articles 594 to 635). These provisions are mostly non-mandatory, and the parties may autonomously agree for specific arbitration rules to apply. The Liechtenstein Arbitration Law is largely based on the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law) and the respective provisions of the Austrian Civil Procedure Code (which in turn are also based on the UNCITRAL Model Law).

The fact that Liechtenstein adopted many provisions from the Austrian Arbitration Law has the advantage that in the absence of specific Liechtenstein case law and legal doctrine, one can refer to Austrian case law and legal doctrine for the construction of the Liechtenstein Arbitration Law. This is a huge asset for a small jurisdiction such as Liechtenstein.

Divergence From the UNCITRAL Model Law

The Liechtenstein Arbitration Law is based on the UNCITRAL Model Law but diverges in a few noteworthy areas. Significantly, the Liechtenstein Arbitration Law does not distinguish between national and international arbitration proceedings. Also, a challenge of an arbitral award must be submitted within four weeks of the date of receipt of the award, as opposed to the three months the UNCITRAL Model Law provides for. Another example of divergence is that the Liechtenstein Arbitration Law does not contain specific conflict-of-laws rules, leaving the choice of law to the arbitral tribunal if no choice has been made by the parties.

2.2 Changes to National Law

The most recent change to the Liechtenstein Arbitration Law, by which the restriction for consumers to participate in arbitration proceedings has been eased, came into effect on 1 August 2017. The change had a major impact on arbitration in corporate, foundation and trust matters, since it is now explicitly stipulated that arbitration clauses included in articles of association, trust deeds or foundation statutes are binding irrespective of whether one of the litigants qualifies as a consumer.

3. The Arbitration Agreement

3.1 Enforceability

The arbitration agreement must either be in a written document signed by the parties or established by the parties exchanging letters, faxes, emails, or other means of communication which prove the existence of the agreement.

Further requirements must be met if a natural person is a party to the arbitration agreement. In particular, an arbitration agreement between an entrepreneur and a natural person may only be effectively concluded with regard to an already arisen dispute. However, this requirement does not apply if (i) the natural person is an entrepreneur as well, or (ii) the arbitration agreement is contained in a separate document that deals exclusively with the arbitral proceedings and the natural person has received legal advice or has been represented by an attorney with regard to the conclusion of the arbitration agreement.

3.2 Arbitrability

In principle, any claim concerning an economic interest that would fall within the jurisdiction of the ordinary courts may be subject to an arbitration agreement. Hence, the scope of a claim involving an economic interest must be interpreted extensively.

As a matter of Liechtenstein law in case of non-pecuniary claims, an arbitration agreement may be concluded and shall have legal effect to the extent that the parties are entitled to conclude a settlement on the subject matter in dispute. However, family law disputes and certain employment law disputes (namely, claims under apprenticeship agreements – the Vocational Education Act) cannot be made subject to arbitral proceedings. Further, the jurisdiction of the ordinary courts cannot be excluded with regard

to proceedings which are either initiated by the court ex officio or due to an application or report of a public authority.

3.3 National Courts' Approach

Because an arbitration agreement is a procedural contract, its interpretation is subject to the provisions of the procedural law of the court in which the proceeding is brought.

If an action is filed in a matter which is subject to an arbitration agreement, the ordinary courts will reject the respective claim unless the counterparty enters an appearance on the merits without objecting to the jurisdiction of the ordinary courts.

If a claim is brought in a matter in which arbitration proceedings are already pending, the claim shall be rejected, unless the jurisdiction or the arbitral tribunal has been challenged and if it is not to be expected that the tribunal will render a decision within an appropriate period of time.

3.4 Validity

While the Liechtenstein Arbitration Law is based on the UNCITRAL Model Law, the provision regarding separability has not been implemented in Liechtenstein. However, given that the Liechtenstein Arbitration Law is also based on the Austrian Arbitration Law, Austrian case law and legal doctrine can be taken into account to answer this question. The doctrine of separability is recognised by Austrian courts.

4. The Arbitral Tribunal

4.1 Limits on Selection

Under the Liechtenstein Arbitration Law, the parties may freely agree on the number of arbitrators. However, if the parties have agreed on an even number of arbitrators, then an additional person must be appointed as chair by the party-appointed arbitrators. Unless agreed otherwise by the parties, three arbitrators shall be appointed. Further, the parties are free to agree on the procedure to appoint the arbitrator(s). The appointment procedure agreed on, however, must not affect the minimum standards as to the neutrality of arbitrators.

Also under the Liechtenstein Rules, it is up to the parties to agree on the number of arbitrators. In the absence of such an agreement, the Liechtenstein Rules set forth that the number of arbitrators shall depend on the amount in dispute: the claim shall be decided by a three-member tribunal if the amount in dispute reaches or exceeds CHF1 million; only one arbitrator shall be appointed if the amount in dispute is less than CHF1 million. If the parties agree in the arbitration agreement that an even number of arbitrators shall be appointed, the commissioner shall, upon request of an arbitrator (and not the parties), appoint a presiding arbitrator with a casting vote.

As a matter of Liechtenstein law, the judges of the ordinary Liechtenstein courts cannot act as arbitrators.

4.2 Default Procedures

If the parties fail to choose a method to appoint the arbitrators, or if the chosen appointing procedure fails, the Liechtenstein Arbitration Law provides for a default procedure. Most importantly, the default procedure allows the appointment of one or more arbitrators by the Liechtenstein District Court as a fallback option regardless of whether it is a two-party or multi-party arbitration.

The Liechtenstein Rules provide for a default procedure as well: in the event that the parties fail to appoint arbitrators, the commissioner will appoint the arbitrators.

4.3 Court Intervention

In principle, the ordinary courts do not intervene in the selection of arbitrators. However, there are two scenarios in which the ordinary courts can intervene: Firstly, if the parties fail to choose a method for the appointment of the arbitrators, or if the chosen method fails, the ordinary courts are competent to appoint one or more arbitrators upon application of either party. Secondly, the ordinary courts may dismiss an arbitrator upon application of a party for certain reasons.

Under the Liechtenstein Arbitration Law, the courts shall take into account the conditions laid down for the arbitrator in the arbitration agreement between the parties, if any, and any aspects ensuring the appointment of an independent and impartial arbitrator.

4.4 Challenge and Removal of Arbitrators

It is up to the parties to agree on a removal procedure. The Liechtenstein Arbitration Law, however, provides for a default procedure, in case the parties fail to agree on a removal procedure.

According to the pertinent provisions, a party that applies to challenge an arbitrator must preliminarily file a written statement to the arbitral tribunal outlining the reasons for the challenge. The written statement must be filed within four weeks upon the notification of the constitution of the arbitral tribunal or upon the party becoming aware of the reasons for the challenge.

An arbitrator may be challenged/removed if circumstances exist/arise which can cast reasonable doubt on the impartiality or independence of the arbitrator, or if the arbitrator does not fulfil (or no longer fulfils) the conditions agreed by the parties. Upon submission of the written statement, the challenged arbitrator has the possibility to resign from his or her office, or the other party to the arbitration may agree that the arbitrator in question shall be removed. In case the challenged arbitrator does not resign and the parties do not mutually agree on his or her removal, the arbitral tribunal must decide on the challenge.

If the challenge to the arbitral tribunal does not lead to the dismissal of the challenged arbitrator, the challenging party may then approach the Liechtenstein District Court within four weeks to decide on the challenge. Decisions of the Liechtenstein District Court on such challenges are final, and no ordinary appeal is admissible. However, a complaint to the Constitutional Court is possible in case of a violation of constitutional rights.

The mechanism for the challenge/removal of an arbitrator under the Liechtenstein Rules is very similar to that under the Liechtenstein Arbitration Law: a party has the right to challenge an appointed arbitrator if circumstances exist/arise which cast doubt on the arbitrator's impartiality or independence. Within 15 days of the notification of the appointment or of the party becoming aware of the respective circumstances, the challenge must be made to the concerned arbitrator by indicating the relevant reasons. The challenged arbitrator can then either resign or communicate to the parties (and the other arbitrators) in writing that he or she is not willing to resign.

If the challenged arbitrator refuses to resign, the challenging party has the opportunity to apply within seven days to the commissioner for the

dismissal of the challenged arbitrator. The commissioner shall then decide within 30 days.

4.5 Arbitrator Requirements

As a matter of both the Liechtenstein Arbitration Law and the Liechtenstein Rules, an arbitrator must be independent and impartial. Prior to the appointment as arbitrator, the prospective arbitrator must disclose all circumstances which might cast doubt on his or her independence and/or his or her impartiality. This duty is an ongoing one, which means that if such circumstances arise during the proceedings, they must be disclosed by the appointed arbitrator.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

Any claim involving economic interests that would otherwise fall within the jurisdiction of the ordinary courts may be subject to an arbitration agreement. The scope of a claim involving an economic interest has to be interpreted extensively. In regard to the arbitrability of non-pecuniary claims, an arbitration agreement may be concluded and shall have legal effect to the extent that the parties are entitled to conclude a settlement on the subject matter in dispute.

Any disputes which have to be heard before the administrative authorities may not be referred to arbitration. Further, family law disputes and certain employment law disputes (namely, claims under apprenticeship – the Vocation Education Act) cannot be made subject to arbitral proceedings. Further, the jurisdiction of the ordinary courts cannot be excluded in regard to proceedings which are initiated by the ordinary courts either ex officio or due to an application or report of a public authority.

5.2 Challenges to Jurisdiction

As a matter of the Liechtenstein Arbitration Law, an arbitral tribunal has the competence to rule on its own jurisdiction – ie, whether it is competent to decide on the respective dispute ("competence-competence"). The arbitral tribunal may decide on its own jurisdiction together with the decision on the merits or by separate arbitral award.

An objection against the jurisdiction of an arbitral tribunal must be raised by a party no later than at the same time as the first pleading on the substance of the case. If a party fails to do so, the right to object to the jurisdiction of the arbitral tribunal is forfeited. However, the appointment of an arbitrator or the participation in the appointment of an arbitrator does not preclude a party from raising an objection against the jurisdiction of the arbitral tribunal.

5.3 Circumstances for Court Intervention

The ordinary courts can only address issues of jurisdiction of an arbitral tribunal upon request of a party.

If an action is filed in a matter which is subject to an arbitration agreement, the ordinary courts will reject the respective claim unless the counterparty enters an appearance on the merits without objecting to the jurisdictions of the ordinary courts.

If a claim is brought in a matter in which arbitration proceedings are already pending, the claim shall be rejected, unless the jurisdiction or the arbitral tribunal has been challenged and if it is not to be expected that the tribunal will render a decision within an appropriate period of time.

The arbitral tribunal's decision on its own jurisdiction is not final, since a judicial reversal action

(against the award on the merits or the separate arbitral award dealing exclusively with the question of jurisdiction) may be brought before the Liechtenstein Court of Appeal.

5.4 Timing of Challenge

As a general rule, an arbitral award is required in order to be able to challenge the jurisdiction of an arbitral tribunal before the Liechtenstein Court of Appeal. If a party has challenged the jurisdiction of the arbitral tribunal at the beginning of the proceedings, the arbitral tribunal may decide on the question of jurisdiction either in a separate arbitral award dealing exclusively with jurisdiction or in the final award. Both kinds of awards may then be challenged before the Liechtenstein Court of Appeal as the sole and last ordinary instance. The only further (extraordinary) remedy is a complaint against the respective decision of the Court of Appeal to the Constitutional Court in case of a violation of constitutional rights.

That said, if the jurisdiction of the arbitral tribunal has been challenged in the arbitration proceedings and it is not to be expected that the tribunal will render a decision within an appropriate period of time, the parties can challenge the jurisdiction of the tribunal before the Liechtenstein Court of Appeal without having to obtain an arbitral award first.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The Court of Appeal is not bound by the findings of the arbitral tribunal when deciding on the questions of admissibility and jurisdiction.

5.6 Breach of Arbitration Agreement

If a party commences court proceedings in a dispute that is subject to an arbitration agreement, the ordinary courts will reject the claim, provided the defendant does not submit to the proceedings on the merits without raising objections against jurisdiction. However, a claim will not be dismissed by the ordinary courts if the arbitration agreement is deemed void or is not capable of being performed.

The ordinary courts do not have any discretion in this respect. If a valid arbitration agreement exists, and if a party objects to the jurisdiction of the ordinary court based on the arbitration agreement, then the ordinary court has no choice but to reject the claim for lack of jurisdiction.

5.7 Jurisdiction Over Third Parties

According to the Liechtenstein Arbitration Law, arbitration clauses in trust deeds or foundation statutes are valid and legally binding. For example, a beneficiary who wants to bring a claim for information against a foundation or a trustee is bound by an arbitration clause contained in the statutes/trust deed of the respective foundation/trust even though the respective beneficiary has never agreed to the arbitration clause.

Further, it has to be noted that Austrian case law has established that both single and universal legal successors, assignees of a claim or contract, and beneficiaries of contracts for the benefit of a third party are bound by an arbitration agreement, even if they are non-signatories. It is likely that Liechtenstein courts would take a similar approach.

Thereby, the Liechtenstein Arbitration Law does not distinguish between foreign or domestic third parties in this respect.

6. Preliminary and Interim Relief

6.1 Types of Relief

Under the Liechtenstein Arbitration Law, an arbitral tribunal may grant preliminary or interim relief, provided the parties have not agreed otherwise in the arbitration agreement. Such preliminary or interim relief can only be granted once the counterparty has been given an opportunity to be heard; ex parte interim relief falls within the sole competence of the Liechtenstein ordinary courts.

The Liechtenstein Arbitration Law does not include a restrictive quota for interim measures. Rather, all different types of relief can be granted. If interim relief is granted which contains measures that are unknown to Liechtenstein law, the Liechtenstein Arbitration Law expects the enforcing ordinary court to interpret and amend the remedy in the light of the purpose to be achieved and grant an equivalent relief available under Liechtenstein Enforcement Law.

The Liechtenstein Rules provide for rules on interim or protective measures as well. According to these provisions, the arbitral tribunal may grant any interim relief it deems appropriate upon respective application of a party. Pursuant to the Liechtenstein Rules (and provided that the parties have not agreed otherwise), the arbitral tribunal shall have exclusive jurisdiction for interim relief once it has been constituted.

If a party wishes to apply for (ex parte) interim relief from the ordinary court, it must first obtain the consent of the arbitral tribunal (or the presiding arbitrator if three arbitrators are appointed). The consent of the arbitral tribunal (or the presiding arbitrator) may be granted ex parte. If a party is in breach of its duty to obtain the arbitral tribunal's consent prior to requesting interim relief from the ordinary court, a contractual penalty may be ordered by the arbitral tribunal.

6.2 Role of Courts

While arbitration proceedings are pending, the parties can either apply to the ordinary courts (that is, the Liechtenstein District Court) or to the arbitral tribunal for preliminary or interim relief. The competence of the arbitral tribunal to grant preliminary or interim relief can be excluded by the parties. The competence of the ordinary courts to grant preliminary or interim relief cannot be excluded. However, if the parties have agreed that the Liechtenstein Rules apply, once arbitral proceedings have commenced, the prior consent of the arbitral tribunal has to be obtained before applying for interim relief with the Liechtenstein District Court.

In any case, under Liechtenstein Law, ex parte injunctive relief can only be granted by the ordinary courts.

Under the Liechtenstein Arbitration Law, interim relief can also be granted in relation to foreign-seated arbitrations.

The Liechtenstein Arbitration Law is not familiar with the concept of emergency arbitrators. Rather, under the Liechtenstein Arbitration Law, the competence to grant interim relief prior to the constitution of the arbitral tribunal lies with the ordinary courts.

6.3 Security for Costs

The Liechtenstein Arbitration Law does not contain a provision explicitly allowing the arbitral tribunal to order a party to provide security for costs. However, there are views that it is within the discretion of the arbitral tribunal to order security for costs unless the parties agree otherwise.

Under the Liechtenstein Rules, the arbitral tribunal may order, and is expected to order, the provision of sufficient security for costs.

7. Procedure

7.1 Governing Rules

The Liechtenstein Arbitration Law is intended to give the parties the greatest possible autonomy. Therefore, only a few procedural rules are mandatory, while the majority of the provisions are to be seen as default rules which apply only if the parties have failed to agree on specific procedural rules.

Under the Liechtenstein Rules, subject to (i) the provisions of the Rules themselves, and (ii) the provisions in the arbitration agreement or the arbitration clause, if any, the procedure is determined by the arbitral tribunal. Thereby, the arbitrators must observe the rules of fairness and efficiency. Like the Liechtenstein Arbitration Law, the Liechtenstein Rules also provide for default rules which apply if the parties have failed to agree on procedural rules.

The most important mandatory procedural principles under the Liechtenstein Arbitration Laws are the right to be heard and the right to be treated fairly. If these procedural principles are violated, this may constitute grounds for setting aside the arbitral award.

7.2 Procedural Steps

Under the Liechtenstein Arbitration Law, no particular procedural steps are to be observed. Rather, it is up to the parties to agree on how the arbitral proceedings shall be conducted. In the absence of such agreement, the non-mandatory provisions of the Liechtenstein Arbitration Law apply as default rules.

Within the very wide frame of the default rules set forth in the Liechtenstein Arbitration Law, it is at the discretion of the arbitrators to decide how to conduct the proceedings. The discretion of the arbitrators is limited by the few mandatory provisions, such as the requirement of the arbitrators to observe the parties' right to fair treatment and to be heard.

Also under the Liechtenstein Rules, it falls within the discretion of the arbitral tribunal to determine how the arbitration shall be conducted (provided the parties have not agreed otherwise).

7.3 Powers and Duties of Arbitrators

Under the Liechtenstein Arbitration Law, an arbitral tribunal has the power to decide on its own jurisdiction and on the merits of the case. If there is no agreement between the parties, the arbitral tribunal has to decide on the rules according to which the proceedings are to be conducted. Moreover, the arbitral tribunal has the power to decide on the admissibility of evidence and to determine its relevance as well as to grant preliminary or interim relief.

The arbitral tribunal has a duty to treat the parties equally and must ensure that each party can exercise its right to be heard. The arbitrators must remain impartial and independent and have an ongoing obligation to disclose any circumstances which might cast doubt on their impartiality or independence.

7.4 Legal Representatives

There are no legal requirements or particular qualifications for legal representatives in arbitration proceedings in Liechtenstein. Furthermore, agreements by which representation by certain persons or groups of persons is excluded are inadmissible and invalid according to the Liechtenstein Arbitration Law. As a consequence, a

free choice of legal representation is ensured, which also includes legal representatives with qualifications not obtained in Liechtenstein.

8. Evidence

8.1 Collection and Submission of Evidence

The collection and submission of evidence is not separately and explicitly dealt with in the Liechtenstein Arbitration Law. The arbitral tribunal is entitled to decide at its own discretion on the collection and submission of evidence. In arbitration proceedings conducted in Liechtenstein, both civil and common law rules on the collection and submission of evidence are admissible. For example, common-law-style written witness statements and cross-examinations are very popular in arbitration proceedings in Liechtenstein, whereas common law-style discovery proceedings are out of favour.

In line with the Liechtenstein Arbitration Law, the Liechtenstein Rules also stipulate that the collection and submission of evidence is to be decided by the arbitral tribunal at its own discretion. When performing this discretion, the arbitral tribunal must consider the principles of equal treatment of the parties and their right to be heard.

In regard to the submission of documents, the Liechtenstein Rules refer to the pertinent provisions of the Liechtenstein Civil Procedure Code, which provides for quite restrictive rules as to what documents have to be submitted to the counterparty, and at what time. A specific feature of the Liechtenstein Rules with regard to the submission of evidence is that the arbitral tribunal must not order the forwarding of certain documents to the opposing party if the submitting party can, at first sight, prove to have an interest in confidentiality. In such a case, the relevant documents can be made available at an appropriate location for inspection.

Further, the Liechtenstein Rules contain provisions on the refusal of testimony and the refusal of document production. The provisions on collecting and submitting evidence set forth in the Liechtenstein Rules aim to protect confidentiality in arbitration proceedings conducted in Liechtenstein.

Under both the Liechtenstein Arbitration Law and the Liechtenstein Rules, absent an agreement by the parties to the contrary, an arbitral tribunal is entitled to decide at its discretion on the taking of evidence.

8.2 Rules of Evidence

Neither the Liechtenstein Arbitration Law nor the Liechtenstein Rules provide for specific rules on the taking of evidence to be applied in arbitral proceedings conducted in Liechtenstein. As a general rule, the arbitral tribunal shall assess the evidence freely.

8.3 Powers of Compulsion

Under the Liechtenstein Arbitration Law, arbitral tribunals do not have any powers of compulsion. In this regard the Liechtenstein Arbitration Law does not distinguish between parties, representatives, members of the arbitral tribunal or third parties. However, an arbitral tribunal (or a party to the arbitral proceedings with the respective consent of the arbitral tribunal) may apply to the ordinary courts for legal assistance regarding the collection of evidence or the interrogation of witnesses. Consequently, the interrogation of a witness or the production of a document can only be indirectly forced by an arbitral tribunal in

Liechtenstein through legal assistance by Liechtenstein and/or foreign ordinary courts.

9. Confidentiality

9.1 Extent of Confidentiality

The Liechtenstein Arbitration Law does not contain any provisions explicitly dealing with confidentiality of arbitral proceedings. Nevertheless, confidentiality is a matter of high priority in Liechtenstein. In fact, confidentiality is one of the most important features of the Liechtenstein Rules. Confidentiality is, inter alia, protected by the following provisions of the Liechtenstein Rules, as detailed below.

- Only persons subject to a statutory duty of confidentiality may be appointed as arbitrators.
- The production of documents is based on the Liechtenstein Civil Procedure Code and, therefore, regulated very strictly in comparison to common law tradition.
- The arbitral tribunal may order that copies of documents and evidence should not be physically handed over to the other party. Instead, such documents should be presented for inspection at the seat of the arbitral tribunal or at another appropriate location.
- All parties involved in the arbitration proceedings are obliged to protect confidentiality. The breach of confidentiality is sanctioned by a penalty. The obligation to protect confidentiality continues after the termination of the arbitration proceeding.
- The arbitral tribunal is obliged to make all appropriate arrangements to protect confidentiality. In particular, it may order that an expert witness (who in turn is subject to professional secrecy) reviews documents and reports on the content of such documents to the arbitral tribunal. As a result, there is no need to produce the concerned documents for inspection by the arbitral tribunal or the opposing party.
- Due to a de facto exclusion of the public at the setting-aside proceedings, the protection of confidentiality is even ensured if the proceedings are brought before the ordinary court.

No other set of arbitration rules contains such wide-ranging provisions to protect confidentiality. Therefore, the Liechtenstein Rules are particularly attractive in highly sensitive matters which require the utmost discretion and confidentiality.

The Liechtenstein Arbitration Law does not contain any provisions explicitly dealing with confidentiality of arbitral proceedings. Therefore, unless the parties expressly agree otherwise, parties to arbitration proceedings which are governed by the Liechtenstein Arbitration Law are not prohibited to disclose information obtained in arbitral proceedings in subsequent proceedings.

The Liechtenstein Rules contain an explicit provision stating that unless the parties expressly agree in writing to the contrary, the parties, their representatives, experts, the arbitrators, any commissioner, the secretariat, and their auxiliary persons shall, as a general principle, keep confidential all awards and orders, as well as all materials submitted and facts made available by other participants in the proceedings in the framework of the arbitral proceedings, unless a right to them exists in other ways, save and to the extent that a disclosure by a party may be imperative to fulfil a legal duty to protect or pursue a legal right or to enforce or challenge an award. Hence, the obligation to maintain confi-

dentiality shall persist even after conclusion of the arbitral proceedings.

10. The Award

10.1 Legal Requirements

Under the Liechtenstein Arbitration Law, unless the parties agree otherwise, the arbitral award shall be made by majority vote of the arbitrators in arbitration proceedings with more than one arbitrator. The Liechtenstein Rules contain the same provision. In addition, the Liechtenstein Rules stipulate that the presiding arbitrator shall have the casting vote in case of a tie vote. Further, it is stated that no arbitrator shall abstain from voting.

As a matter of the Liechtenstein Arbitration Law, an arbitral award shall be issued in writing, showing the date on which it was rendered and the seat of the arbitral tribunal. In the absence of any agreement between the parties, (i) it suffices when the arbitral award is signed by the majority of arbitrators (the award shall name the reasons for the absence of the signatures), and (ii) the award shall state the grounds which led to the decision. In fact, the Liechtenstein Rules contain the same provisions on the form of the arbitral award.

Neither the Liechtenstein Arbitration Law nor the Liechtenstein Rules stipulate time limits within which the arbitration award must be delivered.

10.2 Types of Remedies

The Liechtenstein Arbitration Law does not contain any specific provisions on the types of remedies that an arbitral tribunal may award. In general, the awarded remedy shall be defined by reference to the applicable substantive law on merits. However, there are limits to be considered. For example, an arbitral award rendered in Liechtenstein must not contravene public policy in Liechtenstein ("ordre public"). A rendered arbitral award which is not in accordance with Liechtenstein public policy is vulnerable to being set aside by the Liechtenstein Court of Appeal.

In regard to punitive damages, it has to be said that this remedy is unknown under Liechtenstein law and might be considered a violation of the Liechtenstein public policy.

10.3 Recovering Interest and Legal Costs

The recovery of interest being a question of the applicable substantive law (rather than the procedural law) from a Liechtenstein law perspective, the Liechtenstein Arbitration Law does not contain any provisions in this respect.

In regard to the entitlement of a party to recover costs, the Liechtenstein Arbitration Law provides that the arbitral tribunal shall decide on the recovery of costs upon termination of the arbitration proceedings, unless the parties have agreed otherwise. Concerning the allocation of the costs between the parties, the arbitral tribunal has to take into consideration all aspects of the case, in particular the outcome of the proceedings.

The pertinent provision of the Liechtenstein Rules states that the arbitral tribunal shall decide on the costs of arbitration in its arbitral award. The Liechtenstein Rules are based on the so-called "loser pays" principle. However, the arbitral tribunal may decide on a different allocation of costs if it considers it appropriate in light of the circumstances of the case.

11. Review of an Award

11.1 Grounds for Appeal

The grounds for challenging an arbitral award, according to the Liechtenstein Arbitration Law, correspond largely with the grounds provided for in the UNCITRAL Model Law. Notably, the Liechtenstein Arbitration Law contains two significant deviations from the UNCITRAL Model Law in this respect: (i) the challenge must be submitted within four weeks of the date of receipt of the award, and (ii) the Liechtenstein Arbitration Law provides only for one ordinary instance for setting aside the award (that is, the Liechtenstein Court of Appeal).

The procedure is public in principle, but the public may be excluded upon request of a party if the party has a legitimate interest. Moreover, any person involved in the proceedings may ban third parties from being granted access to the files.

In summary, the distinctive features of the Liechtenstein Arbitration Law ensure that swift and confidential arbitral proceedings are not thwarted by lengthy and public proceedings before the ordinary courts. As mentioned, the Liechtenstein Court of Appeal renders a final decision against which no further ordinary appeal is admissible. While, in theory, a complaint to the Constitutional Court in case of a violation of Constitutional Law is possible, the Constitutional Court has held that arbitral awards are only to a very limited extent bound by constitutional norms. In particular, an arbitral award will not be reviewed on the grounds of arbitrariness. Consequently, the chances of success with a constitutional complaint are very limited.

11.2 Excluding/Expanding the Scope of Appeal

As a matter of the Liechtenstein Arbitration Law, the parties cannot agree to exclude or expand the scope of appeal or challenge to the ordinary courts. On the other hand, it is within the autonomy of the parties to agree to a further arbitral tribunal as a second instance.

11.3 Standard of Judicial Review

The Liechtenstein Court of Appeal does not review the merits of the case.

12. Enforcement of an Award

12.1 New York Convention

Liechtenstein signed and ratified the New York Convention in 2011, but has submitted a reservation on reciprocity. Contrary to some other signatories to the convention, Liechtenstein has not submitted a reservation on commercial trade.

12.2 Enforcement Procedure

The enforcement of an arbitral award does not require a separate recognition procedure in Liechtenstein since arbitral awards are deemed to be equal to judgments of the ordinary (Liechtenstein) courts. Arbitral awards will be enforced in the same way as judgments of the ordinary courts – that is, by means of an application for enforcement to the Liechtenstein District Court.

The enforcement of a foreign arbitral award in Liechtenstein is governed by the provisions of the New York Convention. Accordingly, to enforce a foreign arbitral award, the enforcing party must enclose with the application for enforcement the certified original or a duly certified copy of the arbitral award and a certified translation of the arbitral award. Further, the Liechtenstein District Court must confirm the enforceability of the arbi-

tral award (what may be applied for in the application for enforcement).

If an award has been set aside by the courts in the seat of arbitration in a binding decision, the respective award cannot be enforced in Liechtenstein under the New York Convention. It is up to the party against whom enforcement is sought to argue and prove that the award has been set aside in a binding decision. The mere challenge of the award does not constitute an obstacle for recognition.

However, the enforcement may be suspended upon request if an action for the award to be set aside was filed.

According to Liechtenstein and Austrian case law, a state or state entity may successfully raise the defence of sovereign immunity in all areas of sovereign activity. Actions performed by a state iure gestionis (ie, like a private individual) are not covered by this immunity. The decision as to whether a state activity is to be qualified as sovereign or private shall be made according to Liechtenstein law.

12.3 Approach of the Courts

According to Liechtenstein case law, the New York Convention must be interpreted in a manner supporting the arbitration and enforcement thereof. The public policy grounds must reach a high threshold for the enforcement of an arbitral award to be impeded.

According to Liechtenstein case law, not every deviation from Liechtenstein law constitutes a violation of public policy – a severe violation of the fundamental values of the Liechtenstein legal order as a whole is required. Therefore, the public policy exemption is applied extremely restrictively.

13. Miscellaneous

13.1 Class Action or Group Arbitration

In principle, the Liechtenstein Arbitration Law and the Liechtenstein Rules do not provide for class actions or group arbitrations. However, the Liechtenstein Arbitration Law provides for the joint appointment of one or more arbitrators by more than one party "on the same side".

13.2 Ethical Codes

Neither the Liechtenstein Arbitration Law nor the Liechtenstein Rules contain specific provisions for the ethical conduct of the legal representatives conducting arbitration proceedings. Relevant provisions may in this regard result from the IBA Rules of Ethics for International Arbitrators, the Liechtenstein Code of Civil Procedure, the Liechtenstein Lawyer Act, the professional guidelines of lawyers, or other professionals' codes of conduct.

13.3 Third-Party Funding

There are no rules in Liechtenstein concerning litigation funding by third parties. Thus, third-party litigation funding is permitted and there are no particular restrictions.

13.4 Consolidation

Neither the Liechtenstein Arbitration Law nor the Liechtenstein Rules contain specific provisions on the consolidation of separate arbitral proceedings. As a consequence, a consolidation of separate arbitral proceedings is not permissible without the consent of all concerned parties.

13.5 Binding of Third Parties

According to the Liechtenstein Arbitration Law, arbitration clauses in articles of association, trust deeds or foundation statutes are valid and legally binding. For example, a beneficiary who wants to bring a claim for information against a

foundation or a trustee is bound by an arbitration clause contained in the statutes/trust deed of the respective foundation/trust even though the respective beneficiary has never agreed to the arbitration clause.

Further, it has to be noted that Austrian case law has established that both single and universal legal successors, assignees of a claim or contract, and beneficiaries of contracts for the benefit of a third party are bound by an arbitration agreement, even if they are non-signatories. It is likely that Liechtenstein courts would take a similar approach.

In principle, judgments of the ordinary courts are only binding on the parties to the proceedings.

LITHUANIA

Law and Practice

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WALLESS is a modern Baltic law firm with a client-centric approach and a novel lean business model. During recent years WALLESS has tripled its capacity and has become an integrated service provider across all Baltic countries. The firm has a highly professional and efficient dispute resolution team of 25 lawyers dealing with complex litigation and arbitration matters on a daily basis, in all areas, including: investment disputes; international trade; construction and real estate development; corporate disputes; energy; environmental and infrastructure litigation; public procurement; financial services; transportation; insurance; private clients; sanctions; and asset recovery. Recent work highlights include representation in disputes of the government of Lithuania against a Belarusian company in connection with sanctions; an environmental damage case regarding continued pollution of the Curonian Lagoon; client off-boarding by several commercial banks for compliance reasons; several cases involving airlines; several multimillion D&O liability cases relating to the largest independent oil products terminal operator in the Baltic Sea rim; and others.

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1. General

1.1 Prevalence of Arbitration

Although statistically litigation is much more popular in Lithuania, international arbitration is a universally recognised alternative dispute resolution method and is increasingly gaining its ground. Statistics show that there are approximately the same number of national and international arbitrations submitted to tribunals annually. In most international arbitration cases decided in Lithuania, at least one of the parties is a local (Lithuanian) person. Arbitrations where none of the parties is Lithuanian are less common.

1.2 Key Industries

In Lithuania, the key industries that have seen significant international arbitration activity in 2022–23 involve energy, construction, real estate, and insurance disputes, in particular disputes regarding hardship of fulfilling obligations related to the volatile prices of energy and natural resources. Disputes and matters regarding the application of EU sanctions to legal entities, shareholders of sanctioned legal entities and related persons have also been prevalent. Other industries that have seen increased arbitration activity include IT/telecoms.

1.3 Arbitration Institutions

The only recognised arbitration institution in Lithuania is the Vilnius Court of Commercial Arbitration (VCCA). No new institutions have been established in the current period.

1.4 National Courts

No specific courts are designated to hear disputes related to international and/or domestic arbitrations. However, the Court of Appeal of the Republic of Lithuania decides cases for the setting aside of domestic awards, as well as on recognition and enforcement of foreign arbitral awards. Court of Appeal decisions in such cases may be further appealed to the Supreme Court.

2. Governing Legislation

2.1 Governing Law

Lithuania is a UNCITRAL Model Law country. The Lithuanian Commercial Arbitration Act (2012) is based on the UNCITRAL Model Law, though there are a few divergences. For example, the Commercial Arbitration Act regulates the activities of permanent arbitral institutions and also stipulates the requirement that the number of arbitrators must be uneven. Arbitrability is also dealt with in the Commercial Arbitration Act.

2.2 Changes to National Law

The Commercial Arbitration Act has not been amended since 2017. There are no pending amendments.

3. The Arbitration Agreement

3.1 Enforceability

The arbitration agreement must be in writing and shall be deemed valid if:

- it is signed by the parties; or
- it is concluded by an exchange of letters or other documents between the parties recording the fact of the conclusion of the arbitration agreement; or
- it is signed using electronic devices, provided that the integrity and authenticity of the information transmitted is guaranteed and the information contained therein is available for further use; or
- the parties exchange a statement of claim and a statement of defence in which one party asserts and the other party does not deny that they have concluded an arbitration agreement; or
- there is other written evidence that the parties have entered into or accepted an arbitration agreement.

3.2 Arbitrability

The Commercial Arbitration Act spells out non-arbitrable disputes. They are:

- administrative disputes;
- disputes falling within the competence of the Constitutional Court of the Republic of Lithuania.

Categories of non-arbitrable disputes include:

- disputes arising out of family legal relations;
- disputes concerning the registration of patents, trademarks, and designs.

Disputes arising out of the following contracts require ad hoc consent (ie, after the disputes have arisen) in order to be submitted to arbitration:

- employment contracts;
- consumer contracts.

In general, the list of non-arbitrable disputes shall not be interpreted broadly.

3.3 National Courts' Approach

Lithuanian law recognises the principle of the binding nature of a contract, which also applies to an arbitration agreement. If the courts find that the parties have concluded an arbitration agreement, they usually do not proceed with the case. Generally, Lithuanian courts are very pro-arbitration orientated.

3.4 Validity

As a UNCITRAL Model Law country, Lithuania has implemented the separability of the arbitration agreement doctrine. Under the law, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. Thus, the invalidity of the contract does not necessarily entail the invalidity of the arbitration agreement.

4. The Arbitral Tribunal

4.1 Limits on Selection

There are no limits to the parties' autonomy to select arbitrators unless such limitations are

established by the arbitration agreement. Arbitrators are subject to universal requirements of impartiality and independence.

4.2 Default Procedures

If, after the parties have agreed on a procedure for the appointment of arbitrators, one of them fails to comply with this agreement, the arbitral tribunal shall be constituted in accordance with the procedure established by law or the parties' agreement, such as the rules of the arbitration institution.

When appointing an arbitrator, the president of the arbitration institution or the court shall take into account the circumstances of the case, the requirements for the arbitrator set out in the agreement, and the circumstances that ensure the arbitrator's independence and impartiality.

Under the Commercial Arbitration Act, if the co-claimants do not appoint an arbitrator, the arbitrator shall be appointed by the president of the arbitration institution or, in the case of ad hoc arbitration, by the court. This also applies to co-respondents.

4.3 Court Intervention

A court can intervene in the selection of arbitrators at the request of one of the parties in ad hoc arbitration when the other parties do not appoint the arbitrator. When appointing an arbitrator, the court shall take into account the circumstances of the case, the requirements for the arbitrator set out in the agreement, and the circumstances that ensure the arbitrator's independence and impartiality.

4.4 Challenge and Removal of Arbitrators

An arbitrator may be removed only if there are reasonable doubts as to his or her independence or impartiality or if he or she does not possess the qualifications set out in the parties' agreement.

The Commercial Arbitration Act does not provide grounds for challenge and removal, but case law often refers to the IBA Guidelines on Conflicts of Interest in International Arbitration.

4.5 Arbitrator Requirements

Any natural person having the legal capacity to act may be appointed as arbitrator. Under the Commercial Arbitration Act, before agreeing to serve as an arbitrator, the arbitrator must notify the parties, the arbitration institution, or the court in writing of any circumstances which may give rise to reasonable doubts as to his independence or impartiality.

Under the case law of the Supreme Court of Lithuania, independence is a legal category of an objective nature, identifiable externally. The independence of an arbitrator refers to the absence of organisational, personal, structural, social, economic, business, subordinate, etc, ties between several entities.

Impartiality is defined as the internal state of the subject, which implies the absence of any preconceived notions about the legal relationship at issue or the parties to it. The internal state and judgement of an impartial person must not be influenced by subjective mental or emotional factors which may interfere with the exercise of his or her duties, including the exercise of his or her best endeavours in good faith to reach an objective decision.

Under the Rules of the Vilnius Court of Commercial Arbitration, when a person is approached regarding his/her possible appointment as an arbitrator, such person shall, prior to accepting to act as an arbitrator, notify in writing of all cir-

cumstances that could give rise to reasonable doubts as to the arbitrator's independence or impartiality. An arbitrator must also notify of such circumstances after his/her appointment or during the arbitral proceedings if this was not done earlier, or if the circumstances occurred after the appointment or during the arbitral proceedings.

Before considering the case, each arbitrator appointed in the case by the parties, the arbitrators, or the chair of the VCCA shall sign a statement of acceptance, impartiality, and independence in the respective case. The arbitrator shall be deemed appointed from the moment of concluding an agreement with such arbitrator.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

In addition to the non-arbitrable disputes described in **3.2 Arbitrability** (such as administrative disputes), disputes regarding the pricing of contracts entered into through public procurement procedures and bankruptcy cases cannot be referred to arbitration. In addition, where a party to the agreement is a state-owned enterprise or institution, for the arbitration agreement to be valid a prior approval of the superior body (the founder) is required.

5.2 Challenges to Jurisdiction

The Commercial Arbitration Act recognises the competence-competence doctrine. The arbitral tribunal is entitled to decide on its competence to hear the dispute, including where the existence or validity of the arbitration agreement is in doubt.

5.3 Circumstances for Court Intervention

A party has a right to challenge an award on jurisdiction. The general grounds for setting aside an award on jurisdiction apply. Courts can review all types of decisions on jurisdiction but generally are very unwilling to set aside awards on jurisdictional grounds. The practice of challenging negative awards is not developed, so no particular conclusions can be drawn in this regard.

5.4 Timing of Challenge

The time limit for the request for setting aside an award on jurisdictional grounds is the same as regards any award – ie, one month after the date of the award.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The standard of judicial review is deferential for arbitration. There is a firm judicial policy in Lithuania that the court cannot review the arbitral award on the merits. Decisions de novo would be incompatible with Lithuanian law. Judicial review of arbitral awards in Lithuania takes the form of annulment rather than appeal or remission.

5.6 Breach of Arbitration Agreement

An arbitration agreement is a contract and, in the event of a dispute as to the content of the arbitration agreement, the court must interpret the agreement following the general rules of contract interpretation, including the principle of the binding nature of contracts. Where the parties have concluded an arbitration agreement, it cannot be modified by either party or by the court in the absence of a claim for annulment.

If the arbitration agreement remains in force, the dispute must be referred to arbitration. Under Lithuanian law, if the court finds that the parties have concluded an arbitration agreement, it shall refuse to decide the case ex officio (ie, even if there is no request by a party to do so).

5.7 Jurisdiction Over Third Parties

Under case law, an arbitration agreement can be extended in the following cases:

- where a person, by a separate agreement, takes over the rights and obligations of one of the parties to a particular contract containing an arbitration clause;
- where the person has, by his or her subsequent conduct, consented to the already-started arbitration procedure of the dispute (for instance, participated in the hearing);
- where a person who has not signed an arbitration agreement may be deemed to have consented to arbitration if the arbitration agreement or the contract containing the arbitration clause was concluded by a legal representative of the person, and the representative acted within the scope of the person's authority;
- where the arbitration agreement binds a single legal person, another person with a particularly close connection to that person may also be deemed to have consented to the arbitration of the particular dispute.

This applies to both foreign and domestic parties.

6. Preliminary and Interim Relief

6.1 Types of Relief

The arbitral tribunal has the power to issue preliminary orders and apply interim measures. The preliminary order is legally binding.

The following are types of interim measures specified in the Commercial Arbitration Act:

- prohibition of a party from engaging in certain transactions or performing certain actions;
- an obligation on a party to preserve assets related to the arbitration proceedings, and to provide a cash deposit, bank or insurance guarantee;
- an obligation on a party to secure evidence that may be relevant to the arbitration.

6.2 Role of Courts

If a party fails to comply with the tribunal's order on interim measures, the Vilnius Regional Court may issue an enforcement order at the request of the party (enforceable in the same way as a procedural judgment, in accordance with the procedure laid down in the Code of Civil Procedure). This allows a party to execute the arbitral award or interim measures through a bailiff.

Parties also have the right to request the Vilnius Regional Court to impose interim measures or to secure evidence prior to the arbitration proceedings or prior to the composition of the arbitral tribunal.

An arbitral award or an order on interim measures rendered in any other country may be recognised and enforced in the territory of the Republic of Lithuania.

There are no specific rules for intervention in the appointment of an emergency arbitrator in the Commercial Arbitration Act. Under the rules of the VCCA, an emergency arbitrator may be appointed to resolve applications for interim measures.

6.3 Security for Costs

Lithuanian law allows for the ordering of security for costs. The arbitral tribunal may order the party requesting interim measures to provide security for the other party's damages that may result from the imposition of interim measures.

7. Procedure

7.1 Governing Rules

The procedure of arbitration is more likely to be regulated by the rules of the relevant institution. Under the Commercial Arbitration Act, the arbitration institution adopts the rules of procedure. The rules of arbitration adopted by the arbitration institution shall have the legal effect of an agreement between the parties only if the parties have agreed to apply them by the arbitration agreement. The VCCA has procedural rules that are sufficiently detailed and comparable with international equivalents.

7.2 Procedural Steps

The Commercial Arbitration Act does not provide for a specific list of steps to be performed, though in practice steps have been developed and influenced by the requirements of the law. For example, within a time limit agreed upon between the parties or set by the arbitral tribunal, the claimant must state the facts on which it bases its claim, the matters at issue, the appointment of an arbitrator (if no arbitrator has been appointed) and the formulation of the relief sought; and the respondent must file its statement of defence. There must also be an arbitration hearing (written or oral, depending on the agreement and the rules). The arbitrators are also obliged to finish the case with an award.

7.3 Powers and Duties of Arbitrators

Arbitrators have general inherent powers (to decide the dispute, and the right to apply to a court for help in gathering evidence) and general inherent duties (to maintain impartiality and independence).

7.4 Legal Representatives

There are no specific qualification requirements for representatives appearing in commercial arbitration cases in Lithuania.

8. Evidence

8.1 Collection and Submission of Evidence

Generally, discovery and disclosure procedures are not natural in the Lithuanian legal process. However, the proliferation of international arbitration techniques has brought about some change. Document production is common in international arbitration cases. Witness statements are widespread, but their use depends on the background and habits of the tribunal. The IBA Rules on the Taking of Evidence in International Arbitration are routinely used and applied.

8.2 Rules of Evidence

The following are specified in the Commercial Arbitration Act regarding rules of evidence:

- each party shall prove the facts on which it bases its claims or arguments;
- the arbitral tribunal may require the parties to provide evidence;
- the arbitral tribunal has the right to refuse to accept evidence that could have been submitted earlier and the submission of which will delay the procedures;
- unless the parties agree otherwise, no evidence shall be binding on the arbitral tribunal;
- if the parties do not agree on the rules of evidence to be applied in the arbitration, the arbitral tribunal shall determine them;
- if a party fails to provide the arbitral tribunal with the evidence requested, the arbitral tribunal may decide based on the available evidence or, in exceptional cases, may consider

the fact of the failure to provide the evidence against the party that failed to provide it (contra spoliatorem);
- the arbitral tribunal shall have the right to determine the admissibility, sufficiency, and relevance of any evidence.

As mentioned in **8.1 Collection and Submission of Evidence**, with the consent of the parties, the IBA Rules on the Taking of Evidence in International Arbitration are often used and applied.

8.3 Powers of Compulsion

Generally, under Lithuanian law, the tribunal does not have any particular powers of compulsion. However, the arbitral tribunal, or a party with the approval of the arbitral tribunal, has the right to apply to the Vilnius Regional Court for assistance in taking evidence. Court orders on document production are legally binding; in this way, document production and witness testimony can be compelled by a court order.

If the witnesses summoned to the arbitration hearing fail to appear or refuse to testify, the arbitral tribunal may allow the party requesting the examination of the witnesses to apply to the Vilnius Regional Court within the time limit set by the arbitral tribunal for the examination of the witnesses in accordance with the procedure laid down in the Code of Civil Procedure.

Regarding the parties specifically, when a party fails to file a mandatory procedural document or to attend the arbitral tribunal hearing without a justifiable reason, the arbitral tribunal shall have the right to continue the arbitral proceedings and to render an award on the basis of the evidence in the case or to make final procedural rulings.

9. Confidentiality

9.1 Extent of Confidentiality

The entire arbitration procedure is confidential. The information can only be disclosed in the enforcement or set-aside procedures.

10. The Award

10.1 Legal Requirements

Unless the parties agree otherwise, the arbitral award shall be made by a majority of the arbitrators.

There are some minimal formal requirements for awards. The arbitral award must be: (i) in writing and signed by the arbitrators; (ii) valid when signed by a majority of the arbitrators; and (iii) state the reasons for the non-signature of the other arbitrators. However, arbitrators who disagree with the majority opinion shall have the right to state their dissenting opinion in writing, which shall be annexed to the arbitral award.

The arbitral award must state the reasons on which it is based unless the parties have agreed that it is not necessary to state reasons.

The arbitral award must also state the date and place of its adoption. One signed copy of the arbitral award shall be served on each party.

The law does not provide any time limits on the delivery of the award. Under VCCA rules, the award must generally be delivered within six months of handing over the case file to the tribunal and within 30 days of the closing of the proceedings (the last procedural action, such as final submissions, submissions on costs, etc). The time limit on the delivery of the award can be extended in exceptional circumstances.

10.2 Types of Remedies

There is no specific list of types of remedies. Generally, these stem from the general principles of Lithuanian civil law. Thus, certain remedies may be considered as impermissible for public policy reasons, for example, a claim for excessive interest, etc.

10.3 Recovering Interest and Legal Costs

Awarding of procedural interest (ie, interest on the amount awarded from the date of the statement of claim to the full payment under the award) is universally accepted in the Lithuanian legal system, and accordingly in arbitration. Under the law, the annual procedural interest is the EU Central Bank lending rate plus eight basis points.

In addition, in commercial transactions, it is a common practice for the parties to agree to a delayed interest normally calculated daily. Agreements range from 0.01% to 0.5% per day. Both courts and arbitral tribunals commonly award but reduce the amounts of delay interest to reasonable sums.

According to the Commercial Arbitration Act, the costs of arbitration include:

- the fees and other reasonable expenses of the arbitrators;
- the costs and reasonable expenses incurred by the arbitral institution and other costs agreed between the parties;
- other reasonable expenses incurred by the parties.

VCCA rules establish a "costs follow the event" principle with respect to the institution and tribunal costs. There is no rule regarding the legal fees. In practice, the tribunals apply various approaches including the cost-sharing approach.

11. Review of an Award

11.1 Grounds for Appeal

The Lithuanian Court of Appeal may set aside an arbitral award when the party filing the complaint provides evidence that:

- one of the parties to the arbitration agreement was incapacitated under the applicable law, or the arbitration agreement is invalid under the law applicable to the agreement of the parties, or, where the parties have not agreed on the law applicable to the arbitration agreement, under the law of the country in which the award was rendered; or
- the party against whom the award is sought to be invoked has not been given adequate notice of the appointment of the arbitrator or the arbitration proceedings, or otherwise an opportunity to be heard; or
- the arbitral award was rendered in respect of a dispute or part of a dispute that was not submitted to arbitration – if the part of the dispute that has been referred to arbitration can be distinguished, the part of the arbitral award that resolves the matters referred to arbitration may be recognised and enforced; or
- the composition of the arbitral tribunal or the arbitral proceedings was not under the agreement of the parties and/or the mandatory provisions of the Commercial Arbitration Act; or
- the dispute is not arbitrable under the laws of the Republic of Lithuania; or
- the arbitral award is contrary to the public policy of the Republic of Lithuania.

11.2 Excluding/Expanding the Scope of Appeal

There are no rules on expanding or excluding the scope of appeal. Nevertheless, the list of grounds for setting aside an arbitral award should be interpreted as a mandatory provision of law and expanding it by agreement of the parties would defeat the purpose of the arbitration. Meanwhile, narrowing the list of grounds could be considered a violation of a person's right to a judicial remedy.

11.3 Standard of Judicial Review

The standard of judicial review is deferential. The court does not review the arbitral award on the merits. A contrary view would be incompatible with Lithuanian law and the policy of the Lithuanian courts.

12. Enforcement of an Award

12.1 New York Convention

Lithuania is a party to the New York Convention, which it ratified on 17 January 1995 with the following reservation: "The Republic of Lithuania will apply the provisions of the said Convention to the recognition of arbitral awards made in the territories of the Non-Contracting States, only on the basis of reciprocity."

12.2 Enforcement Procedure

Domestic arbitration awards are enforced and executed under the execution writ issued by the local court. The bailiff is responsible for execution procedures.

Foreign arbitral awards must be granted recognition and enforcement. Article V of the New York Convention provides for an exhaustive list of possible grounds for non-recognition of an arbitral award, and therefore the procedure for recognition and enforcement of foreign arbitral awards entails verification of the existence or non-existence of the grounds set out in Article V of the New York Convention.

Formally, in Lithuania there is no legal prohibition on recognising and enforcing an award that has been set aside by the courts in the seat of arbitration. However, this is one of the grounds for refusal under the New York Convention, and thus may be applied by the court if requested by the relevant party.

When an award is subject to ongoing set-aside proceedings at the seat, the Lithuanian court may suspend the recognition and enforcement proceedings at the request of the relevant party. Usually, the court does this unless there are compelling reasons for taking the contrary view. However, the most recent case law suggests a shift towards stricter rules regarding the suspension of the recognition and enforcement proceedings. In fact, in a few recent cases, the court decided not to suspend recognition and enforcement proceedings due to a lack of compelling reasons – eg, it can be determined that there may be grounds for annulment of the decision at the seat – to deny the priority of enforcement of the arbitral award principle enshrined in the New York Convention.

A state or state entity may invoke sovereign immunity on the basis of public international law and is unlikely to be successful in commercial transactions.

12.3 Approach of the Courts

The courts in Lithuania have taken a very favourable approach to the recognition and enforcement of foreign arbitral awards. The Supreme Court of Lithuania has consistently emphasised in its case law that in deciding on the recog-

nition and enforcement of an arbitral award in Lithuania, the Court will not review the merits of the case: the Court will not examine the manner in which the evidence was evaluated, nor will it assess whether the procedural and substantive law has been properly applied.

As constantly repeated by the Supreme Court, public policy is to be understood as international public policy: ie, fundamental principles of due process and mandatory rules of substantive law embedding generally accepted principles of law.

13. Miscellaneous

13.1 Class Action or Group Arbitration

There is no specific regulation on this issue of class actions in Lithuania. The question is to be decided in accordance with the general principles of arbitration law, the main question being whether there is an arbitration agreement binding all the parties concerned. The same applies to group arbitrations.

13.2 Ethical Codes

There are no specific documents in this regard in Lithuania. Case law often refers to the IBA Guidelines on Conflicts of Interest in International Arbitration. Under the case law of the Supreme Court of Lithuania, the IBA Guidelines should be assessed systematically in conjunction with other criteria for assessing impartiality and independence, as well as with standards customary in international practice.

13.3 Third-Party Funding

There are no restrictions on third-party funding under Lithuanian law. Under 2023 amendments to the VCCA rules, if a party concludes an agreement with a third-party funder, such an agreement and the third-party funder must both be disclosed. After the disclosure arbitrators must reveal if there are circumstances that may raise doubts regarding their independence and/or impartiality. If VCCA deems necessary, it can request a party to provide additional Information.

13.4 Consolidation

Under the Commercial Arbitration Act, arbitration proceedings can be consolidated by the agreement of the parties. VCCA rules contain provisions on the consolidation of proceedings.

13.5 Binding of Third Parties

Generally, third parties are not bound by an arbitration agreement. However, as discussed in **5.7 Jurisdiction Over Third Parties**, in certain situations the arbitration agreement can extend to parties that have not technically signed the arbitration agreement.

LUXEMBOURG

Law and Practice

Contributed by:
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Arendt & Medernach is Luxembourg's largest independent law firm. The firm's international team of 350 legal professionals represents clients in all areas of Luxembourg business law, with representative offices in Hong Kong, London, New York and Paris. The team is composed of lawyers from the following core practice areas: litigation and dispute resolution, banking and financial services, and corporate. Arendt & Medernach assists clients in complex domestic and international commercial arbitrations, and has recently advised clients in ad hoc as well as in institutional arbitrations under the rules of the Arbitration Centre of the Luxembourg Chamber of Commerce, DIS, ICC, etc. The firm has wide experience in both enforcing and opposing international awards before Luxembourg courts and has specific experience in asset tracing. Members of the team also sit as arbitrators in complex disputes, or act as expert witnesses in ICC and CEPANI proceedings.

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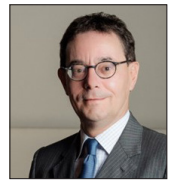

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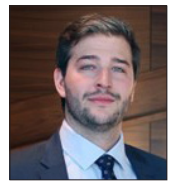

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1. General

1.1 Prevalence of Arbitration

Whilst arbitration is a recognised form of dispute resolution in Luxembourg, domestic parties mostly use litigation. In light of the recent modernisation of the Luxembourg arbitration law in 2023, more frequent use of arbitration by parties to domestic commercial disputes is expected.

Due to its open economy, Luxembourg is more often the place of enforcement of foreign arbitral awards rather than the seat of an arbitration.

However, as ever more contracts under Luxembourg law include arbitration clauses with Luxembourg as the seat of arbitration, the use of arbitration is expected to continue to grow. In that respect, the Luxembourg Arbitration Association (the "Association"), which was founded in 1996 and is dedicated to the promotion and development of arbitration practice in Luxembourg, continues to organise a series of events to share expertise and information on arbitration-related matters. The Association also provides a comprehensive database of Luxembourg and international qualified arbitrators and practitioners.

1.2 Key Industries

Due to the positioning of Luxembourg as a finance and investment funds hub, these industries are experiencing more international arbitration activity than others.

1.3 Arbitration Institutions

International Chamber of Commerce (ICC), Belgian Centre for Arbitration and Mediation (CEPANI) and German Arbitration Institute (DIS) arbitrations are widely used for international arbitration in Luxembourg.

The Arbitration Centre of the Chamber of Commerce of the Grand Duchy of Luxembourg (the "Arbitration Centre") is also used for domestic and international arbitrations. The Arbitration Centre was launched in 1987 and has an institutional system of dispute resolution with Rules of Arbitration inspired by the International Chamber of Commerce (ICC). The Arbitration Centre issued a new set of rules on 1 January 2020. These new rules are available in English and French on the website of the Chamber of Commerce, in the Arbitration Centre section.

1.4 National Courts

Luxembourg does not have a specialised court that has jurisdiction over all arbitration-related

disputes. However, there are only some judicial bodies that regularly deal with arbitration-related matters.

The President of the District Court (usually of Luxembourg City), in their capacity as the judge acting in support of the arbitration (*juge d'appui*), has jurisdiction over disputes relating to arbitration proceedings. They are also competent to confer exequatur to arbitral awards.

The Luxembourg Court of Appeal has exclusive jurisdiction over actions to annul awards rendered in Luxembourg as well as appeals against decisions granting or rejecting recognition (*exequatur*) of foreign arbitral awards rendered outside of Luxembourg. It also has subsidiary jurisdiction to hear revision applications against awards rendered in Luxembourg (where the arbitral tribunal cannot be reconvened), as well as exclusive jurisdiction to hear revision applications against orders conferring exequatur to foreign awards.

2. Governing Legislation

2.1 Governing Law

The main source of legislation on arbitration can be found in Articles 1224 to 1249 of the New Code of Civil Procedure (NCCP), and is essentially based on French arbitration law and the UNCITRAL Model Law. Unlike French law, Luxembourg law does not distinguish between domestic and international arbitration but establishes a single regime for both types of arbitration. Luxembourg law does not limit the possibility of parties to resort to arbitration in international commercial matters but, subject to certain exceptions, includes all civil and commercial matters in which the parties may freely dispose of their rights.

Luxembourg is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, the European Convention on International Commercial Arbitration of 1961, and the ICSID Convention.

2.2 Changes to National Law

As of 25 April 2023, the new Luxembourg arbitration law is in force. Based essentially on French law and the UNCITRAL Model Law, the new law has modernised the provisions regarding arbitration in the NCCP. However, it does not apply to arbitration agreements concluded, arbitral tribunals constituted, and awards rendered prior to the date of its entry into force.

3. The Arbitration Agreement

3.1 Enforceability

For an arbitration agreement to be enforceable under the laws of Luxembourg, such agreement can either take the form of an arbitration clause (*clause compromissoire*) or a submission agreement (*compromis*). Neither is subject to any formal requirements and both can be concluded at any moment notwithstanding any commenced court procedure.

Case law rendered under the previous legal regime also considered the voluntary appearance of the parties before the arbitral tribunal to constitute a valid submission agreement.

In practice, the parties must be very precise in drafting the submission agreement to avoid additional discussions on the seat, applicable law, and language of the arbitration

3.2 Arbitrability

Disputes involving rights that are at the full disposal of a person can be submitted to arbitra-

tion (Article 1224 NCCP). The mere fact that the subject matter of a dispute may be a matter of Luxembourg public policy does not per se render the dispute non-arbitrable.

Luxembourg law provides that, save for disputes regarding the status of persons and disputes involving a weaker party, most civil and commercial matters are arbitrable. Thus, disputes arising out of, but not limited to, matters regarding status and capacity of persons, representation or causes of incapacitated persons or the rights of an absent person or one who is presumed absent are not arbitrable (Article 1224 NCCP). Furthermore, disputes between professionals and consumers, employers and employees, or landlords and tenants in residential leases cannot be submitted to arbitration, even after the relevant and underlying contractual relationship has ended (Article 1225 NCCP).

Luxembourg law specifically provides that the opening of insolvency proceedings does not affect arbitration agreements, regardless of whether they were concluded before or after the opening of insolvency. However, disputes regarding or arising out of the conduct of the insolvency proceedings themselves are not arbitrable (Article 1226 NCCP).

Public establishments placed under the supervision of municipalities (*communes*) have to request a specific authorisation to enter into any arbitration agreement in relation to contracts of (and thus an exposure to disputes in) a value higher than EUR100,000. Save for this specific limitation, no provision of Luxembourg law prohibits public entities from entering into arbitration agreements.

3.3 National Courts' Approach

Luxembourg national courts generally enforce arbitration agreements.

If one of the parties to an arbitration agreement seizes the courts of a matter falling within the scope of the arbitration agreement and the other party contests the jurisdiction of the court seized, that court will decline jurisdiction and refer the parties to arbitration, unless the arbitration agreement is null and void due to the non-arbitrable character of the matter, or unless the arbitration agreement is manifestly null and void or inapplicable for any other reason (Article 1227-3 NCCP).

It should be noted that the lack of jurisdiction of the state courts in the phase of an arbitration agreement will not be raised *ex officio* but must be raised *in limine litis* by a party. A defendant that fails to do so is deemed to have waived the objection.

The interim relief judge may, under certain circumstances and upon request of the parties, order provisional and conservatory measures, provided the tribunal has not yet been constituted or the remedy is not one that the arbitral tribunal may grant.

3.4 Validity

Severability of arbitration agreements is a recognised principle of Luxembourg arbitration law (Article 1227-3 NCCP). The validity of arbitration agreements is not affected by the contract being null and void. Furthermore, the nullity of the arbitration agreement does not affect the validity of the contract.

Article 5(4) of the 2020 Rules of the Luxembourg Arbitration Centre also endorses the principle of severability and indicates that "unless otherwise

agreed, the arbitrator shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitrator upholds the validity of the arbitration agreement".

4. The Arbitral Tribunal

4.1 Limits on Selection

Only a natural person who is not deprived of their civil rights, can be designated as arbitrator. If a legal person is designated, it must designate a natural person as arbitrator (Article 1228-1 NCCP).

4.2 Default Procedures

In the absence of party agreement regarding the appointment of arbitrators, the relevant appointments are made by the appointing authority pursuant to the applicable arbitration rules or, in the absence of such an authority, by the judge acting in support of the arbitration (Article 1228-4 NCCP) (the "*juge d'appui*" – see **4.3 Court Intervention**).

Thus, if the dispute is to be submitted to a sole arbitrator and the parties cannot agree on the person to be appointed, the appointment will be made by the appointing authority or, in its absence, by the judge acting in support of the arbitration.

Similarly, where the dispute should be submitted to a panel of three arbitrators and (i) a party fails to appoint its arbitrator within a month or (ii) the two co-arbitrators fails to reach an agreement on the person that will serve as president, the necessary appointments are made by the appointing authority or, failing that, by the judge acting in support of the arbitration.

Where there are multiple parties to an arbitration and they cannot agree on the manner in which to appoint the arbitrators, the appointments are made by the appointing authority or, failing that, the judge acting in support of the arbitration.

It should be noted that the 2020 Rules of the Luxembourg Arbitration Centre include provisions in respect of multiple contracts and multiple parties (Articles 7 and 8 of the 2020 Rules).

4.3 Court Intervention

The new law introduces the function of the judge acting in support of the arbitration (*juge d'appui*). The judge acting in support of the arbitration has jurisdiction where the seat of the arbitration is in Luxembourg or, failing that, where one of the following conditions is met:

- Luxembourg law is the chosen procedural law;
- the parties have expressly granted jurisdiction to the Luxembourg courts to resolve disputes regarding the arbitral process; or
- the dispute has a significant connection with Luxembourg.

Finally, the Luxembourg judge acting in support of the arbitration is competent where either party would be exposed to a risk of denial of justice.

Pursuant to Article 1230 NCCP, the President of the District Court of Luxembourg is, by default, the judge acting in support of the arbitration, unless the parties have designated another president of a district court in the arbitration agreement. The judge may be seized by either party, the tribunal or any of its members. Unless otherwise provided by law, the judge acting in support of the arbitration renders their decisions in the form of an order that is not subject to appeal.

The judge acting in support of the arbitration may intervene in various circumstances and in the absence of an authority whose task is to administer the arbitration (normally an arbitration centre), notably with respect to the appointment of arbitrators.

Articles 1228-3 and 1228-4 NCCP provide four scenarios in which the judge acting in support of the arbitration may intervene in all disputes relating to the appointment of arbitrators, including the following:

- in the event parties do not agree on the choice of the sole arbitrator (where the dispute must be referred to an arbitral tribunal composed of a sole arbitrator);
- in the event a party fails to choose an arbitrator within one month of receipt of the request made by the other party, or if the two arbitrators do not agree on the third arbitrator (where the tribunal should be composed of three arbitrators); and
- in the event the dispute is between more than two parties, and they do not agree on the manner in which to appoint the arbitrators.

The judge acting in support of the arbitration may also intervene to resolve disputes regarding the recusal of arbitrators (Article 1228-7 to 1228-9 NCCP), to extend the deadline of the arbitration (Article 1231-6 NCCP), or to order a third party to produce documents (Article 1231-8 NCCP).

4.4 Challenge and Removal of Arbitrators

Article 1228-7 NCCP provides that arbitrators can only be challenged if there are legitimate grounds to believe that the arbitrator is not independent and impartial or lacks the qualifications required by the parties. The appointing authority or, in its absence, the judge acting in support of the arbitration may be seized of a dispute regarding the recusal of arbitrators within a month following the discovery of the relevant fact(s).

The specific grounds for challenging arbitrators are not set out in the law on arbitration. However, case law rendered under the previous legal regime confirms that the grounds and procedure for challenging an arbitrator are the same as those used to challenge a judge (Article 521 NCCP). Pursuant to this provision, arbitrators may be challenged if:

- they are a relative of one party;
- they (or a relative) are having a dispute on the same subject or having a dispute with one of the parties;
- they have in the past advised one of the parties on the same subject;
- they have been invited by one of the parties to their home since the beginning of the proceeding; or
- they have received a present from one of the parties since then.

During arbitral proceedings, parties can unanimously decide to dismiss one or several arbitrators (Article 1228-8 NCCP). As there are not specific provisions in respect of the procedure for the designation of substitute arbitrators, the latter should be designated in the same manner as the original arbitrators.

4.5 Arbitrator Requirements

Under Luxembourg law, there are no specific requirements as to arbitrator independence, impartiality and/or disclosure of potential conflicts of interest. As seen in **4.4 Challenge and Removal of Arbitrators**, since Luxembourg case law confirms that the grounds for challenging an arbitrator are limited to those used to challenge a judge, it is considered that the disclo-

sure requirements of a judge also apply to an arbitrator (Article 523 NCCP). On that basis, an arbitrator is obliged to disclose facts that may raise doubts as to their impartiality and independence.

The Luxembourg Arbitration Centre has clear requirements in respect of arbitrator independence, impartiality and disclosure (see Article 10 of the 2020 Rules of the Luxembourg Arbitration Centre).

- Firstly, every arbitrator must be, and remain, impartial and independent of the parties involved in the arbitral proceedings.
- Secondly, before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The prospective arbitrator shall disclose in writing to the Secretariat of the Arbitration Centre any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality. The Secretariat shall provide such information to the parties in writing and set a time limit for any comments from them.
- Thirdly, an arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature to those referred to in the precedent paragraph concerning the arbitrator's impartiality or independence which may arise during the arbitration.

In the context of arbitrations conducted under the rules of the Arbitration Centre, a challenge, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by submission of a written statement specifying the facts and circumstances on which the challenge is based to the Secretariat of the Arbitration Centre (see Article 11 of the 2020 Rules of the Luxembourg Arbitration Centre).

5. Jurisdiction

5.1 Matters Excluded From Arbitration

See **3.2 Arbitrability**.

5.2 Challenges to Jurisdiction

Luxembourg law explicitly recognises the principle of competence-competence. The positive aspect of competence-competence is addressed in Article 1227-2 NCCP which provides that the tribunal has the power to decide on its own jurisdiction, including any arguments raised regarding the validity of the arbitration agreement itself.

5.3 Circumstances for Court Intervention

Generally, the courts of Luxembourg are reluctant to intervene in issues of jurisdiction. As mentioned in **3.3 National Courts' Approach**, Luxembourg law recognises, to a lesser extent, the negative aspect of competence-competence in Article 1227-3 NCCP, regardless of whether an arbitral tribunal had been already constituted or not.

Therefore, at the request of one of the parties, the courts must decline jurisdiction with respect to a dispute falling within the scope of an arbitration agreement, unless the matter is not arbitrable, or if the arbitration agreement is manifestly void or inapplicable.

Article 1227-3 NCCP provides that if the arbitral tribunal declares that it does not have jurisdiction, or if the arbitral award is set aside for reasons that preclude a new referral to an arbitral

tribunal, the case must be heard by the state court initially seized as soon as the parties or one of them has notified the court's registry and the other parties of the relevant event.

5.4 Timing of Challenge

Luxembourg law does not provide a deadline within which a party should object to the jurisdiction of an arbitral tribunal.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The standard of judicial review for questions of jurisdiction is that of *de novo* assessment.

5.6 Breach of Arbitration Agreement

See **5.3 Circumstances for Court Intervention**.

5.7 Jurisdiction Over Third Parties

In the absence of an arbitration agreement, third parties cannot be forced to participate in arbitration proceedings. However, pursuant to Article 1231-12 NCCP, an interested third party may apply to the arbitral tribunal for leave to intervene in the proceedings. The tribunal must communicate the application to the parties. A party to the arbitration may also apply for a third party to intervene.

However, intervention requires the existence of an arbitration agreement between the parties and the third party as well as the tribunal's approval.

The 2020 Rules of the Luxembourg Arbitration Centre include a provision dealing with the intervention and joinder of third parties to the arbitration proceedings (see Article 6 of the 2020 Rules).

6. Preliminary and Interim Relief

6.1 Types of Relief

Luxembourg law explicitly allows a tribunal to grant, adapt, and modify provisional and conservatory relief measures under the conditions that it deems appropriate, except for attachments that may only be granted by the courts. The party that has requested the interim relief will be held liable for any fees and loss arising out of the attachment if it turns out that the attachment has been wrongfully granted. A tribunal may also order the party requesting interim relief to provide appropriate security (Article 1231-9 NCCP).

Recognition of interim relief measures ordered by a tribunal may only be refused for one of the grounds of annulment of awards rendered in Luxembourg listed in Article 1238 NCCP (referred to by Article 1231-9, NCCP). Pursuant to Article 1231-13 NCCP, the tribunal may order a penalty payment (*astreinte*) to ensure that the parties comply with its decision.

The 2020 Rules of the Luxembourg Arbitration Centre provide for emergency arbitration (see Article 20 and Appendix III).

6.2 Role of Courts

As long as the arbitral tribunal has not yet been constituted, or when the measure sought cannot be granted by the arbitral tribunal (eg, attachment of assets), the existence of an arbitration agreement does not prevent a party from seeking interim relief from the competent courts.

Such an application does not imply a waiver of the arbitration agreement.

It should be noted that, unlike the arbitral tribunal, the interim relief judge can issue interim measures against third parties, and the judge

acting in support of the arbitration can order a third party to produce documents (Article 1231-8 NCCP).

6.3 Security for Costs

There are no specific provisions expressly empowering arbitral tribunals to order security for costs.

7. Procedure

7.1 Governing Rules

As mentioned in **2.1 Governing Law**, the main source of legislation on arbitration can be found in Articles 1224 to 1249 NCCP. Most rules regarding arbitration procedure are indicated in Articles 1231 to 1231-13 NCCP. However, as indicated in Article 1231-2 NCCP, parties can deviate from the procedural rules laid down in the NCCP by agreement or by opting for a set of institutional arbitration rules. However, parties cannot deviate by agreement from the fundamental norms of due process (Article 1231-3 NCCP).

7.2 Procedural Steps

The arbitration law does set specific procedural steps that must be followed in order to initiate and conduct an arbitration. These are normally governed by the parties' agreement and the arbitration rules chosen by the parties (if any).

7.3 Powers and Duties of Arbitrators

Arbitrators must handle evidence submitted by the parties in a diligent manner, uphold essential principles of procedural fairness, as well as be and remain impartial and independent of the parties involved in the arbitral proceedings.

According to Article 1228-6 NCCP, arbitrators must disclose every circumstance likely to affect their independence and impartiality in the eyes of the parties, including circumstances that may arise after acceptance of their appointment.

7.4 Legal Representatives

There are no particular qualifications or other requirements for legal representatives appearing in international arbitration proceedings in Luxembourg. Arbitral tribunals may require the parties to provide powers of attorney authorising their legal counsel to represent them in the arbitral proceedings.

8. Evidence

8.1 Collection and Submission of Evidence

In terms of the general approach to the collection and submission of evidence at the pleading stage and at the hearing, the parties are free to organise the arbitral proceedings, including the collection and submission of evidence, as they wish.

Evidence rules regarding the production of documents or witness statements are normally determined at the beginning of the arbitral proceedings by the parties and the arbitral tribunal or through a reference to institutional rules of procedure. Parties and tribunals may take guidance from the IBA Rules on the Taking of Evidence in International Commercial Arbitration.

Even though the Luxembourg law on arbitration remains fairly silent with regard to evidence, arbitral tribunals should ensure that the rules of due process are complied with. If the parties did not provide for this in their arbitration agreement, then the relevant supplementary rules of the NCCP apply (see **8.2 Rules of Evidence**).

8.2 Rules of Evidence

Pursuant to Article 1231-2 NCCP, unless the arbitration agreement provides otherwise, arbitral tribunals apply the procedural rules, including with respect to evidence, that they deem appropriate without being bound to apply the rules of evidence contained in the NCCP.

Article 1231-8(1) NCCP provides that the arbitral tribunal may hear the parties and any other party, including witnesses. Oral testimony is not provided under oath.

The same provision enables arbitral tribunals to order parties to produce documents in their possession. In an international dispute, tribunals will be normally guided by the IBA Rules on the Taking of Evidence in International Arbitration.

According to Article 1231-8(3) NCCP, arbitral tribunals may rule on the authenticity of documents, unless these are public or official documents (*actes authentiques*). In such a case, the arbitral tribunal invites the parties to seize the competent judicial authorities.

As of March 2018, Article 3.6.5 of the Internal Regulation of the Luxembourg Bar Association (*règlement intérieur de l'Ordre des avocats du Barreau de Luxembourg*) enables Luxembourg lawyers to assist witnesses in the drafting of their witness statements and to prepare for their cross-examination.

8.3 Powers of Compulsion

Arbitral tribunals do not have direct powers of compulsion in respect of production of documents or the attendance of witnesses at the hearing. No provision prevents the arbitrators from drawing adverse inference from a party's failure to comply with a request of evidence production.

9. Confidentiality

9.1 Extent of Confidentiality

Luxembourg law provides for the confidentiality of arbitral proceedings, unless the parties have agreed otherwise (Article 1231-5 NCCP).

However, once a party files an application for annulment of an arbitral award or an appeal against the an exequatur order, the existence of the proceedings becomes part of the public record.

10. The Award

10.1 Legal Requirements

Although this is not explicitly provided for by the law of arbitration, the award must be handed down in writing.

The tribunal's deliberations must remain secret. The parties may allow, through the arbitration agreement or the applicable arbitration rules, separate or dissenting opinions to be appended to the award (Article 1232 NCCP).

The award is adopted by the majority of arbitrators, but must be signed by all arbitrators. In the event an arbitrator(s) refuse(s) to sign the arbitral award, a reference to this refusal should be included in the arbitral award (Article 1232-1 NCCP).

Awards must be reasoned, unless the parties have agreed otherwise (Article 1232-2 NCCP).

The inclusion of certain information in the arbitral award such as the date, the place of arbitration, the names of the parties and their addresses, the names of the legal counsels and of the arbitrator

is not mandatory by law, but is strongly recommended.

Parties may agree on a time limit for the delivery of the award, but usually rely implicitly on a time limit included in the applicable arbitration rules. If no time limit has been agreed, the default position under Luxembourg law is that the award must be rendered within six months from the arbitrators' acceptance of their mandate (Article 1231-6 NCCP). The parties, the institution charged with administrating the arbitration, and the judge acting in support of the arbitration may extend the deadline (Article 1231-6NCCP).

10.2 Types of Remedies

The law is silent as to the types of remedies an arbitral tribunal can award. Tribunals may grant the remedies provided under the laws that they are called upon to apply. They may also grant interim relief (Article 1231-9 NCCP).

At the request of a party, tribunals may interpret the award, rectify any material errors or omissions in the award or supplement the award where the tribunal has omitted to rule on a claim (Article 1232-4 NCCP).

10.3 Recovering Interest and Legal Costs

The recovery of interest is a matter of applicable law. Under Luxembourg law, arbitral tribunals may award compensatory interest at either the statutory or the contractually agreed rate.

The 2020 Rules of the Luxembourg Arbitration Centre are silent on the subject.

Parties may recover their legal costs as well as any other costs related to the arbitration (ie, arbitrators' fees and expenses and administrative costs). The allocation of costs will be decided by the arbitral tribunal based on the parties' agreement (if any) and the applicable arbitration rules. If no specific provisions are applicable, an arbitral tribunal enjoys broad discretion and can, on a case-by-case basis, order each party to bear its own costs or apportion costs between the parties based on the relative success of their claims.

The arbitral tribunal could also punish the abusive behaviour of a party through the allocation of costs.

11. Review of an Award

11.1 Grounds for Appeal

Awards rendered in Luxembourg are not subject to any form of appeal before the Luxembourg courts but to an action for annulment before the Court of Appeal (Article 1236 NCCP). Any agreement waiving the action for annulment is ineffective. The action for annulment must be lodged within a month from the award's notification to the parties (Article 1239 NCCP). The action for annulment does not suspend the award's enforceability (Article 1241 NCCP).

The grounds to annul an award are exhaustively enumerated in Article 1238 NCCP:

- the arbitral tribunal has wrongly decided that it has or that it lacks jurisdiction;
- the arbitral tribunal was improperly constituted;
- the arbitral tribunal exceeded its mandate;
- the award is contrary to public policy;
- the award is not reasoned, unless the parties have dispensed the arbitrators from giving reasons; and
- there has been a violation of due process rights.

As of the 2023 reform, awards rendered in Luxembourg are also subject to the additional, and extraordinary remedy of revision aiming at the award's revocation so that a new decision can be made in fact and in law. Revision is possible in four exhaustively enumerated cases all of which pertain to instances where the award was procured through fraud (Article 1243(1) NCCP).

The deadline to seek revision of an award is two months starting from the date on which the victim of the fraud discovered the relevant event (Article 1243(2) NCCP).

Finally, awards rendered in Luxembourg may also be opposed by third parties so that they do not produce an effect against them. Third-party opposition must be made to the court that would have been competent in the absence of the arbitration agreement (Article 1244 NCCP).

11.2 Excluding/Expanding the Scope of Appeal

Parties cannot agree to expand the scope of challenge before the courts or reserve their rights as to the lodging of an appeal against the arbitral award before the courts.

11.3 Standard of Judicial Review

In annulment proceedings, the courts will not review the merits of the case unless the invoked grounds require such review, such as a violation of public policy, arbitrability, and fraud. On certain matters, such as jurisdiction, public policy, and arbitrability, the standard will be of *de novo* review.

12. Enforcement of an Award

12.1 New York Convention

Luxembourg ratified the New York Convention by the law of 20 May 1983 and made a declaration of reciprocity.

Luxembourg is also a party to the European Convention on International Commercial Arbitration of 21 April 1961, and the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).

12.2 Enforcement Procedure

Luxembourg law draws a distinction between awards rendered in Luxembourg and foreign arbitral awards.

The party seeking to enforce an award rendered in Luxembourg must apply to the president of the district court that is territorially competent in respect of the seat of the arbitration to obtain an exequatur order (Article 1233 NCCP).

The president of the district court is seized *ex parte*. Exequatur may be refused only if the award is tainted by one of the grounds listed in Article 1238 NCCP.

An order refusing exequatur may be appealed to the Court of Appeal within a month from the date on which it was served to the party seeking enforcement (Article 1235 NCCP).

The order conferring exequatur is not subject to a challenge distinct from the action for annulment against the award (see **11.1 Grounds for Appeal**). Thus, the action for annulment against the award also entails an appeal against the exequatur order (Article 1237 NCCP).

In order to enforce a foreign arbitral award in Luxembourg, the requesting party must obtain an exequatur order from the president of the district court that is territorially competent in respect of the other party (Article 1245 NCCP). There is no specific time limit to request enforcement.

The president of the district court is seized *ex parte*. Exequatur may be refused only if the award is tainted by one of the grounds listed in Article 1246 NCCP (Article 1245 NCCP).

If exequatur is refused, the requesting party may lodge an appeal before the Court of Appeal within one month the notification of the order refusing exequatur. (Article 1245 NCCP referring to Article 1235 NCCP).

If exequatur is granted, the party against which exequatur is granted may lodge an appeal against the exequatur order within a month from the service of the order before the Court of Appeal.

If the award brought for recognition and enforcement in Luxembourg falls within the scope of an international treaty, the terms of that treaty override the grounds to resist recognition and enforcement listed in Article 1246 NCCP. Thus, ICSID awards are recognised and enforced pursuant to Articles 53–55 of the ICSID Convention. Similarly, the recognition and enforcement of New York Convention awards may only be resisted on the basis of the grounds listed in Article V of the said Convention.

Pursuant to Article 1246 NCCP, the recognition and enforcement of awards that do not fall under an international treaty may be resisted for one of ten grounds including the six grounds for the annulment of awards rendered in Luxembourg (Article 1238, NCCP – see **11.1 Grounds for Appeal**), plus the following:

- after the award has been rendered, it transpires that it was obtained through fraud;
- if decisive documents withheld by another party have surfaced;
- if the award was made based on documents that a court has found to be forgeries; and
- if the award was based on testimony that a court found to be false.

In addition to the above, Article 1247 NCCP provides that a party that discovers that the award has been obtained through fraud after the deadline to challenge the exequatur order has expired, may request the Court of Appeal to revise the order within two months from the moment when it became aware of the fraud.

Finally, at the enforcement stage, foreign States and their emanations may plead sovereign immunity as a defence to recognition and enforcement of an award.

12.3 Approach of the Courts

Luxembourg courts have a pro-arbitration approach towards recognition and enforcement of arbitral awards. They have generally stayed within the limits imposed by Article V of the 1958 New York Convention. The Luxembourg courts have shown restraint in the application of public policy (Article V(2)(b) of the New York Convention). In order to refuse recognition and enforcement, Luxembourg courts require a manifest, effective and concrete breach of Luxembourg public policy (Court of Appeal, 17 May 2018, No 44420).

13. Miscellaneous

13.1 Class Action or Group Arbitration

Luxembourg law does not specifically provide for class-action arbitration or group arbitration.

13.2 Ethical Codes

No specific ethical codes, save for professional standards applicable to counsel and arbitrators conducting arbitral proceedings in Luxembourg, are applicable. Lawyers admitted to the Luxembourg Bar must comply with the Bar's ethical rules, even in the context of arbitration proceedings.

13.3 Third-Party Funding

Luxembourg law does not include any specific provisions regarding third-party funding. However, third-party funding is permitted in practice.

13.4 Consolidation

Consolidation may therefore be possible subject to the parties' agreement and the applicable arbitration rules.

In this respect, we note that Article 9 of the Rules of the Luxembourg Arbitration Centre provide for consolidation of arbitration proceedings.

13.5 Binding of Third Parties

Third parties are not normally bound by arbitration agreements. However, this may exceptionally happen when the contract confers rights to third parties, or if it can be established that the intention of the parties with respect to the contract was to extend the arbitration agreement to the third party at issue.

Given that awards may impact the rights of third parties, a third party may apply to the courts to oppose an award rendered in Luxembourg (Article 1244 NCCP).

Trends and Developments

Contributed by:
Clara Mara-Marhuenda, François Kremer, Séverine Hamm, Paschalis Paschalidis and Gil Bové
Arendt & Medernach

Arendt & Medernach is Luxembourg's largest independent law firm. The firm's international team of 350 legal professionals represents clients in all areas of Luxembourg business law, with representative offices in Hong Kong, London, New York and Paris. The team is composed of lawyers from the following core practice areas: litigation and dispute resolution, banking and financial services, and corporate. Arendt & Medernach assists clients in complex domestic and international commercial arbitrations, and has recently advised clients in ad hoc as well as in institutional arbitrations under the rules of the Arbitration Centre of the Luxembourg Chamber of Commerce, DIS, ICC, etc. The firm has wide experience in both enforcing and opposing international awards before Luxembourg courts and has specific experience in asset tracing. Members of the team also sit as arbitrators in complex disputes, or act as expert witnesses in ICC and CEPANI proceedings.

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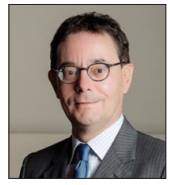

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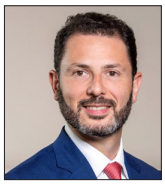

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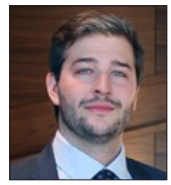

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New Luxembourg Arbitration Law

Luxembourg's new arbitration law (Articles 1224-1249 of the New Code of Civil Procedure) entered into force on 25 April 2023.

Arbitration law has been codified since the Napoleonic era, but this is the first significant change to the law in a long time. This eagerly anticipated reform ensures that Luxembourg's arbitration law is responsive to the realities of international commerce and the growing demand for efficiency in alternative dispute resolution. Luxembourg's arbitration law provides parties with options to resolve their dispute in a discrete, efficient and timely fashion while also ensuring recourse to the support of state courts when necessary.

The new law is inspired by French arbitration law and the UNCITRAL Model Law on international commercial arbitration, thus bringing the procedural framework applicable to arbitration in line with international standards. However, in a departure from French law, the Luxembourg law does not distinguish between domestic and international arbitration but rather creates one coherent regime. This choice makes the law well adapted to the realities of arbitration in Luxembourg, which is typically international, and follows the UNCITRAL model that has been widely adopted by other countries in this respect.

Matters excluded from arbitration

The law prioritises party access to arbitration in civil and commercial matters, while expressly excluding certain types of disputes from arbitration. No arbitration agreement may be made concerning the status and capacity of persons. Furthermore, disputes between professionals and consumers, employment disputes and disputes relating to residential leases may not be subject to arbitration even after the end of contractual relations between the parties. Disputes arising from insolvency proceedings may also not be subject to an agreement to arbitrate, although the opening of insolvency proceedings does not prevent the application of existing arbitration agreements or the conclusion of such agreements during the course of the insolvency proceedings.

The arbitration agreement – validity and separability

The law broadly upholds the right of parties to have recourse to arbitration, even after proceedings before state courts have already been initiated.

Parties may enter into an arbitration agreement either by concluding an arbitration clause before any dispute arises in relation to their contract(s), or via an agreement to submit an existing dispute to arbitration (known as a compromis). The law formally recognises the separability and autonomy of the arbitration clause, meaning that its validity is not affected by the invalidity of the contract, and vice versa. The law formally enshrines the principle of "competence-competence", meaning the arbitral tribunal is competent to rule on its own jurisdiction over a dispute.

If a dispute that falls within the scope of an arbitration agreement is brought before a state court, the court must decline jurisdiction unless it finds the subject matter of the dispute to be non-arbitrable, or the arbitration agreement to be manifestly null and void, or manifestly inapplicable. The state court may not, however, assert its lack of jurisdiction over a dispute on its own initiative.

Intervention by state courts – interim measures and the supporting judge ("juge d'appui")

Several provisions of the new law give parties the option of requesting the intervention of state courts to support resolution of their dispute throughout the arbitration process. As provided by Article 1227-4, the existence of an arbitration agreement does not preclude a party from applying to a state court for interim measures before the arbitral tribunal is constituted, or when the tribunal cannot grant the requested measure – eg, in the case of an attachment procedure or a measure of constraint placed on third parties. Furthermore, an application for an interim, provisional or conservatory measure does not imply a waiver of the arbitration agreement.

To facilitate the progression of an arbitration, the law introduces the role of the supporting judge, or "juge d'appui". Pursuant to Article 1229, the supporting judge may be involved when:

- the designated seat of the arbitration is Luxembourg;
- in the absence of such designation, the parties have agreed to submit the arbitration to Luxembourg procedural law;
- the parties have agreed to the jurisdiction of Luxembourg courts over disputes relating to the arbitral proceedings; or
- there is a significant link between the dispute and Luxembourg.

The supporting judge is the president of the district court designated in the arbitration agreement, or the President of the District Court of Luxembourg in the absence of a designation. The supporting judge plays an important role in resolving difficulties and disputes that may arise during the arbitration. According to Article 1230, their intervention may be requested by a party, the arbitral tribunal or a single member of the arbitral tribunal.

The law gives the supporting judge authority to intervene in disputes involving the tribunal, including:

- constitution of the arbitral tribunal, failing agreement by the parties, or a decision by the person in charge of organisation of the arbitration (Article 1228-3);
- appointment of the arbitrator or arbitrators, failing agreement by the parties, or a decision by the person in charge of organisation of the arbitration (Article 1228-4);
- settlement of any other disagreements relating to the appointment of arbitrators, failing agreement by the parties, or a decision by

the person in charge of organisation of the arbitration (Article 1228-4);
- settlement of disagreements concerning whether an arbitrator should be removed or recuse themselves due to legitimate doubts as to their impartiality or independence, or lack of required qualifications, if the person in charge of organising the arbitration does not settle the disagreement (Articles 1228-7 and 1228-8); and
- settlement of disagreements as to the reality of the motive for an arbitrator's decision to abstain or resign, if the person in charge of organising the arbitration does not settle the disagreement within one month following their impediment, abstention, or resignation (Article 1228-99).

The supporting judge may also intervene to:

- extend the duration of the arbitral tribunal's mission (limited to six months from the date the last of the arbitrators accepts their mandate or to a duration specified in the arbitration agreement), failing agreement by the parties or a decision by the person in charge of organising the arbitration (if authorised) (Article 1231-6);
- order the production of documents by third parties upon the request of one of the parties based on the invitation of the arbitral tribunal (Article 1231-8); and
- reconvene the arbitral tribunal after the award has been rendered, failing agreement by the parties to do so, for interpretation, correction or supplementation of the award (Article 1232-4).

Annulment and enforcement of arbitral awards

For the purposes of enforcement of an arbitral award, Luxembourg law distinguishes between arbitral awards rendered in Luxembourg and foreign awards. If Luxembourg is the seat of the arbitration, the award is deemed to have been rendered in Luxembourg (Article 1228).

Awards rendered in Luxembourg may be enforced using a simplified procedure, as follows.

- The party requesting enforcement will file its request for an exequatur order before the district court in the territorial jurisdiction of which the award was rendered. This exequatur procedure is not adversarial.
- Pursuant to Article 1234, exequatur may be refused only if the award is manifestly contrary to one of the grounds of annulment provided in Article 1238.
- The order granting exequatur is not subject to any appeal separate from the action of annulment against the award. An order refusing exequatur must state the reasons for refusal and may be appealed before the Luxembourg Court of Appeal within one month of service of the order on the applicant. In the context of this proceeding, a party opposed to enforcement may bring an action for annulment of the award before the Court of Appeal.
- According to Article 1238, actions for annulment of an award must be made within one month of notification of the award, and only on one of the limited grounds enumerated in the law (eg, the tribunal wrongly asserted its jurisdiction, the award is contrary to public order, or the tribunal failed to state reasons).
- Parties cannot agree to waive the action for annulment. Any agreement to the contrary shall be void (Article 1236).
- Application for review in order to have the award revoked and decided again may only be made on limited grounds – eg, the award having been tainted by fraud or based on

evidence declared false after the award was made.
- Third parties may oppose an award before the court that would have had jurisdiction in the absence of arbitration.

Before the reform, parties were required to request the setting-aside of an award before the district court, a decision which could then be appealed to the Court of Appeal. Given that, under the new law, requests for annulment are submitted directly to the Court of Appeal, the reform streamlines and accelerates the enforcement process. Dismissal of the action for annulment confers exequatur to the award, or to the part of the award that has not been annulled by the Court of Appeal (Article 1242).

Foreign awards may be enforced in Luxembourg only through an order of exequatur granted by the President of the District Court having territorial jurisdiction over the domicile or residence of the person against whom enforcement is sought, or, failing this, over the location where the award is to be enforced.

The exequatur order may be appealed within one month of notification. Insofar as recognition and enforcement are not governed by a treaty (such as the 1958 New York Convention or the ICSID Convention), the Court of Appeal may only refuse enforcement on the grounds enshrined in Article 1246. The first six grounds are the same as those that also apply to awards rendered in Luxembourg (Article 1238). However, Article 1246 adds four additional grounds on the basis of which awards rendered abroad may be refused enforcement (fraud, discovery of decisive documents, recognition of documents as false, or recognition of testimonies as false after the award).

As provided in Article 1245, the exequatur order cannot be granted if the award is manifestly affected by one of the grounds for annulment provided for in Article 1246.

Other notable provisions

The reform makes it clear that, unless the parties have agreed otherwise, the arbitral tribunal has the authority to order provisional or conservatory measures, and may require parties to provide adequate security to back their requests for such measures (Article 1231-9). The arbitral tribunal may also consent to the intervention of a third party in the proceedings (Article 1231-12).

Conclusion

The reform makes Luxembourg an even more attractive choice as a seat of arbitration. Luxembourg now has a modernised arbitration framework to match its status as a sophisticated, multilingual and multicultural legal centre.

MALAYSIA

Law and Practice

Contributed by:
Rabindra S. Nathan, Rodney Gomez, K. Shanti Mogan and Alexius Lee
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Shearn Delamore & Co is one of the largest award-winning, full-service law firms in Malaysia, with more than 100 lawyers and 280 support staff. The firm has the resources to manage complex cross-border transactions, projects and matters. It acts for MNCs, private equity, international organisations, government institutions and private clients; it is frequently instructed by international law firms. Shearn Delamore & Co's international resources and reach include its membership of the World Law Group, World Services Group, Employment Law Alliance and, in 2020, Drew Network Asia (DNA) – a regional platform to serve clients seeking legal advice within the ASEAN region. The firm's diverse experience and interdisciplinary collaborations enable it to provide clients with a complementary range of skills to meet their needs.

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1. General

1.1 Prevalence of Arbitration

Litigation continues to be the primary method of resolving disputes in Malaysia, for both domestic and international disputes. This is not expected to change in the near future.

Based on statistics from the Asian International Arbitration Centre (AIAC), for arbitrations registered with the AIAC (both AIAC-administered matters and ad hoc appointments), the COVID-19 pandemic has had an effect on the volume of domestic arbitration registrations over the last few years – with 117 domestic arbitrations in 2019, 89 domestic arbitrations in 2020, 104 domestic arbitrations in 2021, 69 domestic arbitrations in 2022 and 92 domestic arbitrations in 2023. The number of domestic arbitration registrations is increasing and it is expected to improve further. Quite a fair number of domestic construction-based disputes are disposed of by adjudication.

The number of international arbitration registrations at the AIAC has been relatively constant over the last few years. In 2019, the AIAC registered a total of eight international arbitration cases; in 2020, the AIAC registered a total of 11 international arbitration cases; in 2021, the AIAC registered a total of 13 international arbitration cases; in 2022, the AIAC registered a total of 9 international arbitration cases; in 2023, the AIAC registered a total of 11 international arbitration cases.

The available statistics for 2023 show a significant surge in AIAC-registered domestic arbitration and a slight rise in international arbitrations compared to the preceding year.

1.2 Key Industries

AIAC statistics indicate that the majority of arbitrations registered in 2022-2023 relate to construction contracts. This is largely consistent with the trend in previous years.

AIAC statistics do not indicate any particular industries that experienced significant international arbitration activity in 2022-2023.

1.3 Arbitration Institutions

The arbitral institution most used for international arbitration in Malaysia is the AIAC.

The AIAC was previously known as the Kuala Lumpur Regional Centre for Arbitration. It was first established in 1978 under the Asian–African Legal Consultative Organization as a not-for-profit, non-governmental international organisation aimed at promoting alternative dispute resolution in the Asian region. It was subsequently rebranded as the AIAC on 7 February 2018.

In 2021, the Affordable Arbitration and ADR Chambers PLT (AA-ADR Chambers) was established with the goal of promoting University cum Court Annexed Arbitration – ie, where courts allow parties to opt, by mutual agreement, out of the court system and refer the dispute to arbitration. The chambers targets arbitration and alternative dispute resolution solutions for matters filed in court where there is no agreement to arbitrate. The chambers provides all forms of domestic and international alternative dispute resolution services, including hearing rooms, administrative support and a panel list of arbitrators, mediators and other adjudicators.

AIAC's Initiatives

The AIAC maintains its own rules of arbitration, known as the AIAC Arbitration Rules. The AIAC takes the initiative to actively upgrade the AIAC

Arbitration Rules from time to time in accordance with international trends to cater for best practices in the global environment.

The AIAC released the AIAC Arbitration Rules 2023, which took effect from 24 August 2023. The AIAC Arbitration Rules 2023 were designed to expedite dispute resolution with simplified provisions and streamline procedures that offer greater clarity. The key features of these rules include consolidation and joinder provisions, technical review, third-party funding provision, summary determination and settlement negotiations provision.

The AIAC also released the AIAC i-Arbitration Rules, which offer a practical solution for the settling of disputes arising out of or in connection with Sharia-based commercial transactions, enabling the arbitral tribunal to refer to the relevant Sharia Advisory Council or Sharia expert for opinions on matters related to Sharia principles. The AIAC regularly updates its i-Arbitration rules, with the latest update being the AIAC i-Arbitration Rules 2023, which took effect from 24 August 2023.

The AIAC released its inaugural Asian Sports Arbitration Rules 2023, which took effect from 06/10/2023. The Asian Sport Arbitration Rules aim to cater to the needs of the sports industry and provide an effective and efficient mechanism for resolution of sports-related disputes. The Asian Sport Arbitration Rules contain two procedures: the general rules applicable to any matter related to sport and the special procedure for resolution in disputes relating to selection and eligibility misunderstandings.

1.4 National Courts

The High Courts of Malaysia are designated to hear disputes related to international arbitration and domestic arbitrations for matters where they have jurisdiction under the Arbitration Act 2005. There are designated arbitration specialist courts that deal with arbitration-related matters arising typically from construction and commercial-related arbitration disputes.

2. Governing Legislation

2.1 Governing Law

The Arbitration Act 2005 governs international arbitration in Malaysia. Parts I, II and IV of the Arbitration Act 2005, comprising Sections 1 to 5, Sections 6 to 39 and Sections 47 to 51, are of mandatory application in respect of international arbitration. Part III of the Arbitration Act 2005, comprising Sections 40 to 46, do not apply to international arbitrations unless the parties agree to opt in, in writing.

Comparison with UNCITRAL Model Law

The Arbitration Act 2005 is based closely on the UNCITRAL Model Law. Part II of the Arbitration Act 2005 – containing Sections 6 to 39 governing general provisions and provisions relating to arbitration agreements, the composition of arbitrators, the jurisdiction of the arbitral tribunal, conduct of arbitral proceedings, the making of awards and termination of proceedings, recourse against awards and the recognition and enforcement of awards – closely mirrors the subject headings and sequence of Articles 3 to 36 of the UNCITRAL Model Law.

In the context of international arbitration, there are no significant differences between the Arbitration Act 2005 and the UNCITRAL Model Law. However, specific powers are provided to arbitrators in several sections of the Arbitration Act 2005 which are not found in the UNCITRAL Model Law.

For instance, the Arbitration Act 2005 empowers the arbitral tribunal to grant security for costs as an interim measure (see Section 19E of the Arbitration Act 2005) and to give directions for the speedy determination of a claim if the claimant fails to proceed with the claim (see Section 27(d) of the Arbitration Act 2005).

The Arbitration Act 2005 also provides for specific powers of the arbitral tribunal in conducting the arbitration, which includes drawing on its own knowledge and expertise, making orders for the provision of further particulars, the granting of security for costs, fixing and amending time limits within which various steps in arbitral proceedings must be completed, ordering the discovery and production of documents or material within the possession or power of a party, ordering interrogatories to be answered, and ordering that any evidence be given on oath or affirmation (see Section 21 of the Arbitration Act 2005).

2.2 Changes to National Law

There have been no amendments to the Arbitration Act 2005 since the 2018 Amendments. The 2018 Amendments brought the Arbitration Act 2005 further in line with the UNCITRAL Model Law through measures such as:

- the clarification of the definition of an arbitration agreement that is "in writing";
- the recognition that the requirement that an arbitration agreement be made in writing can be met by any electronic communication;
- the introduction of provisions dealing with the arbitral tribunal's powers to grant interim measures; and
- the reinstatement of parties' rights to choose any law or rules of law applicable to the substance of a dispute and the arbitral tribunal's right to decide according to equity and conscience if so authorised by the parties.

The said amendments, among other things, allowed the parties the right to choose representation by any representative and not merely a lawyer; further, they expanded the definition of "arbitral tribunal" to include emergency arbitrators.

Recent Developments

The biggest recent development in Malaysian arbitration was the introduction of the AIAC Arbitration Rules 2023. These Rules were launched in August 2023 and replaced all the previous editions of the Rules, unless otherwise agreed by the parties.

The latest revisions to the AIAC Arbitration Rules simplified provisions and streamlined procedures that offer greater clarity. The key features of the AIAC Arbitration Rules 2023 include the consolidation and joinder provisions that allow multiple disputes to be handled cohesively. Further, the AIAC Arbitration Rules 2023 impose a technical review of final awards, which entails matters relating to the procedural history, general content issues and clerical errors to ensure the enforceability of awards. The AIAC Arbitration Rules 2023 also introduced a third-party funding provision to ensure every party can access justice. Summary determination provisions accelerate the arbitration process for straightforward issues, while settlement negotiations provisions encourage amicable solutions between parties.

3. The Arbitration Agreement

3.1 Enforceability

An arbitration agreement must be an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal rela-

tionship, whether contractual or not (see Section 9 of the Arbitration Act 2005).

Forms of Arbitration Agreement

An arbitration agreement may be in the form of an arbitration clause contained in an agreement, in a standalone agreement or in a reference to another agreement that contains an arbitration clause.

In Pandan Etika Sdn Bhd v Liang Builders Sdn Bhd [2019] 1 LNS 1978, the High Court gave effect to an arbitration clause that had been incorporated by reference.

Arbitration Agreement Must Be in Writing

The arbitration agreement must be in writing (see Section 9(3) of the Arbitration Act 2005). This requirement of a written agreement may be met if its content is recorded in any form, including situations where the initial arbitration agreement or contract has been concluded orally, by conduct, or by other means (see Section 9(4) of the Arbitration Act 2005). The requirement can also be met if the existence of an agreement is alleged by one party and not denied by the other in an exchange of statement of claim and defence.

An arbitration agreement is deemed to be in writing if it is evidenced by any electronic communication that the parties make by means of a data message, if the information contained therein is accessible so as to be usable for future reference (see Section 9(4A) of the Arbitration Act 2005). The signature of the parties is not a prerequisite to an arbitration agreement being enforced (see Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd [2013] 5 MLJ 625).

No Specific Words or Form Required

No specific words or form are required to be used to constitute an arbitration clause or an arbitration agreement; an electronic transmission referring to or implying the parties' intention to submit to arbitration suffices, as long as there is an agreement to refer disputes to arbitration and the parties' intention to arbitrate is clear and unequivocal (see the Malaysian Court of Appeal's decision in Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd [2010] 3 MLJ 656).

3.2 Arbitrability

Any dispute the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration, unless the arbitration agreement is contrary to public policy or the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia (see Section 4 of the Arbitration Act 2005). The fact that any written law confers jurisdiction in respect of a matter on any court of law but does not refer to the determination of that matter by arbitration does not indicate that a dispute about that matter is incapable of determination by arbitration.

Public Policy

There is no universally accepted test on what public policy is; different courts and different tribunals may have different views as to the enforceability of contracts on the ground of public policy (see the Malaysian Federal Court judgment in Arch Reinsurance Ltd v Akay Holdings Sdn Bhd [2019] 1 CLJ 305).

The Arbitration Act 2005 does not identify any specific subject matter that cannot be referred to arbitration.

The question of whether a subject matter is arbitrable is not determined by jurisdictional limitations on the relief that may be granted (see the UK Court of Appeal decision in Fulham Football Club (1987) Ltd v Richards and another [2011] EWCA Civ 855; [2012] Ch 333; [2012] 1 All ER 414; [2012] 2 WLR 1008; [2012] 1 All ER (Comm) 1148; [2012] 1 BCLC 335; [2011] All ER(D) 197 (Jul)). Matters that may have public interest elements have been approved as being non-arbitrable in the Singapore courts, such as citizenship, the legitimacy of a marriage, grants of statutory licences, the validity of the registration of trade marks or patents, copyrights, the winding up of companies, the bankruptcy of debtors and the administration of estates (see the Singapore Court of Appeal decision in Larsen Oil and Gas Pte Ltd v Petroprod Ltd [2011] 3 SLR 414). Malaysian courts would find such judicial findings persuasive.

In Arch Reinsurance Ltd v Akay Holdings Sdn Bhd [2019] 1 CLJ 305, the Malaysian Federal Court held that the provisions of the National Land Code setting out the rights and remedies of parties under statutory charge over land are exhaustive and exclusive and any attempt to contract out of these rights is void as being contrary to public policy; and hence a dispute triggered by a statutory notice of demand under the National Land Code is not arbitrable under the Arbitration Act 2005. Based on this decision, the Malaysian courts have taken the position that where there are statutory provisions that exhaustively set out procedures involving the rights and remedies of parties, then that subject matter will most likely not be arbitrable.

In Uat Energy Sdn Bhd & Anor v Buildcraft Construction Sdn Bhd & Ors [2021] CLJU 2727, the High Court held that an action based on fraudulent trading under Section 540 of the Companies Act 2016 is a proceeding under the insolvency regime and is not arbitrable. The High Court supported its decision by referring to the rationales set out by the Singapore Court of Appeal in Larsen Oil and Gas Pte Ltd v Petroprod Ltd [2011] 3 SLR 414, comprising of policy objective of statutory provisions in the insolvency regime and to avoid different findings by different adjudicators as statutory remedies may invariably involve claims against the former management of companies who are non-parties to the arbitration agreement.

In Padda Gurtaj Singh v Tune Talk Sdn Bhd & Ors and another appeal [2022] 4 MLJ 257, the Malaysian Court of Appeal acknowledged that exceptions to arbitrability occur when the interests of wider parties, such as creditors, are affected or where Parliament intended to exclude arbitration. It was held that the statutory provisions in Sections 106 and 107 of the Companies Act 2016, concerning the registration and transfer of shares, do not amount to such an exception.

The Tribunal's Powers to Determine Arbitrability

If the issue of whether a dispute is arbitrable or not is raised by any party, the arbitral tribunal has the power to rule on its own jurisdiction, which includes deciding whether a dispute is arbitrable. Within 30 days of receiving notice of the arbitral tribunal's ruling that there is jurisdiction, any party may appeal to the High Court to decide the matter.

3.3 National Courts' Approach

Law of Arbitration Agreement

The conflict of laws rules are used by Malaysian courts with respect to determining the law governing arbitration agreements. The general principle is that, in the absence of an express choice of the governing law of the arbitration agreement

or any contrary indication, the law that has the closest and most real connection with the arbitration agreement is the law of the seat of the arbitration – ie, the lex arbitrii (see the Malaysian Federal Court decision in Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's Democratic Republic [2017] 9 CLJ 273).

Enforcement of Arbitration Agreements

Arbitration agreements are frequently enforced by the Malaysian courts. Where court proceedings are brought in respect of a matter that is the subject of an arbitration agreement and a party makes an application to stay the court proceedings, in view of the existence of a valid agreement to arbitrate, it is mandatory for the court to do so (see the Malaysian Federal Court's decision in Press Metal Sarawak Sdn Bhd v Etika Takaful Sdn Bhd [2016] 5 MLJ 417). So long as an application to stay the court proceedings is made before any further steps in the court proceedings are taken, there is no discretion for the Malaysian courts to refuse enforcement of an arbitration agreement when the arbitration agreement is not null and void, inoperative or incapable of being performed.

This was further emphasised in the case of Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd & Another Appeal [2020] 4 CLJ 301. There, the issue before the Malaysian Federal Court was whether a judgment in default may be sustained when the plaintiff who obtained the judgment in default is bound by a valid arbitration agreement. The defendant raised disputes to be ventilated in arbitration pursuant to the arbitration clause. The Malaysian Federal Court held that a judgment in default cannot act as a bar to arbitration and, as such, set aside the judgment in default and granted a stay pending reference to arbitration.

However, where the validity of the arbitration agreement itself is questioned, the Malaysian courts may find that they retain jurisdiction to determine that issue. Recently, in Macsteel International Far East Ltd v Lysaght Corrugated Pipe Sdn Bhd and other appeals [2023] 4 MLJ 551, the respondents to a Hong Kong seat arbitration filed a suit against the claimants in the High Court for declarations that the arbitration agreements between the parties were fraudulently prepared and/or forged, and therefore null and void, and sought a permanent injunction restraining the claimant from proceeding with the arbitration. The claimants applied for the proceedings to be stayed pending arbitration. The Court of Appeal upheld the High Court's decision in refusing the application for stay. The Court of Appeal held that as the High Court and arbitral tribunal both have concurrent jurisdiction and power to investigate and conclude the validity of the arbitration agreement, a flexible approach should be adopted as to the appropriate forum in which to investigate and determine the validity of the arbitration agreement. The forum should be the one that is, on balance, more just and convenient, having regard to the facts and circumstances in issue. In this case it was held that the Malaysian courts were the appropriate forum to determine the validity of the arbitration agreement.

Further, the High Court in Biaxis (M) Sdn Bhd (in liquidation) v Peninsula Education (Setia Alam) Sdn Bhd (formerly known as Segi International Learning Alliance Sdn Bhd) [2023] MLJU 2938 held that an arbitration agreement is inoperative when a company is wound up and is subject to insolvency protection. The High Court adopted the definition of "inoperative" arbitration agreements in the Supreme Court of Canada case of Peace River Hydro Partners v Petrowest Corp [2022] SCJ No. 41 – ie, the arbitration agreements, although not void ab initio, "have ceased

for some reason to have future effect" or "have been inapplicable to the parties and their dispute".

3.4 Validity

Malaysia applies the rule of separability of arbitration clauses contained in invalid agreements. An arbitration clause that forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement in which it is contained. A decision by an arbitral tribunal that the agreement is null and void does not invalidate the agreement to arbitrate (see Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor [2008] 1 MLJ 233 – High Court).

The Court of Appeal has reiterated the rule of separability of arbitration clauses in the recent case of Tumpuan Megah Development Sdn Bhd v Ing Bank N V & Anor [2024] MLJU 44.

4. The Arbitral Tribunal

4.1 Limits on Selection

There are no limits set by the Arbitration Act 2005 on the parties' autonomy to select arbitrators in Malaysia. It is explicitly provided in Section 13 of the Arbitration Act 2005 that no person shall be precluded by reason of nationality from acting as an arbitrator, unless the parties agree otherwise.

4.2 Default Procedures

Where the parties' chosen method for selecting arbitrators fails, the default procedure depends on the number of arbitrators appointed – ie, one or three. In the context of international arbitration, where parties fail to determine the number of arbitrators, the default position is three arbitrators in an international arbitration and one in a domestic arbitration (see Section 12 of the Arbitration Act 2005).

Where the arbitration consists of three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator as the presiding arbitrator (see Section 13(3) of the Arbitration Act 2005). If a party fails to appoint an arbitrator within 30 days of receiving a request in writing to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment or within such extended period as the parties may agree, either party may apply to the Director of the AIAC for such appointment (see Section 13(4) of the Arbitration Act 2005).

Where the arbitration consists of a sole arbitrator and the parties fail to agree on the arbitrator, either party may apply to the Director for the appointment of the sole arbitrator (see Section 13(5) of the Arbitration Act 2005).

Where the parties have agreed on the procedure for appointment of the arbitrator(s), and (i) a party fails to act as required under such procedure; or (ii) the parties, or two arbitrators, are unable to reach an agreement under such procedure; or (iii) a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the Director to take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment (see Section 13(6) of the Arbitration Act 2005). The decision of the Director is final and non-appealable (see Section 13(9) of the Arbitration Act 2005).

The procedure for the appointment of arbitrator(s) is also provided for in Rule 3 of the AIAC Arbi-

tration Rules 2023 where the parties agree to arbitrate under the AIAC Arbitration Rules.

Multi-party Arbitrations

Where there are multiple parties in an arbitration, where the arbitration consists of a sole arbitrator and the parties fail to agree on the arbitrator, any party may apply to the Director of the AIAC for the appointment of the sole arbitrator. The decision of the AIAC is final and non-appealable.

There is no default procedure in the Arbitration Act 2005 governing multi-party arbitrations where the number of arbitrators is three, as the Arbitration Act 2005 only states that "each party shall appoint one arbitrator". However, it is common practice for multiple parties on the same side (whether as joint claimants or respondents) to jointly appoint an arbitrator.

Rule 3.5 of the AIAC Arbitration Rules 2023 addresses this and provides for claimants and respondents to jointly nominate half the number of arbitrators if there are two or more arbitrators and the number of arbitrators is an even number. In a case where there are three or more arbitrators and the number of arbitrators is an odd number, the claimants and respondents shall nominate an equal number of arbitrators who will together nominate a presiding arbitrator for the Director's confirmation. Failing such nomination, the Director shall appoint the presiding arbitrator.

If no agreement is reached on the joint nomination, the entire arbitral tribunal shall be constituted by the Director upon the request of any party. In this case, in the absence of agreement, the previously nominated and appointed arbitrators shall not form part of the tribunal, unless parties agree to retain such nominations and appointments.

4.3 Court Intervention

Where the Director of the AIAC is unable to act or fails to act within 30 days when any party applies to him or her for the appointment of an arbitrator, any party may apply to the High Court for the appointment of the arbitrator (see Section 13(7) of the Arbitration Act 2005). If such an application is made, the High Court is required to have due regard to any qualifications required of the arbitrator by the agreement of the parties, other considerations that are likely to secure the appointment of an independent and impartial arbitrator, and the advisability of appointing an arbitrator of a nationality other than those of the parties. The appointment of the arbitrator by the High Court in this manner is final and non-appealable.

The High Court does not have any power under the Arbitration Act 2005 to intervene in the selection of arbitrators in any other manner.

4.4 Challenge and Removal of Arbitrators

Grounds for Challenge of Arbitrators

An arbitrator may be challenged in two situations: if the circumstances give rise to justifiable doubts as to his or her impartiality or independence; or if he or she does not possess the qualifications agreed by the parties (see Section 14 of the Arbitration Act 2005).

Challenge Procedure

Under the default procedure governing the challenge or removal of arbitrators, any party who intends to challenge the appointment of an arbitrator shall send a written statement of the reasons for the challenge to the arbitral tribunal, within 15 days of becoming aware of the constitution of the arbitral tribunal or of any of the reasons referred to above (see Section 15 of the Arbitration Act 2005).

Unless the challenged arbitrator withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. Where the challenge is not successful, the challenging party may apply to the High Court to decide on the challenge, within 30 days of receiving notice of the decision rejecting the challenge. The High Court's decision on the matter is final and non-appealable.

A similar procedure to initiate the challenge of an arbitrator is provided for in Rule 5 of the AIAC Arbitration Rules 2023.

4.5 Arbitrator Requirements

It is a requirement that there should be no justifiable doubt as to an arbitrator's impartiality and independence. A person who is approached in connection with a possible appointment as arbitrator is required to disclose any circumstances that are likely to give rise to justifiable doubts as to his or her impartiality or independence under the Arbitration Act 2005 without delay (see Section 14(2) of the Arbitration Act 2005).

In the case of Persatuan Kanak-Kanak Spastik Selangor & Wilayah Persekutuan v Low Koh Hwa & Another Appeal [2023] 1 CLJ 536, the Court of Appeal found that although the arbitrator did not make the declaration promptly as required by Section 14 of the Arbitration Act (AA), the crucial information regarding his relationship with a witness was disclosed. This disclosure was enough to raise concerns about his impartiality or independence.

The party's decision not to object to the arbitrator's continued appointment, after this disclosure indicates confidence in the arbitrator's impartiality. The disclosure averted a breach of public policy.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

There are no specific subject matters that may not be referred to arbitration under the Arbitration Act 2005. Section 4 of the Arbitration Act 2005 provides that any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy, or the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia.

A wide approach to what is arbitrable is illustrated by the case of Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394, where in addition to conventional commercial disputes, the Malaysian Court of Appeal held that tortious disputes are arbitrable.

Case Law

While there is no universally accepted test on public policy, matters that are naturally contrary to public policy and not capable of settlement by arbitration would include criminal proceedings, citizenship, legitimacy of a marriage, validity of a matter where the court is conferred sole jurisdiction to make specific orders or declarations such as grants of statutory licences, validity of the registration of trade marks or patents, copyrights, winding up of companies, bankruptcy of debtors and administration of estates (see the Singapore Court of Appeal decision in Larsen Oil and Gas Pte Ltd v Petroprod Ltd [2011] 3 SLR 414).

In much of the world, the question of whether the subject matter is arbitrable is not determined by the jurisdictional limitations on the relief that may be granted by the arbitral tribunal (see Section 4(2) of the Arbitration Act 2005 and the UK

Court of Appeal decision in Fulham Football Club (1987) Ltd v Richards and another [2011] EWCA Civ 855; [2012] Ch 333; [2012] 1 All ER 414; [2012] 2 WLR 1008; [2012] 1 All ER (Comm) 1148; [2012] 1 BCLC 335; [2011] All ER(D) 197 (Jul)).

However, this is not the position in Malaysia. The Malaysian courts have looked carefully at whether an arbitral tribunal can grant relief that is statutorily vested in a court. In Pendaftar Pertubuhan Malaysia v Establishmen Tribunal Timbangtara Malaysia & Ors [2011] 6 CLJ 684, the High Court held that disputes relating to any act, duty or functions carried out by a statutory body in the exercise of its statutory powers are not subject to arbitration.

Recently, in Arch Reinsurance Ltd v Akay Holdings Sdn Bhd [2019] 1 CLJ 305, the Malaysian Federal Court held that subject matter concerning a statutory notice of demand for order for sale of a charged property under the National Land Code 1965 is not arbitrable. This was applied by the High Court in FMC Petroleum Equipment (Malaysia) Sdn Bhd v FMC Wellhead Equipment Sdn Bhd [2019] MLJU 473.

5.2 Challenges to Jurisdiction

The principle of competence-competence is applicable in Malaysia with the enactment of Section 18(1) of the Arbitration Act 2005 – ie, an arbitral tribunal can rule on a party's challenge to the tribunal's own jurisdiction. This was affirmed in Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd [2016] 5 MLJ 417, where the Malaysian Federal Court held that the court must acknowledge the competency of an arbitral tribunal to decide on its own jurisdiction without interference.

In discussing Section 18 of the Arbitration Act 2005, the case of Tumpuan Megah Development Sdn Bhd v ING. Bank NV & Anor [2024] 3 CLJ 18 held that while an arbitral tribunal may decide on its jurisdiction under the principle of competence-competence, its decision is not final and can be challenged in the court of the seat of arbitration or the enforcement court.

The Court of Appeal emphasised that challenges to jurisdiction can be distinguished from the existence and validity of an arbitration clause. Further, the doctrine of separability ensures the arbitration agreement's survival even if the main contract is null and void.

5.3 Circumstances for Court Intervention

Pursuant to Section 18(7) of the Arbitration Act 2005, the arbitral tribunal may rule on a plea that it does not have jurisdiction or is exceeding the scope of its authority either as a preliminary question or in an award on the merits.

Positive Rulings on Jurisdiction

Where the arbitral tribunal rules on such a plea as a preliminary question that it has jurisdiction, any party may appeal to the High Court within 30 days of receiving a notice of that ruling (see Section 18(8) of the Arbitration Act 2005). A decision of the High Court thereon is final and non-appealable (see Section 18(10) of the Arbitration Act 2005).

On the other hand, if the arbitral tribunal decides to address such plea at the award stage, then the parties may apply to the High Court under Section 37 of the Arbitration Act 2005 to set aside such award made by the arbitral tribunal.

The courts generally show a reluctance to intervene in issues regarding the jurisdiction of an arbitral tribunal. In Capping Corp Ltd & Ors v Aquawalk Sdn Bhd & Ors [2013] 6 MLJ 579, the Malaysian Court of Appeal held that under the

Arbitration Act 2005, the courts are obliged to take a minimal interference approach, and such approach is reflected in Section 18 of the Arbitration Act 2005, where the arbitral tribunal is empowered to rule on its own jurisdiction.

Negative Rulings on Jurisdiction

The Arbitration Act 2005 provides for an appeal against an arbitral ruling that it has jurisdiction. The converse (ie, a negative ruling on jurisdiction) is not referenced as a ground for appeal under Section 18(8).

In PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA [2007] 1 SLR(R) 597, the Singapore Court of Appeal accepted that pursuant to Article 16(3) of the UNCITRAL Model Law, a negative jurisdictional ruling by a tribunal is intended to be a final and binding decision between the parties, and is not appealable. While the Singapore International Arbitration Act was amended in 2012 to allow appeals to the High Court on a negative jurisdictional ruling, no such amendment has been made to the Arbitration Act 2005.

5.4 Timing of Challenge

Pursuant to Section 18(8) of the Arbitration Act 2005, if the arbitral tribunal rules on a plea as a preliminary question that it has jurisdiction, parties have the right to go to court to challenge the jurisdiction of the arbitral tribunal within 30 days of receiving a notice of the arbitral tribunal's ruling on the issue.

If the arbitral tribunal determines such plea in an award on the merits, the parties may, within 90 days from the date of receipt of the award, make an application to the High Court to set aside such award (see Section 37(4) of the Arbitration Act 2005).

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

In Malaysia, the standard of review by the courts on questions of arbitral jurisdiction is generally de novo. In Usahasama SPNB-LTAT Sdn Bhd v ABI Construction Sdn Bhd [2016] 7 CLJ 275, the High Court held that an appeal under Section 18(8) of the Arbitration Act 2005 involves a full rehearing of all issues afresh and uninfluenced by the prior decision of the arbitrator(s).

5.6 Breach of Arbitration Agreement

When there are court proceedings brought in breach of an arbitration agreement, it is mandatory for the Malaysian courts to stay such proceedings in favour of arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed (see Section 10 of the Arbitration Act 2005).

This was confirmed by the Malaysian Federal Court in Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd [2016] 5 MLJ 417 where it was held that in granting a stay under Section 10 of the Arbitration Act 2005, the court only needs to consider whether there is in existence a binding arbitration agreement or clause between the parties, that is neither null and void nor inoperative or incapable of being performed. Referring to the Malaysian Court of Appeal decision in TNB Fuel Services Bhd v China National Coal Group Corp [2013] 4 MLJ 857, the Malaysian Federal Court held that the question as to whether there is a dispute in existence is not a requirement to be considered as it is an issue to be decided by the arbitral tribunal.

This was reiterated in the recent case of Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd [2020] 3 MLJ 545, where the Malaysian Federal Court set aside a judgment in default based on underly-

ing disputes that the parties were contractually bound to resolve by arbitration.

This was emphasised in Zion Shipping Limited v The Owners and/or Demise Charterers of and/or Other Persons Interested in the Ships or Vessels [2024] CLJU 466, where the plaintiff was entitled to a mandatory stay of proceedings pending arbitration in Singapore. The court found that there was no dispute that the arbitration agreement was valid, operative, and capable of being performed.

However, it has been clarified that although the court generally favours arbitration where the arbitration clause is explicit, the parties' intentions must be assessed based on their actions and whether these actions are preparatory to, and not constitutive of, "taking any other steps" in court proceedings.

In the case of Airbus Helicopters Malaysia Sdn Bhd v Aerial Power Lines Sdn Bhd [2024] 4 CLJ 243, it was emphasised that in the absence of a clear, unequivocal, and irrevocable intention to abandon arbitration, the court would allow a stay of the court proceedings in favour of arbitration.

The Court of Appeal concluded that a request for an extension to file a defence does not automatically amount to "taking any other steps in the proceedings" as it does not represent a significant step in advancing the proceedings.

Recently, in Bongsor Bina Sdn Bhd v SH Builders & Marketing Sdn Bhd [Civil Appeal No. W-02(C)(A)-2315-12/2022], a claim was commenced in the High Court by the plaintiff despite the presence of an arbitration agreement. Thereafter, the defendant obtained a stay pending reference to arbitration. The plaintiff subsequently commenced arbitration proceedings against the defendant; however, the notice of arbitration was filed beyond the limitation time bar. The Court of Appeal held that time stops running when a suit is filed in court, hence even if an arbitration is commenced beyond limitation, the operative point in time to stop time from running would be the date of filing of the writ.

5.7 Jurisdiction Over Third Parties

The arbitral tribunal cannot assume jurisdiction over individuals or entities that are neither party to an arbitration agreement nor signatories to the contract containing the arbitration agreement. The Arbitration Act 2005 does not apply to non-parties to an arbitration agreement (see the Malaysian Federal Court decision in Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors [2019] 5 MLJ 1). This is subject to the newly introduced rules on joinder in the latest AIAC Arbitration Rules. For instance, Rule 21.1 of the AIAC Arbitration Rules 2021 permits an additional party to be joined as a party to the arbitration where all parties to the arbitration and the additional party consent in writing to the joinder, or where the participation of such additional party is necessary for the efficient resolution of the dispute and directly affects the outcome of the arbitral proceedings.

6. Preliminary and Interim Relief

6.1 Types of Relief

Pursuant to Section 19(1) of the Arbitration Act 2005, unless otherwise agreed by the parties, an arbitral tribunal is permitted to grant interim measures at the request of either party to the arbitration agreement. The 2018 Amendments to the Arbitration Act 2005 confer power upon the arbitral tribunal under Section 19(2)(a) to (e) of the Arbitration Act 2005 to grant the following interim reliefs:

- to order a party to maintain or restore the status quo pending determination of the dispute;
- to take action that would prevent current or imminent harm or prejudice to the arbitral process itself, or to refrain from taking action that is likely to cause such harm or prejudice;
- to provide a means of preserving assets out of which a subsequent award may be satisfied;
- to preserve evidence that may be relevant and material to the resolution of the dispute; or
- to provide security for the costs of the dispute.

An interim measure issued by an arbitral tribunal shall be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the court, irrespective of the country in which it was issued (see Section 19H of the Arbitration Act 2005).

The powers of the tribunal under Section 19 of the Arbitration Act 2005 were further clarified in the case of Malaysia Resources Corporation Bhd v Desaru Peace Holdings Clubs Sdn Bhd [2023] 4 CLJ 91. The phrase "unless otherwise agreed by the parties" in Section 19(1) requires a clear, mutual agreement that interim measures will be sought from the courts rather than the arbitral tribunal.

6.2 Role of Courts

The High Court has the power to issue any interim relief before or during arbitration proceedings (see the Malaysian Court of Appeal decision in KNM Process Systems Sdn Bhd v Lukoil Uzbekistan Operating Company LLC [2020] MLJU 85; [2020] 1 LNS 479). This is irrespective of whether the seat of arbitration is in Malaysia.

Pursuant to Section 11 of the Arbitration Act 2005, the High Court may make the following orders:

- to maintain or restore the status quo pending the determination of the dispute;
- to take action that would prevent current or imminent harm or prejudice to the arbitral process, or to refrain from taking action that is likely to cause such harm or prejudice;
- to 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;
- to preserve evidence that may be relevant and material to the resolution of the dispute; or
- to provide security for the costs of the dispute.

It should be noted that the powers of the court to grant interim relief are wider than the powers of an arbitral tribunal. In considering an order to provide a means of preserving assets out of which a subsequent award may be satisfied, the High Court has the power to order an arrest of property or bail or other security. Such power is not confined to the admiralty jurisdiction of the High Court; it extends to its civil jurisdiction under the Courts of Judicature Act 1967 (see the High Court decision in JANA DCS Sdn Bhd v TAR PH Family Entertainment Sdn Bhd and other cases [2022] 8 MLJ 201).

Recently, in Malaysia Resources Corporation Bhd v Desaru Peace Holdings Club Sdn Bhd [2023] 4 CLJ 91, the claimant in an arbitration filed an application for security for costs in the High Court instead of the arbitral tribunal. This was opposed by the respondent, who argued that the application should have been made

to the arbitral tribunal instead. The High Court held that in the absence of a prior agreement between the parties to exclude the arbitral tribunal's jurisdiction to grant interim measures pursuant to Section 19 of the Arbitration Act 2005, the parties must resort to the arbitral tribunal first to grant such interim measures notwithstanding the court's parallel jurisdiction. The only exceptions which may justify bypassing the arbitral tribunal's jurisdiction in granting interim relief are where (i) the interim measure is sought against a third party over whom the arbitral tribunal has no jurisdiction, (ii) the issue in question is very urgent, (iii) where the High Court's coercive powers of enforcement are needed, or (iv) where the arbitral tribunal has not been constituted.

Emergency Arbitrators

Pursuant to the 2018 Amendments, the Arbitration Act 2005 now recognises the use of emergency arbitrators, and the definition of "arbitral tribunal" under the Act has been redefined to include an emergency arbitrator.

Emergency arbitrators are prescribed the same powers as the arbitral tribunal. The decisions of emergency arbitrators are recognised as binding, and can be enforced upon application to the court, irrespective of the country in which they are issued.

The AIAC Arbitration Rules provide additional powers to emergency arbitrators; virtual or documents-only emergency arbitration proceedings are permitted, as are ex parte proceedings. Emergency arbitrators are permitted to rule on their own jurisdiction.

The Malaysian courts do not have the power to intervene in arbitration proceedings once an emergency arbitrator has been appointed, except in situations specifically provided by the Arbitration Act 2005, such as determination of an appeal against the emergency arbitrator's ruling of an unsuccessful challenge to the arbitral tribunal.

Interim relief by the courts is permissible both before and after an emergency arbitrator has been appointed.

6.3 Security for Costs

Malaysian law confers concurrent jurisdiction on both courts and arbitral tribunals to make an order for security for costs as an interim measure upon an application for such. As outlined in **6.2 Role of Courts**, an application for security for costs should be first made to the arbitral tribunal (Malaysia Resources Corporation Bhd v Desaru Peace Holdings Club Sdn Bhd [2023] 4 CLJ 91).

In determining the same, the courts of Malaysia have set out the following factors for consideration (Measat Broadcast Network Systems Sdn Bhd v AV Asia Sdn Bhd [2014] 3 CLJ 915):

- the financial status of the claimant;
- the persons who own or control the claimant;
- the amount of taxed costs that the respondents are likely to be awarded;
- substantial costs incurred prior to the application for security;
- whether there is an arguable case;
- whether the respondents could suffer irrevocable losses if no security is ordered; and
- whether there is evidence of third-party financing.

7. Procedure

7.1 Governing Rules

The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting

the arbitration (see Section 21 of the Arbitration Act 2005). Such procedural rules can be ad hoc or institutional. The most commonly adopted institutional rules in Malaysia are the AIAC Arbitration Rules.

If parties fail to agree on the procedural rules, the arbitral tribunal will become the master of the proceedings, upon which it will be empowered to determine matters such as the time and place of proceedings, the time limits for pleadings and written submissions as well as the taking of evidence.

7.2 Procedural Steps

Regardless of the applicable procedural rules, the claimant is in law required to submit a statement of claim containing the facts supporting its claim, the points in issue and the relief or remedy sought from the arbitration after the commencement of arbitration and within the period of time agreed by the parties or determined by the arbitral tribunal. The respondent to the arbitration shall then state its defence in respect of the particulars set out by the claimant.

Together with the submissions of the parties' statement of claim and defence, the parties may further submit any document they consider relevant or add a reference to the documents or other evidence that they may submit.

The arbitral tribunal will then decide whether to hold oral hearings for the presentation of evidence or oral arguments, or to conduct the proceedings on the basis of documents and other materials. If any party applies for the arbitral tribunal to hold oral hearings at an appropriate stage of the proceedings, it is mandatory for the arbitral tribunal to hold such oral hearings (see Section 26 of the Arbitration Act 2005).

7.3 Powers and Duties of Arbitrators

Powers of Arbitrators

In Malaysia, arbitrators are granted the following powers:

- to rule on their own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement;
- to order interim measures as described in **6.1 Types of Relief**;
- to conduct the arbitration in such manner as they consider appropriate if no procedure is agreed upon by the parties, which includes the powers to:
  - (a) determine the admissibility, relevance, materiality and weight of any evidence;
  - (b) draw on their own knowledge and expertise;
  - (c) order the provision of further particulars in a statement of claim or statement of defence;
  - (d) order the provision of security for costs;
  - (e) fix and amend the time limits within which various steps in the arbitral proceedings must be completed;
  - (f) order the discovery and production of documents or materials within the possession or power of a party;
  - (g) order the interrogatories to be answered;
  - (h) order that any evidence be given on oath or affirmation; and
  - (i) make any such orders as the arbitral tribunal considers appropriate;
- to determine the seat of arbitration, the language to be used in arbitration proceedings and the timeline to submit pleadings, submissions, etc, where the parties fail to agree on these points; and
- to appoint one or more experts to report on specific issues to be determined by the arbitral tribunal, and to require a party to give the expert any relevant information or to produce

or provide access to any relevant documents, goods or other property for the expert's inspection.

Duties of Arbitrators

When a potential arbitrator is approached in connection with his or her possible appointment as an arbitrator, that person has a duty to disclose any circumstances that are likely to give rise to justifiable doubts as to his or her impartiality or independence.

Once the person is appointed as an arbitrator, he or she has a duty to treat the parties with equality, and to give the parties a fair and reasonable opportunity to present their case. The arbitrator is also under a duty to act in good faith at all times of the arbitration. In making an award, arbitrators are also duty-bound to state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given, or if the award is on agreed terms pursuant to a settlement.

7.4 Legal Representatives

Generally, parties to arbitral proceedings are permitted to be represented in arbitral proceedings by any representative appointed by the party. Section 37A of the Legal Profession Act 1976 provides that the restrictions on non-Malaysian qualified lawyers from practising in Malaysia shall not apply to any person representing any party in arbitral proceedings.

However, it must be noted that the above principle is only applicable to arbitrations taking place in West Malaysia. In respect of arbitration proceedings in East Malaysia (Sabah & Sarawak), Sabah and Sarawak advocates are conferred exclusive right to practise in East Malaysia, and such exclusivity includes representation in arbitration proceedings (see Samsuri bin Baharuddin & Ors v Mohamed Azahari bin Matiasin and another appeal [2017] 2 MLJ 141 (Malaysian Federal Court)).

8. Evidence

8.1 Collection and Submission of Evidence

In arbitration, the parties are free to agree on the procedure to be followed by the arbitral tribunal, including the approach to the collection and submission of evidence. In the submission of the statement of claim and the defence, the parties are free to submit with their statements any document that they consider to be relevant, or to add a reference to the documents or other evidence that they may submit. One of the examples of such procedural rules includes the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration.

Unless otherwise agreed by the parties, the arbitral tribunal retains the power to decide whether to hold oral hearings for the presentation of evidence or oral arguments, or to conduct the proceedings on the basis of documents and other materials. However, if there is an application to hold oral hearings at an appropriate stage of the proceedings, it is mandatory for the arbitral tribunal to do so.

8.2 Rules of Evidence

The rules of evidence that apply to arbitral proceedings seated in Malaysia would depend on the applicable rules of evidence agreed between the parties. Where the parties fail to agree on the applicable rules of evidence, the arbitral tribunal may determine the rules of evidence regarding admissibility, relevance, materiality and weight in such manner as it considers appropriate.

In respect of the application of the rules of evidence in court, it is statutorily stipulated that the Evidence Act 1950 does not apply to proceedings before an arbitrator.

8.3 Powers of Compulsion

With the approval of the arbitral tribunal, the parties are empowered to make an application under Section 29(2) of the Arbitration Act 2005 to the High Court for assistance in taking evidence. The High Court has the power to order the attendance of a witness to give evidence or, where applicable, to produce documents on oath or before an officer of the High Court or any other person, including the arbitral tribunal.

Pursuant to the AIAC Arbitration Rules, the arbitral tribunal may order any party to produce any documents in its possession or control which the arbitral tribunal deems relevant to the case, and to supply these documents and/or copies thereof to the arbitral tribunal and the other parties.

9. Confidentiality

9.1 Extent of Confidentiality

The 2018 Amendments introduced Section 41A of the Arbitration Act 2005 to reinforce the confidentiality of arbitration proceedings, which provide that no party may publish, disclose or communicate any information relating to the arbitral proceedings under the arbitration agreement or an award made in those arbitral proceedings. This would include all pleadings, evidence, documents and the award, which will remain confidential and cannot be disclosed in subsequent proceedings.

There are three exceptions to this rule:

- where the publication, disclosure or communication is made to protect or pursue a legal right or interest of the party, or to enforce or challenge the award in legal proceedings before a court or other judicial authority;
- if the publication, disclosure or communication is made to any government body, regulatory body, court or tribunal and the party is obliged by law to make the publication, disclosure or communication; or
- if the publication, disclosure or communication is made to a professional or any other adviser of any of the parties.

The confidentiality obligation under Section 41A of the Arbitration Act 2005 does not, however, extend to non-parties of an arbitration proceeding (see Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd [2019] 10 MLJ 693).

The exceptions under the AIAC Arbitration Rules are where disclosure is necessary for the implementation and enforcement of the award or to the extent that disclosure may be required of a party by a legal duty, or to protect or pursue a legal right, or to challenge an award in bona fide legal proceedings before a court or other judicial authority. The AIAC Arbitration Rules extend confidentiality further, with the same applying equally to the arbitral tribunal, the Director of the AIAC, the AIAC, any tribunal secretary and any witness or expert appointed by the arbitral tribunal, and parties are required to seek an undertaking of confidentiality from those involved in the arbitration.

The importance of confidentiality of arbitration proceedings was emphasised by the Malaysian Federal Court in Siemens Industry Software GmbH & Co Kg (Germany) (formerly known as Innotec GmbH) v Jacob and Toralf Consulting Sdn Bhd (formerly known as Innotec Asia Pacif-

ic Sdn Bhd) (M) & Ors [2020] 3 MLJ 1. There, the Federal Court held that the recognition and enforcement of an arbitration award by way of entry as a judgment of the High Court of Malaya and the High Court of Sabah and Sarawak ought to relate only to the dispositive parts of the said award and not to the entire award containing the reasoning, evidentiary and factual findings of the arbitral tribunal. To register the entire arbitral award would undermine the confidentiality of the arbitration proceedings.

10. The Award

10.1 Legal Requirements

The arbitral award must be made in writing, be signed by the arbitrator or a majority of all the members of the arbitral tribunal, state its date and seat of arbitration and, unless the parties have agreed otherwise or it is an award pursuant to a settlement, also state the reasons upon which it is based (see Section 33 of the Arbitration Act 2005).

There is no time limit provided by Malaysian law on the delivery of the award, but the time for making an award may be limited by the arbitration agreement entered into between the parties. If there is a time limit, the arbitrator must deliver the award within that time limit or give notice to extend the time limit where this is provided for under the arbitration agreement between the parties, failing which the award may be set aside (see Ken Grouting Sdn Bhd v RKT Nusantara Sdn Bhd [2021] 2 CLJ 173 (Court of Appeal)).

The High Court may also extend the time limit, unless otherwise agreed by the parties (Section 46 of the Arbitration Act 2005). However, the High Court may only do so where there is an application made by the arbitrator or the parties and not on its own volition (see Ken Grouting Sdn Bhd v RKT Nusantara Sdn Bhd [2021] 2 CLJ 173 (Malaysian Court of Appeal)).

Pursuant to the AIAC Arbitration Rules, the arbitral tribunal is required to submit a draft of the final award to the director of the AIAC within three months after the proceedings are declared to be closed for a technical review. The time limit may be extended by the arbitral tribunal with the consent of the parties and upon consultation with the Director of the AIAC or unilaterally by the Director of the AIAC where it is deemed necessary.

10.2 Types of Remedies

The types of remedies that an arbitral tribunal may award are not limited by the Arbitration Act 2005 or the AIAC Arbitration Rules. However, the type of remedies awarded are necessarily confined to the powers conferred on the arbitral tribunal by the parties in the agreement to arbitrate.

Reliefs that form part of the exclusive jurisdiction of the court pursuant to statute may not be granted by an arbitral tribunal, even if the arbitral tribunal may decide on the subject matter of the dispute (see the UK Court of Appeal decision in Fulham Football Club (1987) Ltd v Richards and another [2011] EWCA Civ 855; [2012] Ch 333; [2012] 1 All ER 414; [2012] 2 WLR 1008; [2012] 1 All ER (Comm) 1148; [2012] 1 BCLC 335; [2011] All ER(D) 197 (Jul)).

10.3 Recovering Interest and Legal Costs

Parties are entitled to recover interest and legal costs in an arbitration, especially where doing so is provided for in the arbitration agreement. The arbitral tribunal has the discretion to award simple or compound interest from such date,

rate and rest as the arbitral tribunal considers appropriate.

The interest granted may also be for:

- any period, ending no later than the date of payment;
- of the whole or any part of sums awarded by the arbitral tribunal;
- sums paid before the date of the award; or
- costs awarded or ordered by the arbitral tribunal in the arbitral proceedings.

The 2018 Amendments and Interest

The 2018 Amendments to the Arbitration Act 2005 make it possible for both pre-award and post-award interest to be claimed for arbitrations commencing after the statutory amendments came into force on 8 May 2018 (see UDA Land Sdn Bhd v Puncak Sepakat Sdn Bhd [2020] MLJU 892 (High Court)).

The position on whether the 2018 Amendments allow for pre-award interest to be claimed in arbitrations which commenced before the 2018 Amendments came into force is less clear. In UDA Land Sdn Bhd v Puncak Sepakat Sdn Bhd [2020] MLJU 893, arbitration proceedings commenced prior to the 2018 Amendments. However, the arbitrator granted pre-award interest based on the Arbitration Act 2005 post the 2018 Amendments. The plaintiff sought to set aside the arbitral award on the ground that the arbitrator acted in excess of his jurisdiction or power and denied the parties natural justice by failing to afford the parties the opportunity to submit on the applicability of the amended Arbitration Act 2005. The High Court allowed the plaintiff's application and held that the plaintiff had the accrued right upon commencement of the arbitration proceedings to have the arbitration conducted based on the Arbitration Act 2005 as it then stood (prior to the 2018 Amendments) pursuant to Section 30(1)(b) of the Interpretation Acts 1948 and 1967.

Notwithstanding UDA Land Sdn Bhd v Puncak Sepakat Sdn Bhd [2020] MLJU 893, there are authorities that suggest the contrary. In Food Corpn of India v Marastro Cia Naviera SA, The Trade Fortitude [1986] 3 All ER 500, the English Court of Appeal had to consider whether an arbitrator had the power to award pre-award interest when the statutory provisions at the time the arbitration agreement was entered into and when the arbitration commenced did not provide for the same. The Court of Appeal held it was an implied term of the arbitration agreement that an arbitrator should conduct the reference in accordance with the law at the time of the hearing, and accordingly had the power to award pre-award interest.

Further, in Lesotho Highlands Development Authority v Impregilo SpA and others [2006] 1 AC 221, the United Kingdom House of Lords stated in obiter that an arbitral tribunal's power to grant pre-award interest is a procedural right that is unaffected by the substantive law. In Lee Chow Meng v Public Prosecutor [1978] 1 LNS 88, the Malaysian Federal Court held that a statute dealing with procedure has retrospective effect. This also suggests that the 2018 Amendments allowing for pre-award interest apply retrospectively to arbitration proceedings commenced prior to the 2018 Amendments.

Whether pre-award interest may be awarded in arbitrations which commenced before the 2018 Amendments remains an open issue in Malaysia that may be clarified by decisions of the appellate courts in Malaysia in due course.

The Arbitration Act 2005 does not limit the grant to simple interest or compound interest. This is dealt with in accordance with underlying contract and the substantive law.

The general principle in relation to the award of costs is for the arbitral tribunal to order costs in favour of the successful party and to award all reasonable costs incurred by that party during the arbitration. This would generally include legal fees and disbursements reasonably incurred by the party in respect of the arbitration.

11. Review of an Award

11.1 Grounds for Appeal

An arbitral award made by an arbitral tribunal pursuant to an arbitration agreement is final, binding and conclusive, and is not appealable based on questions of fact or law. This is because the arbitrator is master of the facts, and the courts should not review the arbitral award on its merits (see the Malaysian Court of Appeal decision in Asean Bintulu Fertilizer Sdn Bhd v Wekajaya Sdn Bhd and another appeal [2018] 4 MLJ 799).

The limited circumstances in which an arbitral award may be set aside, or its recognition and enforcement may be opposed, are on the following grounds:

- a party to the arbitration agreement was under any incapacity;
- 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;
- the party making the application was not given proper notice of the appointment of an arbitrator or the arbitral proceedings, or was otherwise unable to present their case;
- the award deals with a dispute that is not contemplated by or does not fall within the terms of the submission to arbitration;
- the award contains decisions on matters that are beyond the scope of the submission to arbitration;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
- the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or
- the award is in conflict with the public policy of Malaysia.

See Sections 37 and 39 of the Arbitration Act 2005.

Further, the recognition and enforcement of the arbitration award may be refused where the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made (see Section 39 of the Arbitration Act 2005 and Malaysian Bio-XCell Sdn Bhd v Lebas Technologies Sdn Bhd & Another Appeal [2020] 3 CLJ 534 (Malaysian Court of Appeal)).

These grounds are exhaustive (see Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal [2021] 1 MLJ 1 in respect of grounds to set aside an arbitral award, Tune Talk Sdn Bhd v Padda Gurtaj Singh [2020] 3 MLJ 184 in respect of grounds to oppose the recognition and enforcement of an arbitral award).

11.2 Excluding/Expanding the Scope of Appeal

There is no provision for parties to agree to exclude or expand the scope of challenge to the decision of the arbitral tribunal under the Arbitration Act 2005.

11.3 Standard of Judicial Review

Judicial review of an arbitral award is not intended to review the merits of the case but instead to confine itself to the limited grounds in the Arbitration Act 2005. The standard of review is intended to be deferential rather than de novo. Having said that, in the Government of the Lao People's Democratic Republic v Thai-Lao Lignite Co Ltd, A Thai Co and Anor [2017] 9 CLJ 273, the Malaysian Federal Court equally held that its role was not to rubber-stamp arbitral awards.

12. Enforcement of an Award

12.1 New York Convention

Malaysia has been a signatory to the New York Convention on the Recognition of Foreign Arbitral Awards 1958 since 1985. This requires courts of contracting states to recognise and enforce arbitral awards made in other contracting states.

The commitment to the New York Convention is reflected in the provisions of the Arbitration Act 2005.

12.2 Enforcement Procedure

A party seeking to enforce an arbitral award may make an application to the High Court in Malaysia. Upon such an application, the award will be recognised as binding and will be enforced by entry as a judgment in terms of the award. The award to be enforced may be made in respect of an arbitration where the seat of arbitration is in Malaysia or a foreign state.

The only legal requirement for the enforcement of an arbitral award is the production of a duly authenticated original award or a duly certified copy of the award, and the original arbitration agreement or a duly certified copy of the agreement. As long as this formal requirement is complied with, the court must grant recognition and enforcement of an arbitration award upon such an application being made (see the Malaysian Court of Appeal's decision in Tune Talk Sdn Bhd v Padda Gurtaj Singh [2020] 3 MLJ 184).

Nevertheless, if the party against whom the enforcement of the award is invoked provides proof that the arbitral award has been set aside or suspended by a court of the country in which the award was made or under the law under which the award was made, the High Court may refuse the recognition or enforcement of the award.

The provisions of the Arbitration Act 2005, including the provisions of the enforcement of arbitral awards, bind the federal government or the government of any component state of Malaysia that are parties to an arbitration. Therefore, no defence of sovereign immunity can be raised by a state or state entity at the enforcement stage of arbitration.

The court has a discretion to adjourn the recognition and enforcement of an arbitration award in Malaysia pursuant to Section 39(2) of the Arbitration Act 2005 where the award is subject to ongoing set-aside proceedings at its seat (see Ipco (Nigerian National Petroleum Corp [2005] EWHC 726 (Comm); [2005] All ER (D) 385 (Apr) and Man Diesel Turbo SE v I.M. Skaugen Marine Services Pte Ltd [2018] SGHC 132; [2019] 4 SLR 537).

However, the courts do not have the jurisdiction to permanently injunct an application to recognise and enforce an arbitral award on the basis that the award sum is allegedly not due (Southern HRC Sdn. Bhd. v Danieli Co., Ltd [2023] 2 CLJ 831).

12.3 Approach of the Courts

The public policy considerations that domestic courts apply in refusing to enforce foreign arbitral awards are based not on domestic public policy but on international norms; conflict with public policy is defined as violating the most basic notions of morality and justice, or as that which would shock the public conscience or be injurious to the public good. Thus, instances such as "patent injustice", "manifestly unlawful and unconscionable", "substantial injustice", "serious irregularity" and other similar serious flaws in the arbitral process and award would fall within the applicable concept of public policy (Jan De Nul (Malaysia) Sdn Bhd v Vincent Tan Chee Yioun [2019] 2 MLJ 413).

In Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd [2020] 12 MLJ 198, the Malaysian Federal Court confirmed that the Malaysian courts may set aside an arbitration award that was made in breach of natural justice but this would only be done where the breach had material and causative effect on the outcome of the arbitration.

13. Miscellaneous

13.1 Class Action or Group Arbitration

The possibility of class action arbitration or group arbitration remains untested in Malaysia.

13.2 Ethical Codes

It is implicit in the Arbitration Act 2005 that an arbitrator must be impartial; the requirement to disclose any circumstances that are likely to give rise to justifiable doubts regarding that person's impartiality or independence makes this clear. Good faith requirements are also mandated by the Arbitration Act 2005. Arbitrations pursuant to the AIAC are bound by the Asian International Arbitration Centre's Code of Conduct for Arbitrators, which references the IBA Guidelines on Conflict of Interest in International Arbitration.

Advocates and solicitors in Malaysia who act as counsel in arbitration proceedings remain bound by the ethical codes and professional standards governing advocates and solicitors contained in the Legal Profession Act 1976.

13.3 Third-Party Funding

The Arbitration Act 2005 is silent on whether third-party funding or champerty is permissible in Malaysia. Third-party funding is allowed under the AIAC Arbitration Rules 2023 provided that a party that is funded by a third party discloses the existence and the identity of the funder, as mandated under Rule 12(1) of the AIAC Arbitration Rules 2023. Rule 12(2) of the AIAC Arbitration Rules 2023 further provides that the disclosure obligation under Rule 12(1) is a continuous one and shall be adhered to until conclusion of the proceedings.

There is a restriction on champerty or third-party funding under Section 112 of the Legal Profession Act 1976, which expressly prohibits advocates and solicitors in Malaysia from purchasing or agreeing to purchase an interest that is the subject matter of a client in a contentious proceeding, or from entering into any agreement that stipulates or contemplates payment only in the event of success in such suit, action or proceeding.

The Common Law Position

There is also a common law restriction on champertous agreements as being against public policy – see the UK Court of Appeal case of Re Trepca Mines Ltd (No 2) [1962] 3 All ER 351.

The common law position on champertous agreements suggests that express regulation is recommended before third-party funding is accepted in international arbitrations with a Malaysian seat. The AIAC Arbitration Rules sanction third-party funding insofar as the same is not precluded by relevant law or court order.

13.4 Consolidation

An arbitral tribunal may consolidate separate arbitral proceedings, provided that the parties agree to confer such power on the arbitral tribunal. Section 40 of the Arbitration Act 2005 confers express power on the arbitrator to consolidate proceedings in such circumstances.

The court will not be able to exercise this power to consolidate separate arbitral proceedings under Section 40 of the Arbitration Act 2005 (Ragawang Corporation Sdn Bhd v One Amerin Residence Sdn Bhd [2020] 1 LNS 895 (High Court)).

The AIAC Arbitration Rules 2023 provide for consolidation in wider circumstances, with it being permitted even where there is no agreement by the parties, if all claims in the arbitration are made under the same arbitration agreement, or, where the claims are made under more than one arbitration agreement, the relief sought arises out of the same transaction or series of transactions and the Director considers the arbitration agreements to be compatible. As for joinder of parties, the arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties.

13.5 Binding of Third Parties

Generally, an arbitral award pursuant to an arbitration agreement is only binding on the parties to the arbitration agreement. The national court does not have the ability to bind foreign third parties.

Trends and Developments

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Shearn Delamore & Co is one of the largest award-winning, full-service law firms in Malaysia, with more than 100 lawyers and 280 support staff. The firm has the resources to manage complex cross-border transactions, projects and matters. It acts for MNCs, private equity, international organisations, government institutions and private clients; it is frequently instructed by international law firms. Shearn Delamore & Co's international resources and reach include its membership of the World Law Group, World Services Group, Employment Law Alliance and, in 2020, Drew Network Asia (DNA) – a regional platform to serve clients seeking legal advice within the ASEAN region. The firm's diverse experience and interdisciplinary collaborations enable it to provide clients with a complementary range of skills to meet their needs.

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Malaysia is a signatory to the New York Convention and has adopted the UNCITRAL Model Law ("Model Law") within its arbitration regime. The Arbitration Act 2005 ("AA 2005") has since been amended to make it consistent with the Model Law, endorsing a non-interventionist policy in respect of arbitral awards (which can only be set aside under the limited grounds found in the Model Law).

Developments in the Law Surrounding a Stay of Court Proceedings Pending Reference to Arbitration

It is well established in Malaysia that the court will stay court proceedings in favour of arbitration pursuant to Section 10 of the AA 2005 where an arbitration agreement exists between parties to the same unless the party making the stay application has taken other steps in the proceedings or the court finds the arbitration agreement is null and void, inoperative or incapable of being performed.

Standard of proof required to prove the existence or validity of an arbitration agreement

Section 18 of the AA 2005 provides for the arbitral tribunal to rule on its own jurisdiction, including any objections to the existence of the arbitration agreement. However, in determining whether a stay of court proceedings pursuant to Section 10 of the AA 2005 ought to be granted, the Malaysian courts are tasked with firstly determining the existence and validity of an arbitration agreement. With this concurrent jurisdiction given to the court, a question that recently arose in Malaysia is to what extent the court must be satisfied that an arbitration agreement exists in order to grant such a stay.

In this regard, there are two recent decisions of the Malaysian Court of Appeal on the standard of proof required to prove the existence or validity of an arbitration agreement.

In Cockett Marine Oil (Asia) Pte Ltd v MISC Bhd and another appeal [2022] 6 MLJ 786 ("Cockett Marine"), the Court of Appeal ruled that the court is limited to deciding whether there is a prima facie existence of an arbitration agreement; once a prima facie determination is made, the court will stay the court proceedings and a full determination of whether there exists a binding arbitration agreement will be adjudicated by the arbitral tribunal.

However, the Court of Appeal in Macsteel International Far East Ltd v Lysaght Corrugated Pipe Sdn Bhd and other appeals [2023] 4 MLJ 551 ("Macsteel International") adopted a different approach to that in Cockett Marine. In Macsteel International, the Court of Appeal held that whilst the arbitral tribunal may rule on its own jurisdiction under Section 18 of the AA 2005, the High Court has a similar jurisdiction and power to investigate and conclude on the validity of the arbitration agreement. The Court of Appeal adopted a flexible approach that the appropriate forum to determine the validity of the arbitration agreement would be one which was on balance more just and convenient from a case-to-case basis. This approach was followed by the High Court in Stamford College (Malacca) Sdn Bhd v Asia Pacific Higher Learning Sdn. Bhd. [2023] CLJU 2337.

With these two seemingly conflicting decisions of the Malaysian Court of Appeal, a future judgment that provides clarification or reconciliation would be beneficial.

Taking other steps in the proceedings

Section 10 of the AA 2005 provides for parties to make an application to stay court proceedings

before taking any other steps in the proceedings. As such, even if there is a valid arbitration agreement, if the applicant takes steps in the court proceedings (other than entering an appearance and filing a stay application), the court will consider whether such conduct amounts to a step such as to abandon the right to have the dispute be arbitrated.

Recently, the Court of Appeal in JSB v ACSB [2024] 1 CLJ 382 and the High Court in Black Swan Petroleum DMCC v The Owners And/Or Demise Charterers Of The Ship Or Vessel 'Oceania' Of The Port Of Antwerp, Belgium [2023] MLJU 3048 held that filing an application to strike out the claim would amount to a such a step in the proceedings.

The question of whether a request for an extension of time to file the defence to the plaintiff's claim amounts to "taking any other steps in the proceedings" was recently posed to the Court of Appeal in Airbus Helicopters Malaysia Sdn Bhd (formerly known as Eurocopter Malaysia Sdn Bhd) v Aerial Power Lines Sdn Bhd [2024] MLJU 188 ("Airbus Helicopter").

Prior to Airbus Helicopter, there were conflicting High Court decisions regarding this issue. The High Court's decisions in Winsin Enterprise Sdn Bhd v Oxford Talent (M) Sdn Bhd [2009] MLJU 286 and Mun Seng Fook v AIG Malaysia Insurance Bhd [2018] 8 CLJ 394 adopted a strict approach, namely, finding that a request for an extension of time to file a defence to the claim amounted to "any other steps in the proceedings". However, there were other High Court cases such as Dynaciate Engineering Sdn Bhd v Punj Lloyd Sdn Bhd [2020] 1 LNS 2252 and Dian Kiara Sdn Bhd v GCH Retail (M) Sdn Bhd [2020] 12 MLJ 570 which held that a mere request for an extension of time to file a defence does not amount to "taking any other steps in the proceedings" as it is a step preparatory to further action.

The Court of Appeal in Airbus Helicopter held the latter interpretation was more aligned with the non-interventionist policy under the Model Law, which resonates with Section 8 of the AA 2005. Furthermore, the court held that while it is prudent to reserve the party's right to proceed to arbitration, the absence of such an express reservation would not automatically result in the party losing its right. The court observed that, especially when dealing with foreign clients or industry-related contracts, it is advisable for the applicant's counsel to reserve the right to apply for a stay of proceedings when requesting an extension of time, just in case an arbitration agreement is in place. This decision clarifies whether a request for an extension of time to file a defence constitutes a waiver of the right to arbitration. It further underscores the Malaysian courts' pro-arbitration approach, upholding arbitration agreements in line with the legislative objectives of the AA 2005.

Arbitration agreement is inoperative

If the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed, the court will not grant a stay of court proceeding pursuant to Section 10 of the AA 2005. Recently, the Malaysian courts identified two situations which could render an arbitration agreement "inoperative".

The failure of payment of the required deposit by another party

In JSB v ACSB [2024] 1 CLJ 382, the Court of Appeal held an arbitration agreement to be inoperative for failure to pay deposits to the Asian International Arbitration Centre (AIAC). In this case, the plaintiff (JSB) sued the defendant

(ACSB) in court. JSB then withdrew the suit and commenced an arbitration against ACSB at the AIAC primarily because of ACSB's insistence on arbitration. However, ACSB refused to pay the AIAC further deposits after the arbitration was commenced. ACSB contended that JSB should pay the ACSB's portion of the deposit and have that included in the final award. JSB refused and the arbitration was terminated by the arbitrator. JSB then commenced a suit at the High Court and ACSB applied to have the same struck out or stayed under Section 10 of the AA 2005.

The Court of Appeal refused to grant the Section 10 stay. The Court of Appeal held that while the AIAC Arbitration Rules allow the other party to pay the deposits for the non-paying party, there is no obligation to do so. In this case, ACSB's conduct was akin to a "sly strategy to scuttle the arbitration with impunity", pressuring the other party to bear the entire deposit.

This decision serves as an important reminder that uncooperative respondents can no longer frustrate attempts to resolve disputes by seeking to stay court proceedings while refusing to pay the arbitral institution's deposits.

If the innocent party (who paid its portion of deposits) wishes to arbitrate its dispute, it would be required to pay the full deposits and claim the same at the conclusion of the arbitration. That said, the Court of Appeal noted that the innocent party may also apply for security for costs under Section 19 of the AA 2005; should the non-paying party refuse to provide such security, the arbitral tribunal may bar them from defending the dispute until the security for costs is furnished.

A company is wound up

In Biaxis (M) Sdn Bhd (In Liquidation) v Peninsula Education (Setia Alam) Sdn Bhd (Formerly Known as Segi International Learning Alliance Sdn Bhd) [2023] MLJU 2938, the liquidator of the company initiated an action against the defendant to recover an outstanding sum. The defendant applied for a stay of the action, citing an arbitration clause in the contract. However, the High Court refused the stay. The court held the arbitration agreement was rendered inoperative because the company was wound up and subject to insolvency protection. The court observed that arbitral proceedings would increase costs and cause delays, which would be detrimental to the interests of creditors and shareholders.

The decision is currently being appealed. It remains to be seen whether a general rule will be established that an arbitration agreement ceases to be effective upon the winding up of a party to the arbitration agreement.

Limitation for arbitration that is the subject of stayed court proceedings

If court proceedings are stayed under Section 10 of the AA 2005, and the limitation period expires ahead of the filing of the notice of arbitration, the question arises whether the arbitration proceedings are time-barred if the court proceedings were filed within the limitation period.

Whilst Section 30 of the Limitation Act 1953 provides that time stops running when the claimant serves the respondent with a written notice to appoint an arbitrator and to refer the dispute to arbitration, and an arbitral proceeding is deemed to commence after the written notice is received by the respondent pursuant to Section 23 of the AA 2005, the Court of Appeal in Bongsor Bina Sdn Bhd v SH Builders & Marketing Sdn Bhd [2024] MLJU 1049 held that these two sections

apply only to cases where the dispute is directly referred to arbitration ab initio – ie, without a prior court action that has been stayed.

If there is a prior court action that has been stayed, the Court of Appeal held that time stops running when a suit is filed in court even if it is stayed for the disputes to be arbitrated. In this case, the plaintiff commenced an action against the defendant; the action was within the limitation period when the suit was filed in court. However, limitation had set in when the notice of arbitration was served after the court proceeding had been stayed. The Court of Appeal held that the arbitration was not time-barred.

However, the Court of Appeal held that this does not justify unreasonable delays in issuing the notice of arbitration once the stay application is granted in favour of the defendant; the plaintiff must act promptly or within a reasonable time in filing the notice of arbitration, failing which they risk losing the right to arbitrate their dispute through the doctrine of laches.

Arbitral Tribunal's Power to Grant Interim Relief Takes Priority Over Courts

Section 11 of the AA 2005 grants Malaysian courts the power and jurisdiction to provide interim relief before or during arbitral proceedings. Once an arbitral tribunal is constituted, an arbitral tribunal is also empowered to grant certain types of interim measures under Section 19(1) of the AA 2005. However, the phrase "unless otherwise agreed by the parties" in Section 19(1) allows the parties to opt for relief from the courts and sidestep the arbitral tribunal's jurisdiction to grant interim measures. In the absence of such an agreement, and where the interim measures under both Section 11 and Section 19 overlap, there exists a concurrent jurisdiction of the arbitral tribunal and the Malaysian courts to grant these interim measures.

In Malaysia Resources Corp Bhd v Desaru Peace Holdings Club Sdn Bhd [2023] 11 MLJ 412, the claimant in the arbitration filed an application for security for costs in the High Court instead of making an application to the arbitral tribunal. The claimant's position was that parties have the freedom of choice to apply to court or the arbitral tribunal considering the concurrent jurisdiction that exists between the two tribunals. The High Court held that the arbitral tribunal must be resorted to first, notwithstanding the court's parallel jurisdiction save in exceptional circumstances. This approach is consistent with the principle of minimum judicial intervention adopted from the Model Law.

Development in the Law Surrounding Disclosures of Conflicts of Interest by Arbitrators

Outside of developments surrounding applications for stay of proceedings, there has also been a recent development in respect of the disclosure requirements for conflicts of interest by arbitrators.

After an arbitration is commenced, the appointment of an arbitrator or the arbitral tribunal is crucial. Section 14 of the AA 2005 requires the arbitrator to make full and timeous disclosures of circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence in adjudicating the dispute.

In Persatuan Kanak-Kanak Spastik Selangor & Wilayah Persekutuan v Low Koh Hwa @ Low Kok Hua (practicing as the sole certified architect for Low & Associates) [2023] 1 MLJ 342, there was a dispute between PKKS and an architect over the balance of professional fees that was due to

him. The arbitrator rendered an award in favour of PKKS and the architect applied to the High Court to set aside the arbitral award. The High Court allowed the architect's application to set aside the whole award; in doing so, it found, among others, that the arbitrator had breached Section 14 of the AA 2005 by not making full and timeous disclosure of his relationship with PKKS's witness. Here, the arbitrator informed the architect of his relationship with the witness of PKKS on the first day of the proceeding.

One of the questions considered by the Court of Appeal was whether the High Court is correct to rule that the arbitrator failed to make full and timeous disclosure of his relationship pursuant to Section 14(1) and (2) of the AA 2005. Whilst the Court of Appeal agreed that the arbitrator owes the duty to make full and timeous disclosure imposed by the AA 2005, the Court of Appeal did not agree with the High Court decision setting aside the award and ruling that the arbitrator did not make full disclosure of his relationship, for the following reasons:

- The declaration of arbitrator of his relationship with the witness is more than enough to trigger a concern about impartiality.
- If the architect was concerned with the arbitrator's impartiality, the architect ought to have exercised his right to object to the arbitrator's appointment.
- The arbitrator also granted the opportunity for the architect to engage a lawyer after the disclosure of the relationship. However, the architect chose not to object to the appointment of the arbitrator and chose instead to proceed on with the arbitration.
- The issue of impartiality was only raised after the award rendered was not in his favour.

Enforcement of ICSID Award in Malaysia

Recently, the Malaysian court handed down its first reported decision on recognition of an International Centre for Settlement of Investment Disputes (ICSID) award. In Elisabeth Regina Maria Gabriele Von Pezold & Ors v Republic of Zimbabwe [2023] MLJU 2657, the arbitral tribunal found the Republic of Zimbabwe liable for breaching investment treaties through various expropriation and mistreatment measures, which resulted in damage to the Plaintiffs' investments. The High Court allowed recognition of the ICSID Award after finding that the requirements of Article 54(2) of the Convention on the Settlement of Investment Disputes Act 1966 (for requisite certification of the Award and Decision) were satisfied. Notably, the court emphasised that sovereign immunity is irrelevant at the recognition stage; it is only relevant at the execution stage. This case demonstrates Malaysia's commitment to honouring its treaty obligations under the ICSID Convention, and upholds the pro-arbitration policy underlying the New York Convention.

MALTA

Law and Practice

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Ganado Advocates is Malta's leading commercial law firm servicing international clients doing business in or through Malta; it has a particular focus on corporate, financial services, maritime/aviation and dispute resolution, and has one of the leading dispute resolution practices in the jurisdiction. In international commercial and investment arbitration matters, Ganado Advocates has been engaged to represent clients under the leading sets of rules in Europe and beyond. The firm regularly assists in the recognition and enforcement of foreign arbitration awards, setting-aside proceedings, interim and injunctive relief proceedings, as well as providing expert evidence on Maltese law in various arbitration proceedings. The team has a significant breadth of experience in matters relating to proceedings under the New York Convention and on matters relating to sovereign immunity in international commercial arbitration.

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1. General

1.1 Prevalence of Arbitration

Arbitration is a frequently used and broadly accepted method of dispute resolution in Malta for both general and sector-specific commercial disputes. It is particularly prevalent in certain sectors such as construction, maritime and information technology, where most domestic parties engaged in international contracts have recourse to institutional or ad hoc international arbitrations as the preferred method of dispute resolution. Arbitration clauses also feature regularly on a more generic level across various other industries. Institutional arbitration clauses are increasingly featuring in commercial contracts governed by Maltese law or involving a Malta-based entity.

There has been a discernible uptake in the use of international arbitration in relation to contracts involving public and private entities, shipping, insurance, as well as financial services disputes. Various factors, such as the geographical location, legal framework and cost-to-quality ratio, may incentivise parties to resort to arbitration as opposed to court litigation in Malta.

The principal advantages of arbitration in Malta are the flexibility of procedure, the value added brought by arbitrators, as well as the relative ease of the enforceability of awards. With some notable exceptions in judgments that are widely regarded as outliers, the jurisdiction is generally supportive of arbitration, and the courts have extensive powers of support (including interim relief) for both domestic and international arbitrations having their seat in Malta.

On a purely domestic level, litigation remains the predominant method of dispute resolution in Malta amongst local market players. Litigation costs in Malta are generally low and, in domestic disputes, arbitration, despite a discernible upward trend, has not yet managed to break through as the prevalent method of dispute resolution.

1.2 Key Industries

The use of arbitration in Malta has been increasing steadily. In particular, due to the increased number of large-scale infrastructure projects, the construction industry has seen a significant increase in arbitration, especially since International Federation of Consulting Engineers (FIDIC) contracts have become the prevalent construction contract in Malta for medium-to-large-scale developments. Accordingly, a number of claims have been arbitrated. Arbitration clauses are increasingly being incorporated in contracts which are the subject of public procurement processes with public authorities, clearly indicating to the market the preference for disputes being referred to arbitration.

Moreover, a marked increase in arbitrations relating to areas which were hitherto the exclusive domain of the Maltese courts has been witnessed. This includes shareholder disputes and certain intellectual property disputes, largely due to the flexibility afforded by arbitration as well as an expert's focus on the subject matter.

1.3 Arbitration Institutions

The Malta Arbitration Centre (MAC, or the "Centre") is the principal institution that oversees the conduct of domestic arbitrations and an ever-increasing number of international arbitrations having Malta as their seat of arbitration. It is run by a publicly appointed board of governors that is responsible for the policy and general administration of the affairs and business of the Centre and has its own secretariat. The MAC offers basic facilities for the conduct of arbitration and

may act as the default appointing authority with a choice of arbitrator(s) from panels of professionals practising different areas of law.

Malta is also regularly designated as the seat of ad hoc international arbitrations, as well as the seat of institutional arbitrations under the rules of leading arbitration institutions, most commonly, the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA).

No new institutions have been established in Malta in 2023-24.

1.4 National Courts

The Superior Courts (First Hall of the Civil Courts and the Court of Appeal) are vested with the powers to stay arbitration proceedings, grant interim relief, hear procedural challenges and make recognition orders. The specific division of powers and jurisdiction of the particular courts depend on the nature of the relief sought. The courts are regulated by the Arbitration Act (Chapter 387 of the Laws of Malta) (the "Act") and the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta) (the "Code of Organisation and Civil Procedure"), and will be addressed in more detail in subsequent sections of this chapter.

2. Governing Legislation

2.1 Governing Law

The Act and the Arbitration Rules (Subsidiary Legislation 387.01) (the "Rules") are the principal legislative instruments regulating arbitration in Malta. The Act is modelled on the 1985 UNCITRAL Model Law, and the Rules are likewise modelled on the UNCITRAL Arbitration Rules 1976 (revised in 2010). The Act also incorporates the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"), the Geneva Protocol on Arbitration Clauses of 1923 (the "Geneva Protocol"), the Convention on the Execution of Foreign Arbitral Awards 1927 (the "Geneva Convention"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (the "Washington Convention").

The 1985 Model Law is annexed to the Act as the First Schedule of the Act and forms an integral part thereof in its entirety.

The Act has not yet been amended to reflect the later versions of the UNCITRAL Model Law. Expected initiatives on this front have not yet marterialised.

2.2 Changes to National Law

Until an amendment in August 2020, the MAC was the designated court for recognition and enforcement purposes under the New York Convention. The decisions of the chairperson of the Centre were final and could not be appealed against, although nothing barred a party from subsequently bringing fresh proceedings for recognition and enforcement if recognition proceedings were initially not accepted by the chairperson.

One significant feature of the 2020 amendment was the introduction of a right of appeal before the Court of Appeal against a decision by the chairperson of the MAC on the registration of a foreign award. An appeal by an aggrieved party must be filed within 20 days from the date on which the determination of the chairperson of the MAC on the registration of the foreign award is communicated to the parties. Such appeals are to be lodged with the Court of Appeal in its inferior jurisdiction.

Through this substantial amendment, the recognition court is effectively no longer just the MAC but there is a second instance proceeding in front of the Court of Appeal. Notwithstanding the inclusion of a second tier, there has been a marked increase in the efficiency of the process leading to the recognition of foreign arbitral awards in Malta over the past few years. However, the two-tier process will, in the longer term, delay the process of exequatur of international awards, although it is expected to produce a greater level of consistency and predictability of outcome.

3. The Arbitration Agreement

3.1 Enforceability

In so far as the formal requirements of an arbitration agreement are concerned, Maltese arbitration law follows the UNCITRAL Model Law and the New York Convention, which are reproduced in the First Schedule and Part III of the Second Schedule respectively, both forming part of the Act. An arbitration agreement must be in writing and may be drawn up in the form of an arbitration clause in a contract or in the form of a separate agreement. Domestic law requires that an arbitration agreement be made in writing as provided under Article 7(2) of the UNCITRAL Model Law.

For the purposes of Maltese law, an agreement is considered to have been made in writing solely in the following circumstances:

- if it is contained in a document that is transferred from one party to the other party or by a third party to both parties, provided no objection was raised within 30 days from receipt thereof;
- if reference is made in a written contract to a document containing an arbitration clause, in so far as that reference operates to make such clause part of the contract; or
- through the issuance of a bill of lading, provided the latter contains an express reference to an arbitration clause in a charter party, in which case the bill of lading is – in and of itself – deemed to constitute a written arbitration agreement.

The Model Law further elaborates in this respect, and confirms that the "in writing" requirement is also satisfied if it is contained in:

- a document signed by the parties;
- an exchange of telecommunication which provide for a record of the agreement; or
- an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

Naturally, the references in the 1985 UNCITRAL Model Law and the 1958 New York Convention to an instrument "in writing" have to be interpreted in the light of more recent laws establishing equivalence between traditional written instruments and electronic communications.

3.2 Arbitrability

Over the past few years, there has been an increase in the scope of the types of disputes that are considered by arbitration tribunals and the courts of law as "arbitrable", both in terms of subjective and objective arbitrability. The general provision contained in Article 15 of the Act (under the part dedicated to domestic arbitration, but equally applicable to international commercial arbitration having Malta as its seat) states that disputes concerning questions of personal civil status are not capable of settlement by arbitra-

tion. Equally, most public law matters are generally regarded as not arbitrable.

However, even in traditionally non-arbitrable areas of law like disputes concerning personal status, purely patrimonial or monetary claims arising from such traditionally not arbitrable disputes can still be referred to arbitration, including disputes relating to the division of property between spouses and damages arising out of intellectual property disputes, or public law disputes.

3.3 National Courts' Approach

As a signatory of the New York Convention and having modelled the Act on the UNCITRAL Model Law, Malta is a jurisdiction which supports the arbitration process.

National courts are less likely to interfere with international arbitrations that have Malta as their seat of arbitration than they are with domestic arbitrations, where they still exercise residual powers. In general, and with some notable exceptions in recent judgments, Maltese courts look with disfavour on parties attempting to circumvent or frustrate arbitration proceedings through court actions. When this happens, the Maltese courts have generally (with some notable exceptions in a limited number of judgments, which are largely recognised by the legal profession to be outliers) shown themselves to be supportive of arbitration and unsympathetic to such claims, and tend to recognise the arbitrator's jurisdiction to rule on its competence.

There is no significant case law to report in the last year on the approach taken by the Maltese courts on matters relating to the applicable law to the arbitration agreement. Typically, the arbitration agreement will be deemed to be governed by the law of contract.

Recently, Maltese courts have refused to lift local precautionary measures in support of pending recognition and execution proceedings of an international arbitration award in Malta, despite the existence of security in another member state of the European Union in support of foreign exequatur proceedings of that same award. Maltese courts have also stayed proceedings in favour of a valid arbitration clause invoked in litigation which involved, apart from the signatories to the arbitration clause, a non-signatory party in litigation.

On a more general note, arbitration agreements are, for the most part, immediately recognised and enforced by the courts, and the courts regularly stay proceedings in favour of arbitration proceedings when they are faced with what appears to be a valid arbitration agreement.

When the court seised so stays proceedings in favour of the arbitral jurisdiction, it does not automatically decline all residual jurisdiction, but merely stays until the arbitration tribunal ascertains jurisdiction on the matter and proceeds with the decision on the case.

3.4 Validity

In terms of Article 16 of the UNCITRAL Model Law and Article 32 of the Act (modelled on Article 16 of the UNCITRAL Model Law), an arbitral clause shall be considered valid even if the rest of the contract in which it is included is determined to be invalid. This applies to both domestic and international arbitrations. There can be little doubt that Maltese courts may consider an arbitral clause to be valid even if the rest of the contract in which it is contained is invalid in full application of the doctrine of separability that is contained in statutory provisions.

4. The Arbitral Tribunal

4.1 Limits on Selection

In accordance with the Model Law, the Act allows the parties to an arbitration agreement the faculty of determining any matters relating to the choice, as well as the number, of arbitrators. Failing a determination, the default number of arbitrators is three. This is except for those cases where the disputed amount is under approximately EUR12,000, in which cases there will be only one arbitrator. In addition, the MAC (the chairperson of the Centre being established as the default appointing authority) has set up various specialised panels for domestic, as well as international, arbitration which may be resorted to in order to appoint accredited arbitrators. To name a few, these panels include:

- the Maritime Panel;
- the General/Civil Commercial Panel;
- the Banking, Finance, Accounting and Taxation Panel;
- the Building Construction Panel; and
- the Medical Panel.

There is no law forcing either the parties or the default appointing authority to restrict their choice of arbitrators from the said panels.

4.2 Default Procedures

In default of any agreement on the procedure for the appointment of arbitrators, the Act provides that, in the case of an arbitration with three arbitrators, each party will appoint one arbitrator, with the two party-nominated arbitrators then appointing the third arbitrator, who shall act as the chairperson of the arbitration tribunal. However, if a party fails to appoint an arbitrator within 30 days of receipt of notification of the appointment of an arbitrator by the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made, upon the request of a party, by the chairperson of the MAC.

In an arbitration with a sole arbitrator, where the parties fail to agree on the choice of arbitrator within 30 days after receipt by a party of a proposal, that arbitrator shall be appointed, upon request of a party, by the chairperson of the MAC. In the context of international arbitration, the MAC chairperson fills the role of default appointing authority and the functions mentioned in Articles 11(3), 11(4), 13(3) and 14 of the UNCITRAL Model Law. Therefore, if there is no agreement as to the method for the appointment of arbitrators, the parties do not agree on the arbitrator(s), any of the parties fail to act as required under the agreed appointment procedure, an arbitrator becomes unable to perform their functions or fails to act or their office terminates, or an arbitrator is successfully challenged, the chairperson shall appoint the arbitrator(s) at the request of one of the parties.

Default procedures for selecting arbitrators in multiparty arbitrations are contemplated in Article 21A of the Act. These procedures mimic the default procedures explained above, with the difference that the multiple claimants or multiple respondents are to make a joint nomination and to jointly reach an agreement with the other party on the choice of the arbitrator(s).

4.3 Court Intervention

Outside the parameters of the procedures for challenge or removal of arbitrators described in **4.4 Challenge and Removal of Arbitrators**, there is no room for court intervention in the selection of arbitrators. This excludes the possibility of extraordinary remedies including constitutional challenges on matters like due process, which

are exceptional and outside the scope of the current review.

4.4 Challenge and Removal of Arbitrators

The Act expressly provides that arbitrators are to be independent and impartial. Accordingly, prospective arbitrators are obliged to disclose any conflict of interest as soon as possible. An arbitrator may only be challenged if circumstances exist that give rise to justifiable doubts in relation to their impartiality or independence. However, a party may only challenge an arbitrator appointed by them for reasons that it becomes aware of after the appointment has been made. While the UNCITRAL Model Law adopts a similar approach, in the context of international arbitration, a party may also challenge the appointment of an arbitrator when that arbitrator does not possess the qualities previously agreed to between the parties.

The parties are free to agree on a procedure for challenging an arbitrator. Failing such agreement, a party which intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances giving rise the challenge, send a written statement containing the reasons for the challenge to the arbitral tribunal.

Unless the challenged arbitrator withdraws from their office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. If a challenge is not successful, the challenging party may request, within 30 days after having received notice of the decision rejecting the challenge, the chairperson of the MAC to decide on the challenge, which decision shall not be subject to an appeal. While a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award. If the chairperson of the MAC sustains the challenge, they are to appoint a substitute arbitrator.

4.5 Arbitrator Requirements

See **4.4 Challenge and Removal of Arbitrators**. Maltese law adopts both tests of independence and impartiality, which are qualities that have to be assessed at appointment stage and throughout the procedure leading to the expiry of the jurisdiction of the arbitrators.

In matters relating to the assessment of such qualities, regular use is made of the International Bar Association Guidelines on Conflicts of Interest in international arbitration and publications issued by the leading arbitration institutions in Europe and beyond.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

See **3.2 Arbitrability**.

5.2 Challenges to Jurisdiction

An arbitral tribunal in arbitrations having Malta as their seat of arbitration determines its own jurisdiction. In the event that proceedings are filed before a court for a declaration relating to the jurisdiction of an arbitral tribunal, such proceedings shall be stayed and the parties shall in principle be referred to the arbitral tribunal for its decision on such issue, unless the court considers that a party will suffer irreparable harm if it does not determine such issue immediately. The principle that an arbitration tribunal is competent to rule on its own competence is widely acknowledged and the provisions of the Act are designed to safeguard its application.

5.3 Circumstances for Court Intervention

Article 32(5) of the Act expressly provides that proceedings filed before a court for a declaration relating to the jurisdiction of an arbitral tribunal must be dismissed as this is a matter for the tribunal to decide. This is unless the court considers that a party will suffer irreparable harm if it does not determine the issue. Accordingly, in terms of Article 16(3) of the Model Law, the tribunal is to decide claims pertaining to its jurisdiction, with parties having a right of appeal from the tribunal's interim award finding jurisdiction before the Court of Appeal. On the other hand, if the arbitral tribunal decides that it does not have jurisdiction, there is no right to appeal to domestic courts. With a few exceptions, national courts have generally taken a positive approach in preserving the jurisdiction of the tribunal, thereby showing a general reluctance to intervene in issues of jurisdiction of an arbitral tribunal.

5.4 Timing of Challenge

A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that they have appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified. The arbitration tribunal may rule on a plea of non-jurisdiction either as a preliminary question or in an award on the merits.

If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days after having received notice of that ruling, the Court of Appeal to decide the matter, which decision shall not be subject to an appeal. While such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The standard of review under a challenge to the jurisdiction of the tribunal is de novo. The court will review the tribunal's jurisdiction by way of complete reassessment of facts, without being bound by the tribunal's reasoning.

5.6 Breach of Arbitration Agreement

As explained in **3.3 National Courts' Approach** and **5.3 Circumstances for Court Intervention**, the court will stay proceedings if there is a valid arbitration clause. With a few exceptions, the approach of national courts has been positive in the preservation of jurisdiction of the arbitrator.

In fact, courts typically view with disfavour proceedings brought in breach of an arbitration agreement. It has to be said, however, that the courts usually stay rather than outright dismiss proceedings so brought until the jurisdiction of the arbitration tribunal is ascertained by the tribunal itself.

5.7 Jurisdiction Over Third Parties

An arbitration agreement applies only to the parties that have signed the arbitration agreement and the arbitral tribunal may not assume jurisdiction over persons who are not party to an arbitration agreement. This is so even in connection with other group entities in the context of a group of companies or in the case of subcontractors in the same project.

Under Maltese law, arbitration is recognised as a consensual process and, therefore, contracts

between two parties are in principle considered to be res inter alios acta with respect to third parties. This doctrine finds application in numerous cases decided by the Superior Courts.

6. Preliminary and Interim Relief

6.1 Types of Relief

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take such interim measure of protection as the arbitral tribunal considers necessary in respect of the subject matter of the dispute. The arbitral tribunal may require a party to provide appropriate security in connection with such measure.

In principle, there is no classification or limit on the interim relief that may be granted by the tribunal. However, the effectiveness of such orders is limited in that the tribunal has no jurisdiction over third parties. As such, recourse is often made to the Maltese courts, as the courts of the seat of arbitration, for assistance in matters such as the subpoena of witnesses, garnishee orders, or security in the hands of third parties, as further explained in **6.2 Role of Courts**.

6.2 Role of Courts

Granting Interim Relief

Courts may play a very important role in the granting of interim relief in support of arbitration in Malta in the immediate run-up to arbitration, during the arbitration, as well as after the award in support of recognition proceedings. Interim relief is typically granted upon ex parte application by a party. If the requisites in terms of law are satisfied, the court may accede to an application for the issuance of the following precautionary measures in support of an arbitration.

The interim measures of protection which can be sought are listed in Article 830(1) of the Code of Organisation and Civil Procedure, and include:

- a garnishee order;
- a warrant of seizure of movables;
- a warrant of description;
- warrants of arrest on vessels and aircraft; and
- a warrant of prohibitory injunction preventing a party from carrying out certain actions.

Recourse to such interim measures may be made even prior to instituting arbitral proceedings, provided that arbitral proceedings are brought within 20 days from the filing of the request by a party for precautionary measures. If arbitral proceedings have already been instituted, the request to court must be accompanied by a confirmation issued by the registrar of the MAC confirming that arbitral proceedings have been lodged.

Choice of Venue

The courts recognise the freedom of the parties to choose the venue from which to seek interim relief. Further, there is no limitation in principle on the powers of the arbitral tribunal to grant interim measures in terms of the applicable rules. Where interim measures have been granted by the tribunal, the courts will recognise and enforce such measures upon the application of the party in whose favour the measure has been granted.

In addition, national courts also regularly grant, upon application, interim relief in support of arbitration proceedings seated outside of Malta.

Emergency Arbitrators

Maltese law is silent on the use of emergency arbitrators and orders issued by emergency arbitrators under specific institutional rules have not yet been tested by the Maltese courts. There

should, in principle, be no objection or difficulty with the enforceability of orders issued by emergency arbitrators. It is expected that these will be dealt with in the same way in which interim relief issued by the tribunal is dealt with.

In principle, it is also believed that the choice of an emergency arbitrator does not in itself preclude courts from issuing interim relief in support of the arbitration, unless parties themselves close such avenue in the arbitration agreement. As a matter of fact, interim relief by Maltese courts is relatively easy to obtain and, in circumstances arising in Malta or involving assets located in Malta, is likely more cost-effective and efficient than seeking interim relief from emergency arbitrators under most institutional rules.

6.3 Security for Costs

Maltese law allows the arbitral tribunals to order security for costs.

When the MAC manages domestic and international arbitrations, it requests each party to provide a deposit as an advance for costs. Ad hoc tribunals in international arbitrations with Malta as their seat of arbitration can also issue orders for security for costs.

During the course of the arbitral proceedings, the arbitral tribunal may request from the parties' supplementary deposits to cover further costs. If the required deposits are not paid in full within 30 days from the receipt of the request, the arbitral tribunal shall inform the parties in order that any one of them may make the required payment. If the payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

At the recognition and enforcement stage, on the application of the party claiming recognition or enforcement of the award, the court may order the other party to provide appropriate security.

7. Procedure

7.1 Governing Rules

Where parties have not selected institutional rules or otherwise governed their proceedings in the contract, the rules governing the arbitration procedure are contained in the Act and the Rules. Part IV of the Act on procedure and the Rules apply to:

- domestic arbitrations; and
- international arbitrations where the parties expressly agree that the procedure shall be regulated by such rules.

However, the domestic rule requiring a notice of arbitration ad validitatem only applies to domestic arbitrations.

7.2 Procedural Steps

The parties are at liberty to determine the procedure to be followed by the arbitral tribunal in international arbitrations having Malta as their seat of arbitration. The Act and the Rules provide rules on procedure as default rules in case the parties do not agree on the procedure, or the parties expressly adopt such rules in international arbitrations. The general public policy provisions regulating fair trial (due process) naturally apply. In domestic arbitrations, procedural flexibility is much more limited and is managed by the MAC.

7.3 Powers and Duties of Arbitrators

In domestic arbitration and where in international arbitration the parties adopt the Rules to regulate their arbitration, the tribunal is empowered to:

- rule on its own jurisdiction, including on any objections on the existence or validity of the arbitration agreement;
- order interim measures of protection;
- in the absence of party agreement, adopt appropriate procedure to conduct the arbitration – this includes the power to determine the admissibility, relevance, materiality and weight of evidence;
- appoint experts and require parties to co-operate with the experts;
- request court assistance in taking evidence;
- decide whether additional written statements should be exchanged;
- issue an order for the termination of the arbitration proceedings if their continuation becomes unnecessary or impossible, unless a party raises justifiable grounds for objection; and
- impose penalties for non-compliance with orders, for failure to observe time limits and for failure to attend hearings or cancellation thereof without valid reasons.

Apart from the duties of independence and impartiality which have already been discussed in **4.5 Arbitrator Requirements**, an arbitrator is expected to perform their duties as arbitrator honestly, impartially, with due diligence and without fear or favour according to law.

Article 10 of the Act also lists, amongst the functions of the MAC, the right to review the performance of arbitrators, including the right to admonish or issue appropriate sanctions against arbitrators that do not perform their duties.

7.4 Legal Representatives

Those appearing on behalf of parties to arbitration proceedings are not required to have any particular qualifications. However, representatives should be familiar with both the legal and procedural rules relating to the matter in dispute as well as arbitration law and procedure. Therefore, it is possible to engage legal representatives with qualifications other than Maltese qualified representatives.

In terms of Article 18(2) of the Act, "a legal practitioner or a person not qualified under the Laws of Malta may act on behalf of a party to an arbitral proceeding to which this Act applies, including appearing before the arbitral tribunal, and he shall not thereby be taken to have breached any law of Malta regulating the practice of the legal profession".

8. Evidence

8.1 Collection and Submission of Evidence

The parties to the arbitration are at liberty to decide how the gathering and tendering of evidence should be carried out in the arbitration agreement. Generally, parties do so through the incorporation of institutional rules or the choice of the Rules. In default of such choice, the arbitration tribunal shall regulate the evidence before it to ensure compliance with the applicable law, which is generally the law of the seat of arbitration. The evidence in arbitration may be produced either viva voce or by sworn written statements. Moreover, Maltese law also recognises a "documents only arbitration" without the need for oral hearings.

The same rules regulating legal privilege, the use of witness statements and other related rules applicable to litigation apply to arbitration proceedings. In practice, even though discovery and disclosure are not entirely familiar to Maltese law, the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbi-

tration are widely known and applied (either as guidance or as governing rules).

Each party bears the burden of proving the facts that they allege. The tribunal may in turn establish a period of time for a party to file a summary of the documents and other evidence which that party intends to produce in support of their claim or defence. Whilst parties may agree on rules of disclosure, discovery proceedings do not exist under the Act or the Rules.

Unless the arbitration agreement states otherwise, the tribunal is allowed to appoint experts or require parties to submit expert evidence.

8.2 Rules of Evidence

The Rules provide that the arbitral tribunal shall regulate the production of evidence before it to ensure compliance with the provisions of the Act.

The Act provides that in domestic arbitrations the rules of the Code of Organisation and Civil Procedure shall apply as they apply to the production of evidence before a court of civil jurisdiction.

Any application for the subpoena of a witness before an arbitral tribunal shall indicate that the witness is to appear before an arbitral tribunal for the purpose of arbitral proceedings and shall indicate clearly the address of the place that the witness is to attend and the date and time of attendance. The arbitral tribunal may administer oaths to persons called as witnesses or experts giving evidence before an arbitral tribunal.

8.3 Powers of Compulsion

In domestic arbitrations, where the evidence of any person is required, the registrar of the MAC may issue an application for writs of subpoena in the Superior Courts to ask the courts to compel the attendance of a witness to give evidence or produce documents before an arbitral tribunal.

Where any person who has been properly subpoenaed to appear before an arbitral tribunal in accordance with the aforementioned procedure fails to appear before the said tribunal without reasonable excuse, the tribunal may make a report thereon to the registrar of the MAC, who shall by application bring the report to the attention of the Superior Courts, requesting it to deal with the matter in the same manner as if the person concerned had failed to appear before that court when properly subpoenaed and thereupon the court shall deal with the matter in the said manner.

9. Confidentiality

9.1 Extent of Confidentiality

Article 47 of the Rules imposes an obligation on arbitration participants to maintain the confidentiality of the proceedings. Neither the existence of proceedings nor the eventual award are publicised. The MAC treats all documents filed with it as confidential, except to the extent as authorised by the parties or otherwise necessary to implement the provisions of the Act. Related to the confidentiality of documents, the Rules also provide that the documents filed in the arbitral proceedings shall only be accessible to the arbitral tribunal and the parties on request, unless confidentiality is waived by the parties. Moreover, the hearings are held in private chambers and only the parties, their assistants or representatives, the Registrar and individuals necessary for the support of the proceedings as ordered by the arbitral tribunal are permitted to attend. Confidentiality does not apply in the following circumstances:

- where a party expressly seeks consent to publicise;
- where a party seeks recourse in terms of the arbitration agreement or the Act and requires disclosure of information to protect its own interests; and
- in mandatory arbitrations.

The general rule is that disclosure in subsequent proceedings is prohibited unless otherwise agreed to in the arbitration agreement.

10. The Award

10.1 Legal Requirements

Article 44 of the Act and Article 31 of the Model Law establish the legal requirements for an arbitral award, which must:

- be in writing;
- be signed by the tribunal (if the tribunal is composed of three arbitrators, the signature of the majority is required, provided that the reason for any omitted signature is stated);
- unless the parties have otherwise agreed, contain the reasons for the award; and
- state the date and place of arbitration.

Unfortunately, there are no pre-set time limits for the rendering of an award under Maltese law. Time limits contained in institutional rules for the rendering of an award by the arbitration tribunal are, however, recognised by Maltese law as an expression of the will of the parties.

10.2 Types of Remedies

The Act does not address the types of remedies available, but, in principle, all kinds of remedies are available, provided they find legal support under the applicable law and are not in violation of the public policy of Malta. Tribunals can, therefore, make declaratory reliefs and order monetary compensation, specific performance or other ad hoc types of remedies requested by the parties within the parameters outlined above.

10.3 Recovering Interest and Legal Costs

In accordance with Article 50 of the Act, the term "costs" includes:

- the fees of the tribunal;
- travel and other expenses incurred by each arbitrator;
- costs of expert advice and other assistance required by the tribunal;
- travel and other expenses of witnesses approved by the tribunal;
- costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only if the tribunal deems such costs to be reasonable; and
- any fees and expenses payable to the MAC.

In both domestic and international arbitration, the Act specifies that the costs of arbitration shall in principle be borne by the unsuccessful party. However, it is at the discretion of the arbitral tribunal to apportion the costs, taking into account the particular circumstances of the case.

Unless otherwise agreed by the parties, an arbitral tribunal may include interest at a reasonable rate in any monetary award, whether for a liquidated or unliquidated amount. This interest can apply to the whole or any part of the awarded sum and for any period between the cause of action's date and the award's date. Additionally, the tribunal may direct that interest is payable from the date of the award or a later specified date.

11. Review of an Award

11.1 Grounds for Appeal

Recourse to the national courts against an international arbitral award may be had only by an application for setting aside in accordance with specific provisions provided by the Act.

The party making the application must show that either:

- a party to the arbitration agreement was under some incapacity;
- the agreement is not valid under the law which the parties have stipulated it or, failing any indication thereon, under the law of Malta;
- 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 their case;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, 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
- 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 Act from which the parties cannot derogate or, failing such agreement, was not in accordance with the Act.

An arbitral award may also be set aside if the courtfinds that:

- the subject matter of the dispute is not capable of settlement by arbitration under the law of Malta; or
- the award is in conflict with the public policy of Malta.

An application for setting aside may not be made after 3 months have elapsed from the date on which the party making that application had received the award or, if a request had been made for correction, interpretation, or an additional award, from the date on which that request had been disposed of by the arbitration tribunal.

Recourse against an international arbitral award may be made to the Court of Appeal by an appeal on a point of law only if the parties to the arbitration agreement have expressly agreed that such right of appeal is available to the parties in addition to the rights of recourse as contemplated in Article 34 of the UNCITRAL Model Law.

When it comes to domestic arbitral awards, recourse against an arbitral award may be made to the Court of Appeal by application for:

- setting aside in accordance with specific provisions of the Act;
- appeal on a point of law in accordance with specific provisions of the Act; and
- appeal on points of law and fact in accordance with specific provisions of the Act in the case of mandatory arbitrations.

In these cases, the application must be made within 15 days from the notification to the applicant of the award in accordance with the Act, and the applicant is to notify the arbitrators and the MAC with a copy of the application as soon

as practicable but not later than 15 days after the application is filed.

11.2 Excluding/Expanding the Scope of Appeal

The parties may agree to exclude the right of appeal in domestic arbitrations either in the arbitration agreement or in a separate document in writing.

11.3 Standard of Judicial Review

In principle, there is no right to appeal (de novo review) an international arbitral award unless the invoked grounds require a limited review thereof, such as a violation of public policy. See **11.1 Grounds for Appeal**.

12. Enforcement of an Award

12.1 New York Convention

Malta is a party to the New York Convention and its provisions have been incorporated into domestic law. The courts have generally applied the New York Convention with a pro-enforcement bias. Both reservations applicable under the New York Convention, the reciprocity reservation and the commercial reservation, have been adopted by Malta. The Act also incorporates the Geneva Protocol, the Geneva Convention and the Washington Convention.

12.2 Enforcement Procedure

Foreign awards to which the treaties set out in the Second Schedule to the Act apply are enforceable in the same manner as if they were awarded locally, once registered with the MAC. Part VIII of the Rules outlines the documents required for the registration of the foreign arbitral award with the MAC, these being:

- the duly authenticated original award or a duly certified copy thereof;
- a certified translation of the award into English when the award is not in the English language;
- the original arbitration agreement or a certified copy thereof;
- a sworn declaration by the applicant or their authorised attorney that no recourse has been taken and is pending against the award and the award is final; and
- the name, address and all other known communication details of the respondent, and if they are not resident or otherwise present in Malta, of their representative or other connected person in Malta together with a description of the connection to them or their property in Malta.

On receipt of an application with all the attachments, the registrar of the MAC shall serve the respondent with a copy of all the documents received. The respondent shall have 10 working days to state in writing whether there are any reasons why the registrar should not proceed with the registration of the award.

On registration with the MAC, awards constitute executive titles. The awards are then enforced with the intervention of the national courts through the issuance of a number of executive warrants.

Awards Set Aside

Maltese courts have not yet dealt with the issue of recognition of arbitral awards set aside at the seat of arbitration. In such a circumstance, it would be difficult to see Maltese courts enforce awards set aside at the seat.

Where an arbitration award has not been set aside at the seat of arbitration, but is subject

to ongoing set-aside proceedings at the seat, the recognition procedure in Malta is typically stayed. There are a number of cases where the New York Convention designated court has opted to stay. This is in line with the procedural requirement under Rule 54 of the Rules which states that together with the application for recognition the applicant has to provide "a sworn declaration [...] that no recourse has been taken and is pending against the award and the award is final". There is doubt whether this requirement raises the "ceiling" of maximum harmonisation established by the New York Convention.

Sovereign Immunity

The sovereign immunity defence can successfully be raised at the enforcement stage in relation to all assets that a state or state entity can prove are functional to the exercise of public powers including under international or bilateral conventions.

12.3 Approach of the Courts

The MAC and the Maltese courts apply a strict standard to the enforcement of awards but have generally taken a positive pro-arbitration stance towards the recognition and enforcement of arbitration awards, interpreting the Article V exceptions in the New York Convention restrictively. Awards are generally considered to violate public policy only in cases of blatant and manifest contrast with the basic principles of the Maltese legal framework. However, there is no developed case-law on international public policy similar to French case-law on the subject.

13. Miscellaneous

13.1 Class Action or Group Arbitration

While Maltese law does not specifically provide for class action arbitration, it is possible to have multiple parties as claimants or defendants to arbitration proceedings (Article 21A of the Act).

13.2 Ethical Codes

The MAC has published a code of ethics for arbitrators which has not been updated for a number of years. The IBA Guidelines on Conflicts of Interest and policy documents issued by leading organisations, like the Chartered Institute of Arbitrators (CIArb), are regularly consulted on professional standards and ethical codes in arbitrations having Malta as their seat of arbitration.

13.3 Third-Party Funding

Third-party funding of an arbitral claim is not contemplated by Maltese law and there is currently no market for the industry.

13.4 Consolidation

Parties may agree that arbitral proceedings are consolidated with other arbitral proceedings or that concurrent hearings are held. Parties are free to determine the terms for consolidation, in line with Article 52(2) of the Rules. Conversely, the arbitral tribunal may only order consolidation or concurrent hearings upon agreement of all the parties to confer such power on the tribunal.

13.5 Binding of Third Parties

Third parties who are not signatories to a contract containing an arbitration clause or parties to an arbitration agreement are not bound to arbitrate. A third party can be requested to join as a party in the arbitral proceedings and may be so joined provided all the parties to the proceedings agree. Having said this, doctrines on non-signatories are not well developed in Malta.

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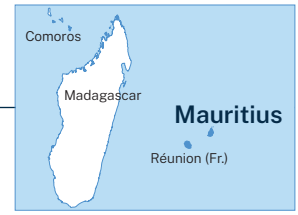

Law and Practice

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BLC Robert & Associates is a leading independent business law firm in Mauritius, with eight partners and over 30 locally and internationally trained lawyers. It is a member of the Africa Legal Network (ALN), which is recognised by international directories as the leading legal network in Africa. The firm has four main practice areas: corporate and M&A; banking and finance; financial services and capital markets; and dispute resolution. It offers the full service of attorney and counsel in a range of commercial disputes, whether before the courts or arbitral tribunals. With the promulgation of the International Arbitration Act 2008 and the setting up of institutions geared for international commercial arbitration in the jurisdiction, the firm has built its capacity in that area and has handled a range of high-value complex arbitrations in contractual disputes, construction, hospitality, oil and gas, and private equity.

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1. General

1.1 Prevalence of Arbitration

International arbitration is now quite prevalent in the commercial landscape in Mauritius, especially in construction contracts, constitutions and shareholders' agreements of global business companies and commercial contracts where the parties are not of the same nationality. The parties tend to choose international arbitration as the method of dispute resolution. Parties also choose Mauritius as the seat of arbitration in construction disputes, commercial contracts governed by Mauritian law and constitutions of global business companies.

1.2 Key Industries

Construction disputes tend to be resolved by arbitration because the contracts are based on standard forms that include arbitration clauses. By law, the constitutions of global business (offshore) companies that include arbitration clauses have to provide for Mauritius as the seat of arbitration.

There may have been a slowdown in resorting to arbitration in commercial and construction contracts generally, where the parties have chosen to allow their counterparties' financial position to improve in order to maintain a business relationship and not destroy value in lengthy and costly arbitrations. In some cases, they may even have accepted discounted payments instead of bearing arbitration costs.

1.3 Arbitration Institutions

Both the Mauritius International Arbitration Centre (MIAC) and the Mauritius Chamber of Commerce and Industry Arbitration Centre (MARC) are commonly used, as they both have modern hearing centres and rules adapted for international arbitration, and are supported by reputable appointing bodies: the Permanent Court of Arbitration (PCA) in the case of MIAC and the MARC Court in the case of MARC.

1.4 National Courts

Matters to be decided under the International Arbitration Act 2008 (IAA) or the Convention for the Recognition and Enforcement of Foreign Arbitral Awards Act 2001 (the "2001 Act") are heard by "Designated Judges", who are judges of the Supreme Court appointed in that capacity by the Honourable Chief Justice. Designated Judges are the only ones who are able to hear applications made under the IAA and the 2001 Act.

2. Governing Legislation

2.1 Governing Law

International arbitration is governed by the IAA and the 2001 Act, which incorporates the New York Convention. The IAA is founded on the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") and contains a specific provision that, inter alia, highlights the need to promote uniformity with the Model Law (Section 2B of the IAA). However, the IAA contains a few modifications, tailored to ensure better effectiveness of and support for international arbitration.

- Arbitration clause: once a party contends that the dispute is subject to an arbitration clause, the parties are referred to arbitration unless the opposing party "shows, on a prima facie basis, that there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed" (Section 5 of the IAA).
- Jurisdiction: under Section 20 of the IAA, the Supreme Court decides on the issue

of jurisdiction when an arbitral tribunal has decided it has jurisdiction and also when it has decided it does not have jurisdiction to determine the dispute.
- Arbitration proceedings: under the IAA, the arbitral tribunal needs to give parties a "reasonable opportunity to present their case", whereas the Model Law provides that parties should be given "full opportunity".
- Awards: under the IAA, there are no distinctions between partial awards, interim awards and final interim awards – all awards are final and binding. In setting aside an award, the Supreme Court has the power to make consequential orders (Section 39A of the IAA).
- Grounds to set aside an award: under Section 39 of the IAA, two additional grounds to set aside an award have been added:
  (a) if the award was induced or affected by fraud or corruption; and
  (b) if there is a breach of natural justice during the arbitral proceedings or in connection with the making of the award by which the rights of any party have been or will be substantially prejudiced.

The Third Schedule to the IAA sets out the provisions of the Model Law to which the provisions of the IAA correspond, in order to assist international users in identifying where the Articles have been incorporated.

2.2 Changes to National Law

No significant changes have been made to the national law in the past year and there is no pending legislation relating to international arbitration in Mauritius.

3. The Arbitration Agreement

3.1 Enforceability

Under the IAA, an arbitration agreement should be in writing and be in the form of either an arbitration clause in a contract or legal instrument or a separate agreement in order to be enforceable.

The addition of the term "legal instrument" under the IAA includes investment treaty arbitrations arising under investment treaties. Furthermore, Article II of the New York Convention, as incorporated in the 2001 Act, provides that contracting states should recognise agreements in writing, which includes an "arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams".

Under Section 4(2) of the IAA, an arbitration agreement is in writing if:

- its contents are recorded in any form, whether or not the arbitration agreement or the contract has been concluded orally, by conduct or by other means;
- it is concluded by an electronic communication and the information contained in it is accessible so as to be usable for subsequent reference; or
- it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

3.2 Arbitrability

No definitive pronouncement has yet been given on subject matters that may not be referred to arbitration. Courts give a broad interpretation to arbitration agreements, in order to give effect to the intention of parties in entering arbitration agreements.

Referral to arbitration is governed by Section 5 of the IAA, which provides that, when an action is brought before any court and a party contends that the action is subject to an arbitration agreement, that court should "automatically" transfer the action to the Supreme Court if the party does so after submitting its first statement on the substance of the dispute. The Supreme Court will thereafter refer parties to arbitration, unless the other party shows "on a prima facie basis, that there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed", in which case it will itself determine whether the arbitration agreement is indeed null, void, inoperative or incapable of being performed. If the Supreme Court so finds, the matter is transferred back to the court.

3.3 National Courts' Approach

No court has yet been tasked with determining the law governing an arbitration agreement. Nevertheless, the correct approach would be to give effect to the intention of the parties.

In fact, under Section 32(1) of the IAA, which embodies Article 28 of the Model Law, the arbitral tribunal itself will decide the dispute in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute. If there is any designation of the law or legal system of a state, it should be construed (unless otherwise expressly provided) as referring directly to the state's substantive law and not to its conflict of laws rules (Section 32(2) of the IAA). If there is no such designation, the arbitral tribunal will apply the law determined by the conflict of law it considers applicable.

Parties can expressly authorise an arbitral tribunal to decide the dispute ex aequo et bono or as amiable compositeur, meaning that it will determine the dispute on the basis of notions of fairness and equity without being bound by the strict rules of law (Section 32(4) of the IAA). In any event, disputes are decided in accordance with the terms of the contract, and usages of trade applicable to the transaction are also considered by the arbitral tribunal (Section 32(5) of the IAA).

Courts are willing to enforce arbitration agreements, and this is reinforced by Section 5 of the IAA and Article II(3) of the New York Convention.

3.4 Validity

The principle of the separability of an arbitration agreement is entrenched in Section 20(2) of the IAA, which provides that an arbitration clause is an agreement independent of the other terms of the contracts in which it is contained, and therefore a decision of the arbitral tribunal that the contract is null and void will not invalidate the arbitration clause.

4. The Arbitral Tribunal

4.1 Limits on Selection

Section 12(2) of the IAA provides that parties are free to agree on a procedure for appointing the arbitral tribunal, subject to the provisions of Sections 12(4) and 12(5) of the IAA, which provide for situations where the PCA can intervene to break deadlocks within the selection process, unless the agreement between the parties provides for other means for resolving such issues.

Under Section 12(4) of the IAA, the PCA's intervention includes situations where:

- parties fail to act in accordance with the agreed procedure;

- parties or arbitrators are unable to reach an agreement; or
- a third party (including an arbitral institution) fails to perform any function entrusted to it under that procedure.

Any party may request the PCA to take any measures as necessary.

The PCA's power to intervene is further extended by Section 12(5) of the IAA, which provides that any party may request the PCA to take any necessary measures in the event of any other failure to constitute the arbitral tribunal.

4.2 Default Procedures

Where any party has requested the PCA to intervene under Section 12(4) or 12(5) of the IAA, Section 12(6) sets out the measures that may be taken by the PCA, including:

- giving directions as to the making of any necessary appointments;
- directing that the arbitral tribunal shall be constituted by such appointments (or any one or more of them) as have been made;
- revoking any appointment already made;
- appointing or reappointing any or all of the arbitrators; and
- designating any arbitrator as the presiding arbitrator.

In appointing an arbitrator, the PCA shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator. In the case of a sole or third or presiding arbitrator, the PCA shall also take into account the advisability of appointing an arbitrator of a nationality other than those of the parties (Section 12(7) of the IAA).

4.3 Court Intervention

The IAA does not give the court power to intervene in the selection of arbitrators in international arbitrations seated in Mauritius.

In domestic arbitrations, a judge in chambers may appoint an arbitrator or the tribunal where the parties cannot agree on the identity of arbitrators or an appointment procedure.

4.4 Challenge and Removal of Arbitrators

Parties can challenge arbitrators under Sections 13 and 14 of the IAA, or they can terminate the arbitrators' mandates under Section 15 of the IAA for failure or inability to act.

The appointment of an arbitrator may be challenged where the arbitrator has failed to disclose any circumstance giving rise to justifiable doubts as to their impartiality or independence, or where the arbitrator is seen to lack such qualifications as agreed on by the parties (Section 13 of the IAA). Under Section 13(4) of the IAA, arbitrators can only be challenged by a party who appointed them for reasons of which that party became aware after the appointment was made.

Parties are free to agree on a procedure for challenging an arbitrator (Section 14(1) of the IAA). However, in the absence of an agreement, a party who intends to challenge an arbitrator shall send a written statement of the reasons for the challenge to the arbitral tribunal, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance giving rise to justifiable doubts as to the arbitrator's impartiality or independence. Unless the challenged arbitrator withdraws from their office or the other party agrees to the challenge, it shall be up to the arbitral tribunal to decide on the challenge (Section 14(2) of the IAA).

Where a challenge under any procedure as agreed by the parties or as per the above does not succeed, the challenging party may then, within 30 days of receiving notice of the decision rejecting the challenge, request the PCA to decide on the challenge (Section 14(3) of the IAA).

While the request made to the PCA is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make one or more awards (Section 14(4) of the IAA).

With regards to termination, Section 15 of the IAA provides that if arbitrators become de jure or de facto unable to perform their functions, or fail to act without undue delay, their mandate shall terminate on their withdrawal from office, or upon agreement of the parties. Parties may request the PCA to resolve any remaining controversy on any of the grounds for termination.

4.5 Arbitrator Requirements

An arbitrator's duty to disclose any circumstance likely to give rise to justifiable doubts as to their impartiality or independence arises at the time where they are approached in connection with their possible appointment as an arbitrator, and is maintained from the time of their appointment and throughout the arbitral proceedings (Section 13 of the IAA).

5. Jurisdiction

5.1 Matters Excluded From Arbitration

There has not yet been any pronouncement on the subject matters that are excluded from arbitration. The following are generally understood to be outside the purview of consensual arbitration:

- the making of winding-up orders; and
- disputes relating to the status of a person, taxation and the exercise of public law powers.

It is worth noting that an arbitration agreement is not discharged by the death, bankruptcy or winding-up of a party, as it can still be enforced against the representative(s) of that party (Section 7 of the IAA).

5.2 Challenges to Jurisdiction

An arbitral tribunal can rule on a party's challenge to the tribunal's own jurisdiction, and the principle of competence – competence is catered for under Section 20(1) of the IAA.

5.3 Circumstances for Court Intervention

A party can only challenge the jurisdiction of an arbitral tribunal up to the submission of the statement of defence, and it would not be precluded from doing so even if it participated in the appointment of the arbitrator (Section 20(3) of the IAA). Furthermore, a plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings (Section 20(4) of the IAA). However, the arbitral tribunal may admit a later plea under Section 20(3) or 20(4) if it considers the delay justified.

The arbitral tribunal can rule on its jurisdiction as a preliminary question or in an award on the merits of the dispute. If jurisdiction has been determined by the arbitral tribunal as a preliminary question, Section 20(7) of the IAA states that any party may request the Supreme Court to decide the matter of jurisdiction within 30 days of receiving notice of that ruling. Whilst such request is pending before the Supreme Court,

the arbitral proceeding may continue, and one or more awards can be made by the tribunal.

Section 20(7) of the IAA modifies the Model Law in a material aspect as it allows the Supreme Court to review rulings of the arbitral tribunal when it has ruled it has jurisdiction, and also where it has ruled it does not have jurisdiction. This was confirmed in the recent ruling of Digame Investment Company Limited & Ors v Apex Fund and Corporate Services (Mauritius) Ltd 2023 SCJ 273.

5.4 Timing of Challenge

The arbitral tribunal may rule on a plea of jurisdiction as a preliminary question or in an award on the merits. Where the tribunal does so as a preliminary question, any party may request the Supreme Court to decide the matter (Section 20(7) of the IAA), within 30 days of receiving notice of that ruling. Nevertheless, the arbitral proceeding is not stayed while such a request is pending, and the tribunal can make one or more awards.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The standard of judicial review for jurisdiction is "de novo", which means that the Supreme Court will make its own determination of the issue of jurisdiction by way of a full rehearing. The notion is that, as a matter of logic, the arbitral tribunal cannot itself finally resolve any matter going to its own jurisdiction and "thereby pull itself up by its own bootstrap" (The Mauritian International Arbitration Act 2008: Text and Travaux Préparatoires, paragraph 77, page 203).

5.6 Breach of Arbitration Agreement

Under Section 5 of the IAA, if a party contends that an action before a court is subject to an arbitration agreement, the court will automatically transfer the action to the Supreme Court, which in turn shall refer the matter to arbitration unless a party shows, on a prima facie basis, that there is a very strong probability that the arbitration agreement is null and void, inoperative or incapable of being performed. The referral under Section 5 of the IAA therefore caters for circumstances where a party is acting in breach of an arbitration agreement. The high threshold imposed on the party opposing a referral to arbitration is clear evidence of a reluctance to allow parties to act in breach of an arbitration agreement.

5.7 Jurisdiction Over Third Parties

An arbitral tribunal will not have jurisdiction over individuals or entities that are neither party to an arbitration agreement nor signatories to the contract containing the arbitration agreement. However, third parties may be affected in the following ways.

- If the parties expressly agree, under the arbitration agreement, that the supplementary provisions for international arbitrations under Schedule 1 to the IAA will apply ("Supplementary Provisions"), paragraph 4 of the Supplementary Provisions allows a party to the arbitration to make an application to the Supreme Court to determine that one or more persons be joined in the arbitration as a party, provided that such third person and the applicant party have consented thereto in writing. This would apply regardless of whether the third party is foreign or domestic.
- Unless agreed otherwise by the parties, an arbitration agreement is not discharged by the death, bankruptcy or winding-up of a party, so it can be enforced by or against representatives of that party (Section 7 of the IAA), even though the representative was not a party to the arbitration agreement per se.

- If the "corporate veil" is lifted.
- If an entity or individual has conducted itself in a manner that shows it is intervening in a contract and agrees to be bound by its terms, that person can be considered to have become a party to the contract and will therefore be subject to the arbitration agreement.

6. Preliminary and Interim Relief

6.1 Types of Relief

Section 21 of the IAA provides that, unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures in the form of an award or in another form, by which it orders a party to do the following at any time before making the award by which the dispute is finally decided:

- maintain or restore the status quo pending determination of the dispute;
- take action that would prevent the arbitral process itself, or refrain from taking action that is likely to cause current or imminent harm or prejudice to such process;
- provide a means of preserving assets out of which a subsequent award may be satisfied;
- preserve evidence that may be relevant and material to the resolution of the dispute; or
- provide security for costs.

The arbitral tribunal may modify, suspend or terminate an interim measure it has granted upon the application of any party or, in exceptional circumstances and on prior notice to the parties, on the arbitral tribunal's own initiative (Section 21(5) of the IAA).

6.2 Role of Courts

Generally, court intervention is permitted only in certain circumstances, and in respect of international arbitrations seated in Mauritius. However, the grant or recognition of interim relief is not limited to international arbitrations seated in Mauritius (Section 3A of the IAA).

Section 6 of the IAA provides that a party can request an interim measure of protection in support of arbitration from the Supreme Court or a court in a foreign state, before or during arbitral proceedings. An application to the Supreme Court shall be made and determined in accordance with Section 23 of the IAA, which provides for the powers of the Supreme Court to issue interim measures.

Section 22 of the IAA deals with the recognition by the Supreme Court of interim remedies granted by an arbitral tribunal.

Section 22(1) of the IAA provides that an interim measure granted by an arbitral tribunal shall be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the Supreme Court, regardless of the country in which it was issued.

The party who is seeking or has obtained recognition or enforcement of an interim measure is required to promptly inform the Supreme Court of any termination, suspension or modification of that measure (Section 22(2) of the IAA).

Upon an application for the recognition or enforcement of an interim measure, and if it considers it proper, the Supreme Court may order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security, or where such a decision is necessary to protect the rights of third parties (Section 22(3) of the IAA).

Section 22(4)(a)(i) of the IAA provides that the recognition or enforcement of an interim measure may be refused at the request of the party against whom it is invoked where the court is satisfied that one of the grounds for exclusive recourse against an award under Section 39(2)(a) applies – namely, that the party making the application has furnished proof that:

- it was under some incapacity or the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under Mauritius law;
- it was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;
- the award deals with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration; or
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the IAA.

Recognition or enforcement may also be refused at the request of the party against whom it is invoked where the court is satisfied that the arbitral tribunal's decision with respect to the provision of security in connection with the measure issued by the arbitral tribunal has not been complied with (Section 22(4)(a)(ii) of the IAA), or where the interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the state in which the arbitration takes place or under the law under which that interim measure was granted (Section 22(4)(a)(iii) of the IAA).

Furthermore, under Section 22(4)(b) of the IAA, recognition or enforcement of an interim measure may be refused where the court finds that the measure is incompatible with the powers conferred on the court, unless the court decides to reformulate the measure to the extent necessary to adapt it to its own power and procedures for the purposes of enforcing that measure and without modifying its substance, or unless any of the following grounds set out in Section 39(2)(b) apply to the recognition and enforcement of the measure:

- the subject matter of the dispute is not capable of settlement by arbitration under Mauritius law;
- the award is in conflict with the public policy of Mauritius;
- the making of the award was induced or affected by fraud or corruption; or
- a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award by which the rights of any party have been or will be substantially prejudiced.

Where the tribunal is unable to exercise its powers in granting or recognising an interim measure as provided for under Section 21 of the IAA, Section 23 sets out the powers of the Supreme Court to issue interim measures. The tribunal shall have the same power to issue an interim measure in relation to arbitration proceedings as it has in relation to proceedings in court, whether the juridical seat of the arbitration is in Mauritius or not, and whether that power is exercised by a judge in chambers or otherwise. In so doing, the court shall have regard to the specific features of international arbitration.

However, the court shall exercise its power in such a manner as to support and not disrupt the

existing or contemplated proceedings (Section 23(2A) of the IAA).

Where the case is one of urgency, the court may make such order as it thinks necessary, on the ex parte application of a party or proposed party to the arbitral proceedings (Section 23(3) of the IAA).

Where the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings made on notice to the other parties and to the arbitral tribunal, and with the permission of the arbitral tribunal or the agreement in writing of the other parties (Section 23(4) of the IAA).

Under Section 23(5) of the IAA, other than in urgent circumstances, the Supreme Court can only order interim measures if the applicant has obtained the permission of the arbitral tribunal or written agreement of the other parties. In addition, the Supreme Court can act only if, and to the extent that, the arbitral tribunal and any other arbitral or other institution or person vested by the parties with powers regarding interim measures has no power or is unable for the time being to act effectively. Where the court so orders, an order made by it shall cease to have effect on the order of the arbitral tribunal or of any such arbitral or other institution or person having power to act in relation to the subject matter of the order (Section 23(6) of the IAA).

As can be seen from the above, the powers of the Supreme Court to issue interim relief are delimited by Section 23 of the IAA, so as to be in harmony with the arbitral tribunal.

6.3 Security for Costs

Parties can be entitled to apply for an order for security for costs if the parties have agreed that the arbitration agreement shall be governed by specific rules that provide for such. Under the IAA, the arbitral tribunal can order a party to provide a means of preserving assets out of which a subsequent award may be satisfied (Section 21(1)(c) of the IAA) or to provide security for costs (Section 21(1)(e) of the IAA).

Furthermore, under Section 39(6) of the IAA, where an application is made to set aside an award, the court may order that any money made payable by the award shall be brought into court or otherwise secured pending the determination of the application.

It is also provided under Section 28 of the Supreme Court (International Arbitration Claims) Rules 2013 (the "2013 Rules") that a "defendant to any arbitration claim may apply for security for his costs of the proceedings" (Rule 28(1)). Such an application is to be supported by written evidence, either by way of affidavit or in the form of one or more witness statements accompanied by any supporting documents (Rule 28(2)). Where the court decides to make an order for security for costs, it shall determine the amount of security, direct the manner and time in which the security shall be given, and make an order specifying the consequences of a breach of the order for security for costs.

The importance of complying with the procedure of the 2013 Rules was highlighted in the case of Segatto Paolo Italo v Geosond Holding Ltd 2015 SCJ 400, in which a motion for security for costs not made in accordance with the 2013 Rules was not entertained.

7. Procedure

7.1 Governing Rules

Subject to the IAA, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting arbitral proceedings.

7.2 Procedural Steps

As the parties have the liberty to agree on the procedure to be followed by the arbitral tribunal under the IAA framework, the procedural steps will depend on the chosen law and/or rule.

7.3 Powers and Duties of Arbitrators

Under Section 24(1) of the IAA, every arbitral tribunal has the duty to:

- "treat parties with equality and give them a reasonable opportunity of presenting their case"; and
- "adopt procedures which are suitable to the circumstances to the case, avoiding unnecessary delay and expenses, so as to provide a fair and efficient means for the resolution of the dispute between the parties".

7.4 Legal Representatives

Legal representatives include barristers at law, attorneys at law and notaries, and are subject to the Law Practitioners Act 2008. Under Section 31 of the IAA, unless otherwise agreed by the parties, a party to an arbitral proceeding can be "represented in the arbitral proceedings by a law practitioner or other person chosen who need not to be qualified to practise law in Mauritius or in any other jurisdiction".

8. Evidence

8.1 Collection and Submission of Evidence

Subject to the IAA, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Failing such agreement, the arbitral tribunal may, subject to the IAA, conduct the arbitration in such manner as it considers appropriate, and determine all the procedural and evidential matters (Sections 24(2) and 24(3) of the IAA).

8.2 Rules of Evidence

In the absence of an agreement between the parties, the arbitral tribunal can determine all procedural and evidential matters (Section 24(3)(d) of the IAA).

8.3 Powers of Compulsion

In the absence of an express agreement on the collection and submission of evidence at the pleading stage and at the hearing, an arbitrator can compel a party to disclose documents under Section 24(3)(d) of the IAA.

Whilst the above shall only apply to parties to the arbitration, Section 29 of the IAA further provides that the arbitral tribunal can request the Supreme Court to provide assistance through the issue of relevant summons to non-parties to give evidence or produce documents or other material, or to order any witness to submit to examination on oath before the arbitral tribunal or before an officer of the court or any person for the use of the arbitral tribunal.

9. Confidentiality

9.1 Extent of Confidentiality

A strict application of the IAA does not render an arbitration confidential, but the parties can (and typically do) agree to the confidentiality of arbitration proceedings and their constituent parts either by express agreement or in the rules they have chosen to govern the arbitration.

Section 42(1B)(a) of the IAA provides that, upon application by a party, international arbitration-related cases before the Supreme Court can be heard in private where:

- all the parties agree; or
- the court considers that publicity would prejudice the interests of justice, taking into account the specific features of international arbitration, including any expectation of confidentiality that the parties may have had when concluding their arbitration agreement, or any need to protect confidential information.

Only the announcement of the court's decision would then be public.

Section 42(1C) of the IAA further provides that the Supreme Court can prohibit the publication of all information relating to the court proceedings, upon the application of one or all of the parties and where the interests of justice so require.

In addition, Rule 12 of the 2013 Rules provides that any judgment of the Supreme Court can be edited before being published and that any evidence, court records and documents must be kept in the manner in which the Supreme Court directs.

10. The Award

10.1 Legal Requirements

Sections 34(1) and 34(2) of the IAA provide that, unless otherwise agreed by the parties, the arbitral tribunal can make more than one award at different points in time in the arbitration proceedings on a specific issue or on claims or counterclaims submitted to it for decision. The key legal requirements of an award include the following (Section 36 of the IAA):

- it must be in writing and signed by the arbitrator or more than one arbitrator, or by the majority of arbitrators or the presiding arbitrator, provided that the reason for omitting any signature is stated;
- it must state reasons on which it is based, unless the parties have agreed otherwise;
- it shall state the date on which it was made and shall always be deemed to have been made at the juridical seat of the arbitration; and
- after an award is made, a signed copy must be delivered to each party.

10.2 Types of Remedies

Unless otherwise agreed by the parties, the arbitral tribunal:

- may make a declaration as to any matter to be determined in the proceedings;
- may order the payment of a sum of money in any currency;
- has the same powers as a court in Mauritius:
  - (a) to order a party to do or to refrain from doing anything;
  - (b) to order specific performance of a contract; and
  - (c) to order the rectification, setting aside or cancellation of a deed or other document; and

- may award simple or compound interest for such period and at such rate as it considers meets the justice of the case.

It is worth noting that enactments relating to limitation and prescription in Mauritius are not applicable to arbitration proceedings, even if the judicial seat is Mauritius. This is reinforced by Section 4B of the 2001 Act, which provides that, notwithstanding any other enactment, the limitation period under the laws of Mauritius is not applicable to the recognition and enforcement of an arbitration award under the New York Convention.

This was confirmed in the recent ruling of Pueblo Holdings Limited v Emirates Trading Agency LLC 2023 SCJ 223, in which the court held that the limitation period prescribed for default judgments under the Mauritian Civil Code of Procedure did not apply to arbitral awards under the IAA and the 2001 Act.

10.3 Recovering Interest and Legal Costs

The award of costs depends on either the arbitration agreement of the parties or the rules applicable to the arbitration. Under the IAA, costs include "the costs of the PCA in discharging its functions… the fees and expenses of the arbitral tribunal, the legal and other expenses of parties, and any other expenses related to the arbitration".

Section 33(2) of the IAA provides that, unless agreed otherwise by the parties, the cost of arbitration shall be fixed and allocated by the arbitral tribunal in an award, applying the following general principles:

- costs should follow the event, except where it appears to the tribunal that this rule should not apply or not apply fully; and
- the successful party should recover a "reasonable amount reflecting the actual costs of the arbitration and not only a nominal amount", and if the award does not allocate costs, "each party shall be responsible for their own costs and shall bear in equal share the costs" of the arbitration, fees and expenses of the arbitral tribunal and any other related expenses.

The conduct of the parties is one of the factors considered in awarding costs.

11. Review of an Award

11.1 Grounds for Appeal

Whilst there is no general right of appeal against an award under the IAA, the following applies:

- the First Schedule to the IAA provides for a right of appeal on any question of Mauritian law – parties can opt into the First Schedule, but its application is mandatory in arbitrations on the constitution of global business companies; and
- otherwise, Section 39 of the IAA provides an exclusive recourse on limited grounds for the setting aside of an award made in an arbitration seated in Mauritius.

Under Section 39(2) of the IAA, an arbitral award may be set aside by the Supreme Court only where:

- the party making the application furnishes proof that:
  (a) a party to the arbitration agreement was under some incapacity or the agreement

is not valid under the law to which the parties have subjected it or, failing any indication thereon, under Mauritius law;
(b) it was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;
(c) the award deals with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration; or
(d) 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 IAA; or

- the Court finds that:
  (a) the subject matter of the dispute is not capable of settlement by arbitration under Mauritius law;
  (b) the award is in conflict with the public policy of Mauritius;
  (c) the making of the award was induced or affected by fraud or corruption; or
  (d) a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award by which the rights of any party have been or will be substantially prejudiced.

An appeal against any final decision of three Designated Judges of the Supreme Court can only be made to the Judicial Committee of the Privy Council (Section 44 of the IAA).

Under Section 39(4) of the IAA, an application for setting aside may not be made more than three months after the date on which the party making that application has received the award or, if a request has been made under Section 38 (for correction or interpretation of an award or for an additional award), from the date on which that request has been disposed of by the arbitral tribunal.

When asked to set aside an award, the court may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside (Section 39(5) of the IAA), and may order that any money made payable by the award shall be brought into court or otherwise secured pending the determination of the application (Section 39(6) of the IAA).

It is for the parties to select which if any of the provisions of the First Schedule they wish to opt into. In order to avoid any controversy as to whether parties have opted into the Schedule or any specific provision thereof, the IAA requires that the parties expressly refer to the First Schedule of the IAA or to the specific provision in question in their agreement. As an exception, the provisions of the First Schedule apply mandatorily to arbitrations under the constitution of a Global Business Licence company.

The "opt in" options are:

- the determination of a preliminary point of Mauritius law by the court;
- appeals on questions of Mauritius law;
- the consolidation of arbitral proceedings; and
- joinder.

Leave to appeal shall not be granted by the court unless it considers that, having regard to all circumstances, the determination of the question

of Mauritius law concerned could substantially affect the rights of one or more parties (Paragraph 2(2), First Schedule of the IAA).

11.2 Excluding/Expanding the Scope of Appeal

The IAA does not expressly authorise parties to waive any rights of challenge to an award by agreement before the dispute arises. The procedure and grounds for setting aside an award are mandatory provisions of the law.

11.3 Standard of Judicial Review

Under Section 39 of the IAA (or an application for the recognition and enforcement of a foreign arbitral award under the 2001 Act), no review on the merits of the dispute is allowed before the courts, so that the arbitral award is truly final on the merits of the dispute, even if an arbitral tribunal may have committed errors of fact and/or errors of law. Where the First Schedule to the IAA applies, the court may overturn the arbitral tribunal's conclusions on a point of Mauritian law.

Therefore, except in relation to interim measures granted by the arbitral tribunal in the form of an award pursuant to Section 21 of the IAA, an award shall be final and binding on the arbitral tribunal with respect to the matters determined therein (Section 36(8) of the IAA).

12. Enforcement of an Award

12.1 New York Convention

Mauritius is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (without reservation), which has been given force of law in the Schedule to the 2001 Act. The New York Convention is applicable irrespective of reciprocity (Section 3A of the 2001 Act), allowing the enforcement of foreign arbitral awards rendered even in non-signatory states.

12.2 Enforcement Procedure

As well as foreign arbitral awards, the IAA provides that the 2001 Act (which contains the New York Convention) "shall" apply to the recognition and enforcement of awards rendered under the IAA – ie, awards made in international arbitrations whose juridical seat is Mauritius (Section 40 of the IAA).

Otherwise, applications for the recognition and enforcement of arbitral award applications are governed by Rule 15 of the 2013 Rules, as follows.

- An application is made by way of an arbitration claim and is initially made without notice to any respondent.
- Written evidence in support of the enforcement claim should include the documents as set out in Article IV of the New York Convention (the duly authenticated original award or a duly certified copy and the original or a duly certified copy of the agreement).
- The application should state the name and the usual or last known place of residence or business of the applicant or, if a body corporate, the registered address of the person against whom it wishes to enforce the award.
- The application should state whether the award has been complied with or the extent to which it has not been complied with.
- The application should include a draft order.
- The application is dealt with by the Chief Justice and, if the above requirements have been complied with, a provisional order is granted recognising the award and authorising the enforcement of the award in the same manner. The Chief Justice can specify the parties on which the order should be served.

- Within 14 days after receipt of the provisional order, the applicant has to cause the enforcement claim and provisional order to be served on the respondent or any such parties as ordered by the Chief Justice. It is worth noting that an application can also be made to extend the delay to allow service to be effected outside the jurisdiction (Rule 8 of the 2013 Rules).
- The respondent may apply to set aside the provisional order and enforcement claim within 14 days of receipt or within such period as specified by the order if it has been served outside the jurisdiction. The grounds on which the respondent can rely to set aside the provisional order are limited to those contained in Article V of the New York Convention.
- The award only becomes enforceable once the period given to the respondent to set aside the provisional order has lapsed or, if the respondent has made an application to set aside the provisional order, when the respondent's application has been finally dealt with.

If an award has been set aside by the court in the seat of the arbitration, the Supreme Court still has discretion to enforce it in Mauritius. Article V(1)(e) of the New York Convention provides that the court may refuse recognition and enforcement if the respondent furnishes proof that the award:

- has not yet become binding; or
- has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

When an award is subject to ongoing set aside proceedings, the court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to furnish suitable security (Article VI of the New York Convention).

There is currently no specific law on state immunity at the enforcement stage or under the IAA. This question therefore remains subject to customary international law.

12.3 Approach of the Courts

On the whole, the Mauritian courts have taken a pro-enforcement stance in the recognition and enforcement of arbitral awards. The courts would refuse to engage anew in the merits of an award unless the arbitration was seated in Mauritius and the parties had expressly agreed to the Supreme Court of Mauritius having the power to hear appeals on Mauritian law.

If the international arbitration is seated in Mauritius, the Supreme Court of Mauritius has the power to set aside the award under Section 39 of the IAA, based on grounds similar to those found in Article V of the New York Convention. If the international arbitration is seated outside Mauritius, the Supreme Court of Mauritius may refuse recognition and enforcement under Article V of the New York Convention. Some illustrations on the approach taken are set out below.

Public Policy

Betamax Ltd v State Trading Corporation 2021 UKPC 14

This case concerned an application to set aside an award on the ground that the arbitration agreement was void and the award contravened public policy. The Supreme Court held that an award which gave effect to an illegal contract was contrary to public policy and should be set aside. The Privy Council overturned this decision and held that the Court was debarred from

determining the legality of the contract under which the dispute arose when the arbitral tribunal had addressed the issue of the illegality of the underlying contract. The award was therefore final and binding. Furthermore, the Supreme Court of Mauritius, whose judgment had been overturned, had previously confirmed that the public policy to be looked at was international public policy rather than the domestic public policy of Mauritius.

Unable to Present its Case

Essar Steel Limited v ArcelorMittal USA LLC 2021 SCJ 248

Essar Steel Minnesota Limited (ESML) and ArcelorMittal USA LLC (AMUSA) entered into a contract for the supply of iron pellets, which was then amended to include a holding company, Essar Steel Limited (ESL), as party. Following a dispute, AMUSA terminated the contract and ESML entered into bankruptcy proceedings. Pursuant to an arbitration clause, AMUSA referred its dispute to arbitration and, although ESL had filed an answer and counterclaim, it did not participate in the evidential hearings. When an award was delivered in favour of AMUSA and a provisional order was granted to recognise and enforce the award, ESL sought to set aside the award on the ground that it had been unable to present its case as, inter alia, it had no access to ESML's documents. The court was not persuaded and held that ESL had a substantial burden to show that there was "serious, grave denial of procedural fairness" and that a respondent has forfeited its opportunity if it has been notified and refused to participate.

Breach of Natural Justice and Public Policy

Peepul Capital Fund II LLC And Anor v Vsoft Holdings LLC 2018 PRV 84

Vsoft Holdings LLC appealed against the Supreme Court's decision to set aside its application under Section 39 of the IAA to set an award aside on grounds that it was in breach of natural justice (Section 39(2)(b((iv) of the IAA) and public policy (Section 39(2)(b)(ii) of the IAA). Vsoft sought to argue that its counsel had not abandoned its case. However, the agreed transcript of the arbitral proceedings, placed before both the Supreme Court and the Privy Council, confirmed that there was no breach of natural justice as:

- the counsel had been afforded an adjournment to seek proper instructions;
- it was clear that Vsoft had abandoned its case and conceded the claimants' claims; and
- the arbitrator was right to only determine the quantum.

Furthermore, Vsoft's case was that the award was in contravention of public policy as it afforded the successful party (the investors) a form of double recovery as the award did not contain a provision that they could not continue to enjoy the benefit of being equity shareholders once they were paid. The Privy Council found that this was a "hopeless submission", that the arbitrator had no obligation to include such condition and that, in any event, Vsoft had not taken any administrative steps to remove the investors from the share register.

Breach of Natural Justice as the Wrong Arbitral Rules Had Been Applied

Flashbird Ltd v Compagnie de Sécurité Privée et Industrielle SARL (Respondent) (Mauritius) [2021] UKPC 32

This was an appeal against the Supreme Court's decision to dismiss an application to set aside an arbitral award on the ground that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement

of the parties. Under the arbitration clause, the following applied:

- the applicable law was that of the Mauritius Chamber of Commerce and Industry and the Mediation Centre (MARC);
- the applicable rules were the Rules of Arbitration of the International Court of the International Chambers of Commerce (the ICC Rules); and
- the arbitrators were to be appointed in accordance with the ICC Rules.

The issue to be determined was whether the MARC or the ICC had jurisdiction to arbitrate the dispute. Flashbird contended that the arbitration clause was a "hybrid arbitration" that allowed the arbitrator to follow the ICC Rules and not the MARC Rules, which was agreed by the parties. The Privy Council held that, for an award to be set aside on this ground, the applicant must show "a material breach of the arbitration agreement that was not an inconsequential irregularity". It was held that Flashbird suffered no substantial prejudice of the alleged breach of the ICC Rules and that, in any event, minor and technical errors will not necessarily lead to an award being set aside.

13. Miscellaneous

13.1 Class Action or Group Arbitration

There is no procedure in Mauritius that provides for class action arbitration or group arbitration. However, different persons may jointly enter a case based on a common cause of action. Alternatively, those parties may enter separate cases and retain their respective attorneys and counsel to appear for them. When the respective cases are in shape for hearing, the court may allow them to be consolidated and heard together, in accordance with paragraph 3 of the First Schedule to the IAA.

13.2 Ethical Codes

There are no specific codes of ethics and/or codes of conduct applicable to arbitrators, but the respective Mauritian Codes of Ethics for Barristers and Attorneys at Law are applicable.

13.3 Third-Party Funding

Mauritian laws on arbitration do not provide for any rules or restrictions on third-party funders. To the extent that there is no legislation prohibiting third-party funding, it may be considered to be permitted in Mauritius.

Although not commonly used in Mauritius, third-party funding is increasingly being considered, especially by parties to complex arbitration matters and enforcement proceedings before the Supreme Court of Mauritius where the value of the claim involved is significant. In those cases, litigants have recourse to funders established internationally. To date, however, there is no public information available on cases in which parties have resorted to third-party litigation funding.

In OGD Services Holdings Ltd v Norscot Rig Management Pvt Limited (Mauritius) 2023 SCJ 455, the Supreme Court held that a costs award in an English-seated arbitration allowing the successful party to recover third-party litigation costs did not contravene Mauritian public policy.

13.4 Consolidation

An arbitral tribunal seated in Mauritius and a court can consolidate separate arbitral proceedings if all parties agree. Under the IAA, parties can expressly opt for the Supplementary Provisions set out in Schedule 1 of the IAA to be applied to their arbitration. If they have done so,

paragraph 3 of the Supplementary Provisions allows an arbitral tribunal to consolidate separate arbitral proceedings upon the application of at least one party.

The arbitral tribunal will do so on such terms as it thinks just, and can also order that one of those arbitral proceedings be stayed (paragraph 3(1) of the Supplementary Provisions of the IAA).

If the arbitral tribunal refuses or fails to make such order, the Supreme Court may make such order in lieu of the arbitral tribunal, upon the application of a party to any of the proceedings.

13.5 Binding of Third Parties

A third party, whether domestic or foreign, will not be bound by an arbitration agreement or award if it was not or did not become a party to it.

Trends and Developments

Contributed by:
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Steven and Associates is a globally oriented law firm in Mauritius, offering counsel and guidance on Mauritius law as well as international law concerning cross-border insolvency, international arbitration, dispute resolution, corporate and commercial law, legal opinions, general litigation in the Supreme Court of Mauritius, and Privy Council matters before the judicial committee of the Privy Council (UK). The firm's objective is to deliver precise, succinct and practical advice rooted in a profound understanding of the legal, regulatory and commercial landscape in Mauritius. Steven and Associates has gained recognition for its exceptional business acumen and unwavering commitment to its clientele. The team excels at assisting clients in devising innovative strategies while remaining adaptable to change. Steven and Associates boasts a unique offshore legal approach, enabling the firm to assemble elite legal teams from across the world. This international model provides the clarity needed to comprehend the challenges encountered by clients in both their local and global contexts.

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Introduction

The landscape of international arbitration in Mauritius is witnessing a notable expansion, marked by a significant rise in disputes governed by the International Arbitration Act 2008. The adjudication of these disputes by the Supreme Court of Mauritius has notably contributed to enhancing clarity and transparency within the realm of international arbitration in the Mauritian jurisdiction.

Evidencing a broader trend of escalating disputes resolved through arbitration on a global scale, these developments underscore a favourable momentum towards an increasingly pro-enforcement posture. The recent series of judgments delivered by the Supreme Court of Mauritius not only signifies a growing caseload but also underscores the judiciary's commitment to upholding and enforcing arbitration agreements in line with internationally recognised principles.

This trend not only reflects Mauritius' commitment to providing a robust framework for resolving international disputes but also reinforces the jurisdiction's attractiveness as a forum for parties seeking efficient and effective resolution mechanisms. The consistent pro-enforcement stance adopted by the Mauritian courts serves to enhance confidence in the arbitral process and promotes certainty and predictability for parties engaged in cross-border transactions.

In conclusion, the rising prominence of international arbitration under the auspices of the International Arbitration Act 2008 in Mauritius, coupled with the judicious approach taken by the Supreme Court, underscores a growing trend towards fostering an environment conducive to dispute resolution through arbitration. This evolution not only positions Mauritius as an attractive hub for resolving international disputes but also underscores its commitment to upholding best practices and promoting fairness and equity within its legal framework.

Detailed Judgment Summary of OGD Services Holdings Ltd v Norscot Rig Management Pvt Limited (Mauritius) (2023 SCJ 455)

In a landmark decision rendered on 06 November 2023, the Supreme Court of Mauritius reaffirmed the fundamental principles governing the enforcement of arbitration awards under the

Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention") and the robust International Arbitration Act (IAA) of 2008. In a resounding victory for the award creditor, the court underscored that the enforcement process is governed by a distinct and autonomous procedural framework, untethered by the conventional procedural rules that govern civil matters. Notably, the court emphasised that enforcement claims need not adhere to the procedural strictures imposed by statutes such as the Deposit of Powers of Attorney Act. This seminal judgment not only upholds the sanctity of arbitration awards but also underscores the primacy of the enforcement regime in safeguarding the rights of award creditors.

Background

The application was made under Article V of the New York Convention, which is enforced in Mauritius under Section 3 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act and Section 39 of the IAA.

A dispute arose between OGD (the applicant) and Norscot (the respondent), leading to arbitration in London, England. The sole arbitrator – Rt Hon Sir Phillip Otton, a former Lord Justice of the English Court of Appeal – awarded in favour of Norscot, including the costs of litigation funding. OGD acknowledged the award and made the payment but contested the decision to award litigation funding costs.

Amended motion paper

The orders sought by the OGD are:

- declaration that the arbitrator erred in ruling he had jurisdiction to award litigation funding costs;
- setting aside of the costs award made by the arbitrator;
- setting aside of the provisional order granting recognition and enforcement of the final award; and
- any other order the court deems fit.

Preliminary issues raised by OGD

OGD raised the following preliminary issues.

- Power of attorney issue – OGD argued that the power of attorney was not properly deposited, making the application void ab initio.
- Forum shopping and litispendence – OGD raised concerns about potential overpayment due to enforcement in multiple jurisdictions.
- Exceeding jurisdiction – OGD questioned whether the arbitrator exceeded his jurisdiction in awarding litigation funding costs.
- Complete costs – OGD questioned whether "other costs" could include the full litigation funding costs.
- Public order in Mauritius – OGD argued that the enforcement of the award would breach Mauritian public order principles.

Court's analysis

Power of attorney issue

Article IV of the New York Convention specifies the documents required for recognition and enforcement, which were verified by the Chief Justice. The documents required were:

- the duly authenticated original award or a duly certified copy; and
- the original arbitration agreement or a duly certified copy.

If the documents are not in an official language of the country, a certified translation is required.

The court found that compliance with the Deposit of Powers of Attorney Act was not required for

the enforcement claim. Rule 15 and Article IV set out the necessary documents, which were sufficient for the Chief Justice to issue the provisional order.

As regards legal precedents, the court referenced previous judgments (eg, Digame Investment Company Limited & Ors v Apex Fund and Corporate Services (Mauritius) Ltd) to affirm that an attorney does not require a special mandate to initiate proceedings.

Forum shopping and litispendence

The court referenced legal texts (eg, Gary B Born, Emmanuel Gaillard) supporting the legitimacy of seeking enforcement in multiple jurisdictions to locate assets. It was noted that parallel enforcement does not constitute true lis pendens, as it seeks relief against different assets.

Exceeding jurisdiction and complete costs

The arbitration and costs were governed by English law. The arbitrator's decision to award litigation funding costs was within his discretion and was upheld by the English courts. The court found these issues meritless as they had been previously adjudicated.

Public order in Mauritius

OGD failed to precisely state which public policy was contravened. The court emphasised that the applicable law was English law and that the issue of public policy should concern the award itself, not the costs. The court referenced the judgment in Betamax Ltd v State Trading Corporation (Mauritius) to underline the limited scope of public policy considerations in setting aside international arbitration awards.

Substantive application consideration

Section 39 of the IAA was not applicable as the juridical seat of arbitration was not in Mauritius. The application did not fall within the scope of Section 39(2)(a)(i)–(iv) or Section 39(2)(b)(i)–(iv) of the IAA.

Article V of the New York Convention does not allow for declaratory orders or setting aside awards as requested by OGD. Article V states that "recognition and enforcement of the award may be refused", not that the award can be declared erroneous or set aside.

Conclusion

In terms of the provisional order, the court found the arbitrator's decision on litigation costs was not a jurisdictional determination but an exercise of discretion, upheld by the English High Court. OGD's arguments regarding public policy were found to be without substance. The application was set aside with costs.

Mauritius Courts' Support for International Arbitration

Legal framework

Mauritius has adopted the New York Convention and the IAA, providing a robust legal framework for the enforcement of both domestic and international arbitral awards.

The Supreme Court (International Arbitration Claims) Rules 2013 rules provide specific procedural guidelines for the recognition and enforcement of international arbitration awards in Mauritius.

Case law supporting enforcement

Digame Investment Company Limited & Ors v Apex Fund and Corporate Services (Mauritius) Ltd (2023 SCJ 273) affirmed that an attorney does not require a special mandate to initiate proceedings, supporting the procedural aspects of enforcement.

Cruz City 1 Mauritius Holdings v Unitech Limited (2014 SCJ 100) emphasised that the jurisdictional objections verified by the supervisory court of the seat of arbitration should not be re-verified unless exceptional circumstances are present.

Betamax Ltd v State Trading Corporation (Mauritius) (2021 UKPC 14) clarified the limited scope of public policy considerations in setting aside international arbitration awards, reinforcing the finality and enforceability of arbitral decisions.

Support for international arbitration

The Supreme Court's analysis and decisions in OGD v Norscot reaffirm Mauritius' commitment to upholding the enforceability of international arbitration awards. The court consistently applied international principles and respected the decisions of supervisory courts from other jurisdictions.

The Supreme Court maintained a narrow interpretation of public policy exceptions and jurisdictional challenges, aligning with international arbitration standards and promoting a pro-enforcement stance.

Conclusion

The OGD v Norscot judgment demonstrates Mauritius' strong support for international arbitration and its alignment with global standards. The Supreme Court's decisions reflect a commitment to ensuring that arbitral awards are recognised and enforced, thus fostering a favourable environment for international arbitration in Mauritius.

MEXICO

Law and Practice

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Galicia Abogados, S.C. has one of the most complete and outstanding dispute resolution teams in Mexico. The firm's arbitration and commercial litigation practice specialises in handling complex domestic and international disputes by uniting renowned experts in arbitration and civil and commercial litigation to work in synergy with top-tier practice areas within the firm. The firm's arbitration practice handles arbitrations related to contractual, shareholders', infrastructure, construction and energy disputes, among many others. The team also has considerable experience in handling arbitrations against Mexican government entities – specifically, state-owned enterprises from the energy sector. The firm's arbitration practice also assists international foreign investors with an extensive analysis of the applicable bilateral investment treaties and free trade agreements, providing strategies to protect and defend their investments in the most comprehensive way possible.

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1. General

1.1 Prevalence of Arbitration

Following the amendment to the Mexican Commercial Code (*Código de Comercio*) in 1993 and the adoption and implementation of the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law"), Mexico has seen a steady increase in the use of international commercial arbitration.

These changes have been paired with case law from federal courts and the Supreme Court, all of which have sought to strengthen pro-arbitration principles and implement clear guidelines on their use. As a result, Mexico is well on its way to becoming a prominent arbitration seat in Latin America and throughout the world. The statistics from the most relevant arbitral institutions confirm the increase in the use of commercial arbitration by Mexican parties and counsel.

Another reason for the steady increase in commercial arbitration in Mexico during the past decade is the arrival of sophisticated foreign companies and investors, who have opted to include arbitration clauses in their commercial contracts. Moreover, state-owned companies include arbitration clauses in most of their contracts – especially in the energy sector (electricity, oil and gas).

The rise of arbitration as a dispute settlement mechanism in many Mexican commercial contracts is evidenced by the fact that in 2020 Mexico was ranked tenth in the ICC's most-represented nationalities, accounting for 3.11% of total worldwide arbitration.

In Latin America, Mexico is the second most frequently selected seat for arbitration. The ICC and the International Centre for Dispute Resolution (ICDR) remain the preferred international institutions, but the LCIA has increased its Mexican caseload in the past few years. This has been mainly motivated by the inclusion of LCIA clauses in contracts belonging to Mexico's Federal Electricity Commission (*Comisión Federal de Electricidad* or CFE) and the state-owned petroleum company PEMEX.

1.2 Key Industries

It is common practice in Mexico for government agencies and government enterprises, especially in the energy, infrastructure and construction sectors, to include arbitration clauses in their contracts with private companies. In this context, the change in administration in 2018 – and the ensuing administrative restructure – has led to a growing number of domestic and international arbitrations involving construction, infrastructure and energy, as well as contractual disputes between state-owned companies and private parties.

Additionally, owing to the economic situation faced by many companies as a result of the COVID-19 pandemic, several infrastructure projects that experienced delays and M&A deals have faced certain difficulties both pre- or post-closing – some of which are being decided in arbitration.

Mexico recently introduced significant changes to its mining laws and related regulations, which could give rise to potential disputes. Additionally, public policy decisions affecting the energy sector have given rise to disputes between state-owned entities and investors, both in the investment protection regime and the commercial arbitration realm.

1.3 Arbitration Institutions

The most common arbitral institutions used in Mexico can be grouped into domestic institutions and international institutions.

Regarding international institutions, the most common are the ICC, the ICDR and the LCIA. The ICSID is the institution used to resolve investor–state disputes. The German Arbitration Institute (DIS) and some South American institutions have recently administered certain disputes involving Mexican parties. Efforts have also been made to increase the presence and use of arbitration administered by institutions headquartered in Asia.

Regarding domestic institutions, the ones most commonly used are CANACO (*Cámara de Comercio de la Ciudad de México*).and the Arbitration Centre of Mexico (*Centro de Arbitraje de Mexico* or CAM).

1.4 National Courts

There are no specialised courts designated exclusively for disputes related to international and/or domestic arbitrations. Federal and local courts specialising in commercial law are the competent tribunals to hear disputes related to domestic and international arbitrations.

2. Governing Legislation

2.1 Governing Law

The Mexican lex arbitri is a special chapter entitled "Commercial Arbitration" within the "Commercial Proceedings" section of the Mexican Commercial Code.

In 1993, Mexico adopted the UNCITRAL Model Law almost in its entirety. The original 1985 version was then amended in 2006, but such amendments have not been incorporated into the Mexican Commercial Code.

The most relevant reform to the Mexican lex arbitri took place on 27 January 2011. Article 1460 of the Mexican Commercial Code was derogated, Article 1463 was reformed, and Chapter 10 (on "Judicial Intervention in Arbitration") was included. These amendments were intended to adapt Mexican judicial procedure to those limited situations where judicial co-operation or assistance is needed to aid the arbitration process.

The Mexican Commercial Code is applicable to domestic arbitrations and international arbitrations when the seat of arbitration is Mexico (Article 1415). Accordingly, Mexico has a single arbitration statute, unlike other countries that have independent regulations to govern international and domestic arbitration. Civil arbitrations (between private, non-merchant, parties) are currently regulated by the civil procedure codes of the 32 states but will soon be regulated by the National Civil and Family Procedural Code which will gradually enter into force (state by state) in the upcoming years.

Aside from the statutory regulation of arbitration in Mexico via the Mexican Commercial Code, it is important to consider how courts have interpreted and applied such regulation in practice. For purposes of clarity, it is necessary to take a broad look at how the system of judicial precedent works in Mexico.

By mandate of Article 94 of the Mexican Constitution, Articles 215–230 of the Amparo Law (*Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos*) regulate those cases in which a judicial decision by a federal court will

either bind or guide lower courts. To understand this, a distinction must be made between two concepts.

Tesis

When a relevant decision is issued by the Supreme Court or a federal circuit court, an abstract of the decision will be drafted. This is known as a *Tesis*, and shall include:

- the title identifying the subject matter;
- the reference to the legal provision that is being applied or interpreted by the court, if any;
- the key legal considerations and interpretations of the court; and
- the identification data of the case, the number of *Tesis*, the court that issued it and mention of the concurring or dissenting votes of the case.

Abstracts are sent for publication to the Federal Judicial Weekly (*Semanario Judicial de la Federación*). Tesis issued by the Supreme Court or a Federal Circuit Court are not binding for lower courts but are certainly used as authoritative guides.

Jurisprudencia

In Mexico, the term *jurisprudencia* refers to binding legal decisions. The Amparo Law provides for a series of mechanisms by which a precedent can become binding for lower courts. The following are the most frequently occurring mechanisms by which a precedent becomes binding.

- A binding precedent is created when the Supreme Court issues a judgment with favourable votes from a certain number of justices.
- A binding precedent can be created when five consecutive *Tesis* decide a legal question in the same way. This is known as "precedent by repetition".
- Binding case law can also be created when two *Tesis* have decided the same legal matter in a contradictory way and the competent authority decides which decision shall prevail. This is known as "precedent by contradiction".

Throughout this article, several *Tesis* and *Jurisprudencias* are referred to in which Mexican courts have either interpreted the scope of application of a provision from the Mexican lex arbitri or provided guidance as to Mexican arbitration practice.

2.2 Changes to National Law

On 26 January 2024, Mexico published the General Law on Alternative Dispute Resolution Mechanisms. The intent behind ADR mechanisms is to provide viable options for applicants to resolve their disputes without resorting to state court proceedings, thereby guaranteeing the right to effective justice.

Although the Law includes a definition of the term "Arbitration", the provisions that refer to this mechanism seem to exclude it from the Law's scope of application, acknowledging that its regulation falls under the Commercial Code. Therefore, despite the enactment of the new Law, commercial arbitration appears to remain unaffected by this change. However, the last sentence of Article 115 raises questions, as it prohibits arbitration "in administrative justice", despite many administrative laws providing for this mechanism as a means of conflict resolution. It will be necessary to await the interpretation that Mexican courts give to this provision.

3. The Arbitration Agreement

3.1 Enforceability

Under Mexican law, an arbitration agreement is defined as an agreement by which the parties decide to submit to arbitration all or certain disputes that have arisen or that may arise between them out of a defined legal relationship, whether contractual or not. An arbitration agreement may take the form of an arbitration clause included in a contract or a separate agreement.

An arbitration agreement must be in writing and recorded either in a document signed by the parties or in an exchange of letters, telexes, telegrams, facsimiles or other means of electronic communication that leave a record of the agreement. An arbitration agreement may also arise from an exchange of statements of claim and defence in which one party alleges the existence of an agreement and this is not denied by the other party, or it can be incorporated by reference.

3.2 Arbitrability

Mexican courts have determined that only disputes relating to rights that parties can freely dispose of can be arbitrable (*Tesis* 162088). As such, matters related to family (with some limited exceptions) and criminal law are understood to be under the exclusive jurisdiction of the state.

Additionally, certain explicit limitations regarding which matters can be referred to arbitration are found in different Mexican laws (lex fori).

Under Article 568 of the Federal Code of Civil Procedure, which has a limited scope of application, matters that cannot be referred to arbitration include those relating to:

- resources of the exclusive economic zone;
- any of the sovereign rights over the exclusive economic zone;
- acts of authority of the state and of state and federal departments;
- the internal regime of the state and of state and federal departments;
- the internal regime of the embassies and consulates of Mexico abroad and their official acts; and
- any other matter that is provided for in other laws.

According to the Hydrocarbons Law, a dispute about the validity of an administrative rescission cannot be submitted to arbitration. As such, both the Law on Public Works and Related Services and the Law on Procurement, Leasing and Services in the Public Sector state that the validity of an administrative rescission and the early termination of contracts cannot be subject to arbitration. The effects and reach of these limitations are extensively discussed in Mexico.

Also, the Law of Public-Private Partnerships provides that the revocation of concessions and authorisations – as well as acts of authority – may not generally be referred to arbitration. Under such law, the resolution of disputes concerning the legal validity of any administrative act may only be settled by federal courts.

3.3 National Courts' Approach

The determination of which law applies to the arbitration agreement stems from a conflict of laws rule that establishes both the applicability of the party's common intent and the law of the seat. As such, in the absence of the parties' consent to a specific law, Articles 1457 (I) (a) and 1462 (I) (a) of the Mexican Commercial Code provide a default rule that favours the law of the seat.

As is the case with arbitration around the world, parties sometimes try to sidestep their arbitral agreements and start litigation before state courts. In Mexico, the enforcement of arbitral agreements by the courts or the referral of the dispute to arbitration is not an ex officio decision. This means that one of the parties must request such referral in the corresponding proceeding. Failing to do so is considered a waiver of the right to enforce the arbitration agreement and an expression of consent for the dispute to be resolved by a judicial court (a sort of forum prorogatum).

Originally, the Commercial Code ordered that the party wishing to enforce the agreement must do so no later than when it answered the complaint. However, the Third Federal Circuit Court for Civil Matters in the First Circuit issued a non-binding precedent in which it stated that the enforcement of the arbitral agreement and the referral of the parties to arbitration could be requested at any stage of the proceedings up until the final ruling (*Tesis* 2021586).

According to the Commercial Code and the corresponding court interpretations, the execution of an arbitral agreement can only be denied if – by means of a prior or final judicial ruling or arbitral award – the arbitration agreement has been declared null and void, inoperative or incapable of being performed (*Tesis* 2021255).

Recently, the Sixteenth Collegiate Tribunal of the First Circuit decided a case involving the annulment proceeding of an arbitration award between a private company and a state-owned entity. In the annulment proceeding, the Claimant (a private entity) tried to argue that the arbitration agreement was invalid. However, the Court ruled that if said party had initiated the proceedings under the arbitration agreement, it could not later argue its invalidity in an annulment proceeding (*Amparo en Revisión* 418/2022).

3.4 Validity

Under the Commercial Code, an arbitration clause (arbitration agreement) that is contained within a contract is deemed to be an independent agreement. A decision by an arbitral tribunal declaring a contract invalid does not mean that the arbitration clause is invalid.

4. The Arbitral Tribunal

4.1 Limits on Selection

The Mexican Commercial Code does not provide any statutory limitation to the appointment of arbitrators. However, parties can agree on limitations to such appointment (ie, qualifications or expertise). Of course, members of arbitral tribunals must be independent and impartial.

The Mexican Commercial Code expressly provides that no person shall be precluded from acting as arbitrator because of their nationality, unless otherwise agreed by the parties (Article 1427 (1) Mexican Commercial Code).

4.2 Default Procedures

If the parties have not chosen a method for the selection of arbitrators, the following shall apply (Articles 1426–1427 Mexican Commercial Code).

- Where the parties have not agreed upon the number of arbitrators, the default rule will be the appointment of a sole arbitrator.
- In an arbitration with a sole arbitrator, they shall be appointed by a judge at the request of either party if they cannot agree on the appointment of the arbitrator.
- In an arbitration with three arbitrators, each party shall appoint one arbitrator, and these

two appointed arbitrators shall appoint the third. If a party fails to appoint an arbitrator within 30 days of receiving a request from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made by the judge at the request of either party.

Conversely, either party may request a judge to take the necessary measures in cases where:

- an appointment procedure is agreed upon by the parties and one of the parties does not act in accordance with the provisions of that procedure;
- the parties or two co-arbitrators cannot reach an agreement under the agreed appointment procedure; and/or
- a third party (including an institution) fails to perform any function entrusted to it in such procedure.

The aforementioned is only possible as a default mechanism if the agreed appointment procedure does not provide special rules for the specific circumstance.

There is no specific default procedure under Mexican law for multiparty arbitrations.

4.3 Court Intervention

According to the Commercial Code, courts can intervene in the selection of arbitrators, as well as in the challenges made against them. Regarding the selection of arbitrators, Article 1427 of the Commercial Code distinguishes between cases with a sole arbitrator and cases with three arbitrators (see **4.2 Default Procedures**).

4.4 Challenge and Removal of Arbitrators

Arbitrators' Obligation to Disclose

The Mexican Commercial Code mandates that an arbitrator must disclose, upon being notified of their potential appointment and throughout the arbitration, all circumstances that may give rise to justifiable doubts about their independence and impartiality (Article 1428 Mexican Commercial Code).

Grounds for Challenge and Removal of Arbitrators

An arbitrator may only be challenged and removed if doubts concerning their independence and impartiality are justified or if the arbitrator does not meet the requirements agreed by the parties (Article 1428 Mexican Commercial Code).

Challenge and Removal Proceedings

The Mexican Commercial Code provides that parties can agree upon the procedure for challenge and removal of arbitrators. However, if the parties did not expressly agree on such procedure, the Mexican Commercial Code provides the following default rules (Article 1429 Mexican Commercial Code).

- A party that wants to challenge an arbitrator shall send the arbitral tribunal a written submission stating the grounds for challenge within 15 days after becoming aware of:
  (a) the constitution of the arbitral tribunal; or
  (b) circumstances that give rise to questions concerning an arbitrator's impartiality, independence or lack of qualifications.
- If the challenged arbitrator does not withdraw from their appointment and the non-challenging party does not agree to the challenge, then the arbitral tribunal shall decide the challenge.

- If the challenge procedure is not successful before the arbitral tribunal, the challenging party may file a request to a Mexican court within 30 days of receiving notice of the decision rejecting the challenge. The court's decision may not then be appealed.
- During such court proceedings, the arbitral tribunal may continue the arbitral proceedings and issue an award; the court proceedings do not suspend the arbitral proceedings.

4.5 Arbitrator Requirements

In arbitrations governed by the Mexican lex arbitri, an arbitrator must be independent and impartial, both when appointed and throughout the entire arbitration (Article 1428 Mexican Commercial Code).

The Mexican Commercial Code does not provide a definition of what should be understood as impartiality and independence. However, in certain commentaries it is found that:

- "independence" refers to the ties that an arbitrator may or may not have to the parties, their representatives, and the subject matter of the dispute; and
- "impartiality" refers to the arbitrator's capacity to make objective and autonomous decisions.

The Mexican Commercial Code does not provide for further arbitrator requirements, but the parties may agree upon additional requirements in their arbitration agreement.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

See **3.2 Arbitrability**.

5.2 Challenges to Jurisdiction

The Mexican Commercial Code explicitly recognises the principle of competence-competence in Article 1432. This principle has also been recognised by several judicial decisions (*Tesis* 162932 and 176581).

The article also establishes the following timeframes in which the parties may challenge the arbitral tribunal's jurisdiction or raise a plea that the arbitral tribunal is exceeding the scope of its authority during the arbitration.

- A jurisdictional challenge shall be raised no later than the submission of the response to the request for arbitration. A party is not precluded from raising such challenge because it has appointed or participated in the appointment of an arbitrator.
- A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceeding.

The Mexican Commercial Code indicates that the arbitral tribunal may admit challenges at a later stage if it considers the delay to be justified.

The Mexican Commercial Code also provides for the possibility of the jurisdictional challenge being resolved either during preliminary questions or in an award on the merits.

The above-mentioned are default rules, which are superseded by the institutional arbitration rules chosen by the parties.

5.3 Circumstances for Court Intervention

The Mexican Commercial Code establishes four circumstances in which Mexican courts may rule on the jurisdiction of an arbitral tribunal.

- If a court receives a claim that has been submitted to arbitration, the general rule is that it shall refer the parties to arbitration at the request of either party. However, a court may not refer the parties to arbitration if it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The initiation of such court proceedings does not preclude the parties from starting an arbitration or continuing existing arbitral proceedings until an award is rendered (Article 1424 Mexican Commercial Code).
- If the arbitral tribunal issues an interim award upholding its jurisdiction within 30 days of receiving notice of such award, a party may request a Mexican court to rule on such decision. Throughout the duration of these court proceedings, the arbitral tribunal may continue the arbitration and render an award. The judgment of the Mexican court on this matter shall not be subject to appeal (Article 1432 Mexican Commercial Code).
- In domestic or international arbitrations seated in Mexico, setting-aside proceedings may be filed by a party within 30 days of receiving notice of the award (Article 1458 Mexican Commercial Code). An award may be set aside by a Mexican court pursuant to Section (a) if the arbitration agreement is invalid or pursuant to Section (c) if the award refers to disputes not included in the arbitration agreement (Article 1457 (I) Mexican Commercial Code).
- The recognition and enforcement of an award may be refused by a Mexican court pursuant to Section (a) if the arbitration agreement is invalid or pursuant to Section (c) if the award refers to disputes not included in the arbitration agreement (Article 1462 Mexican Commercial Code).

Even if there are several points at which a Mexican court may render a decision regarding the jurisdiction of the arbitral tribunal, Mexican federal courts have found that such determination has res judicata effects. Therefore, once a Mexican court has finally determined that an arbitral tribunal has jurisdiction, its decision on this issue cannot then be revisited (*Tesis* 162932).

5.4 Timing of Challenge

See **5.3 Circumstances for Court Intervention**.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The prospect of judicial review of arbitral jurisdiction has been addressed in previous sections (see **5.2 Challenges to Jurisdiction** and **5.3 Circumstances for Court Intervention**).

However, the standard of review has developed in a series of rulings. First, it has been established that courts have ex ante or ex post competence to review the tribunal's jurisdiction (*Tesis* 176472). Furthermore, the principle of res judicata has been confirmed regarding jurisdiction. The Fourth Federal Circuit Court for Civil Matters of the First Circuit affirmed that when a first court has intervened to review the jurisdiction of an arbitral tribunal through the specific procedure set out by the statutory provisions, a second court cannot then review jurisdiction de novo later (*Tesis* 162932).

5.6 Breach of Arbitration Agreement

As stated (see **5.3 Circumstances for Court Intervention** and **5.4 Timing of Challenge**), the Mexican Commercial Code has incorporated Article 8 of the UNCITRAL Model Law and Article II (3) of the New York Convention. In doing so, it mandates that the court shall refer the parties to arbitration at the request of either party if both parties consented to an arbitration agreement –

unless the arbitration agreement is considered null and void, inoperative or incapable of being performed (Article 1424 Mexican Commercial Code).

In the 2011 reform of the Mexican lex arbitri, several provisions further specified the procedure that must be followed when a court refers the parties to arbitration (Article 1464 of the Mexican Commercial Code).

- The motion to refer the parties to arbitration must be made by the requesting party in its first submission on the merits (ie, the answer to the claim).
- The judge shall ask both parties to submit their arguments regarding said motion.
- If the judge deems it appropriate, they will refer the parties to arbitration immediately and order a stay of the court proceedings. The parties may not appeal this decision, although other challenges may be filed.
- If the dispute is finally resolved in the arbitration, the judge will finalise the court proceedings at the request of either of the parties.
- If the dispute is not finally resolved in the arbitration (ie, the arbitral tribunal declines jurisdiction), after consulting all parties involved, the court may lift the suspension at the request of one of the parties and the proceedings may continue.

As per Article 1465 of the Mexican Commercial Code, a motion to refer the parties to arbitration may only be denied if:

- one of the parties provides evidence – in the form of a court judgment or arbitral award – that the arbitration agreement has been declared null and void in a final and binding decision;
- the submissions of the parties clearly demonstrate that the arbitration agreement is null and void, inoperative or incapable of being performed – however, the Mexican lex arbitri mandates that the judge use a "rigorous approach" when making this decision.

5.7 Jurisdiction Over Third Parties

As a general premise, arbitral tribunals only have jurisdiction over signatory parties to the arbitration agreement. Despite the ongoing debate based on recent decisions issued by foreign courts, Mexican courts have yet to reach a direct decision on this issue. Nevertheless, two judicial precedents will be closely analysed when deciding this matter.

First, in 2004 the Third Federal Circuit Court for Civil Matters of the First Circuit established that an arbitral tribunal or court could consider applying an arbitral agreement to third parties in cases of transferred rights and succession (Tesis 178813). The latter scenario opens the possibility that a person who inherits rights may also inherit the arbitral agreement related to those rights.

Second, in 2012 the Fourth Federal Circuit Court for Civil Matters of the First Circuit recognised the working premise of inter partes applicability. However, it acknowledged that there are complex commercial relations that require close analysis when it comes to applying arbitral agreements to third parties (*Amparo en Revisión* 273/2012). Nevertheless, a 2019 decision by the Third Federal Circuit Court for Civil Matters of the First Circuit reiterated the inter partes premise for applying arbitral agreements, albeit without directly disputing the previously mentioned precedents (Tesis 2021201).

Further, a decision issued in 2019 stated that when there is a series of contracts involving parties who did not agree to arbitration related to one of the parties who did, the arbitration award cannot be overturned in Mexican courts (Tesis 2021236).

The circumstances upon which a third party may be bound by an arbitration agreement must therefore be subject to a very specific legal and factual analysis, as well as a detailed review of the above-mentioned precedents.

6. Preliminary and Interim Relief

6.1 Types of Relief

Under the Mexican lex arbitri, parties may request interim measures from either the arbitral tribunal or an emergency arbitrator, or a Mexican court.

Arbitral Tribunals or Emergency Arbitrators

An arbitral tribunal or an emergency arbitrator may order interim measures in cases where the procedural rules chosen by the parties provide for this option.

An interim measure ordered by an arbitral tribunal or emergency arbitrator will be recognised as binding and enforced throughout Mexico by a Mexican court, if so requested – regardless of the state where it has been ordered (Article 1479 Mexican Commercial Code)

Per Article 1480 of the Mexican Commercial Code, recognition and enforcement of an interim measure ordered by an arbitral tribunal or emergency arbitrator can only be refused if the affected party proves that:

- one of the grounds to refuse the recognition and enforcement of awards provided in Article 1462 I (a) (b) (c) or (d) would be violated by enforcing the interim measure;
- the requesting party has not posted the guarantee ordered by the arbitral tribunal when it granted the interim measure; or
- the interim measure has been revoked or suspended by the arbitral tribunal or a competent court.

Mexican Courts

Recognition and enforcement of a requested interim measure can only be refused by a Mexican court if it is found that:

- the interim measure is incompatible with the court's powers; or
- one of the grounds to refuse the recognition and enforcement of awards provided in Article 1462 II would be violated by enforcing the interim measure.

When requested to recognise or enforce an interim measure ordered by an arbitral tribunal or emergency arbitrator, a Mexican court may not revise the content of the interim measure (Article 1480 Mexican Commercial Code).

A Mexican court can order an interim measure at the request of one of the parties before an arbitration is initiated or during the arbitral proceeding (Article 1425 of the Mexican Commercial Code). Mexican courts have full discretionary power when adopting interim measures in disputes subject to arbitration (Article 1478 Mexican Commercial Code).

6.2 Role of Courts

As stated in **6.1 Types of Relief**, Mexican courts have jurisdiction to issue interim measures before the constitution of the arbitral tribunal

and during the arbitral proceedings (Article 1425 Mexican Commercial Code).

However, there is no specific statutory provision that establishes the types of measures that may be adopted by a court in the context of an arbitration. Although Article 1425 of the Mexican Commercial Code provides courts with a wide discretionary power to adopt the interim measures they see fit, courts tend to base their jurisdiction on said article and refer to other articles of the lex fori such as Article 1168, which establishes the interim measures applicable in commercial proceedings.

Mexico's Commercial Code makes no distinction between provisional measures granted by arbitral tribunals and those granted by emergency arbitrators. Accordingly, the authors are not aware of any judgments issued deciding whether a Mexican court may intervene once an emergency arbitrator has been appointed.

Despite their right to issue certain immediate provisional measures, Mexican courts have interpreted that, upon receiving a request for interim measures from one party, the procedure to be followed shall include service of process or notice to the defendant – even if such notice is not given when the measures are initially granted (Tesis 2002829).

The process to obtain interim relief is effective since the court can issue certain immediate provisional measures, requesting the common elements for these requests worldwide. Additionally, for the granting of precautionary measures, Mexican courts commonly require the posting of bonds.

In practice, this procedure lasts between six and 18 months, including challenges to the judgment. As this is a long time for the issuance of provisional measures, some courts have granted "measures within the interim measures procedure", which protect the party seeking the measures while the procedure is ongoing.

The basis for the provision of interim measures in this case is found in Article 1425 of the Commerce Code, according to which, even if there is an arbitration agreement, prior to the arbitration proceedings or during their course, the parties may request the judge to adopt interim measures.

Under Article 1422 of the Commerce Code, jurisdiction primarily lies in the courts of the seat of the arbitration. However, if the arbitration occurs outside national territory, the Mexican courts may decide to accept jurisdiction on the respondent's domicile, or alternatively, on the location of the assets.

6.3 Security for Costs

The Mexican Commercial Code does not provide an express regulation of security for costs. However, parties to an arbitration can seek an interim measure for that purpose. Arbitral tribunals and courts must decide this issue as they would with other provisional measures (see **6.1 Types of Relief**).

7. Procedure

7.1 Governing Rules

Mexico's Commercial Code has adopted the UNCITRAL Model Law. Parties are therefore free to agree upon the rules that govern their arbitration and may reference institutional arbitration rules to do so. However, in case the parties fail to choose such rules, and instead pursue an ad hoc proceeding, the arbitral tribunal may con-

duct the arbitration however it deems appropriate (Article 1435 Mexican Commercial Code), according to default rules contained in Articles 1436–1443 of the Mexican Commercial Code, among others.

Furthermore, the Mexican Commercial Code does include a due process mandatory provision that ensures parties must be treated with equality and given an opportunity to present their case. The breach of such provision by an arbitral tribunal may be grounds to set aside (Article 1457 Mexican Commercial Code) or refuse the recognition and enforcement (Article 1462 Mexican Commercial Code) of an award before a Mexican court.

7.2 Procedural Steps

The Mexican Commercial Code does not require any specific mandatory procedural steps to be incorporated into arbitral proceedings. See **7.1 Governing Rules** for the default rules.

7.3 Powers and Duties of Arbitrators

Although the Mexican Commercial Code does not enumerate specific powers and duties of arbitrators, Article 1435 upholds the principle of party autonomy as a general premise in determining the rules and procedures to be followed.

In the absence of such agreement, the provision also establishes that arbitral tribunals can conduct the proceedings in accordance with the applicable rules of the Commercial Code and in the manner they deem appropriate (including the corresponding evidentiary determinations). Article 1435 also provides the possibility of ex aequo et bono decisions, but only if the parties agree upon it.

Mexico's Supreme Court established in 2003 that Article 1435 complies with constitutional standards, as it upholds the principles of due process and provides for the parties' equal procedural opportunities (*Amparo en Revisión* 759/2003).

Moreover, Article 1448 of the Mexican Commercial Code enshrines the arbitral tribunal's obligation to issue reasoned awards, unless otherwise stipulated by the parties. Additionally, the article requires arbitrators to render their awards in writing and for them to be signed (see **10.1 Legal Requirement** s).

7.4 Legal Representatives

There are no specific provisions concerning particular qualifications or requirements for legal representatives appearing in arbitration proceedings in Mexico. There are no publicly available cases or decisions in which foreign law firms or lawyers have been disqualified from participating in such proceedings.

8. Evidence

8.1 Collection and Submission of Evidence

According to Article 1445 of the Mexican Commercial Code (see **7.3 Powers and Duties of Arbitrators**), the arbitral tribunal is responsible for deciding evidentiary matters and has the power to rule on the admissibility, pertinence, collection, and submission of evidence. Taking of evidence commonly follows international practice, including the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration (the "IBA Rules of Evidence").

8.2 Rules of Evidence

Although rules of evidence are not binding upon arbitral tribunals, and parties are free to regulate

such matters, it is worth noting that arbitral proceedings in Mexico tend to be swayed by civil law traditions of procedure.

Mexican counsel and arbitrators tend to feel more comfortable adopting rules of evidence of the civil law tradition (including the mixed approach of the IBA Rules of Evidence). Moreover, most of the arbitral institutions' flexibility includes rules that allow not only the fusion of several traditions but their adaptation in the interest of efficiency to the specific circumstances of each case.

8.3 Powers of Compulsion

One of the few cases for court assistance in aid of arbitration pertains to evidentiary powers of compulsion. The Mexican Commercial Code incorporates a flexible provision with respect to this matter.

Article 1444 not only allows arbitral tribunals to request judicial assistance in the production of evidence and subpoenas, but the parties can also request it (with prior approval from the tribunal). Despite the latter, it is not a common practice to make use of powers of compulsion for international arbitrations seated in Mexico.

9. Confidentiality

9.1 Extent of Confidentiality

The Mexican Commercial Code does not expressly establish that arbitrations are confidential. In this respect, parties must either:

- expressly provide in their arbitration clauses that their arbitrations will be confidential; or
- choose a set of procedural rules that include such provision.

Most domestic arbitration rules establish such confidentiality, at least for the members of the arbitral tribunal and the administrative institution.

10. The Award

10.1 Legal Requirements

Under Mexican law, an arbitral award must comply with the following requirements unless the parties agree otherwise (including by agreeing to certain arbitration rules).

- It must be made in writing and signed by the arbitrator(s). In arbitrations with more than one arbitrator, the signatures of most of the members of the arbitral tribunal are sufficient, provided that the reasons for the omitted signatures are stated.
- It must state the reasons upon which it is based, unless the parties have agreed otherwise, or the award is won on agreed terms resulting from a settlement between the parties.
- It must state the date of the award and the seat of arbitration.
- After the award is rendered, the arbitral tribunal must deliver a signed copy of such award to the parties.

The Commercial Code does not provide for any time limits on delivery of the award.

10.2 Types of Remedies

There are no provisions establishing limits on the types of remedies that an arbitral tribunal may award. Thus, arbitral tribunals may grant any remedy available under Mexican law or the law applicable to the merits of the dispute. There are no publicly available judgments annulling an arbitral award on the basis that the remedy awarded violates Mexico's public policy.

10.3 Recovering Interest and Legal Costs

The parties to an arbitration may expressly agree upon the rules for determining legal costs and the arbitral tribunal's fees, or instead choose a set of procedural rules that regulate such matters (Article 1442 Mexican Commercial Code). In the absence of such agreement, the following default rules will apply when Mexico is the seat of arbitration.

Legal Costs

The arbitral tribunal shall fix the legal costs of the arbitration in the award (Article 1453 of the Mexican Commercial Code). If the arbitral tribunal issues a consent award or an order terminating the arbitration before rendering the award, the costs shall be fixed in such order or award (Article 1454 of the Mexican Commercial Code).

Generally, the costs of the arbitration shall be borne by the losing party. However, the arbitral tribunal may make a pro rata distribution of costs between the parties whenever it deems this reasonable based on the circumstances of the case (Article 1455 of the Mexican Commercial Code). It is common for arbitral tribunals seated in Mexico to decide this issue on a costs-follow-the-event approach.

Regarding costs related to the legal representation of the parties, the Arbitral Tribunal shall take the circumstances of the case into consideration to decide which party shall bear them or instead make a pro rata distribution of such costs between the parties (Article of the 1455 Mexican Commercial Code).

Arbitral Tribunal's Fees

Article 17 of the Mexican Constitution provides that the administration of justice by Mexican courts shall be free of charge, therefore forbidding judicial costs. However, Mexican federal courts have interpreted that arbitration falls outside the scope of such prohibition (Tesis 176594).

Generally, the arbitral tribunal's fees are determined by the arbitral tribunal itself. The arbitral tribunal must ensure that the fees charged are reasonable when issuing such determination by considering the amount in dispute and other relevant circumstances of the case (Article 1454 of the Mexican Commercial Code).

Exceptionally, when one of the parties requests a Mexican court and such court accepts the request, the arbitral tribunal shall fix the fees only after consulting the court and considering its observations (Article 1454 of the Mexican Commercial Code).

Once an arbitral tribunal is constituted it may request the parties to deposit an advanced payment of the fees to cover travel expenses, among other things (Article 1456 of the Mexican Commercial Code).

The arbitral tribunal shall not charge additional fees for the interpretation, rectification, or completion of the award (Article 1455 of the Mexican Commercial Code).

11. Review of an Award

11.1 Grounds for Appeal

Unless the parties agree otherwise, Mexican law does not recognise the right of appeal against arbitral awards. The only permitted judicial recourses after an award has been rendered are those of annulment, recognition, and enforcement.

11.2 Excluding/Expanding the Scope of Appeal

Despite the fact that there is no right of appeal against arbitral awards, Mexico's Law of Amparo, which constitutes a petition for judicial protection against violations of constitutionally guaranteed rights, has posed several challenges to the aforementioned premise.

In 2013, reforms to the Law of Amparo allowed for the possibility that certain private entities could be deemed "authorities" for the purposes of amparo proceedings. This reform prompted intense discussions among both practitioners and scholars regarding its implications. However, a recent decision by the Third Federal Circuit Court for Civil Matters of the First Circuit determined that arbitrators cannot be considered "authorities" in amparo proceedings (Tesis 2020940).

Notwithstanding the latter, a writ of amparo is still accessible to parties wishing to challenge judicial decisions regarding annulment and/or recognition and enforcement judgments. This creates a different but indirect way in which courts intervene in arbitral proceedings. It must be noted that in such cases the scope of review is limited to the judicial decision in question and cannot interfere with the arbitral award.

Furthermore, it is important to point out that the Mexican Supreme Court rendered an important decision concerning possible challenges in recognition and enforcement proceedings by deciding that neither the final judgment nor the interlocutory rulings in these proceedings were subject to any type of ordinary remedy (*Jurisprudencia* 171447).

None of the above, however, has provided any judgments or precedents on the issue of whether parties can agree to exclude or expand the scope of appeal under the national law.

Regarding the potential intervention of arbitrators in annulment proceedings, the Eight Collegiate Tribunal of the First Circuit recently ruled in an amparo proceeding against an annulment decision that arbitrators cannot be defendants or interested parties in an annulment proceeding. Through its decision, the tribunal also emphasised that arbitrators have no obligation to return their fees when an award is annulled (Tesis 2023333 and 2023332).

11.3 Standard of Judicial Review

As stated in **11.2 Excluding/Expanding the Scope of Appeal**, in Mexico there is no possibility for appeal on the merits in commercial arbitration. The only standards for judicial review of arbitral awards are the limited grounds for review listed in the UNCITRAL Model Law and the New York Convention.

Recently, the Mexican Supreme Court of Justice upheld this criterion by determining that a judge ruling on a set-aside request of an award may not revisit the arbitral tribunal's analysis of the admissibility, relevance, and weight of the evidence, even if the party seeking the annulment argues a due process violation (Tesis 2025652).

12. Enforcement of an Award

12.1 New York Convention

Mexico ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 14 April 1971 with no reservations, and it entered into force on 13 July 1971 in Mexico.

Mexico is also a member state to the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, which it signed on 12 February 1986 and ratified on 2 November 1987.

12.2 Enforcement Procedure

There are no precedents that can indicate a clear and identifiable judicial trend regarding the enforcement of an award that is subject to ongoing set-aside proceedings at the seat. However, courts might be inclined to apply the principle of international reciprocity and guide their determination by what the courts in the seat of the arbitration do in similar scenarios.

Regardless of the country in which it was rendered, an arbitral award shall be recognised as binding under Mexican law and, upon application in writing to the competent court, shall be enforced in accordance with the provisions set forth in the Commercial Code. Federal or state first instance (trial) civil courts of the seat of the arbitration are competent to decide on the recognition and enforcement of an arbitral award. When the seat of the arbitration is not located in Mexico, the competent courts are the federal or state first instance (trial) civil courts wherever the debtor is domiciled or the assets are located (Articles 1422, 1462 and 1463 of the Mexican Commercial Code).

In the 2011 amendment to the Commercial Code, a procedure was established to expedite the recognition and enforcement of arbitral awards. The procedure includes two stages:

- the trial-level procedure; and
- an amparo proceeding in which the recognition and enforcement judgment may be challenged.

The authors know of no judgments or decisions in which Mexican courts have analysed the enforcement of an award that was set aside by the courts in the seat of arbitration, or have decided on a state's or state entity's defence of sovereign immunity.

12.3 Approach of the Courts

When Mexico is the seat of the arbitration, or where recognition and enforcement are sought in Mexico, it is possible to argue the validity of the award both in the annulment proceeding and the enforcement proceeding. This is principally down to the fact that the grounds for annulment are the same as the grounds to deny enforcement (with one exception). In this scenario, parties have frequently litigated the enforcement of the award within the annulment proceeding by claiming the enforcement of the award as a counterclaim (Tesis 167459 and 167398).

In 2017, the Mexican Supreme Court, through a petition of certiorari, ruled on a writ of amparo that sought to challenge an annulment decision (*Amparo Directo*70/2014). The Supreme Court decided that, even though one of the grounds for annulment was that the arbitral tribunal had exceeded its jurisdiction, the judicial analysis of the arbitral award did not allow the court to substitute the arbitral tribunal.

The court indicated emphatically that judges must practise self-restraint and that the courts must use two methods when analysing an arbitral decision to determine if the arbitral tribunal exceeded its jurisdiction. First, the court must analyse the arbitral agreement to determine if it is clear or ambiguous. Once this has been established:

- in cases where the terms are clear, the judge must strictly apply the text of the agreement; and
- in cases where the terms are ambiguous, the courts must adhere to what the tribunal decided and limit themselves to determining only whether the tribunal's decision is reasonable (Tesis 2014012).

In the same decision, the Supreme Court analysed the concept of public policy in relation to arbitrations arising from contracts with state agencies. As a result, the court set forth the idea that the decision to incorporate an arbitral clause into a contract of this nature was a public policy decision on its own.

As such, the state is thought to have agreed that the issues or conflicts arising from the contractual relationship come under the exclusive jurisdiction of the arbitral tribunal, ergo the award could have public policy repercussions. The court established that in these scenarios, public policy questions should not be understood as public order grounds for annulment (Tesis 2014011).

However, the scope of public policy or *lois de police* questions have not always been clear. In 2009, for instance, public policy issues were raised in the annulment proceedings of a case in which the award was annulled because a new law precluded administrative rescissions from being resolved through arbitration. Although many regard this as an exception, it goes to show the shifting scope of review.

13. Miscellaneous

13.1 Class Action or Group Arbitration

The Mexican lex arbitri does not regulate class action or group arbitration. However, in *Amparo Directo*33/2014, the Supreme Court decided that a consumer class action should follow the judicial procedure applicable by law (including the court's jurisdiction over the claim) even if the by-laws of the defendant corporation included an arbitration agreement entered by the individual claimants (who were members of the corporation).

13.2 Ethical Codes

Mexico does not have an ethical code for arbitrators and counsel participating in arbitrations. However, this does not mean certain ethical questions (especially regarding independence and impartiality) are not regulated by the lex arbitri.

Article 1428 of the Mexican Commercial Code – taken from Article 12 of the UNCITRAL Rules – establishes that, to be eligible as an arbitrator, the candidate must reveal any circumstances that may give rise to reasonable doubts concerning their impartiality or independence.

Additionally, Article 1428 of the Mexican Commercial Code binds the arbitrator to comply with the above-mentioned obligation from the moment they are appointed and throughout the entire procedure. Otherwise, the arbitrator may be disqualified or challenged if reasonable doubts regarding their independence or impartiality arise.

See **4.4 Challenge and Removal of Arbitrators** and **4.5 Arbitrator Requirements**.

13.3 Third-Party Funding

The Mexican Commercial Code does not contain any rules or restrictions for third-party funding in arbitration.

13.4 Consolidation

The Mexican Commercial Code does not regulate arbitral proceeding consolidation. However, parties may agree upon procedural rules that allow such a possibility (ie, the ICC Arbitration Rules). There are no publicly available judicial decisions by Mexican courts on the consolidation of arbitral proceedings.

13.5 Binding of Third Parties

The Mexican Commercial Code does not regulate instances where a third party may be bound by an arbitration agreement or award. There are no publicly available judicial decisions by Mexican courts on this issue.

Trends and Developments

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LITREDI, S.C. is a boutique law firm which specialises in arbitration, litigation, and general dispute resolution. It offers unparalleled legal services across all stages of a controversy, including potential settlements. Its clientele includes national and international corporations, governments, state-owned entities, private individuals, organisations, and vulnerable groups. With a combined experience of over 65 years, LITREDI's partners have an impressive track record, achieving success in 94% of their cases. Its team has expertly represented and advised clients in high-stakes arbitration, administrative, and commercial litigation. It handles disputes in diverse areas such as: conflicts between shareholders, joint ventures, distribution and supply agreements, franchises, energy, construction and infrastructure, reinsurance, and financial services, among others. The firm provides clients with the highest level of support and personal involvement at every stage, invariably, under elevated ethical and trustworthiness guidelines that are intended to reinforce the honour and integrity of the legal profession.

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The Dispute Resolution Landscape Resulting from the Recovery of the Security and Sovereignty of the Electricity Sector by the Mexican Government

Introduction

The quantity and complexity of lawsuits concerning energy projects in Latin America have significantly increased in recent years. This uptick can be traced back to changes in government regulations and policies, as well as a global trend towards reclaiming control and sovereignty over energy production. Mexico exemplifies this trend, with its current landscape of disputes rooted in the energy reform of 2013–2014 and subsequent counter-reforms. This article explores the evolution of Mexico's electricity sector, the impact of recent policy changes, and the ensuing disputes.

Background to Mexico's energy sector reform

Reform policies

The energy reform of 2013–2014 was a landmark initiative driven by the then-ruling political parties in Mexico, primarily the Institutional Revolutionary Party (PRI) and its allies. This reform aimed to revitalise the energy sector by shifting away from a state-controlled model towards a more open and competitive market. It was driven by the need to attract private investment, modernise infrastructure, and boost energy production to meet growing domestic demand and foster economic growth.

Constitutional amendments

The constitutional amendments facilitated the creation of a wholesale electricity market, overseen by the Energy Regulatory Commission (CRE) and the National Center for Energy Control (CENACE). This market allowed any company authorised to produce energy to sell electricity under a regulated framework. This constitutional overhaul marked a paradigm shift, positioning Mexico to attract substantial private investment and technology transfer to modernise its energy infrastructure.

As part of the legal reform, electricity was redefined as a commodity that could be traded in a newly established wholesale electricity market. The creation of this market was overseen by the CRE and the CENACE, which were tasked with ensuring fair competition and reliability in the electricity grid. The goal was to increase efficiency, reduce costs, and improve service quality through competition.

Incentives for clean energy

A critical component of the reform was the introduction of incentives for the production of clean energy. These incentives aimed to diversify Mexico's energy mix and reduce greenhouse gas emissions, aligning with global trends towards sustainable energy. The government offered various financial incentives, including tax breaks, subsidies, and long-term power purchase agreements (PPAs) for renewable energy projects. These measures led to a surge in investment in photovoltaic plants and wind farms, making Mexico a leader in renewable energy development in Latin America.

Significant renewable projects

As a result of these incentives, several important renewable energy projects were developed. Notable examples include:

- Villanueva Solar Park – one of the largest solar parks in the Americas, located in Coahuila, which significantly boosted Mexico's solar energy capacity; and
- Oaxaca Wind Farm – a series of wind energy projects in the state of Oaxaca, harnessing

the region's strong wind resources to generate substantial amounts of clean electricity.

These projects contributed to a rapid increase in renewable energy capacity, helping to diversify Mexico's energy portfolio and reduce reliance on fossil fuels.

Imbalances affecting the CFE

Despite the reform's intended benefits, its implementation exposed several imbalances that negatively impacted the CFE. Established in 1937, the CFE had been the exclusive producer, transmitter, distributor, and supplier of electricity in Mexico. It was responsible for maintaining the national grid and ensuring energy supply to all regions, including remote and underserved areas.

Reduced market share and financial burden

The introduction of private competitors significantly reduced the CFE's market share in electricity generation. Private companies, often leveraging advanced technologies and benefiting from government incentives, were able to produce electricity more efficiently and at lower costs, thereby outcompeting the CFE in many areas.

Moreover, while private companies benefited from using the existing transmission and distribution infrastructure, the CFE continued to bear the costs of maintaining and operating the national grid. This created an uneven playing field, where private entities could maximise profits while the CFE's financial burden increased.

Subsidies and market distortions

The subsidies granted to private renewable energy projects further strained the CFE. These subsidies, intended to promote clean energy, ended up distorting the market, as the CFE's traditional energy projects and its own renewable initiatives did not receive equivalent support. This imbalance hindered the CFE's ability to compete and innovate within the renewable sector.

Challenges in energy dispatch and grid management

The reform also introduced challenges in energy dispatch and grid management. The regulatory framework prioritised the dispatch of renewable energy, which is intermittent by nature, over traditional sources. This sometimes led to inefficiencies and increased operational costs for the CFE, as it had to ensure grid stability and reliability, often requiring backup from more expensive and less environmentally friendly energy sources.

In summary, the 2013–2014 energy reform represented a significant shift towards an open and competitive electricity market in Mexico. While it aimed to foster efficiency, reduce tariffs, and promote clean energy, its implementation revealed several imbalances that disadvantaged the CFE. These challenges underscored the need for a more balanced regulatory approach to ensure the sustainability of both state and private entities in Mexico's energy sector.

Government counter-reforms

In response to the issues arising from the 2013–2014 energy reform, the administration that came into power in 2018 under President Andrés Manuel López Obrador (AMLO) initiated a series of counter-reforms aimed at regaining control over the electricity sector. These measures sought to address the imbalances that had disadvantaged the CFE and to reassert state sovereignty over Mexico's energy resources. The counter-reforms were multifaceted, encompassing legal, tax, and commercial initiatives.

Legal measures

One of the first steps in the counter-reform was the revision and renegotiation of existing contracts, especially those perceived as unfavourable to the CFE. The government scrutinised contracts related to energy production and infrastructure, including those for the construction and operation of natural gas pipelines. Many of these contracts, signed under the previous administration, were found to include terms that were disadvantageous to the CFE, such as high fees and restrictive conditions.

The renegotiation process aimed to eliminate these unfair terms, thereby reducing costs and improving the operational flexibility of the CFE. This renegotiation was a significant move, as it involved complex legal and commercial discussions with various private companies and international investors. Despite initial resistance, the government successfully amended several contracts, resulting in more favourable terms for the CFE and potentially saving millions of dollars in operational costs.

In addition to contract renegotiations, the government also introduced legislative changes. In 2021, a significant reform of the Electricity Industry Law was enacted. This reform sought to prioritise the dispatch of electricity generated by the CFE over that produced by private companies, altering the rules for the order of dispatch, the awarding of electricity coverage contracts, and the system for the procurement of clean energy certificates.

These changes aimed to increase the market share of the CFE, ensuring its financial viability and operational sustainability. However, this legislative reform faced legal challenges from private investors, who argued that it violated constitutional principles of free competition. These challenges culminated in a series of amparo lawsuits, which led to the suspension of the reform's effects and eventually, a ruling by the Mexican Supreme Court that declared parts of the reform unconstitutional.

Tax measures

The counter-reforms also included tax measures designed to support the financial health of the CFE. The government introduced tax incentives for investments in CFE infrastructure projects, particularly those aimed at modernising the national grid and increasing the capacity for renewable energy production. These incentives were intended to encourage both domestic and foreign investment in state-led projects, ensuring that the CFE could compete more effectively with private companies.

Additionally, the government reviewed and adjusted the tax obligations of private energy producers. This included closing loopholes that allowed for tax evasion and ensuring that private companies contributed fairly to the national revenue. By levelling the tax playing field, the government aimed to reduce the financial disparity between the CFE and private entities.

Commercial measures

On the commercial front, the government undertook several initiatives to bolster the CFE's competitive position in the electricity market. One of the most notable actions was the acquisition of 13 power plants from the Spanish company Iberdrola in April 2024. This acquisition significantly increased the CFE's generation capacity, allowing it to produce a larger share of the nation's electricity. The acquired plants, which had previously operated at only 40% capacity, were expected to operate more efficiently under CFE management, thereby enhancing national

energy security and reducing dependency on private producers.

The government also launched programmes to rehabilitate existing CFE power plants and construct new facilities. These projects were aimed at modernising the country's energy infrastructure, improving efficiency, and increasing the production of clean energy. By 2024, it was anticipated that the CFE would generate 55.5% of Mexico's electricity, with further plans to reach 65% in the coming years through continued investment and development.

Future prospects

Looking ahead, the political landscape in Mexico suggests that the ruling party may soon gain a qualified majority in Congress, potentially enabling further constitutional reforms to consolidate government control over the energy sector. Such reforms could significantly impact private sector operations, leading to potential investment treaty claims. However, given that many private energy projects were funded by Mexican government financial institutions, the outcome of such claims remains uncertain.

In conclusion, the government's counter-reforms represent a strategic effort to reassert state control over Mexico's electricity sector. While these measures have faced legal challenges and sparked controversy, they reflect a broader trend towards national sovereignty in energy policy. The ongoing balance between state and private interests will continue to shape the future of Mexico's energy sector and its dispute resolution landscape.

Dispute resolution in the energy sector

The evolving legal framework and complex commercial contracts in Mexico's energy sector have inevitably led to numerous instances of litigation and arbitration. These disputes arise from the multifaceted interactions between various stakeholders, including public entities, private companies, and financial institutions. Understanding the nature of these disputes is crucial for navigating the sector's legal landscape. They can be categorised as follows.

Disputes between project shareholders

These disputes often arise from disagreements over the management and financial performance of energy projects. Shareholders may have conflicting interests regarding project direction, dividend distribution, reinvestment strategies, or responses to regulatory changes. For example, in projects involving multiple investors, tensions can arise if one party perceives that another is not fulfilling its contractual obligations or is acting against the collective interest. These disputes typically involve issues of corporate governance, fiduciary duties, and shareholder rights.

Disputes between developers and construction companies

Conflicts between developers and construction companies are common in large-scale energy projects, often revolving around project delays, cost overruns, or quality of work. Developers might claim that construction companies failed to meet deadlines or standards specified in the contract, while construction companies might argue that delays or additional costs were due to unforeseen circumstances or inadequate project management by the developers. Such disputes can lead to arbitration or litigation over contract performance, breach of contract, and compensation claims.

Disputes between financial institutions and project owners

Financial institutions, such as banks and investors, provide crucial funding for energy projects,

and disputes can arise if project owners default on loan agreements or fail to meet financial obligations. Issues such as non-payment, restructuring of debt, or disagreements over the terms of financing can lead to complex legal battles. Additionally, financial institutions may challenge project owners over the use of funds, alleging mismanagement or misallocation of resources.

Disputes between project owners and government agencies

These disputes often stem from regulatory changes, permitting issues, or compliance with new government policies. Project owners may find themselves in conflict with government agencies if they believe that new regulations unfairly hinder their operations or if there are delays in obtaining necessary permits. Such disputes can involve administrative proceedings, litigation, or negotiations to resolve issues related to regulatory compliance, environmental standards, and contractual obligations with the state. Due to their distinctive nature, these disputes may be heard by administrative and constitutional courts, by arbitral tribunals in private controversies or by arbitral tribunals in investment treaty disputes.

Disputes between plant managers and owners

Operational conflicts between plant managers and owners can arise from disagreements over the management and maintenance of energy facilities. Plant managers may dispute directives from owners that they consider impractical or detrimental to the plant's operation, while owners might challenge managers over perceived inefficiencies or failure to meet performance targets. These disputes typically involve issues of operational control, performance metrics, and managerial accountability.

Conclusion

The recovery of control and sovereignty over Mexico's electricity sector has led to significant legal and commercial challenges and disputes. The government's efforts to regain control and restructure the sector have created a dynamic and often contentious environment, where effective dispute resolution mechanisms are essential. These mechanisms, including arbitration, and commercial and administrative litigation are crucial to maintaining sector stability and fostering a climate that attracts future investments.

As the government continues to implement and refine its policies, addressing the root causes of disputes and establishing clear, fair, and efficient resolution processes will be vital. Ensuring that all parties – public entities, private companies, and financial institutions – have confidence in these processes will help mitigate conflicts and promote a more stable and predictable investment environment.

The landscape of dispute resolution in Mexico's energy sector reflects the broader challenges and opportunities of the government's efforts to reclaim control over this vital industry. By enhancing legal frameworks and dispute resolution mechanisms, Mexico can navigate the complexities of this transition and build a robust, sustainable energy sector for the future.

NEW ZEALAND

Law and Practice

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Bankside Chambers

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BANKSIDE CHAMBERS

1. General

1.1 Prevalence of Arbitration

International arbitration as a method of resolving disputes is increasingly prevalent in New Zealand. This is primarily a result of increased numbers of New Zealand entities and their overseas counterparties entering into contracts containing arbitration clauses, rather than domestic parties choosing international arbitration. According to the inaugural Aotearoa New Zealand Arbitration Survey, 15% of all arbitrations conducted by New Zealand-based arbitrators in 2019–20 were international arbitrations.

Historically, domestic parties have preferred litigation as a dispute resolution method but, increasingly, arbitration is being adopted.

1.2 Key Industries

Most disputes submitted to arbitration in New Zealand relate to general commercial contracts. Specific sectors in which arbitration is common in New Zealand include construction and property-related disputes, particularly disputes arising out of leases. Valuation and rent review disputes are also commonly arbitrated. Specific to New Zealand, share milking/farming disputes are often arbitrated, as are some disputes within Iwi (Māori tribes). New Zealand has also recently legislated to allow trust disputes to be arbitrated.

1.3 Arbitration Institutions

Most arbitrations in New Zealand are ad hoc – conducted under the Arbitration Act 1996 (the "Act"), without the assistance of institutional rules.

In 2022 the Arbitrators' and Mediators' Institute of New Zealand (AMINZ) released its new Arbitration Rules, which include expedited arbitration provisions. The New Zealand International Arbitration Centre also offers a variety of arbitration rules, including rules providing for expedited arbitrations conducted in 60, 90 or 120 working days, depending on the sum claimed or whether declaratory relief only is sought, as well as its standard Arbitration Rules.

Where international institutional rules are adopted, the ICC Rules are most common, followed by the SIAC and UNCITRAL Rules.

No new arbitral institutions were established in New Zealand in 2023–24.

1.4 National Courts

In the limited circumstances in which the Act permits a New Zealand court to intervene in arbitral proceedings, the Act designates the High Court as the supervisory court, with limited rights of appeal to the Court of Appeal.

In certain limited circumstances, recourse may also be had to the District Court: issuance of a witness summons or assistance in obtaining documents (Art 27 of Sch 1); interim measures (Art 9(2)); recognition and enforcement if the sum awarded does not exceed the jurisdiction of the District Court (Art 35(3)(b)); acting in aid of an arbitral tribunal (cl 3(1) of Sch 2); and granting extensions of time to commence arbitral proceedings (cl 7 of Sch 2).

2. Governing Legislation

2.1 Governing Law

The Act governs arbitration proceedings seated in New Zealand, including international arbitrations. It contains three core parts:

- The general provisions of the Act, which are denoted by "sections" on various matters

including: arbitrability (s 10); the power of arbitral tribunals to grant relief (s 12); arbitrator immunity (s 13); and confidentiality and privacy (s 14).
- Schedule 1, which contains "articles" that substantially reproduce the UNCITRAL Model Law.
- Schedule 2, which contains "clauses" with additional rules on, for example: the appointment of arbitrators (cl 1); consolidation (cl 2); and preliminary determinations of, and appeals on, points of law (cls 4 and 5).

The general provisions of the Act and of Schedule 1 to the Act apply to all domestic and international arbitrations. Schedule 2 to the Act applies to a domestic arbitration unless the parties agree that it does not, and to an international arbitration only if the parties agree that it does.

Schedule 1 to the Act substantially reproduces the UNCITRAL Model Law. It was amended in 2007 to reflect the changes made to the Model Law in 2006. There are some notable differences between the Act and the Model Law, including the following:

- Additional requirements for the enforceability of arbitration agreements with consumers (s 11).
- An arbitrator is not liable for negligence in respect of anything done or omitted to be done in their capacity as arbitrator (s 13).
- Express requirements of privacy and confidentiality (ss 14–14I).
- The arbitration agreement may be made orally or in writing (Art 7(1) of Sch 1).
- A stay of court proceedings may be refused if "there is not in fact any dispute between the parties" (Art 8(1) of Sch 1). However, the New Zealand Supreme Court has held that these words were not intended to expand the jurisdiction of the courts beyond that provided for in the Model Law, and therefore a court may only grant summary judgment despite the existence of a valid arbitration agreement if there is no actual dispute (and not merely no arguable defence) (Zurich Australian Insurance Ltd v Cognition Education Ltd [2015] 1 NZLR 383).
- The powers of courts to grant interim measures are assimilated to those of an arbitral tribunal, though the courts are bound by any findings of fact made by the tribunal (Art 9(2)–(3) of Sch 1).
- The ability of a party to request a decision on jurisdiction from the High Court is not limited to situations where the tribunal has positively ruled as a preliminary question that it has jurisdiction (Art 16(3) of Sch 1).
- Security for costs is available as an interim measure (Art 17 of Sch 1, definition of "interim measure").
- Witnesses and counsel have the same privileges and immunities as witnesses and counsel in a court proceeding (Art 19(3) of Sch 1).
- If a claimant fails to prosecute its claim, the arbitral tribunal may make an award dismissing the claim or give directions for the speedy determination of the claim (Art 25(d) of Sch 1).
- The High Court and District Court are empowered to take various steps to assist the arbitral tribunal in taking evidence (Art 27(2) of Sch 1).
- Unless the arbitration agreement provides otherwise, or the award otherwise directs, any sum awarded shall carry interest from the date of the award at the same rate as a judgment debt (Art 31(5) of Sch 1).
- The death of a party does not terminate the arbitration, unless otherwise agreed by the parties (Art 32(4) of Sch 1).
- Grounds for setting aside, or refusing to recognise or enforce, an arbitral award on

the basis that it is contrary to public policy expressly include the award having been induced or affected by fraud or corruption, or a breach of the rules of natural justice (Arts 34(6) and 36(3) of Sch 1).

2.2 Changes to National Law

There have been no significant changes to the Act in the past year, and there is no pending legislation relating to arbitration of which we are aware. The proposed statutory amendments to the English Arbitration Act are being monitored closely and it is possible that this may prompt amendments to the New Zealand Act.

3. The Arbitration Agreement

3.1 Enforceability

Section 2(1) of the Act provides that an arbitration agreement is "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not".

An arbitration agreement may be made orally or in writing (Art 7(1) of Sch 1), save for arbitration agreements in a contract between a consumer and a trader, which are only enforceable if certain formality requirements are met (s 11).

3.2 Arbitrability

Section 10(1) of the Act provides that any dispute that the parties agree to submit to arbitration may be determined in that way "unless the arbitration agreement is contrary to public policy or, under any other law, such a dispute is not capable of determination by arbitration". However, Section 10(2) of the Act clarifies that "[t]he fact that an enactment confers jurisdiction in respect of any matter on the High Court or the District Court but does not refer to the determination of that matter by arbitration does not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration".

Whether a particular type of dispute is considered arbitrable is therefore a matter for the courts, having regard to either relevant public policy factors in New Zealand, or other laws.

There are two decisions of the New Zealand courts on the concept of arbitrability under Section 10 of the Act. One decision has confirmed that matters relating to child guardianship (that is, the care and custody of children) are not arbitrable (Wade v Wade [2022] NZHC 3254). Another decision, which has proved controversial, held that issues of whakapapa (loosely translated as one's genealogical identity) could not be arbitrated and that to do so would be an abuse of process (Ngawaka v Ngāti Rehua-Ngātiwai Ki Aotea Trust Board (No 1) [2021] NZHC 291).

Section 11 of the Act places further restrictions on the arbitrability of disputes under consumer contracts, unless specific criteria have been fulfilled. This provision is designed to ensure individual consumers (not corporates) are not drawn into arbitration by unnegotiated standard form agreements.

3.3 National Courts' Approach

There are no judgments of the New Zealand courts under the Act with respect to determining the law governing the arbitration agreement. The New Zealand courts would, however, likely follow the recent UK Supreme Court decision in Enka v Chubb [2020] UKSC 38. A detailed analysis of the Enka case is beyond the scope of this chapter. In brief, the Supreme Court held that where the parties had agreed on the law governing the contract, save for the validation

principle, that law would also govern the arbitration agreement. As there was no governing law of the contract, the court still had to determine what was the law governing the arbitration agreement. By majority, the court held that in the absence of any express choice of law, the law applicable to the arbitration agreement was the law of the seat, being the law most closely connected to that agreement.

The New Zealand courts generally take a pro-arbitration stance and strive to enforce arbitration agreements where possible. This pro-arbitration stance was recently affirmed in a case in which an anti-suit injunction was sought, restraining overseas litigation allegedly in breach of a New Zealand law governed arbitration agreement. The High Court noted that in such cases, comity has a diminished role given "the Court's role in upholding and enforcing the parties' contractual bargain" (Maritime Mutual Insurance Association (NZ) Ltd v Silica Sandport Inc [2023] NZHC 793). The New Zealand courts therefore generally favour a liberal interpretation of arbitration agreements and do not allow inconsistencies or uncertainties in the wording used by the parties in their arbitration agreement to thwart their intent to arbitrate disputes (see Marnell Corrao Associates Inc v Sensation Yachts (2000) 15 PRNZ 608 at [61]).

This view was, however, somewhat tempered by the judgment of the Supreme Court in Carr v Gallaway Cook Allan [2014] 1 NZLR 792. In that case, a domestic arbitration clause purported to allow the appeal of an award to the High Court on a question of fact. Such appeals are prohibited under New Zealand law. A majority of the Supreme Court did not adopt a narrow interpretation of "arbitration agreement" that would have confined it to the expression of intention to arbitrate. Instead, it set aside the arbitral award because the offending words were "integral" to the agreement to arbitrate and therefore could not be severed, as a result of which the entire arbitration clause was invalid.

3.4 Validity

An arbitration clause in a contract may be considered valid even if the rest of the contract in which it is contained is invalid. Article 16(1) of Schedule 1 to the Act states that, for the purposes of the arbitral tribunal's competence to rule on its own jurisdiction, "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract", and that "[a] decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure (necessarily) the invalidity of the arbitration clause".

4. The Arbitral Tribunal

4.1 Limits on Selection

The parties are "free to determine the number of arbitrators" (Art 10(1) of Sch 1 to the Act). If the parties do not make such a determination, in an international arbitration, the number of arbitrators shall be three; in every other case, the number of arbitrators shall be one (Art 10(2) of Sch 1).

No person shall be precluded from acting as an arbitrator by reason of their nationality, unless the parties agree otherwise (Art 11(1) of Sch 1). The parties are also "free to agree on a procedure of appointing the arbitrator or arbitrators" (Art 11(2) of Sch 1).

4.2 Default Procedures

If the parties' chosen machinery for selecting arbitrators fails, then (unless the parties have agreed otherwise) at a party's request the "appointed body" – currently AMINZ – shall take

the necessary measures under that machinery (Art 11(4) of Sch 1 to the Act).

If the parties have not agreed any machinery, then the applicable default procedures are specified in the Act:

- In an arbitration with two parties:
  (a) If there are to be three arbitrators, then each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator. If a party fails to appoint an arbitrator within 30 days, or if the two arbitrators fail to agree on a third arbitrator within 30 days, the appointment shall be made by AMINZ upon request (Art 11(3)(a) of Sch 1).
  (b) If there is to be a sole arbitrator, if the parties are unable to agree on the arbitrator, a party may request AMINZ to make the appointment (Art 11(3)(b) of Sch 1).
- If the parties have agreed to an arbitration with two or four or more arbitrators, or there are three arbitrators and more than two parties, then, unless the parties have agreed otherwise, AMINZ may appoint the requisite number of arbitrators upon the request of a party (Art 11(6) of Sch 1).

Schedule 2 to the Act previously provided for a "quick draw" procedure for default appointments. This has since been repealed.

4.3 Court Intervention

The New Zealand courts may only intervene in the selection of arbitrators in limited circumstances. Decisions by AMINZ, as the body authorised by the legislation to act as a default appointing authority, are not subject to appeal (Art 11(4) of Sch 1 to the Act). The High Court may only intervene upon an application by a party to appoint an arbitrator or arbitrators, in the event that (a) AMINZ is unable or fails to appoint an arbitrator within 30 days, or (b) a dispute arises in respect of the process adopted by AMINZ (Art 11(7) of Sch 1).

4.4 Challenge and Removal of Arbitrators

Articles 12 and 13 of Schedule 1 to the Act govern the challenge and removal of arbitrators. An arbitrator may be challenged "only if circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence, or if that arbitrator does not possess qualifications agreed to by the parties".

The parties are free to agree the procedure for challenging an arbitrator. Under the default procedure, the challenging party must send a written statement of the reasons for challenge to the arbitral tribunal within 15 days of the constitution of the tribunal or after becoming aware of the circumstances giving rise to the challenge. The arbitral tribunal shall decide on the challenge. However, if the challenge is unsuccessful, the challenging party may request the High Court to decide on the challenge.

4.5 Arbitrator Requirements

The Act has adopted the Model Law requirement that a person who is approached in connection with appointment as an arbitrator must disclose any circumstances likely to give rise to justifiable doubts as to that person's impartiality or independence. An arbitrator also has an ongoing duty to disclose any such circumstances (Art 12(1) of Sch 1 to the Act). As set out above, an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence (Art 12(2) of Sch 1).

The AMINZ Arbitration Rules contain similar requirements. The 2022 edition provides that an

arbitrator must complete a statement of impartiality and independence (r 6.4) and is under an ongoing disclosure duty (r 6.10). An arbitrator must also be impartial and independent (r 6.9) and may be removed if circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence (r 7.1).

The test for independence or impartiality is objective: whether "a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide" (Saxmere Co Ltd v Wool Board Disestablishment Co Ltd [2009] NZSC 72). The "fair-minded lay observer" has an awareness of the circumstances of the case, but is objective and does not stand in the complainant's shoes (Todd Taranaki Ltd v Energy Infrastructure Ltd HC Wellington CIV-2007-485-2684, 19 December 2007).

The AMINZ Arbitration Rules also state that, unless otherwise agreed, the arbitral tribunal and the parties shall "shall have regard to, but will not be bound by, the IBA Guidelines on Party Representation in International Arbitration and on Conflicts of Interest in International Arbitration" (r 5.2). The "Red", "Orange" and "Green" lists contained in the ICA Guidelines may therefore be used as a source of guidance. However, the touchstone for independence or impartiality is likely to remain the objective test articulated above.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

As set out in **3.2 Arbitrability**, Section 10(1) of the Act provides that any dispute that the parties agree to submit to arbitration may be determined in that way "unless the arbitration agreement is contrary to public policy or, under any other law, such a dispute is not capable of determination by arbitration".

5.2 Challenges to Jurisdiction

Pursuant to Article 16 of Schedule 1 to the Act, an arbitral tribunal may rule on whether (and, if so, to what extent) it has jurisdiction to determine the particular dispute.

The tribunal may rule on the point as a preliminary question, or in an award on the merits.

5.3 Circumstances for Court Intervention

There are three circumstances in which the High Court might address the question of jurisdiction and competence of an arbitral tribunal:

- When a question of jurisdiction is referred to it after a tribunal has already ruled on the point as a preliminary question. There is no appeal from such a decision of the High Court.
- When the jurisdictional ruling is given in an award on the merits. If Schedule 2 to the Act applies (Schedule 2 applies automatically to domestic arbitrations, but not to international arbitrations unless the parties specifically agree), an appeal might lie on a question of law under clause 5 of Schedule 2. Alternatively, the issue of jurisdiction may be considered by the Court in connection with setting-aside or enforcement proceedings (Arts 24(2)(1)(i), (iii) and 36(1)(a)(i), (iii) of Sch 1).
- When deciding whether to stay court proceedings to allow an arbitration to proceed.

5.4 Timing of Challenge

If the arbitral tribunal rules on jurisdiction in a preliminary ruling, the parties have 30 days from notice of that decision to apply to the High Court to decide the question.

If the arbitral tribunal rules on jurisdiction in an award on the merits, the parties have three months from the date on which the award is received (or a request made for a correction, interpretation or additional award is disposed of) within which to exercise any right of appeal on a question of law (see cl 5 of Sch 2 and Art 34 of Sch 1 to the Act).

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The court can review jurisdiction on a de novo basis (see Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd HC Auckland CIV-2004-404-4488, 26 October 2004).

5.6 Breach of Arbitration Agreement

If a party commences court proceedings in breach of an arbitration agreement, it is for the opposing party to apply to have the court proceeding stayed while arbitration is in train. Any application for stay must be made before the applicant submits its first statement on the substance of the dispute.

Article 8(1) of Schedule 1 to the Act provides that the High Court must stay the proceeding and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed, or there is not in fact any dispute between the parties with regard to the matters agreed to be referred. In Ursem v Chung [2014] NZHC 436 (confirmed in Tavendale & Partners Ltd v Dineen [2022] NZHC 1530), the High Court held that the correct approach is to stay court proceedings if the court is satisfied of the prima facie validity of an arbitration agreement. A full review will only be undertaken in unusual circumstances (see HWD NZ Investment Co Ltd v Body Corporate 392418 [2022] NZHC 3472).

The court also retains a residual discretion, by virtue of its inherent jurisdiction, to grant a stay of proceedings in circumstances where Article 8(1) is not engaged. For example, in Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-operative Group Ltd [2014] NZCA 536, the Court of Appeal upheld a temporary 'case management' stay of court proceedings on the basis that the court proceedings between Danone and Fonterra were duplicative of arbitral proceedings involving Danone and wholly-owned subsidiaries of Fonterra.

5.7 Jurisdiction Over Third Parties

In Methanex Motunui Ltd v Spellman [2004] 3 NZLR 454, the Court of Appeal held that, before the tribunal could assume jurisdiction over an entity, "there [must] be a dispute in respect of a defined legal relationship and it is only the parties between whom that dispute has arisen or may arise who can submit the dispute to arbitration". The Court added that "a person is a party to an arbitration agreement only if that person is one of the persons who has submitted the dispute to arbitration and the arbitration is in respect of a defined legal relationship which involves that person". To hold otherwise would undermine the consensual nature of an arbitration agreement.

Some questions might remain with regard to third-party non-signatories, implied consent, groups of companies and principals/agents. A New Zealand court would likely also follow the approach taken by the House of Lords in Fiona Trust & Holding Corporation v Privalov [2007] 4 All ER 951, such that an arbitration agreement contained in one of a number of related contracts would bind a party to those contracts even if they have not signed the arbitration agreement, on the basis that "rational businessmen" are likely to have intended that disputes arising out of their relationship be decided by the

same tribunal. But, generally speaking, the New Zealand courts would regard the compulsion of arbitration with non-signatory parties as being at odds with the basic principle that arbitration must be consensual.

A specific exception to this principle is the arbitration of trust disputes. The Trusts Act 2019 provides for the arbitration of trust disputes, even if the trustees or beneficiaries of the relevant trust are not party to an arbitration agreement.

6. Preliminary and Interim Relief

6.1 Types of Relief

The powers of an arbitral tribunal to grant interim relief in New Zealand are based on the Model Law, as amended in 2006 (see Arts 17–17M of Sch 1 to the Act). Such relief is binding and not merely recommended. As set out in **6.3 Security for Costs**, such relief may include an order to give security for costs.

6.2 Role of Courts

The courts have "the same powers as an arbitral tribunal to grant an interim measure under article 17A for the purposes of proceedings before that court, and that article and article 17B apply accordingly subject to all necessary modifications" (Art 9 of Sch 1 to the Act). The High Court has notably granted interim relief restraining the termination of a construction contract, to preserve the position to enable the parties to follow the contractual dispute resolution procedure, culminating in arbitration (Rau Paenga Limited v CPB Contractors Pty Limited [2023] NZHC 2974).

It was initially considered unclear whether the courts retained powers (in addition to those available to an arbitral tribunal) to grant, eg, ex parte interim orders (arbitral tribunals may only grant ex parte preliminary orders) and interim measures relating to a third party. The High Court has confirmed that it retains inherent jurisdiction to grant such interim measures in support of an arbitration, where doing so is consistent with the scheme of the Act (see Discovery Geo Corporation v STP Energy Pte Ltd [2012] NZHC 3549; Worldwide Holidays Ltd v Liu [2018] NZHC 3443).

The New Zealand courts will also generally enforce interim measures granted by an arbitral tribunal, including a foreign arbitral tribunal (see Sensation Yachts Ltd v Darby Maritime Ltd HC Auckland M1146-SW02, 1 November 2002 and Discovery Geo Corporation v STP Energy Pte Ltd [2012] NZHC 3549).

In 2016, the Act was amended to include emergency arbitrators within the definition of an arbitral tribunal under the Act. Awards by emergency arbitrators are therefore binding and can be recognised and enforced under the Act.

6.3 Security for Costs

In addition to the interim measures specified in the Model Law, interim measures under Article 17 of Schedule 1 to the Act include an order to "give security for costs".

7. Procedure

7.1 Governing Rules

The Act governs the procedure of arbitration in New Zealand. Schedule 1 to the Act, "Rules applying to arbitration generally", includes rules of procedure and expressly covers the following matters of procedure:

- the date of commencement of arbitral proceedings (Art 21);
- the language to be used in the proceeding (Art 22);
- the form and timing of statements of claim and defence and the circumstances in which they may be amended or supplemented (Art 23);
- the receipt and consideration of evidence and argument by the tribunal (Art 24);
- the power of the tribunal to make or authorise a request for court assistance in taking evidence (Art 27);
- the conferring on witnesses giving evidence and counsel, experts or other persons appearing before an arbitral tribunal, of the same privileges and immunities as witness and counsel in proceedings before a court (Art 19(3));
- the powers of the tribunal in the event of default of a party (Art 25); and
- the power of the tribunal to appoint an expert or experts (Art 26).

7.2 Procedural Steps

The parties are generally free to agree on the procedure to be followed by the arbitral tribunal (Art 19(1) of Sch 1 to the Act). Failing agreement, the arbitral tribunal is authorised to conduct the arbitration in such manner as it considers appropriate (Art 19(2) of Sch 1).

Any procedure adopted by the arbitral tribunal must not conflict with: (a) the requirements of equality of treatment and full opportunity to present each party's case imposed by Article 18 of Schedule 1; or (b) any other provision of Schedule 1 from which the parties may not derogate or the relevant public policy, which would have the effect of rendering an award susceptible to being set aside or being refused recognition or enforcement.

7.3 Powers and Duties of Arbitrators

The Act provides for a range of powers for arbitrators, including: procedural powers; the power to award any remedy or relief that could have been ordered by the High Court in civil proceedings (s 12); and, unless the parties have agreed otherwise, the power to grant interim measures (Art 17A of Sch 1).

Further, unless the parties have agreed otherwise, clause 3(1) of Schedule 2 to the Act provides for an arbitral tribunal to have certain powers in those arbitrations to which Schedule 2 applies (again, Schedule 2 applies automatically to domestic arbitrations unless the parties 'opt out', but applies to international arbitrations only if the parties expressly 'opt in'). Those powers include drawing on its own knowledge and expertise and ordering any party to do such things to enable an award to be made properly and efficiently.

As for duties, many of the mandatory rules in Schedule 1 operate as duties on the arbitral tribunal in practice. For example, an arbitral tribunal must: ensure the equal treatment of the parties and provide the parties with an opportunity to be heard (Art 18 of Sch 1); decide the dispute in accordance with the rules of law chosen by the parties (Art 28 of Sch 1); and issue an award in writing, signed and with reasons (Art 31 of Sch 1). More generally, it has been suggested that arbitrators have duties stemming from their quasi-judicial status, namely to take care, proceed diligently, disclose potential conflicts, act impartially, apply the law and not to delegate their duties.

7.4 Legal Representatives

There are no requirements or restrictions on persons able to represent a party in an arbitration

under New Zealand law. Foreign counsel may appear in New Zealand-seated arbitrations.

8. Evidence

8.1 Collection and Submission of Evidence

As set out in **7.2 Procedural Steps**, in the absence of an agreement between the parties to the contrary, the arbitral tribunal has the power to conduct the arbitration in the manner it considers appropriate. In exercising that power, the general approach followed by arbitral tribunals in practice is as follows:

- In relation to discovery/disclosure, arbitral tribunals routinely make orders for the production of documents. In domestic arbitration, it is common for document production orders to reflect the discovery regime that applies to litigation under the New Zealand High Court Rules. In contrast, in arbitrations conducted under the AMINZ Rules, the arbitral tribunal is expressly given the power to "order the production of documents and other material which it considers to be relevant and material to the dispute at a time, and in a manner and form in which the Arbitral Tribunal may reasonably determine", and the arbitral tribunal may have non-binding regard to the IBA Rules on the Taking of Evidence in International Arbitration.
- Evidence may be given informally or under oath. Witnesses may provide written witness statements prior to the hearing. If they do, such evidence may be taken as read during the hearing or read out, depending on the preference of the arbitral tribunal.
- Cross-examination and re-examination would typically follow. Following cross-examination, arbitrators in New Zealand will commonly ask questions of the witness.

In relation to privilege, the Evidence Act 2006, which codifies the rules of privilege in New Zealand, applies only to court proceedings, not arbitrations. Nevertheless, it is arguable that the rules of privilege in New Zealand as codified in the Evidence Act 2006 might, as a matter of substantive law, be regarded as applicable if New Zealand law governed the arbitration. Moreover, Article 19(3) of Schedule 1 to the Act confirms that every witness giving evidence in an arbitration has the same privileges and immunities as witnesses in court proceedings.

8.2 Rules of Evidence

In the absence of an agreement between the parties to the contrary, the arbitral tribunal has the power to conduct the arbitration in the manner it considers appropriate, including to determine the admissibility, relevance, materiality and weight of any evidence (Art 19(2) of Sch 1 to the Act).

Subject to the requirements of equal treatment and a full opportunity to be heard (Art 18 of Sch 1), there are no rules of evidence that apply to arbitral proceedings in New Zealand. The rules of evidence prevailing in New Zealand (eg, those contained in the High Court Rules and the Evidence Act 2006) therefore do not apply to an arbitration, unless the parties expressly choose to adopt them. However, in practice, arbitrators are often guided by such rules.

8.3 Powers of Compulsion

If the optional Schedule 2 to the Act applies, clause 3 states expressly that the parties shall be taken as having agreed that the arbitral tribunal has the power to "order the discovery and production of documents or materials within

the possession or power of a party", "order the answering of interrogatories", "order that any evidence be given orally or by affidavit or otherwise", and "order that any evidence be given on oath or affirmation".

Arbitral tribunals do not have the power to compel a witness to appear before them.

9. Confidentiality

9.1 Extent of Confidentiality

Sections 14A–14I of the Act contain a code on confidentiality that applies to every arbitration for which the place of arbitration is or would be New Zealand.

- Arbitral proceedings must be conducted in private.
- Arbitration agreements are deemed to provide that the parties and the arbitral tribunal must not disclose confidential information. There are, however, limits on that prohibition.
- Disclosure may be made to a professional or other adviser of any party, or if the disclosure is necessary to ensure each party has a full opportunity to present its case, for the establishment or protection of legal rights in relation to a third party or for making and prosecution of any application to a court, provided disclosure is no more than what is reasonably required to serve the purposes for which it is necessary.
- Disclosure is also allowed if required under a subpoena issued by a court.
- Another circumstance is where disclosure is authorised or required by a competent regulatory body (eg, a stock exchange) and written details of the disclosure are provided to the opposing party. The arbitral tribunal and High Court also have discretion, in certain circumstances, to order disclosure.

Court challenges are generally heard in public. However, in limited circumstances, the High Court may make an order allowing the whole or any part of the proceeding to be conducted in private. Such an order can only be made if the Court is satisfied that the public interest in having the proceedings conducted in public is outweighed by the interests of any party to the proceeding in having the whole or any part of the proceedings conducted in private.

Confidential information from an arbitral proceeding may be disclosed in a subsequent proceeding if the parties agree or if permission is given, either by the arbitral tribunal or by the High Court (eg, in response to a subpoena).

10. The Award

10.1 Legal Requirements

The formal requirements for a valid arbitral award are contained in Article 31 of Schedule 1 to the Act, which follows the Model Law. The award must be in writing, signed by (a majority of) the tribunal, state reasons and include the date and place of the arbitration. The signed award must be delivered to each party after it has been made. There is no requirement that the arbitrators sign each page of the award.

Such formal requirements apply to substantive awards as well as corrections/interpretations of an award, and to any additional award made by the tribunal. They also apply to any costs award.

In Ngāti Hurungaterangi v Ngāti Wahiao [2017] NZCA 429, the Court of Appeal held that there is no qualitative measure of adequacy of reasons.

Flexibility was instead required as to the nature and extent of the duty to give reasons, depending on the subject matter being arbitrated, its significance to the parties and the interests at stake.

The Act does not contain any time limits on the delivery of an award.

10.2 Types of Remedies

Section 12(1)(a) of the Act provides that, unless otherwise agreed by the parties, "an arbitral tribunal may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that court".

10.3 Recovering Interest and Legal Costs

Parties are generally entitled to recover interest and legal costs.

In relation to interest, Article 31(5) of Schedule 1 to the Act states that "[u]nless the arbitration agreement otherwise provides, or the award otherwise directs, a sum directed to be paid by an award shall carry interest as from the date of the award and at the same rate as a judgment debt". Section 12(1)(b) also provides arbitral tribunals with a broad power to award interest.

The rate of interest is a matter for the tribunal. The Interest on Money Claims Act 2016 does not bind an arbitral tribunal (s 6(1)(a)) but parties can refer to this statute as a guide for assessing the appropriate interest to be ordered in any particular case. The Ministry of Justice maintains an online Civil Debt Interest Calculator for such purposes.

In relation to costs, tribunals have the power to award costs under the broad power given to arbitral tribunals under Section 12(1) of the Act to award any relief that could have been ordered by the High Court in the dispute (see General Distributors Ltd v Casata Ltd [2006] 2 NZSC 8).

For domestic arbitrations, New Zealand law provides (controversially) that a tribunal must consider costs, even where costs have not been claimed by either party. Schedule 2 to the Act, which applies to domestic arbitration (unless otherwise agreed) and is optional for international arbitration, contains specific provisions on costs. Clause 6 of Schedule 2 states that: (a) the costs and expenses of the arbitration (including legal costs) shall be fixed and allocated by the tribunal; (b) the default position on costs in the absence of an award is that the parties bear their own legal costs and share equally the costs of the arbitration; and (c) the tribunal may have regard to settlement offers that are without prejudice save as to costs (ie, Calderbank offers).

The practice as to costs in New Zealand is generally that costs follow the event. AMINZ has produced a Costs Protocol which is often cited by parties and arbitrators in their awards. The Protocol sets out the principles to be applied to costs in an arbitration; essentially, that the successful party is entitled to recover its reasonable costs. High Court costs scales do not apply to arbitration.

11. Review of an Award

11.1 Grounds for Appeal

There is no right to appeal (whether by consent or otherwise) on a question of fact arising from an arbitral award (Carr v Gallaway Cook Allan [2014] 1 NZLR 792 (SC)).

However, under Schedule 2 to the Act (which, again, applies automatically to domestic arbitrations unless the parties 'opt out', but applies to international arbitrations only if the parties expressly 'opt in'), there is a limited right to appeal against a question of law arising from an arbitral award. Clause 5(10) of Schedule 2 to the Act provides that a question of law "(a) includes an error of law that involves an incorrect interpretation of the applicable law (whether or not the error appears on the record of the decision); but (b) does not include any question as to whether – (i) the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; and (ii) the arbitral tribunal drew the correct factual inferences from the relevant primary facts".

Even if Schedule 2 applies, the right to appeal is not automatic and requires either the agreement of the parties (the mechanics of which differ depending on the timing of the agreement) or leave of the High Court. Any appeal must be made within three months of the date of the award (cl 5(8) of Sch 2). In most cases, leave to appeal is denied (leave is granted in about one-third of cases). (See further Anna Kirk and Lauren Lindsay, "Arbitration" [2023] NZ L Rev 513.)

Both an application to appeal and an application for leave to appeal are commenced by an originating application filed by the appealing party in the appropriate registry of the High Court (see High Court Rules, 26.3(2)(a), 26.15(1)–(2)(a) and Form Arb 1). Leave applications must also be supported by an affidavit.

If an appeal on a question of law is successful, the court may choose to vary the award, set it aside or remit the award back to the tribunal.

11.2 Excluding/Expanding the Scope of Appeal

The parties cannot agree to expand the scope of appeal against an arbitral award. For example, as set out above, the parties cannot agree that there is a right to appeal an arbitral award on a question of fact (as opposed to a question of law).

11.3 Standard of Judicial Review

The standard of review on appeal is de novo, not deferential, in relation to the question of law that is appealed.

12. Enforcement of an Award

12.1 New York Convention

New Zealand has signed and ratified the New York Convention without reservation. Section 5(f) of the Act confirms that a purpose of the Act is to give effect to the New York Convention, which is attached as Schedule 3 to the Act.

12.2 Enforcement Procedure

The recognition and enforcement of awards – both those made in New Zealand and those made overseas – is governed by Articles 35 and 36 of Schedule 1 to the Act, which reflect the Model Law and basic New York Convention requirements. The sole exception is for awards made under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"): the enforcement of such awards is governed by the Arbitration (International Investment Disputes) Act 1979.

Article 35 of Schedule 1 provides that awards must be recognised as binding and, on application, enforced by entry as a judgment or by action.

Under the New Zealand High Court Rules, such an application:

- must be made by way of originating application;
- must be accompanied by an affidavit containing the award and arbitration agreement (if recorded in writing), or duly certified copies thereof;
- must be accompanied by a duly certified English translation (if the award or the arbitration agreement is not in English); and
- must generally be made on notice, but in exceptional circumstances an application may be made without notice. In such circumstances, however, the court may direct that the award not be enforced until after the defendant has been served and a particular period of time has expired.

If the award has been set aside by the courts in the seat of arbitration, the New Zealand courts have discretion to refuse enforcement of that award (Art 36(1)(a)(v) of Sch 1). While the point has not yet been tested in the New Zealand courts, it seems likely – given the general respect for the law of the seat that is well established in New Zealand – that awards set aside by the courts of the seat will not be enforced in New Zealand, unless the set-aside decision was procured by judicial corruption.

If an award is subject to ongoing set-aside proceedings, the New Zealand courts have discretion to adjourn their decision on enforcement (and may require the payment of security) (Art 36(2) of Sch 1). But if the court considered that the application lacked merit, the court may refuse an adjournment request and enforce the award.

In relation to sovereign immunity, the common law doctrine continues to apply in New Zealand. Sovereign immunity in New Zealand applies only to the State's sovereign or public acts as opposed to its commercial activity.

New Zealand has not seen any cases regarding enforcement of an arbitral award against State assets. However, in the recent case of Sodexo Pass International SAS v Hungary [2021] NZHC 371, the High Court held that the clear and unambiguous intention of the ICSID Convention was to waive sovereign immunity in relation to recognition proceedings for an award made under that Convention, but that the immunity was preserved for execution. As Sodexo Pass was seeking recognition of an ICSID award, the Court held that Hungary was not entitled to object to jurisdiction in the recognition proceedings on the basis of sovereign immunity.

12.3 Approach of the Courts

The approach of the New Zealand courts to the recognition and enforcement of arbitral awards is generally consistent with the purpose of encouraging arbitration as a method of dispute resolution and facilitating the recognition and enforcement of arbitral awards (ss 5(a) and (e) of the Act; see also Gallaway Cook Allan v Carr [2013] NZCA 11 (CA) at [66]; Carr v Gallaway Cook Allan [2014] 1 NZLR 792 (SC) at [30]–[32]).

Article 36(1)(b) of Schedule 1 to the Act provides that recognition or enforcement may be refused if it would be "contrary to the public policy of New Zealand". The Act confirms that an award is contrary to the public policy of New Zealand if (a) the making of the award was induced or affected by fraud or corruption, or (b) a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award.

However, the bar for establishing such a conflict with public policy is very high.

In Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd [2004] 2 NZLR 614, the Court of Appeal concluded that a fundamental principle of law and justice must be at issue to establish a conflict with public policy, and that the alleged conflict should be obvious. Similarly, in Hi-Gene Ltd v Swisher Hygiene Franchise Corporation [2010] NZCA 359, it was held that "a narrow reading is to be given to the public policy ground". In relation to the circumstances in which a breach of natural justice will amount to a conflict with public policy, the Court held that such a breach would need to be something that violates a State's "most basic notices of morality and justice", constitutes an abuse of process, or "shocks the conscience of the court".

While Article 36(1)(b) of Schedule 1 expressly refers to the public policy "of New Zealand", it is less clear whether there is a difference between New Zealand public policy as applied to domestic and to foreign arbitral awards. However, in both Amaltal and Swisher Hygiene, the Court of Appeal cited overseas judgments involving the enforcement of foreign awards, which suggests that the distinction between domestic and foreign may have limited practical relevance under Article 36(1)(b).

13. Miscellaneous

13.1 Class Action or Group Arbitration

The Act does not provide for class action or group arbitration.

13.2 Ethical Codes

New Zealand has a "fused" profession whereby most lawyers are "barristers and solicitors". Lawyers can opt to be a barrister sole. Lawyers are regulated by the Law Society and must comply with the Lawyers: Conduct and Client Care Rules 2008 (issued pursuant to the Lawyers and Conveyancers Act 2006). New Zealand lawyers with a New Zealand practising certificate are bound by these rules whether the arbitration is seated in New Zealand or elsewhere. The Lawyers and Conveyancers Act 2006 is drafted to regulate lawyers who hold a current practising certificate in New Zealand.

Therefore, counsel from countries other than New Zealand would not automatically be bound by the Lawyers: Conduct and Client Care Rules 2008 simply by virtue of an arbitration being seated in New Zealand. Those lawyers would, however, continue to be governed by the laws of their own home jurisdiction.

Many New Zealand-based arbitrators and arbitration counsel are members of AMINZ, which has a Code of Ethics. All members are expected to comply with the Code, which states that if a member is alleged to be in breach of the Code, they may be subject to the provisions of the AMINZ Rules dealing with professional misconduct and disciplinary matters.

13.3 Third-Party Funding

There are no specific laws regulating third-party funding of arbitration in New Zealand. In Waterhouse v Contractors Bonding Ltd [2013] NZSC 89, the Supreme Court sanctioned a limited form of judicial oversight of third-party funding arrangements in litigation. The Court said it would assess the fairness of such arrangements, but that it would adjudicate any application regarding third-party funding that was brought by a party.

On 22 June 2022, the New Zealand Law Commission published a final report on class actions and litigation funding in New Zealand. Among other matters, it recommended enhanced court oversight of litigation funding. The Government has indicated its support for the Law Commission's recommendations and intends to advance them in 2023.

There is a developing body of case law in New Zealand addressing the procedural and substantive law governing representative proceedings. Recently, the New Zealand Court of Appeal confirmed the High Court's jurisdiction to make Common Fund Orders (CFOs) where the class action is funded. CFOs are a "mechanism which provide a way of sharing the costs of bringing a class action between all class members, regardless of whether they have signed the funding agreement actions": Anthony Paul Simons and others v ANZ Bank New Zealand Limited and ASB Bank New Zealand Limited [2024] NZCA 330 at [93]. The Court of Appeal held that CFOs should be made at an early stage of the proceeding, primarily to ensure certainty. The Court of Appeal, in contrast to the approach in Australia, held that a CFO was "a procedural mechanism designed to ensure access to justice and the fair application of [the relevant High Court Rule]": Anthony Paul Simons and others v ANZ Bank New Zealand Limited and ASB Bank New Zealand Limited [2024] NZCA 330 at [137].

13.4 Consolidation

Schedule 2 to the Act provides for the consolidation of separation arbitral proceedings by agreement (cl 2(9)) or, absent agreement:

- Where the proceedings have the same arbitral tribunal, consolidation may be ordered by the tribunal on terms the tribunal thinks just, failing which by the High Court (cl 2(1)).
- Where the proceedings do not all have the same arbitral tribunal, consolidation may provisionally be ordered by a tribunal on terms the tribunal thinks just (cl 2(2)). Consolidation ceases to be provisional when consistent consolidation orders are made for all the arbitral proceedings, failing which the High Court may make such orders.

13.5 Binding of Third Parties

As set out in **5.7 Jurisdiction Over Third Parties**, non-signatories may sometimes be regarded as parties to and therefore bound by an arbitration agreement and award. Third parties cannot otherwise be bound by an arbitration agreement or award.

The New Zealand courts do have the ability to bind third parties in circumstances in which an arbitral tribunal cannot, eg, in making interim orders, or making an order of subpoena or issuing a witness summons, compelling the attendance of a witness before the tribunal to give evidence or produce documents.

NIGERIA

Trends and Developments

Contributed by:
Olasupo Shasore, Oyinkansola Badejo-Okusanya and Michael Chukwu
ALP NG & Co

ALP NG & Co is a commercial law firm established following a merger of Nigeria-based law practices, whose members have varied experience spanning all areas of its combined practice. It is an Africa-focused firm with dedicated and innovative corporate and dispute resolution practices, providing the highest quality of legal, business advisory and related services to the local business community, as well as continental and international clients. ALP NG & Co is connected across the African continent and internationally, linked by the extensive support capabilities and correspondent relationships with law firms in Africa, Europe, Asia and North America. It has strong regional networks and international relationships, offering pragmatic and efficient solutions to legal concern and diverse needs.

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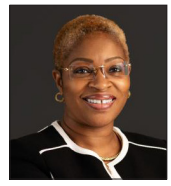

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Introduction

As a result of the well-documented benefits of arbitration as a mechanism for resolving commercial disputes, there has been a trend towards countries actively competing – through legislation and court decisions – to have their jurisdictions perceived as arbitration-friendly. This article discusses the trends and developments in the field of arbitration in Nigeria and analyses in detail some of the provisions of the recently passed Arbitration and Mediation Act 2023 (AMA), in addition to some concerns that may arise in the application of the law. It also examines some recent arbitration-related decisions from Nigerian courts to see whether those decisions support or stifle the quest to establish Nigeria as a veritable regional arbitration hub and an arbitration-friendly jurisdiction.

Innovative Provisions of the Arbitration and Mediation Act 2023

A year after the AMA repealed the 35-year-old Arbitration and Conciliation Act 1988 (the "1988 Act"), the innovations and provisions of the new law are being tested in many ways. The AMA has introduced some significant changes, which shall be discussed.

Definition of arbitration agreement

Unlike the 1988 Act, which did not define "arbitration agreement", Section 2(1) of the AMA contains a wide and liberal definition of "arbitration agreement" and expands the scope of arbitration agreements recognised under the law. Instructively, the AMA acknowledges the advances in technology by expressly stating that the requirement for an arbitration agreement to be in writing is met if the agreement is recorded in any form or is contained in electronic communication. As such, application of the judgment in UBA Plc v Triedent Consulting Ltd (2023) 9 CLRN 69; 14 NWLR (Pt 1903) 130, which was decided based on the 1988 Act, means that electronic communication (including emails) would constitute a binding arbitration agreement even when the arbitration "agreement" is in a separate communication or document from the agreement on the subject matter.

Stay of proceedings and referral to arbitration

The AMA has removed the confusing provisions of Sections 4 and 5 from the 1988 Act, both of which allowed the court to stay proceedings and refer disputes to arbitration, leading to duplication and conflict. The new Section 5 of the AMA aligns with Article II (3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"), stating that a court must refer parties to arbitration if the matter is subject to an arbitration agreement, unless the agreement is found to be null, void, inoperative, or incapable of being performed.

The conditions in Section 5 of the 1988 Act for granting a stay of proceedings – which the courts elevated to onerous levels in their interpretation in, for instance, the Owners of MV Lupex v Nigerian Overseas Chartering & Shipping Ltd (MV Lupex) (2003) 15 NWLR (Pt 844) 469 – no longer form part of the new regime. What remains the same, though, is that the order of stay of proceedings may only be granted if any of the parties so requests and such request must be brought by the party no later than when submitting its first statement on the substance of the dispute.

Designation of default appointing authority

Under the 1988 Act, the default arbitrator(s)-appointing authority was the national court in cases where either the parties fail to appoint a sole arbitrator, or a party fails to nominate or appoint a party-appointed arbitrator, or even where the party-appointed arbitrators fail to

agree on a presiding arbitrator. In such circumstances, the decision of the court in appointing an arbitrator under Section 7(2) and (3) of the 1988 Act was not appealable, as was held by the court of appeal in AG Ogun State & 3 Ors v Bond Investment & Holdings Ltd (2024) 1 NWLR (Pt 1918) 155.

Unlike the 1988 Act, the AMA has now included "an arbitral institution in Nigeria" as the alternate default appointing authority along with the national courts for domestic arbitrations under Section 7(3). For international arbitration, where the parties have neither agreed on a procedure for the appointment of an arbitrator nor on the appointing authority, Section 59 of the AMA provides that the director of the Regional Centre for International Commercial Arbitration, Lagos (RCICAL) will be deemed to be the appointing authority.

The designation of the national courts as the sole default appointing authority under the 1988 Act had been one of the causes of delay in concluding arbitral proceedings speedily and opened the door for interference by the courts. As such, the provisions of the AMA as highlighted here are a major improvement.

However, to encourage expediency, efficiency, and adequate consideration of the facts, the ideal position is to have the arbitral institutions as the default appointing authority. The Arbitration Rules in Article 6 attempt to provide for this by stating that unless parties have already agreed on the choice of an appointing authority, a party may propose the name(s) of one or more institutions or persons (including the director of the RCICAL) to serve as the appointing authority. Where the parties fail to agree on the appointing authority within 30 days following the proposal, any party may request the director of the RCICAL to designate the appointing authority.

There have been arguments that the inconsistency between the provisions of Section 7 of the AMA and Article 6 of the Arbitration Rules must be resolved in favour of the Arbitration Rules, such that parties must agree on the institution (or on the person that may act as the appointing authority or must request the director of the RCICAL to act as the appointing authority) and cannot resort to the court for such appointments. However, the provisions of the AMA as the substantive law are superior to the Arbitration Rules, which is the subsidiary legislation. Therefore, appointment under Section 7 of the AMA is the appropriate step in appointing arbitrators in these circumstances.

Relatedly, the combined reading of Section 7 and the interpretation of "court" under Section 91 of the AMA clearly provide that the appointment of arbitrator(s) may be made by the chief judge of the High Court of a state, the High Court of the Federal Capital Territory Abuja or the Federal High Court, sitting as a judge in Chambers. As such, requests for such appointments by the court need not be made through an application in the form of a motion or other modes for commencement of action. A formal application in writing to the chief judge in these cases should be sufficient to initiate the appointment procedure by the court.

Decisions on challenges to arbitrators

Another area of inconsistency that has now been addressed in the AMA is in respect of the challenge to arbitrators. Section 9(3) of the 1988 Act provided that, unless the challenged arbitrator withdraws or the other party agrees to the challenge, the arbitrator or arbitral panel will decide on the challenge. Article 12 of the Arbitration

Rules contained in the First Schedule to the 1988 Act further provided that the decision on the challenge will be made by the court, except in cases where the parties designated a different appointing authority.

Under the AMA, Section 9(2) equally provides for the powers of the arbitral tribunal to decide on a challenge, whereas Article 13(4) of the Arbitration Rules made pursuant to the AMA contains a slight but significant change to the position in the 1988 Act – in that the decision on the challenge must be made by the appointing authority.

Freedom of parties to decide procedural rules

In a departure from the provisions of Section 15 of the 1988 Act, which provided – and erroneously, too – that arbitral proceedings must be conducted in accordance with the procedure contained in the Arbitration Rules set out in the First Schedule to the Act, the AMA provides in Section 31 that parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. It is only in cases where the parties fail to agree on the procedural rules that the Arbitration Rules set out in the First Schedule to the AMA will apply. There is no gainsaying the fact that the position under the AMA corresponds with the principle of party autonomy, which is the hallmark of arbitration.

Distinction between seat and venue of arbitration

Another important feature of the AMA is that it explicitly provides in Section 32 for the seat of an arbitration and distinguishes between the "seat" and the "venue" where the arbitration proceedings are to take place. Under the AMA, the "seat of arbitration" is the judicial seat of the arbitration for the purpose of determining the law that will govern the proceedings and it may be designated by the parties or an arbitral or other institution, whereas the "venue" is any place that the arbitral tribunal meets for consultation, hearing or inspection.

This is a welcome departure from Section 16 of the 1988 Act, which merely provided for the "place" of the arbitral proceedings. This section had, not unexpectedly, brought about some measure of controversy – sometimes with monumental consequences.

Limitation period for enforcement of arbitral awards

There are also the very welcome provisions in Sections 34(1) and (4) of the AMA to the effect that – although the provisions of the Limitation Act apply to arbitral proceedings as they apply to judicial proceedings – in calculating the date of commencement of proceedings for the purpose of enforcing an arbitral award, the period between the commencement of the arbitration and the date of the award shall be excluded. This effectively reverses the position in cases such as City Engineering Nig Ltd v Federal Housing Authority (1997) 9 NWLR (Pt 520) 224 and Sakamori Construction Nigeria Limited v Lagos State Water Corporation (2022) 8 NWLR (Pt 1823) 339.

In the City Engineering case, the Supreme Court held that – for the purpose of determining the limitation period for the enforcement of an arbitral award – time begins to run from the date that the original cause of action arose and not from the date of the arbitral award. The implication of this judgment has been that award creditors were bound to apply to enforce their award no later than the stipulated limitation period (ie, usually six years). Indeed, there have been cases where the limitation period expired even before the award was rendered. The decision has accordingly wrought considerable hardship on

award creditors and adversely affected the practice of arbitration in Nigeria. The AMA, however, borrows from the sub-national Arbitration Law of Lagos State (the commercial capital of Nigeria) and adopts the ratio in Sifax Nigeria Limited v Migfo Nigeria Limited (2018) 9 NWLR (Pt 1623) 138 and Messrs U Maduka Ent (Nig) Ltd v BPE (2019) 12 8 CLRN 103; (2019) 12 NWLR (Pt 1687) 429 in order to bring the law in line with international expectations.

Interim measures

Yet another innovative provision in the AMA can be found in Section 16, which provides for the appointment of an emergency arbitrator where a party requires urgent relief prior to the appointment of the tribunal and also provides for emergency arbitration proceedings. Under the AMA, the application for the appointment of this emergency arbitrator must be submitted to the arbitral institution designated by the parties or (failing such designation) to the national court. This remedy – designed to safeguard the rights of a party to a dispute, especially in situations where time is of the essence and parties are unable to wait for the constitution of an arbitral tribunal to prevent or remedy a damage – is a commendable inclusion in the AMA.

This provision in the AMA mirrors a similar provision in the Lagos Court of Arbitration Rules and accords with the trend in new-generation national arbitration legislations. Furthermore, Sections 19 and 20 of the AMA respectively provide for the powers of national courts and arbitral tribunals to grant interim measures of protection that, under Section 28, are binding and capable of recognition and enforcement.

An emergency arbitrator appointed under the AMA must issue its decision within 14 days from the date the arbitrator receives the file on the dispute/claims. Any order/decision made by the emergency arbitrator will not bind the arbitral tribunal and, where the arbitral tribunal has been constituted, the emergency arbitrator will have no further power to act.

The AMA also provides for the first time, in Section 22, that a request for interim measures may be made together with an application for a preliminary order without notice to the other party. However, Section 23(5) of the AMA – like Article 17C (5) of the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law") – provides that preliminary orders, while binding, shall not be subject to enforcement by a court.

Third-party funding

The most talked-about – and about which the authors are most excited – innovation in the AMA is the introduction of third-party funding as part of arbitral proceedings. The concept of third-party funding has introduced a remarkable evolution in arbitration, making it more accessible for parties that may not have the financial resources to assert their rights through arbitration. The AMA now permits parties to enter into agreements with third parties to fund the arbitration process on their behalf. This innovation removes the traditional legal barriers of champerty and maintenance, thereby allowing potentially meritorious claims to be brought that would otherwise have been financially prohibitive. The beneficiaries of third-party funding in arbitration proceedings are, however, required to notify the other party(ies) and the arbitrator(s) of this position and may be required to confirm by deposition whether the funder has agreed to cover any adverse cost order.

Despite its benefits, third-party funding in commercial arbitration is still in its nascent stages

of evolution in global arbitral legislation. It is therefore a very welcome addition to Nigerian practice for a number of reasons – not the least of which is adding to Nigeria's competitiveness as a preferred seat for international commercial arbitration. The fact that proceedings may no longer be stalled on account of a lack of sufficient funding and the implications of this for access to justice will potentially contribute to the further growth and development of arbitration in Nigeria.

Award review tribunal

The concept of the award review tribunal is another innovation that will have far-reaching effects. This important solution to a perennial problem offers a faster and more efficient means of challenging an arbitral award, effectively bypassing the characteristically time-consuming and costly court proceedings. Although this innovation has not been adopted, it will not only speed up the process but also preserve the sanctity and reliability of Nigerian-seated arbitral awards, thereby increasing confidence in Nigeria's arbitration framework.

Arbitration-Related Decisions of Nigerian Courts

Nigerian courts have generally, especially in more recent times, adopted a pro-arbitration approach in the determination of arbitration-related cases. Case law in Nigeria is replete with instances where Nigerian courts have given effect to parties' agreements by refusing to adjudicate over actions in respect of which there is an arbitration agreement, instead referring parties to arbitration in accordance with their agreement. These include the cases of Nwagbara v Jadcom Ltd (2021) 16 NWLR (1802) 343 and Esso Exp & Prod (Nig) Ltd v FIRS (2021) 8 NWLR (1777) 98.

Scope of arbitration clauses

However, in UBA Plc v Triedent Consulting Ltd, the Supreme Court made a decision that restricts the scope of arbitration agreements in Nigeria. The court held that common law and statute are the two sources of arbitration law in Nigeria that coexist to complement each other. Essentially, statutes provide the detailed guidance addressing specific issues, whereas the common-law principles supplement statutory provisions by addressing areas not covered by the statue. As such, a court may apply both laws in a matter to the extent that they are relevant in the circumstances.

It was on this basis that the court held that the terms of arbitration agreements must be clear and certain in satisfaction of the elements of contract. The court adopted a restrictive approach in interpreting the arbitration clause (which provided that parties must use their best endeavours to settle "disputes arising from the agreement" entered into by the parties), circumscribing the matters to which the arbitration clause applies. The court held that the operation of such arbitration agreements must be narrowly defined in order to exclude disputes outside of the substance of the original agreement, as the court cannot make inference as to the intention of the parties.

The court's stance differs from the international interpretation tendencies, which – in the interest of the parties – typically favour interpreting arbitration clauses as covering not only future contractual disputes but also disputes arising from the non-contractual obligations of the parties if they relate to the execution of the contract. In applying this position, the House of Lords of the United Kingdom stated in Premium Nafta Products Limited and others v Fili Shipping Company Limited and others (UKHL 2007) 40 that it should

be assumed that parties – when using phrases like "disputes arising from this agreement" in arbitration clauses – intend for any dispute arising from relationship into which they entered to be decided by the same dispute resolution mechanism.

In the UBA Plc v Triedent Consulting Ltd case, the court held that the arbitration clause excluded the issue of defamation raised by the respondent as a result of the appellant's letter, which was published to a third party, indicating that the company was overpaid and in the bank's debt. It was held that defamation and costs for litigation are secondary liabilities and not part of the contractual obligations in the contract and, as such, not covered by the arbitration clause under the agreement. It appears that the court may have aligned with international tendencies to hold that the arbitration clause had a wider scope if the arbitration clause had included the phrase "or relating to…". However, the court's decision is a clear limitation of the scope of arbitration agreements in Nigeria.

Inapplicability of pre-action notices

The courts have also made other pronouncements that have expanded the frontiers of arbitration in Nigeria in cases such as NNPC v Fun Tai Eng Co Ltd (2023) 15 NWLR (Pt 1906) 196, where the Supreme Court held that the right to receive pre-action notice that was granted to the Nigerian National Petroleum Corporation (NNPC) under the NNPC Act does not apply to arbitration. In upholding an award that was made against the appellant and enforcing the fundamental principles of arbitration, the court held that by deliberately, consciously and freely choosing by consensus to submit to arbitration, the corporation's statutory right to pre-action notice was not applicable in such instances.

Setting aside of foreign arbitral awards

But there is also the more problematic occurrence whereby Nigerian courts have, on isolated occasions, erroneously set aside foreign arbitral awards – ie, awards rendered by foreign-seated arbitral tribunals or awards emanating from arbitrations conducted under laws other than Nigerian law. The latest example of this is the case of Limak Yatirim Enerji Uretim Isletme Hizmetleri ve Insaat AS & Ors v Sahelian Energy & Integrated Services Ltd (2021) LPELR-058182(CA), where the Nigerian Court of Appeal upheld the decision of the High Court of the Federal Capital Territory Abuja, which set aside a final arbitral award published on 28 June 2018 by a tribunal of the ICC International Court of Arbitration seated in Geneva, Switzerland on the grounds that enforcing the award would be contrary to public policy. The court held that the lower court was right to exercise its powers to set aside the international arbitral award, as non-compliance with the statutory requirement to register the Co-operation Framework Agreement (which gave rise to the international arbitral award) with the National Office for Technology Acquisition and Promotion is against public policy.

Increasing Adoption of Technology in Arbitral Proceedings in Nigeria

Although parties still favour physical sittings during arbitral proceedings, the use of various forms of electronic communication technology has become increasingly popular in Nigeria. Many remain open to the use of communication technology to allow parties to attend arbitral hearings virtually where unavoidable and where agreed to by the parties. To ensure that the awards are not set aside on grounds that the proceedings were conducted at the wrong venue, the arbitral panel usually sits at the agreed venue of the proceedings and may be joined by the parties and/or witnesses via online videoconferencing platforms.

Conclusion

The need for businesses to resort to arbitration and other ADR options has become even more acute. The introduction and now widely accepted use of virtual and other digital hearing platforms in Nigeria fitted nicely into the flexibility that arbitration offers, and the quest for the continued growth and development of the dispute resolution space in Nigeria – especially the field of arbitration – looks increasingly promising. The Arbitration and Mediation Act 2023 and the issuance of pro-arbitration decisions by Nigerian courts have largely modernised the country's arbitration framework and aligned it with international best practices and the UNCITRAL Model Law.

NORWAY

Law and Practice

Contributed by:
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Advokatfirmaet Thommessen AS

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Advokatfirmaet Thommessen AS was established in 1856 and is considered to be one of Norway's leading commercial law firms. The firm has offices in Oslo, Bergen, Stavanger and London, and provides advice to Norwegian and international companies and organisations in both the public and private sectors, from SMEs to multinational corporations. With approximately 300 lawyers, Thommessen covers all business-related fields of law. It has extensive experience in resolving disputes in arbitration proceedings, and its lawyers are often used as arbitrators in commercial disputes. Many disputes are a fight for facts, and the firm's lawyers find what is necessary. Its litigation and arbitration specialists work closely with in-house technical professionals and market experts, ensuring that the right people get involved at the right time in the process. Thommessen has cutting-edge expertise and versatility, taking neither shortcuts nor detours.

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1. General

1.1 Prevalence of Arbitration

Arbitration is frequently used among professional parties in Norway, and is often the preferred dispute resolution method. For example, it is the prevailing dispute resolution method in the reinsurance market and within the M&A sector in Norway, and is also generally preferred by parties in other large commercial agreements.

The three main reasons parties choose to have disputes resolved by arbitration in Norway are:

- the potential for a quicker dispute resolution process compared to the process offered by the Norwegian ordinary courts;
- the possibility to influence the composition of the arbitral tribunal; and
- the potential for a confidential process.

Domestic parties, however, most frequently rely on ad hoc arbitration as prescribed by the Norwegian Arbitration Act of 14 May 2004 No 25 (the "Arbitration Act") and less so on institutional arbitration proceedings, which in Norway are offered by the Oslo Chamber of Commerce (OCC) and the Nordic Offshore & Maritime Arbitration Association (NOMA), for example.

International arbitration through foreign arbitration institutes is not so commonly agreed between purely domestic parties. However, Swedish or Danish arbitrators are occasionally involved in Norwegian matters and vice versa, due to the similarities between the legal systems in the Scandinavian countries.

In matters where either of the parties is located outside Norway, there is a tendency for parties to resort to the use of international arbitration through one of the recognised arbitration institutes in Europe – for example, the SCC/SAA Arbitration Institute in Stockholm or the ICC in Paris.

1.2 Key Industries

The reinsurance industry is seeing an increase in the number of disputes referred to arbitration. As reinsurance is an international industry, this is leading to an increase in the number of international arbitration proceedings. A possible explanation for this trend is a tightening insurance market, which has raised new and previously unresolved legal questions.

Furthermore, there has been a notable rise in the number of post-M&A disputes being referred to arbitration. What these reinsurance and post-M&A disputes have in common is the frequent involvement of international elements.

The general impression is that international disputes are on the rise in Europe due to, inter alia, the war in Ukraine leading to disturbed supply chains and sanctions, affecting a number of industries.

1.3 Arbitration Institutions

The Arbitration Act is based on ad hoc arbitration, and many international arbitrations are therefore not resolved under the auspices of a Norwegian arbitral institution.

Those international arbitrations that use an arbitral institution typically do so through the OCC Institute. An alternative to the OCC Institute is the Nordic Offshore and Maritime Arbitration Association (NOMA), which was established in 2017 and has seen a recent surge in the resolution of disputes thereunder.

Although the majority of disputes are typically resolved through ad hoc arbitration, there is a

growing trend of utilising the templates and rules provided by arbitration institutes as the foundation for the arbitration process. The rules of NOMA, in particular, are frequently employed. As a result, the distinction between ad hoc and institutional arbitration is becoming less significant.

1.4 National Courts

The national courts of Norway have no courts designated to hear disputes related to arbitration, whether international or domestic.

Where the Arbitration Act grants competence to the ordinary courts (eg, if the parties are unable to agree on an arbitral tribunal), the courts that would have been competent in the absence of the arbitration agreement will have competence to decide on the specific matter. If no specific Norwegian court would have had competence in the absence of the arbitration agreement, Oslo District Court will have competence to decide on the matter.

2. Governing Legislation

2.1 Governing Law

The Norwegian Arbitration Act of 14 May 2004 No 25 (the "Arbitration Act") governs both domestic and international arbitration conducted in Norway. It is structurally and in content based on the UNCITRAL Model Law, but there are some differences, partly due to the fact that the Arbitration Act governs both domestic and international arbitration proceedings.

Two key items on which the Arbitration Act differs from the UNCITRAL Model Law relate to the requirements of the arbitration agreement, and the confidentiality of proceedings.

In regard to the arbitration agreement, it should be noted that the Arbitration Act does not require an arbitration agreement to be in writing. This may raise certain challenges if an award from a Norwegian arbitral tribunal based on an oral arbitration agreement is to be enforced in a country that requires arbitration agreements to be in writing.

In regard to the confidentiality of the proceedings, the Arbitration Act states that arbitral proceedings and any resulting decisions and awards are not confidential unless the parties agree otherwise for the specific dispute. Consequently, an agreement regarding confidentiality must be entered into after the dispute has arisen.

2.2 Changes to National Law

There have been no significant changes to the Arbitration Act in the past year and there is no pending legislation that may change the arbitration landscape in Norway.

3. The Arbitration Agreement

3.1 Enforceability

There are no requirements regarding the form of the arbitration agreement pursuant to the Arbitration Act. On the other hand, the courts in Norway have been somewhat restrictive in determining that the parties have entered into an arbitration agreement; see **3.3 National Courts' Approach**.

Under Section 10 of the Arbitration Act, the enforceability of the arbitration agreement depends upon whether one of the parties is a consumer. An arbitration agreement is not binding for a consumer if it was entered into prior to the dispute.

3.2 Arbitrability

It follows from Section 9 of the Arbitration Act that only legal matters that are subject to the parties' unrestricted right of disposition may be determined by arbitration. In general, the parties' autonomy and the right of disposition follow the lines of what parties may agree upon in a contract. A matter relating to children's rights is a typical example of a matter that cannot be referred to arbitration between private parties.

The question of whether the parties have an unrestricted right of disposition can sometimes be subject to doubt, and as such the arbitrability of a legal matter must be decided on a case-by-case basis. For instance, there is an argument in legal theory that a dispute between a limited liability company and one of its shareholders regarding the validity of a General Assembly decision is not arbitrable.

Another example of a matter not subject to the parties' right of disposition is the validity of private rights that have been achieved by public decision, such as patents or trade marks. Furthermore, Chapter 17 of the Working Environment Act contains provisions for civil procedure that preclude labour matters from arbitration. The only exception made is for cases brought by or against the highest ranking officer of a company.

Matters of competition law are not necessarily subject to the parties' unrestricted right of disposition. However, it follows from Section 10 of the Arbitration Act that matters concerning the private law effects of competition law are arbitrable.

Pursuant to Section 18 of the Arbitration Act, it is the arbitration tribunal that decides whether the case is arbitrable. Nonetheless, a decision that the tribunal is competent to hear the case may be brought before national courts within a month. Furthermore, pursuant to Sections 43 and 44 of the Arbitration Act, a ruling by the tribunal may be held invalid by the national courts on the grounds that the case was not arbitrable.

3.3 National Courts' Approach

In terms of determining which country's law governs the arbitration agreement, the courts are bound by the parties' choice of law. The Arbitration Act is based on the principle of separability and therefore the arbitration agreement may be governed by a choice of law other than the law governing the substantive contract. Under Section 31 of the Arbitration Act, a reference to the laws of a state is presumed to be a reference to the substantive laws of that state and not the state's conflict of law rules.

In determining whether the national courts are precluded from hearing a case because of an arbitration clause, the courts apply Norwegian procedural law as a main rule. However, the courts have taken into consideration whether the solution that follows from Norwegian law harmonises with the laws of the state governing the arbitration agreement. In particular, consideration is made to the law governing the arbitration agreement when determining the arbitrability of a matter and the validity of arbitration clauses.

Case law dictates that the evaluation of whether the parties have entered into an arbitration agreement must be restrictive. The Norwegian Supreme Court has based its reasoning on Article 6 No 1 of the the European Convention of Human Rights, which requires that a waiver of the right to access to court must be voluntary and informed. However, if it can be established that the parties have agreed to arbitrate a matter and arbitral proceedings are initiated, the courts

are required to dismiss a case brought before them unless they find it clear that the arbitration agreement is invalid or owing to other reasons cannot be carried out.

According to Section 7 of the Arbitration Act, the defendant must request dismissal no later than when they address the merits of the case if the plaintiff has initiated a lawsuit in the regular courts for matters covered by an arbitration agreement. Failure to request dismissal in a timely manner will result in the regular court proceeding with the case. The Norwegian Supreme Court has applied a strict interpretation of Section 7 of the Arbitration Act, highlighting the importance of the defendant promptly seeking dismissal in the defence reply.

Notwithstanding the strict evaluation of whether an arbitration agreement has been entered into, arbitration agreements are only exceptionally held invalid. This is due to the strict criteria for voiding agreements in Norwegian contract law.

3.4 Validity

It follows from Section 18 of the Arbitration Act, in which the rule of separability is enshrined, that the validity of an arbitral clause is not dependent on the validity of the contract as such. Therefore, the arbitral tribunal maintains its competence even if it holds the contract invalid.

4. The Arbitral Tribunal

4.1 Limits on Selection

In accordance with Section 13 of the Arbitration Act, there are no limits on the parties' autonomy to select arbitrators. The parties are free to stipulate specific requirements for the tribunal in the arbitration agreement.

In accordance with Section 13 (1) of the Arbitration Act, the arbitrators must be impartial and independent from the parties and qualified for the task. However, these are not mandatory requirements and the parties are free to agree otherwise.

4.2 Default Procedures

Pursuant to Section 13 of the Arbitration Act, the starting point is that the parties shall jointly appoint the arbitrators.

If the arbitral tribunal shall comprise three arbitrators and the parties fail to agree on the composition of the tribunal, each party shall appoint one arbitrator. These two arbitrators shall then jointly appoint the third arbitrator to be the presiding arbitrator.

If the arbitral tribunal cannot be established pursuant to the procedure outlined above, each of the parties may request that the ordinary court having jurisdiction decides on the appointment(s). The decision on appointment passed by the ordinary court is not subject to any appeal.

4.3 Court Intervention

The ordinary court(s) can only intervene in the arbitrator selection process if such intervention is requested by one of the parties and authorised pursuant to the Arbitration Act.

As stated in **4.2 Default Procedures**, in some cases a party may request that the ordinary court appoints the arbitrators. In certain cases, a party may also request that the ordinary court rules on whether there are grounds for requesting an appointed arbitrator to step down from the tribunal due to objections raised; see Section 15, second paragraph, of the Arbitration Act. In

such cases, the decision made by the ordinary court is not subject to appeal.

4.4 Challenge and Removal of Arbitrators

In accordance with Section 14 of the Arbitration Act, an arbitrator may only be challenged if there are circumstances that give rise to justifiable doubts about his or her impartiality or independence, or if he or she does not possess the qualifications agreed between the parties in the arbitration agreement.

The arbitrator is obliged to disclose any circumstances likely to give rise to such justifiable doubts from the time when he or she is approached in respect of a possible appointment as arbitrator. The same obligation will be in place throughout the arbitral proceedings so that the arbitrator is always under the duty to convey such information to the parties.

Unless the parties have agreed otherwise, a challenge against an arbitrator shall state the factual reasons for the challenge and shall be submitted in writing to the arbitral tribunal within 15 days after the party has become aware of both the appointment of the arbitrator and the circumstances on which the challenge is based. Unless the challenged arbitrator voluntarily withdraws from his or her appointment or the other party agrees to the challenge, the arbitral tribunal shall make a decision on whether or not there is a basis for the challenge.

If a challenge is unsuccessful, the challenging party may bring this issue to the ordinary court, unless the parties have agreed to another procedure.

4.5 Arbitrator Requirements

Pursuant to Section 13 of the Arbitration Act, the arbitrators are required to be impartial and independent of the parties, and to be qualified for the role as arbitrator. As mentioned in **4.1 Limits on Selection**, this is not a mandatory requirement and the parties are free to agree otherwise.

The Arbitration Act does not include a definition of "impartial and independent". This must be subject to a concrete assessment in the individual case. The Courts of Justice Act applies for all ordinary courts, and Section 108 thereof sets out some provisions regarding legal capacity for judges in the ordinary courts, which can provide some guidance for the assessment, even though they are not directly applicable. The Guidelines on Conflicts of Interest in International Arbitration from the International Bar Association may also provide some guidance for resolving whether an arbitrator is "impartial and independent".

The requirement regarding the arbitrators' qualifications must also be assessed specifically in each case, based on the parties' agreement and the specific facts. If the parties have agreed on any specific requirements regarding experience or knowledge, this would of course be relevant (if not decisive) in the assessment.

As stated in **4.4 Challenge and Removal of Arbitrators**, a candidate approached for possible appointment as arbitrator, as well as an appointed arbitrator, is under a constant duty to disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

As stated in **3.2 Arbitrability**, only legal matters that are subject to the parties' unrestricted right of disposition may be determined by arbitration;

see Section 9 of the Arbitration Act. In general, the parties' unrestricted right of disposition will normally correspond with what the parties may agree upon in a contract. As a general rule, fields of law traditionally concerned with public policies – such as family law and criminal law – are jurisdiction-exclusive to the national courts. It should also be mentioned that Section 11 of the Arbitration Act provides for a large degree of consumer protection and, inter alia, states that an arbitration agreement entered into prior to the dispute arising shall not be binding on the consumer.

5.2 Challenges to Jurisdiction

Challenges to the tribunal's jurisdiction, including any objections as to the existence or validity of the arbitration agreement, are decided by the arbitral tribunal in accordance with Section 18 of the Arbitration Act. The arbitral tribunal may rule on an objection as to whether it has jurisdiction over the case either during the arbitral proceedings or in the arbitral award determining the dispute.

As a general rule, if a party wishes to raise the objection that the arbitral tribunal does not have jurisdiction over the case or the claim, such objection shall be raised no later than in the parties' submission of the first statement to the merits of the case.

If the arbitral tribunal during the arbitral proceedings rules that it has jurisdiction, any party may – within one month of having received such ruling – bring the issue before the ordinary courts, which will determine such issue by way of an interlocutory order; see Section 18, second paragraph, of the Arbitration Act.

5.3 Circumstances for Court Intervention

As stated in **5.2 Challenges to Jurisdiction**, the ordinary courts can determine whether an arbitration panel has jurisdiction – this is if a party brings the issue before the ordinary courts, pursuant to Section 18 of the Arbitration Act, after a decision from the arbitral tribunal deciding that the arbitral tribunal has jurisdiction has been passed.

In accordance with Section 43, second paragraph, litra c of the Arbitration Act, the ordinary courts may also set aside an arbitral award if such award is outside the scope of the jurisdiction of the arbitral tribunal.

The party must bring a legal action for setting aside the arbitral award before the ordinary courts within three months after receiving the arbitral award. It is also a condition that the courts have not already decided on the arbitral tribunal's jurisdiction in the particular case, pursuant to Section 18 of the Arbitration Act, at an earlier phase of the arbitral proceedings.

If the arbitral award falls outside the scope of the jurisdiction of the arbitral tribunal, the ordinary courts may also refuse to recognise or enforce the award, in accordance with Section 46 of the Arbitration Act.

5.4 Timing of Challenge

As stated in **5.2 Challenges to Jurisdiction**, a party must bring the issue regarding the jurisdiction of the arbitral tribunal before the ordinary courts within one month after having received a ruling from the tribunal deciding that the tribunal has jurisdiction.

If the jurisdiction of the arbitral tribunal is not challenged during the arbitral procedure, the parties can bring a legal action for setting aside

the arbitral award before the ordinary courts within three months of the party receiving the arbitral award; see **5.3 Circumstances for Court Intervention**.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

As a general rule, in the judicial review the ordinary courts will make a full and independent assessment of the relevant facts and of the applicable legal sources, based on the grounds invoked by the parties.

5.6 Breach of Arbitration Agreement

If a party commences court proceedings in the ordinary courts in breach of an arbitration agreement before the arbitration proceedings are initiated, the ordinary courts are obliged to dismiss the case pursuant to Section 7 of the Arbitration Act, provided that the other party requests dismissal no later than when addressing the merits of the case.

As stated in **3.3 National Courts' Approach**, the courts are required to dismiss a case brought before them unless it is found to be clear that the arbitration agreement is invalid or due to other reasons cannot be carried out, in cases where arbitral proceedings are already initiated.

Case law dictates that the evaluation of whether the parties have entered into an arbitration agreement must be restrictive. However, if the courts find that the parties have entered into an arbitration agreement, such agreements are held invalid in exceptional cases only. This is due to Norwegian contract law's general strict criteria to find contract provisions void.

5.7 Jurisdiction Over Third Parties

As stated in **13.5 Binding of Third Parties**, the general principle under Norwegian law is that a contract is only binding for the parties of the contract. Therefore, the main rule is that a third party is not bound by an arbitration agreement or an award issued pursuant to this agreement when said third party has not entered into the agreement or otherwise has not accepted to be bound by the agreement.

6. Preliminary and Interim Relief

6.1 Types of Relief

Unless the parties have agreed otherwise, the arbitral tribunal may, at the request of a party, order any party to take such interim measures as the tribunal may consider necessary based on the subject matter of the dispute, pursuant to Section 19 of the Arbitration Act.

An interim relief ordered by the arbitral tribunal is binding upon the parties but is not enforceable according to Norwegian law, as provisions for this are not contained in the Norwegian Enforcement Act of 26 June 1992 no 86 nor in Chapter 10 of the Arbitration Act. In practice, most parties will adhere to an arbitral tribunal's order for interim relief to show respect for the authority of the arbitral tribunal.

6.2 Role of Courts

The parties may pursue a claim for interim relief in the ordinary Norwegian courts, pursuant to Section 8 of the Arbitration Act. Interim relief may also be sought in foreign-seated arbitrations; see Section 1, second paragraph of the Arbitration Act. The Norwegian rules on interim measures give the courts quite a lot of flexibility to grant arrest, or to issue orders preventing a party from certain actions or prescribing a party to perform certain actions.

The Arbitration Act does not contain any provisions regarding emergency arbitrators; it depends on the parties' agreement. Emergency arbitrators are not common in Norwegian arbitrations.

6.3 Security for Costs

According to Section 41 of the Arbitration Act, the arbitral tribunal may order the parties to provide security for the costs of the arbitral tribunal, unless the parties and the arbitral tribunal have agreed otherwise. The arbitral tribunal may terminate the arbitral proceedings if such security is not provided. If a party fails to provide security as ordered, the other party may provide the security in full or bring the dispute before the ordinary courts, unless the parties have agreed otherwise.

7. Procedure

7.1 Governing Rules

Chapter 6 of the Arbitration Act (Sections 20 to 30) sets out detailed provisions governing the procedure of the arbitration. In the absence of agreement between the parties, the provisions in Chapter 6 will apply. It should also be noted that it is explicitly stated in some of the provisions in Chapter 6 that these may not (fully or partly) be exempted from by agreement. The arbitration agreement between the parties may state that arbitral proceedings are to be filed at a specific institution, in which case the rules of the institution will govern the procedure of the arbitration and supplement the provisions of the Arbitration Act, and possibly overrule the provisions that can be exempted from.

Section 22 provides for the regulation of the place (legal venue) for arbitration, which is decided by the tribunal if not agreed by the parties. Normally, the legal venue and choice of law are agreed upon in the arbitration clause under the contract subject to dispute.

Unless otherwise agreed, the arbitration commences when a written request for arbitration is received by the respondent; see Section 23. The Arbitration Act does not set any explicit requirements for the content of the notice; a letter clearly notifying that arbitration is requested for a specific dispute is sufficient.

Regarding language for the arbitration (communication from the tribunal, pleadings, hearing and judgment), Section 24 states that this is decided by the tribunal, unless otherwise agreed by the parties. Section 24 further states that the tribunal can require written evidence to be translated into the agreed language for the arbitration.

Section 25 sets the requirements for the filing of a statement of claim from the claimant and for the respondent for filing the reply. Pursuant to the last paragraph of Section 25, the parties have wide rights to bring new claims, to expand the contention in respect of existing claims, and to submit new grounds for the contention and new evidence, unless they have agreed otherwise.

Section 27 provides for the regulation of the consequences of the claimant's failure to submit a statement of claim and the respondent's failure to file a reply according to Section 25, absence from hearing, etc. Unless otherwise agreed, the tribunal will have specific powers under Section 27 to pass decisions depending on the non-fulfilment. Specifically, if the claimant fails to provide a statement of claim, the arbitral tribunal shall dismiss the case. If the respondent fails to file a reply, the case will continue and the failure shall not be construed as an acceptance of

the claims. If a party is absent from the hearings without reasonable grounds, the tribunal can continue the case and hand down its verdict on the factual basis that it has been presented with.

Section 26 of the Arbitration Act relates to the question of whether hearings shall be conducted. Unless the parties have agreed otherwise, the tribunal shall decide whether an oral hearing shall be conducted; however, a party may always request an oral hearing.

7.2 Procedural Steps

Please see **7.1 Governing Rules** regarding the procedural steps. As stated, most of the provisions set out in Chapter 6 of the Arbitration Act are non-mandatory, but the principle of equal treatment must be complied with. Also note that Section 30 provides for a provision allowing assistance from other courts to obtain witness statements, take evidence, etc. If the parties have not agreed to authorise the tribunal to pass legally binding decisions on document requests, there is not sufficient basis under the Arbitration Act to force a party to disclose documents, so there might be a need to seek assistance from the ordinary courts to resolve this.

7.3 Powers and Duties of Arbitrators

Pursuant to Section 20 of the Arbitration Act, the arbitration tribunal shall treat each party equally at all stages of the arbitral proceedings, and each party shall be given full opportunity to present its case. The principle of equal treatment has general bearing and applies for all steps under the proceedings; it cannot be exempted from.

Furthermore, pursuant to Section 21 of the Arbitration Act, the tribunal is given a discretionary power to determine how the arbitration proceedings shall be conducted. The exercise of this discretion will be subject to the limitations set out in agreement between the parties and under the Arbitration Act.

7.4 Legal Representatives

In arbitral proceedings, there are no statutory provisions in the Arbitration Act outlining particular qualifications or other requirements for the legal representatives. A party can decide not to appoint legal counsel – although in general this is not recommended.

However, there are legal requirements for representatives acting on behalf of a client and before the regular courts in Norway, as set out in the Norwegian Act relating to mediation and procedure in civil disputes (the "Dispute Act"); see Section 3-3. The main rule is that the legal representative must be a qualified lawyer to appear in the national courts.

8. Evidence

8.1 Collection and Submission of Evidence

The general rule on evidence is set out in Section 28 of the Arbitration Act, which states that the parties are responsible for substantiating the case and are entitled to present such evidence as they wish.

Usually, the witnesses meet directly before the arbitral tribunal and are available for cross-examination. If requested by a party or the arbitral tribunal, an expert who has submitted a written report is obliged to attend the oral hearing, where the parties have the opportunity to ask questions and to present expert witnesses to testify on the points at issue; see Section 29 of the Arbitration Act.

The arbitral tribunal – or a party with the consent of the arbitral tribunal – may also ask the domestic courts to take testimony from the parties or witnesses and to record other evidence. The arbitrators are entitled to be present and to ask questions during the taking of evidence. In such instances, the relevant party or witness is obliged to meet before the court, subject to the provisions in the Dispute Act.

The Arbitration Act does not contain any rules on discovery, disclosure or privilege.

8.2 Rules of Evidence

Please see **8.1 Collection and Submission of Evidence**.

The rules of evidence in the Arbitration Act are less detailed than the rules of evidence in the Dispute Act that apply in domestic matters. However, the parties are free to agree on more specific rules of evidence in the specific matter.

8.3 Powers of Compulsion

As mentioned in **7.2 Procedural Steps**, the Arbitration Act does not contain any provisions that authorise the arbitral tribunal to force a party to disclose documents, and the same will apply relating to the attendance of witnesses.

However, as mentioned in **8.1 Collection and Submission of Evidence**, the arbitrators may ask the ordinary courts for assistance to hear statements from the parties or witnesses, or to record other evidence. In such instances, the more detailed rules in the Dispute Act will apply to the hearing of the evidence, including the rules that oblige anyone (ie, both the parties and third parties) to provide any relevant information and documentation available to them.

9. Confidentiality

9.1 Extent of Confidentiality

As mentioned in **2.1 Governing Law**, Section 5 of the Arbitration Act sets out that the arbitral proceedings and any resulting awards are not confidential, unless the parties agree otherwise for the specific dispute. Consequently, an agreement regarding confidentiality must be entered into after the dispute has arisen. In such instances, the parties may agree that the whole or parts of the proceedings shall be subject to confidentiality.

If the parties have agreed on confidentiality, the main rule is that the information cannot be disclosed in subsequent proceedings. However, there is an important exemption where a party is obliged by law to present the relevant documentation or information. This will, as a main rule, be the case in proceedings before the regular courts if the information is considered to constitute evidence in the proceedings; see Section 21-5 of the Dispute Act, which sets out that "[a]ll persons have a duty to testify about factual circumstances and to grant access to objects etc. that may constitute evidence in legal proceedings, subject to the limitations in the rules on prohibited and exempted evidence in Chapter 22 and other provisions on evidence in this Act".

This provision will also apply to subsequent arbitral proceedings in instances where the arbitrators seek assistance from the courts to obtain evidence, as mentioned in **8.3 Powers of Compulsion**.

10. The Award

10.1 Legal Requirements

The arbitral award shall be made in writing and signed by all arbitrators; see Section 36 of the Arbitration Act. In arbitral proceedings with more than one arbitrator, the signatures of the majority of the members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated in the award.

Furthermore, the award shall state the reasons on which it is based, unless it is an award on agreed terms pursuant to Section 35, which sets out that the arbitral tribunal shall, at the parties' request, record the settlement in an award on agreed terms, unless the court has reason to object to it, and the parties settle the dispute. The award shall also state whether it is unanimous. If it is not unanimous, the award shall state who is in dissent and to which issues the dissent relates.

The award shall also state its date and the place of arbitration.

The Arbitration Act does not contain any provisions on time limits for delivery of the award.

10.2 Types of Remedies

There are no general limitations by law on the types of remedies that an arbitral tribunal may award, but the remedy awarded must fall within the scope of the claims of the parties.

10.3 Recovering Interest and Legal Costs

At the request of a party, the arbitral tribunal shall allocate the costs of the arbitral tribunal between the parties as it sees fit; see Section 40 of the Arbitration Act. This includes ordering one of the parties to pay all or part of the costs of the other party. This will typically be relevant if one of the parties is successful in the claim, fully or in the main.

The allocation of costs by the arbitral tribunal is final and shall be included in the award or in the order terminating the case.

The parties may also agree between them how the costs shall be allocated – ie, that the parties shall carry their own costs regardless of the outcome of the case.

11. Review of an Award

11.1 Grounds for Appeal

Arbitral awards are not subject to appeal. However, an action for invalidity may be brought before the ordinary courts on the grounds set out in Section 43 of the Arbitration Act, which sets out that an award may only be set aside by the courts if:

- one of the parties to the arbitration agreement lacked legal capacity, or the arbitration agreement is invalid under the law to which the parties have agreed to subject it or, failing such agreement, under Norwegian law;
- the party bringing the action to set aside the arbitral award was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was not given an opportunity to present his or her views on the case;
- the award falls outside the jurisdiction of the arbitral tribunal;
- the composition of the arbitral tribunal was incorrect; or
- the arbitral procedure was contrary to law or the agreement of the parties, and it is likely that this has had an impact on the decision.

If the issue of the validity of an award has been brought before the ordinary courts, the court shall also set aside the award on its own initiative if:

- the dispute is not capable of settlement by arbitration under Norwegian law; or
- the award is considered to be contrary to public policy (ordre public).

If the grounds for invalidity affect only parts of the award, only such part shall be deemed to be invalid.

An action to set aside an award shall be brought within three months after the award was received by the party; see Section 44 of the Arbitration Act.

If an action for invalidity has been brought and there are grounds for setting aside the award, the court may, at the request of a party, adjourn the action to set aside and refer the case back to the arbitral tribunal to continue the proceedings and make a new award if this may obviate the grounds for setting aside.

When an award is set aside, the arbitration agreement shall again become effective unless otherwise agreed between the parties or implied by the judgment setting aside the award.

11.2 Excluding/Expanding the Scope of Appeal

Under Norwegian law, the parties may not agree to exclude or expand the scope of appeal or challenge, as set out in **11.1 Grounds for Appeal**.

11.3 Standard of Judicial Review

The court may only set aside the case as invalid based on the grounds detailed in **11.1 Grounds for Appeal**.

12. Enforcement of an Award

12.1 New York Convention

Norway is party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, with the following reservations:

- Norway will apply the Convention only to the recognition and enforcement of awards made in the territory of one of the contracting states; and
- Norway will not apply the Convention to disputes where the subject matter of the proceedings is immovable property situated in Norway, or a right in or to such property.

12.2 Enforcement Procedure

The matters of recognition and enforcement of awards are regulated in Chapter 10 of the Arbitration Act (Sections 45 and 46). The parties cannot derogate from the applicability of these rules by agreement; see Sections 2, 45 and 46.

It is set out in Section 46 that the recognition and enforcement of an arbitral award may only be refused if:

- one of the parties to the arbitration agreement lacked legal capacity, or the arbitration agreement is invalid under the law to which the parties have agreed to subject it or, failing such agreement, under the law of the country where the award was made;
- the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was not given an opportunity to present his or her views on the case;
- the award falls outside the jurisdiction of the arbitral tribunal;

- the composition of the arbitral tribunal was unlawful;
- the arbitral procedure was contrary to the law of the place of arbitration or the agreement of the parties, and it is likely that this has had an impact on the decision; or
- the award is not yet binding on the parties, or it has been permanently or temporarily set aside by a court at the place of arbitration or by a court of the country under the law of which the merits of the dispute has been determined.

The court shall refuse recognition and enforcement of an award of its own accord if:

- the dispute would not have been capable of being determined by arbitration under Norwegian law; or
- recognition or enforcement of the award would be contrary to public policy (ordre public).

If the reason for refusing recognition or enforcement affects only part of the award, the court shall only refuse recognition or enforcement of such part.

Enforcement shall take place pursuant to the provisions of the Enforcement Act, except as provided by Chapter 10 of the Arbitration Act; see Section 45.

The enforcement process is initiated by the claimant filing a petition for enforcement with the execution and enforcement commissioner. The application must include the information set out in Section 5-2 of the Enforcement Act. If the basis for enforcement is a foreign arbitral award, the claimant must also attach documentation to show that the award is enforceable in the relevant foreign jurisdiction. Recognition and enforcement of an award is dependent on a party providing the original award or a certified copy thereof. If the award is not made in Norwegian, Swedish, Danish or English, the party shall also provide a certified translation thereof. The court can require documentary proof of the existence of an agreement or other basis for arbitration; see Section 45 of the Arbitration Act.

The execution and enforcement commissioner shall, on his or her own initiative, ensure that they are competent to handle the case, that the parties have capacity to sue and be sued and that there is a valid basis for enforcement. Besides this, the parties are responsible for clarifying and presenting the relevant facts and documentation that may affect the decision of the execution and enforcement commissioner in the matter; see Section 5-3 of the Enforcement Act.

12.3 Approach of the Courts

The New York Convention is implemented in Norwegian law via the Arbitration Act.

Pursuant to the Arbitration Act, arbitral awards are recognised and enforceable under Norwegian law subject to exhaustively listed exemptions, regardless of the country in which they were made; see **12.2 Enforcement Procedure**.

13. Miscellaneous

13.1 Class Action or Group Arbitration

The Arbitration Act does not contain provisions allowing class action arbitration or group arbitration. In general, the agreement between the parties will be the determining factor. It is possible to consolidate claims between the same parties or to include more parties in the same arbitration process, if agreed upon.

13.2 Ethical Codes

Norwegian qualified lawyers acting as legal counsel in arbitration must act in accordance with the ethical codes generally applicable to lawyers. These ethical rules are set out in Chapter 12 of the Regulations for Advocates.

13.3 Third-Party Funding

There are no general rules or restrictions on third-party funding in the Arbitration Act nor under Norwegian law. It is not common in Norway for third parties to fund litigation in return for a share of the possible outcome of the case. That being said, a party to an arbitration is free to agree to such funding and sharing of the potential outcome.

13.4 Consolidation

There is no basis under the Arbitration Act for the tribunal to decide that separate arbitration proceedings shall be consolidated into one case. There are consolidation rules under the Dispute Act but these will not apply under the Arbitration Act, unless agreed by the parties. Therefore, a consolidation will require an agreement between all parties involved – ie, one agreement that covers all claims and parties subject to the consolidated disputes.

As stated in **7.1 Governing Rules**, Section 25, last paragraph of the Arbitration Act provides for a wide right to bring new claims into the arbitration, but this presupposes that the parties and the claims are initially subject to the same arbitration proceeding. Article 25 does not give a basis upon which to expand the case to new parties.

13.5 Binding of Third Parties

The general principle under Norwegian law (which is in line with the doctrine of privity) is that a contract cannot confer rights nor impose obligations upon any person who is not a party to the contract; correspondingly, only parties to the contracts are able to sue or seek enforcement of their rights or claim for damages as such. Therefore, a third party is not bound by an arbitration agreement or an award issued pursuant to this agreement, provided that this third party has not signed the agreement nor otherwise accepted to be bound by it.

In principle, in case of succession (change of control of a legal person or assignments of contractual obligations), a third party may also succeed in an arbitration clause being agreed by the predecessor. However, this is also based on contractual commitment.

If it is disputed whether a third party is a party to an arbitration agreement or not, the matter may be referred to the regular court for settlement.

Trends and Developments

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Advokatfirmaet Thommessen AS

Advokatfirmaet Thommessen AS was established in 1856 and is considered to be one of Norway's leading commercial law firms. The firm has offices in Oslo, Bergen, Stavanger and London, and provides advice to Norwegian and international companies and organisations in both the public and private sectors, from SMEs to multinational corporations. With approximately 300 lawyers, Thommessen covers all business-related fields of law. It has extensive experience in resolving disputes in arbitration proceedings, and its lawyers are often used as arbitrators in commercial disputes. Many disputes are a fight for facts, and the firm's lawyers find what is necessary. Its litigation and arbitration specialists work closely with in-house technical professionals and market experts, ensuring that the right people get involved at the right time in the process. Thommessen has cutting-edge expertise and versatility, taking neither shortcuts nor detours.

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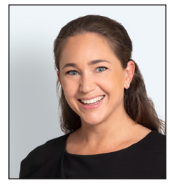

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International Arbitration in Norway: an Introduction

In Norway, commercial disputes have traditionally been litigated in the ordinary courts. There are now signs that more disputes resort to arbitration instead, with a decline in the number of commercial disputes being litigated before ordinary courts having been observed over the last few years. There are multiple reasons for this shift – the main one being that commercial parties more frequently opt for arbitration when entering into contracts. There seems to be an increasing focus on the benefits of arbitration, including the opportunity to secure certain expertise in determining the outcome of a dispute and guarantee its efficient and definitive resolution, owing to the fact that arbitral awards are not subject to appeal.

As ad hoc arbitrations dominate by some way in Norway, there are no published statistics on Norwegian arbitrations, but unofficial surveys indicate that there may be 100–200 arbitrations per year. They cover all areas of commercial contracts, including construction law, supply and delivery contracts, banking, marine insurance, joint ventures and post M&A disputes.

Arbitration has also attracted considerably more academic interest in Norway during recent years. There are numerous seminars and conferences on the topic, and universities are offering courses and conducting research on international commercial arbitration as part of their commercial law programmes.

Internationalisation of Norwegian arbitrations

Just ten years ago, Norwegian arbitrations were generally conducted almost identically to litigation before the ordinary courts. The "Norwegian tradition" involves a high degree of orality, meaning that witness statements are given directly before the judges (without written statements being submitted in advance) and that the documentary evidence on which the parties wish to rely must be presented before the courts. The relevant parts of the documents would be read "word by word" or at least presented in some detail in the opening statements. The main advantage is that the parties' counsel are more in control of what the judges have reviewed, observed and understood. The main disadvantages are that the hearings can become lengthy and that important evidence (including witness statements) is only known about to a limited degree before the hearing.

Although ad hoc arbitration pursuant to the Norwegian Arbitration Act of 14 May 2004 No 25 (the "Arbitration Act") is still the most frequently used form of arbitration, there is a growing tendency among parties to commercial contracts to agree on institutional arbitration (Oslo Chamber of Commerce) or semi-institutional arbitration – in particular, the rules and guidelines adopted by the Nordic Offshore and Maritime Arbitration Association ("NOMA Arbitration").

Once a dispute has been referred to arbitration, it is also common practice for the parties – in dialogue with the arbitrators – to agree to follow more detailed rules and best practice guidelines. This trend brings arbitrations in Norway closer to what may be called "international practice and standards", and is a favourable development in that it makes international parties more comfortable with arbitrations in Norway. The reason for this may be that Norwegian counsel and arbitrators are becoming more familiar with international practice, and foreign arbitrators are appointed more frequently in Norwegian arbitrations.

Although NOMA Arbitration was established in 2017 on the initiative of the Danish, Finnish, Nor-

wegian and Swedish Maritime Law Associations, the NOMA Rules and Best Practice Guidelines are generic and may therefore just as well be used in non-marine disputes to ensure a predictable and efficient process. The NOMA Rules resemble the UNCITRAL Arbitration Rules, and the NOMA Best Practice Guidelines set out more detailed rules regarding case management conferences, procedural orders and the taking of evidence. This typically implies more structured preparations and a higher degree of written proceedings than was the case seven to ten years ago.

This is particularly evident in the increased focus on a detailed Procedural Order No 1, whereby the contentious issues are crystallised and the submission of evidence is regulated in detail. Written witness statements with oral cross-examination are also becoming the norm, and the parties are asked more often than before to produce a joint statement of facts, which the arbitrators will read before the hearing. The arbitral hearing will then focus on legal presentations, the contentious facts and cross-examinations.

Submission of evidence – disclosure obligations

The Arbitration Act contains few rules on evidence. The parties are free to agree on more specific rules on evidence, which may often be recommendable. This is also why it has become more common to agree on more detailed terms on the disclosure and taking of evidence – typically by using the NOMA Best Practice Guidelines and/or by the arbitral tribunal determining the taking of evidence in further detail. Procedural Order No 1 will now generally require the parties to disclose their evidence within certain deadlines, including written witness statements and expert reports, with limited acceptance of delays or the disclosure of significant amounts of supplemental evidence later on. The parties are often encouraged to "front load" the preparations in order to ensure clarity and avoid a "chaotic end-phase" with late submissions of evidence for "tactical reasons".

The NOMA Rules on the Taking of Evidence (the "NOMA Evidence Rules") are included as Appendix 2 to the NOMA Best Practice Guidelines and are becoming more frequently used. The NOMA Evidence Rules are mainly based on the IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules") and are intended to provide an efficient and economical process. On several important aspects they deviate from what Norwegian lawyers would be used to when preparing cases before the ordinary courts of Norway.

The NOMA Evidence Rules require the parties to submit all documents available to them within the time ordered by the arbitral tribunal, as well as requests to the other party to produce documentary evidence (disclosure requests). Disclosure requests must be somewhat more specified than otherwise prescribed by Norwegian civil procedural law. Furthermore, the requested documents must be not only relevant but also – in principle – material to the outcome of the case. Deadlines will be set for disclosing, or objecting to, the requested documents. To the extent an agreement is not reached, unresolved matters will be decided by the arbitral tribunal.

Pursuant to the NOMA Evidence Rules, written witness statements "will not be used unless the parties agree to the contrary". The reason for this default rule, which is not found in the IBA Rules (and which may be discussed), is probably the principle of orality upon which the court system in Norway is based. However, parties are agreeing more frequently to submit written wit-

ness statements, and arbitrators increasingly encourage the use of such written statements in Norway, in contrast with what was once common practice.

The views on written witness statements vary. They are often helpful and should be encouraged, as they ensure the parties have a better understanding of the evidence before the hearing and, accordingly, that the hearing may be narrowed to contentious matters with more efficient witness examinations. As arbitral awards are final without any right of appeal, it may also be better that both parties properly understand the other party's witness evidence – with few "surprises" during the hearing. Arguably, this development may also give rise to an increased number of amicable settlements being reached before the arbitral hearing, because both parties have better insight into the evidence that the other party will invoke.

Confidentiality of awards

Confidentiality is a cornerstone principle of arbitration, providing a secure space for the dispute resolution process. A key component of this confidentiality extends to arbitral awards, which are the results of arbitral proceedings. The confidentiality of these awards not only ensures the privacy of the parties involved but also enhances the integrity of the arbitration process.

The level of confidentiality might vary from jurisdiction to jurisdiction, and is typically outlined in the arbitration agreement or the rules of the arbitration institution. Although the confidentiality of arbitral awards is a general principle, exceptions may occur – for instance, confidentiality might be compromised if the enforcement or challenge of an award necessitates disclosure in a national court.

Under Norwegian law, arbitral proceedings and awards are not confidential, unless confidentiality is agreed for the dispute at hand. Therefore, an arbitration clause containing confidentiality obligations is not decisive unless confidentiality is also agreed in respect of the particular dispute referred to arbitration. This follows from Section 5 (1) of the Arbitration Act and is justified by the desire to disclose the legal developments flowing from arbitral jurisprudence. However, in practice this rule has not led to arbitral awards being more public in Norway compared with other jurisdictions.

First, the arbitral hearings are confidential and private under Norwegian law unless the parties agree otherwise (see Section 5 (2) of the Arbitration Act). This implies that no external parties are privy to the proceedings. According to Section 36 (5) of the Arbitration Act, a signed copy of the award must be sent for archiving to the first instance court of the arbitration venue. However, this does not imply that the award becomes public, and these courts will not disclose such awards to any third party.

Second, the parties and the arbitrators may be subject to general confidentiality obligations – be they statutory or contractual. Such obligations may at least limit the opportunity for the parties or the arbitrators to unilaterally disclose arbitral awards. Accordingly, very few awards are published in Norway and only in circumstances where all parties agree to the publication.

Finally, arbitral awards are published to a certain extent in other jurisdictions as well – particularly awards from international arbitration institutions. However, in these circumstances, information is often anonymised or redacted to protect sensitive information.

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Nevertheless, parties to an arbitration generally expect their disputes – and the resulting awards – to remain confidential. This makes arbitration a preferred dispute resolution method for sensitive matters, especially in sectors such as banking, insurance and international trade. This is also the case in Norway.

In conclusion, while the confidentiality of arbitral awards is a defining and appealing aspect of arbitration, it must be balanced with necessary legal procedures and societal interests. Ensuring this balance is crucial for maintaining the effectiveness and credibility of the arbitration process.

Challenge of arbitral awards

More than 50 arbitration awards have been challenged before the ordinary courts in Norway since 2017. However, the number of cases fluctuates each year, and there has been no clear increase in the number of cases where arbitration awards are challenged. The threshold for succeeding with a claim for invalidity is extremely high and this is evident from the results of the court cases, as at the time of writing none of the challenges have resulted in an arbitral award being declared invalid. There have, however, been examples of partial invalidity.

Recently, Borgarting Court of Appeal considered a challenge against an arbitral award in a dispute between two commercial parties. The question before the Court of Appeal was whether the arbitral award could be set aside based on either:

- improper composition of the arbitral tribunal due to lack of impartiality and independence on the part of one of the arbitrators; or
- the arbitral award's lack of sufficient reasoning.

The Court of Appeal concluded that the conditions for setting aside the award were not met. With regard to the allegation of impartiality of one of the arbitrators, the arguments presented related to the ties between one of the parties and a law firm at which one of the arbitrators had previously been a partner. The court dismissed the arguments and referred to the guidelines and practice from the international arbitration community in its reasoning. Furthermore, the court found that there was no basis for the allegation that the arbitral award lacked sufficient reasoning. The court emphasised that the threshold for setting aside an award due to insufficient reasons is very high, as it also must be demonstrated that the error may have had an impact on the result. The decision was appealed to the Supreme Court, but the Supreme Court did not grant leave to appeal.

There is an ongoing debate among some legal scholars regarding the opportunity to challenge an award based on alleged failure to provide due process. In a Supreme Court judgment from 2005 (Rt 2005 s 1590 "Lisa"), the Supreme Court set aside an arbitral award owing to lack of contradiction with regard to the assessment of damages. The Supreme Court concluded that the assessment of damages was based on facts that had not been subject to contradiction – for example, that the tribunal had deviated from expert reports not disputed by either of the parties. This implies that the Supreme Court in this case weighted the adversarial principle and due process more heavily than the efficient and reliable enforcement of arbitral awards. The judgment was a relatively case-specific instance; deviating from the undisputed expert report was clearly not "best practice" by the arbitral tribunal.

Notwithstanding this judgment, the Norwegian courts are likely to refrain from the substantive

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review of arbitral awards, thereby demonstrating the restraint encouraged by the UNCITRAL Model Law on International Commercial Arbitration 1985 (the "Model Law") and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"). The threshold to set aside an award is and must be high in order to ensure that the principle of contradiction does not become a way of bypassing the key principle that arbitration awards are final and binding on the parties. However, the opportunity to challenge awards based on failure to ensure due process is a necessary safety vent – given that no arbitrator is perfect in its duty.

AI technology, digitalisation and videoconferences

One development in Norwegian litigation and arbitration alike is the increased use of digital technology, both during hearings and in the preparatory phase. The trend is amplified by the current debate on the impact of AI technology and generative language models. It will be interesting to see how parties, lawyers, institutions and arbitrators will embrace the use of AI technology. There are clearly some great advantages associated with utilising AI technology – but there are also some risks.

Digitalisation is not new to arbitration, and it is customary to use a virtual data room in which information and documents pertaining solely to the cases are exchanged electronically in arbitration proceedings. During hearings, all documentary evidence is collected in an electronic file instead of printed case documents. This also enables the lawyers to create links in their outlines for the arbitration tribunal, thereby easing access to the relevant documents. It is also quite common for the major Norwegian law firms to establish virtual data rooms for case preparation, which are shared with the clients. Such data rooms can also be connected to certain AI tools, which can be used to increase the efficiency of the case preparation and document review.

There has also been an uptick in the use of videoconferences in arbitration proceedings. Case management conferences have been held as conference calls or videoconferences for some time, but extensive use of videoconferencing is increasingly common. Some arbitral hearings have been conducted virtually from start to end, as have hearings before the ordinary Norwegian courts. Nevertheless, traditional physical arbitration hearings still seem to be the preferred or most common alternative. Witnesses are, to an increasing extent, heard by videoconferences, especially witnesses who would otherwise have to travel to Norway from other countries. The combination of written statements and oral cross-examination via videoconference is both efficient and cost-effective.

Norwegian arbitration is therefore shifting towards "greener arbitrations" by seeking to reduce the environmental footprint of conducting arbitrations. There is extensive use of electronic documentation instead of hard copies, and the use of videoconferencing is encouraged whenever viable. Still, it must be emphasised that it is ultimately up to the parties how the arbitration proceedings are conducted. Party autonomy remains paramount; however, as the shift towards "greener arbitrations" also reduces the length and cost of these proceedings, a clear trend is emerging in Norway towards a new and more digital approach to conducting arbitrations.

PANAMA

Law and Practice

Contributed by:
Jorge Molina Mendoza, Miguel Urriola and Andrés Beck
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FABREGA MOLINO has an expert and experienced team of professionals who represent clients in various matters before the courts, tribunals and arbitration panels. The lawyers regularly represent clients in cases relating to securities and bond-related claims, trade marks and patents, competition, class actions, consumer rights, banking and finance litigation, commercial, maritime, labour and employment, and many other matters. They act as litigation counsel for individuals and small, medium and large businesses. They also represent clients in the use of constitutional remedies to protect their rights. Arbitration and other forms of dispute resolution have likewise become an essential part of their services, and FABREGA MOLINO's team has a strong reputation for handling negotiations, as well as conflict and non-conflict situations.

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1. General

1.1 Prevalence of Arbitration

Arbitration as a method of dispute resolution prevails over litigation in ordinary courts in Panama in the context of high-level commercial relationships, such as those involving states and international companies or consortiums for the development of international trade, and those agreed upon between the State and foreign physical or legal entities for public works development or investment.

1.2 Key Industries

The construction industry of public works by foreign consortiums or companies has been subject to more international arbitration activity in recent years than most other industries in Panama.

1.3 Arbitration Institutions

The Panama Center for Conciliation and Arbitration ("Cecap") administers international arbitrations as permitted by Panama's arbitration legislation (Law 31 of 2013, "the Arbitration Law"). The Conflict Resolution Center ("Cescon") and the International Chamber of Commerce have also been established in Panama.

1.4 National Courts

There is no specific court in Panama designated to hear disputes related to international or domestic arbitration. The Fourth Chamber of the Supreme Court may review arbitration awards on due process and public order grounds.

2. Governing Legislation

2.1 Governing Law

Law No 131 of 2013 regulates national and international arbitration in Panama. This law is 90% based on the Uncitral Model Law.

2.2 Changes to National Law

As indicated above, Panama's latest legislation in this respect dates from 2013 and has not undergone any changes to date.

3. The Arbitration Agreement

3.1 Enforceability

For an arbitration agreement to be enforceable in Panama, it must be in writing and it must be agreed upon by individuals capable of binding themselves with a lawful purpose.

3.2 Arbitrability

According to Panama's Arbitration Law, only matters that are freely disposable by the parties according to the law and those matters that the law or a treaty specifies may or should be submitted to arbitration are arbitrable.

3.3 National Courts' Approach

The parties are free to agree on the law governing the arbitration agreement. Agreements that meet the requirements established by law are enforceable.

3.4 Validity

An arbitral clause will be considered valid even if the rest of the contract in which it is contained is invalid, as Panama applies the rule of separation or autonomy of arbitration clauses contained in an invalid agreement.

4. The Arbitral Tribunal

4.1 Limits on Selection

As a general rule, there is no limit on the parties' autonomy to determine the number of arbitrators, as long as the number is odd. In the absence of an agreement, there will be only one arbitrator. If one of the parties is a State or a state entity, however, there must be three arbitrators.

4.2 Default Procedures

If the parties to an arbitration are unable to appoint an arbitrator or arbitrators, Panamanian law provides formulas for appointment. Default appointment rules also apply for multi-party arbitrations. In the absence of an appointment, it is understood that there will be only one arbitrator.

4.3 Court Intervention

According to Panamanian arbitration legislation, an arbitration administering institution can intervene in the selection of arbitrators. This can happen when one of the parties has not appointed an arbitrator within the time established by law or the arbitration agreement, or if the appointed arbitrators cannot agree on the appointment of the third arbitrator. Intervention may also be required when the parties cannot agree on the appointment of a single arbitrator, or in multi-party arbitration, where the respective claimant or defendant parties cannot agree on the appointment of an arbitrator or, having each appointed one, the appointees cannot agree on the appointment of a third arbitrator. Regarding the limitations of these powers, it is worth noting that the arbitration institution must take into account the conditions required by the parties. The appointed arbitrator must be of a different nationality from that of the parties and, if applicable, from the nationality of the already appointed arbitrators.

4.4 Challenge and Removal of Arbitrators

Law 131 of 2013 establishes that an arbitrator can be challenged if there are circumstances that give rise to justified doubts about their impartiality or independence, or if they do not possess the qualifications agreed upon by the parties.

4.5 Arbitrator Requirements

According to Law 131 of 2013, it is mandatory for the person appointed as an arbitrator to disclose all circumstances that may give rise to justified doubts about their impartiality or independence. Likewise, should such circumstances arise after their appointment or during the proceedings, they must disclose such circumstances to the parties without delay.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

Subject matters that cannot be submitted to arbitration in Panama are those that are not freely disposable by the parties according to the law.

5.2 Challenges to Jurisdiction

In Panama, only the arbitral tribunal or arbitration institution can decide on its own competence. That is, the competence-competence principle applies.

5.3 Circumstances for Court Intervention

According to Law 131 of 2013, an arbitral tribunal can address issues related to arbitral jurisdiction when one of the parties raises questions about the existence or validity of an arbitration clause. Additionally, in Panama, there is an ordinary court that can review negative decisions on arbitral jurisdiction (competence), and this is the Fourth Chamber of the Supreme Court of Justice.

5.4 Timing of Challenge

The exception of incompetence of an arbitral tribunal must be raised no later than at the time of submitting the statement of defence. If an arbitral tribunal declares itself competent as a preliminary matter, any of the parties may file an annulment appeal before the Fourth Chamber of the Supreme Court of Justice within 30 days of receiving notification of the decision.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The standard of review in Panama is deferential.

5.6 Breach of Arbitration Agreement

Ordinary courts in Panama will deal with any party initiating a process in contravention of an arbitration agreement by declaring the nullity of the proceedings and declining competence in favour of the corresponding arbitral tribunal. National courts are strict in enforcing arbitration clauses.

5.7 Jurisdiction Over Third Parties

Law 131 of 2013 does not contemplate arbitral jurisdiction over a third party that is not a signatory to the contract from which the arbitration clause derives. However, through jurisprudence of the Fourth Chamber of General Business of the Supreme Court of Justice, the inclusion of non-signatory third parties in the arbitration clause in an arbitration process has been recognised as valid. In such a case, the summoning of a third party or their forced participation in an arbitration without having agreed to the arbitration clause, only occurs when there are reasons, causes or circumstances of such magnitude and relevance between that third party and the parties in conflict that the third party's involvement is necessary for the fair resolution of the dispute.

6. Preliminary and Interim Relief

6.1 Types of Relief

According to Law 131 of 2013, arbitral tribunals can decree preliminary or precautionary measures to ensure the effectiveness of the arbitration process results. Similarly, precautionary measures can be taken by ordinary courts of justice before the arbitration begins or at the enforcement stage of the final award. These measures can include the maintenance or restoration of the status quo pending the resolution of the dispute, measures to prevent any current or imminent harm, and measures to preserve movable or immovable property or money.

6.2 Role of Courts

Preliminary measures as such are within the power of the arbitral tribunal. However, ordinary courts can intervene at the express request of the arbitral tribunal or during the enforcement stage of the award. When preliminary orders come from a foreign-seated arbitral tribunal, they must pass through the control of the Fourth Chamber of General Business of the Supreme Court of Justice. In Panama, there are no provisions for emergency arbitrators.

6.3 Security for Costs

Arbitration legislation in Panama does contemplate the possibility of requiring a bond from the petitioner of a preliminary or precautionary measure. Similarly, the arbitral tribunal is empowered to order the petitioner to pay costs and damages caused by the measure at any time during the proceedings.

7. Procedure

7.1 Governing Rules

As mentioned previously, Law 131 of 2013 regulates national and international arbitration in Panama and establishes procedural rules. Additionally, each authorised arbitration administration centre has adopted its own regulations.

7.2 Procedural Steps

The arbitration process in Panama has the components of a process framed in compliance with the principle of due process, such as the adversarial principle, the opportunity to present evidence, and to practise it. However, there are some requirements by law, such as: the rule that when one of the parties is a State or a state entity, there must be three arbitrators, or when arbitration is based on the law, the arbitrators must be lawyers.

7.3 Powers and Duties of Arbitrators

The law in Panama states that arbitrators can be of any nationality unless otherwise agreed by the parties. In the case of international arbitration, arbitrators may or may not be lawyers, at the parties' choice, but when it comes to national arbitration based on law, the arbitrators must be practising lawyers.

7.4 Legal Representatives

Panamanian arbitration legislation establishes that each party may be represented by whomever they choose. This leads to the conclusion that no particular qualification is required for representing the parties.

8. Evidence

8.1 Collection and Submission of Evidence

According to Panama's Arbitration Law, the parties must present their evidence along with the claim and response, respectively. The arbitral tribunal has the exclusive power to determine the admissibility, relevance and assessment of evidence, as well as to order the presentation or practice of necessary evidence at any time. It is also possible for the arbitral tribunal, on its own initiative or at the request of the parties, to seek the assistance of ordinary courts of justice in Panama or any other State for the practice of evidence.

8.2 Rules of Evidence

Given the broad power of the arbitral tribunal to admit and assess evidence, it is common for parties to use means of evidence established for ordinary judicial processes, such as public or private documentary evidence, testimonies, expert reports, inspections, etc.

8.3 Powers of Compulsion

Panamanian arbitration legislation expressly does not establish compulsory measures for ordering the production of documents or the appearance of witnesses. However, it does contain a provision stating that the arbitral tribunal or any of the parties, with its approval, may request the assistance of a judicial court in Panama or any other State for the practice of evidence.

9. Confidentiality

9.1 Extent of Confidentiality

Cecap regulations establish that, unless otherwise agreed, the parties have a duty of confidentiality towards third parties regarding the

documents in the arbitration file or any related information. Included in the parties are the arbitrators, the tribunal secretary, administrative staff, and the board of directors of Cecap.

10. The Award

10.1 Legal Requirements

The award must be written and signed by the arbitrator(s). It must be reasoned, dated and indicate the place where it was issued. In international arbitrations, the period to issue and notify the award is as established by the parties or the applicable regulation, or otherwise by the arbitral tribunal. In national arbitrations, unless otherwise agreed by the parties, the award must be issued within a period not exceeding two months from the presentation of the closing arguments. This period can be extended by the arbitral tribunal for an additional term of up to two months when the complexity of the matter requires it.

10.2 Types of Remedies

Limits on the types of remedies are configured by the autonomy of the parties' will and public order.

10.3 Recovering Interest and Legal Costs

The costs of administering the arbitration, unless otherwise agreed, must be covered equally by both parties. If one of the parties does not deposit the corresponding fee, it can be ordered to pay it. Interest is granted in the award if it is part of the claims of the parties in the agreed amount, or based on the legal rate of interest if there is no agreement on the amount of interest. Regarding the costs generated by the process, generally, if not otherwise agreed, each party assumes the costs of the lawyers. Finally, the tribunal can also order the payment of costs and damages by the party that requested a precautionary or preliminary measure that was later determined by the tribunal to be unnecessary.

11. Review of an Award

11.1 Grounds for Appeal

In Panama, an award cannot be appealed. In such a case, the only recourse against the award is an annulment appeal before the Fourth Chamber of the Supreme Court of Justice, which may resolve to declare the award's validity or nullity subject to the following grounds:

- the incapacity of the parties to sign the arbitration agreement;
- that said agreement is not valid under the law to which the parties have subjected it, or nothing has been indicated in this regard under Panamanian law;
- that it has not been duly notified of the appointment of an arbitrator or the arbitration proceedings;
- that the award refers to a dispute not provided for in the arbitration agreement or contains decisions that exceed the terms of the arbitration agreement;
- that the appointment of the arbitral tribunal or the arbitration procedure have not been in accordance with the agreement between the parties;
- that the arbitrators have decided on matters not subject to arbitration; or
- that the international award is contrary to international public order, or in the case of a national award, that the award is contrary to Panamanian public order.

11.2 Excluding/Expanding the Scope of Appeal

It is not possible to exclude/expand the scope of appeal or challenge under national law. Award annulment rules are not subject to party autonomy and free negotiation.

11.3 Standard of Judicial Review

The standard of judicial review is established by law. In the case of Panama, it is deferential since the powers of the Fourth Chamber of the Supreme Court of Justice are limited to examining the validity or nullity of the award without being able to review the merits of the matter.

12. Enforcement of an Award

12.1 New York Convention

Panama has signed the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards without reserves. Additionally, it has ratified the Inter-American Convention on International Commercial Arbitration, which was approved by Panama on 30 January 1975.

12.2 Enforcement Procedure

The execution of an award corresponds to the ordinary courts of justice under the procedure established for the execution of final judicial sentences. There is an express cause to deny the recognition of an award that has been annulled or suspended by a court of the country in which or according to whose law that award has been rendered. In the case of a pending annulment process, execution of the award must be rejected. A State cannot invoke its immunity prerogative to evade the obligations derived from the arbitration agreement.

12.3 Approach of the Courts

A court in Panama would only reject the recognition and execution of an arbitral award if it is proven that the cause was not arbitrable or that the award is contrary to international public order.

13. Miscellaneous

13.1 Class Action or Group Arbitration

Legislation in Panama does not provide for arbitration in class actions.

13.2 Ethical Codes

In Panama, the Arbitration Law indicates that persons who have seriously violated the Code of Ethics of the arbitration institution, or who are criminally liable for crimes of prevarication, falsehood or fraud, cannot be arbitrators.

13.3 Third-Party Funding

Law 131 of 2013 does not provide rules on third-party funders, and it does not prohibit third-party funding.

13.4 Consolidation

It is not allowed under general rules that arbitration clauses are enforceable just to the signing parties.

13.5 Binding of Third Parties

Bringing third parties into an arbitration process is not prohibited by law. In fact, the jurisprudence of the Fourth Chamber of General Business of the Supreme Court of Justice has recognised awards against third parties brought into arbitration due to having some relation or link with the cause. The third party can be brought into the process at the beginning of it before the case is fixed.

Trends and Developments

Contributed by:
Jorge Molina Mendoza, Miguel Urriola and Andrés Beck
FABREGA MOLINO

FABREGA MOLINO has an expert and experienced team of professionals who represent clients in various matters before the courts, tribunals and arbitration panels. The lawyers regularly represent clients in cases relating to securities and bond-related claims, trade marks and patents, competition, class actions, consumer rights, banking and finance litigation, commercial, maritime, labour and employment, and many other matters. They act as litigation counsel for individuals and small, medium and large businesses. They also represent clients in the use of constitutional remedies to protect their rights. Arbitration and other forms of dispute resolution have likewise become an essential part of their services, and FABREGA MOLINO's team has a strong reputation for handling negotiations, as well as conflict and non-conflict situations.

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Supreme Court Reinforces Autonomy and Protection of Arbitration in Panama: Recent Developments in Constitutional Review and Arbitration Cases

Panama, a pivotal player in international commerce and finance, is known for its strategic geographic location and robust legal framework that supports business activities. One notable aspect of Panama's legal landscape is its approach to arbitration, which plays a crucial role in resolving commercial disputes. This article explores the unique interplay between arbitration and the Panamanian constitutional courts, highlighting a significant 2023 Supreme Court decision that reaffirmed the autonomy and protection of arbitration in Panama from challenges in the constitutional courts. Business leaders will gain insight into the implications of these legal dynamics on their operations and dispute resolution strategies.

Panamanian constitutional courts and litigation

In Panama, the judicial system is characterised by a dual structure: the ordinary courts handle regular civil and commercial litigation, while the constitutional courts address matters related to reviewing possible violations of constitutional rights during litigation. It is not uncommon for civil and commercial litigation cases to ascend to the constitutional courts, particularly when fundamental rights or constitutional principles are at stake. This constitutional review ensures that the highest legal standards are maintained, and that individual rights are protected.

In practical terms, this means that any commercial dispute could potentially escalate to the constitutional level if the parties in litigation argue that there are potential violations to fundamental and individual rights. While this provides a robust layer of legal scrutiny, it also means that litigation can become prolonged and complex, as the constitutional courts may need to adjudicate fundamental legal questions arising from business and commercial disputes.

Arbitration in Panama: an autonomous dispute resolution mechanism

As an alternative dispute resolution mechanism, arbitration offers a more streamlined and efficient process than traditional commercial and civil litigation. Panama's Constitution and Arbitration Law (Law No 131 of 2013) are designed to promote and protect the autonomy of arbitration, recognising its value in resolving commercial disputes swiftly and effectively. The law provides a framework that ensures arbitration agreements are enforceable, arbitration awards are binding, and minimal intervention is required from the ordinary courts. In the context of arbitration, ordinary civil and commercial courts are entitled just to undertake precautionary measures, conduct some evidence gathering and enforce arbitral awards.

A key provision of Panama's arbitration framework is the prohibition for arbitration cases to reach the constitutional courts, as set out in Article 66 of the Arbitration Law. This provision underscores the principle of party autonomy, where the parties to an arbitration agreement have chosen arbitration as their preferred method of dispute resolution, free from the intervention of ordinary or constitutional courts. This legal framework assures businesses that their arbitration agreements will be respected and that the arbitration process will not be subject to undue judicial interference.

The 2023 Supreme Court decision

In 2022, the autonomy and protection of arbitration in Panama faced a significant test. An individual challenged the process of arbitration aim-

ing to repeal Article 66 of the Arbitration Law. He argued that the prohibition on arbitration cases reaching the constitutional courts was an irrational limitation to the constitutional courts' right to review and protect fundamental rights. The challenge argued that this prohibition infringed upon the constitutional right to access justice and to have constitutional issues reviewed by the constitutional courts.

The potential implications of a favourable ruling for the challenger were profound. If the constitutional courts were allowed to adjudicate and interfere in private arbitration cases, it could undermine the autonomy of arbitration and expose arbitration awards to additional layers of judicial scrutiny. This could lead to delays and increased uncertainty in the arbitration process, potentially deterring businesses from choosing arbitration as a dispute resolution mechanism.

The Supreme Court's rejection of the constitutional challenge

The Supreme Court, however, rejected the challenge. The Supreme Court's decision reaffirmed the autonomy and protection of arbitration, emphasising that the prohibition against arbitration cases reaching the constitutional courts is consistent with the constitutional principles of arbitration autonomy and the efficient administration of justice.

The court highlighted several key points in its ruling.

- Party autonomy: The Supreme Court held that parties to an arbitration agreement have voluntarily chosen arbitration as their preferred method of dispute resolution. This choice reflects their desire for a binding and final resolution of their disputes, free from judicial interference and disruption.
- Efficiency and finality: The Supreme Court noted that one of the primary advantages of arbitration is its efficiency and finality. Allowing constitutional courts to review arbitration cases would undermine these advantages, leading to potential delays and increased litigation costs.
- Limited judicial review: The Supreme Court reaffirmed that judicial review of arbitration awards is limited to specific grounds, such as lack of due process, or public order concerns. And the only mechanism to review awards is the "Nullity Recourse" in the Supreme Court. The constitutional courts are not permitted to review arbitration cases. This limited review ensures that arbitration remains an effective and reliable mechanism for dispute resolution.
- Constitutional consistency: The court concluded that the prohibition on arbitration cases reaching the constitutional courts is consistent with the Constitution. It does not infringe upon the right to access justice, as the parties have voluntarily chosen arbitration and agreed to the limited scope of judicial review.

Implications for business

The court's ruling has significant implications for people operating in business in Panama. The following are the key takeaways.

- Reinforcement of arbitration: The ruling reinforces the autonomy and protection of arbitration in Panama. Businesses can continue to rely on arbitration as a swift, efficient and final method of resolving disputes, without the risk of undue judicial interference.
- Legal certainty: The decision provides legal certainty for businesses that have entered into arbitration agreements. They can be confident that their arbitration agreements will be upheld, and that arbitration awards will be

enforceable, subject only to limited judicial review.
- Efficient dispute resolution: The reaffirmation of the prohibition against arbitration cases reaching the constitutional courts ensures that arbitration remains an attractive option for businesses seeking efficient and final dispute resolution. This is particularly important in complex commercial transactions where time and cost are critical factors.
- Strategic considerations: Businesses should continue to rely on and incorporate arbitration clauses in their contracts, particularly in international transactions. The autonomy and protection of arbitration in Panama make it a favourable method for resolving commercial disputes.

The constitutional challenge and the subsequent Panamanian Supreme Court ruling have reinforced the autonomy and protection of arbitration in Panama. For business and commerce, this reaffirmation provides legal certainty and highlights the value of arbitration as an efficient and effective dispute resolution mechanism. By understanding the legal landscape and the implications of the court's ruling, businesses can make informed decisions about their dispute resolution strategies and continue to operate confidently in Panama's dynamic commercial environment.

Practical recommendations

In the context of the recent Supreme Court ruling, businesses should consider the following practical recommendations to leverage the advantages of arbitration in Panama effectively.

- Understand the scope of judicial review in arbitration: Be aware of the limited grounds on which Panamanian courts can review arbitration awards and the fact that constitutional courts are precluded from reviewing arbitration cases and awards.
- Monitor legal developments: Stay informed about legal developments related to arbitration in Panama. Although the Supreme Court ruling reinforces the autonomy of arbitration, legal landscapes can evolve, and staying informed can help businesses adapt to any changes that may impact their arbitration agreements.

Conclusion

Panama's legal framework for arbitration provides a robust foundation for resolving commercial disputes efficiently and effectively. The Supreme Court ruling identifies the importance of maintaining the autonomy and protection of arbitration. Understanding these legal dynamics and implementing best practices for arbitration can enhance the ability of businesses to resolve disputes favourably and operate confidently in Panama's vibrant commercial environment. By embracing arbitration and leveraging its advantages, businesses can mitigate risks, reduce litigation costs, and achieve timely resolutions to disputes, thereby supporting their overall business objectives and fostering a stable and predictable business environment in Panama.

PERU

Law and Practice

Contributed by:
Edwin Pezo, Claudia Quispe and Ricardo Montalvo
Estudio Muñiz, Olaya, Meléndez, Castro, Ono & Herrera

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Estudio Muñiz, Olaya, Meléndez, Castro, Ono & Herrera was founded in 1981, and since then has become a leading law firm in Peru. The firm's robust arbitration practice excels in both domestic and international arbitration, with an experienced team that has handled cases under major arbitration institutions and rules, including ICC, ICSID, PCA, LCIA and UNCITRAL, as well as local rules such as the Lima Chamber of Commerce, AMCHAM and PUCP. The arbitration department has a proven track record of dealing with high-profile cases, and extends its practice to the annulment, recognition, and enforcement of local and foreign awards. The team offers comprehensive services across various industries and sectors, including M&A, retail, oil and gas, energy, real estate, construction, telecommunications, and mining. Its strategic approach combines in-depth legal knowledge with practical insights and commercial awareness, ensuring tailored solutions for its clients.

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1. General

1.1 Prevalence of Arbitration

Peru is one of the jurisdictions in Latin America where the use of arbitration (whether international or local) has been the most favoured in the last ten years.

Arbitration is by far the preferred dispute resolution mechanism by private parties involved in international commercial contracts.

Lima has become a common seat of arbitration for international disputes in recent years. Likewise, foreign awards are regularly recognised and enforced by Peruvian courts under a flexible standard.

1.2 Key Industries

There is no official data available to confirm significant arbitration activity in recent years in a particular industry. However, based on our experience, the energy, mining and transport sectors have had significant international arbitration activity recently, and well as construction disputes in public contracts. It is worth noting that the arbitration market has also grown significantly as arbitration is mandatory in contractual disputes between government entities and their contractors (including sectors such as construction, PPP, and renewable energy).

From our perspective, there has also been an increase in M&A disputes due to a wave of acquisitions by foreign companies in the Peruvian market, and a rapid rebound of M&A transactions in 2023, bolstering a notable increase in the number of transactions compared to 2022 (nearly reaching pre-pandemic levels).

1.3 Arbitration Institutions

The most used arbitral institutions for international arbitration in Peru are:

- the Arbitration Centre of the Lima Chamber of Commerce (LCC);
- the Arbitration Centre of the American Chamber of Commerce (AMCHAM);
- the Centre for Dispute Resolution of the Catholic University of Perú (PUCP).

These arbitral institutions are located in Lima and have lists with renowned national and foreign arbitrators. LCC is particularly well known in the Peruvian market for the good and effective management of their cases. The Centre for Dispute Resolution of the Catholic University of Perú is well known for managing state-related disputes, being the preferred arbitration centre of several state entities.

According to the Peruvian National Registry of Arbitration Centres, as well as other publicly available information, 41 arbitration centres started their operations between 2023 and 2024. There are some concerns within the arbitration community, however, as to the transparency and independence of some of the new arbitration centres.

1.4 National Courts

Commercial courts are competent for the enforcement of both domestic and foreign awards, the judicial assistance for taking evidence and the granting of interim measures prior to the constitution of the arbitral tribunal.

The High Commercial Courts (Sala Superior) have jurisdiction to hear applications for annulment of awards; in the absence of a commercial court, the civil court of the place of arbitration

will be competent. These courts are also competent for the recognition of foreign awards.

If a commercial judge or court is unavailable in a specific judicial circuit, jurisdiction will fall to the civil judge or court linked to the dispute (such as the arbitration site) or the enforcement location (for example, the respondent's domicile, where the respondent's assets are located, or where the respondent exercises rights).

2. Governing Legislation

2.1 Governing Law

The national legislation governing arbitration in Peru is Legislative Decree No. 1071, effective from 1 September 2008, and inspired by the 2006 UNCITRAL Model Law. It incorporates some particularities, for instance:

- It provides for an additional ground for annulment of an arbitral award in Article 63, ie, that the dispute is decided after the deadline (i) agreed by the parties, (ii) established in the applicable arbitral rules, or (ii) established by the arbitral tribunal.
- It offers the arbitral tribunal a broader discretion when deciding the applicable law to the merits. When parties do not agree on the applicable law, Article 57(2) allows the tribunal to determine it according to whatever they deem appropriate.
- It also provides for shareholder-dispute arbitration, testamentary and labour arbitration.
- Article 14 frames the legal standard to incorporate non-signatories parties of the arbitration agreement to the arbitration proceeding.

2.2 Changes to National Law

Currently, there is a legislative project in debate at the Peruvian Congress which aims to (i) forbid judicial interim measures issued prior to the constitution of the arbitral tribunal where a state entity is party of the arbitration, (ii) exclude emergency arbitrations in procedures where a state entity is party of the arbitration and (iii) forbid fast-track arbitrations against state entities (Proyecto de Ley N° 7321/2023/CR).

3. The Arbitration Agreement

3.1 Enforceability

An arbitration agreement is enforceable in Peru if it complies with the requirements set forth in Article 13 of Decree N°1071. These requirements are the following:

- The arbitration agreement shall be in writing, whether as a clause in a contract or as an independent agreement. Similarly to the 2006 UNCITRAL Model Law, the arbitration agreement is deemed to be in writing when:
  - (a) it is recorded in any form, whether the arbitration agreement or contract has been concluded by the performance of certain acts or by any other means;
  - (b) an electronic communication is made, and the information contained therein is accessible for subsequent reference. "Electronic communication" in its turn means any communication that the parties make by means of data messages. "Data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, such as, inter alia, electronic data interchange, electronic mail, telegram, telex or telecopy;
  - (c) it is recorded in an exchange of statements of claim and defence in which the existence of an agreement is affirmed by one party, without being denied by the

other;
(d) a reference in a contract to a document containing an arbitration clause constitutes a written arbitration agreement provided that such reference implies that such clause forms part of the contract.

- In addition, an arbitration agreement in international arbitration is valid and the dispute is arbitrable if it meets the requirements set forth by:
  (a) the legal rules chosen by the parties to govern the arbitration agreement;
  (b) the legal rules applicable to the merits of the dispute; or
  (c) Peruvian law.

3.2 Arbitrability

Decree 1071 does not provide an exhaustive list of non-arbitrable matters. Nonetheless, it establishes a general rule in Article 2(1) under which any matter related to a right which the parties are lawfully free to dispose or waive can be arbitrated. Furthermore, parties can submit to arbitration matters that are authorised by law or international treaty.

This ought to be interpreted systematically with Article 63.e), according to which a local arbitral award shall be annulled if the party alleging the annulment proves that the arbitral tribunal has ruled on subject matters that, with respect to Peruvian law, are manifestly non-arbitrable.

In turn, Article 63.f) establishes as a ground for annulment for an international arbitration that, in accordance with Peruvian law, the subject matter of the dispute is not subject to arbitration. Complementarily, as per Article 13, when an arbitration is international, the dispute is arbitrable if it meets the requirements established by, inter alia, Peruvian law.

In practice, these rules exclude criminal and family matters as arbitrable (although the civil consequences of criminal acts are subject to arbitration). In addition, the Commercial High Court has established that claims related to additional work orders in public contracts are not arbitrable (Cases No 525-2021 and 323-2021).

3.3 National Courts' Approach

Pursuant to Article 13(7) of Decree 1071, in the case of international arbitration, the law applicable to the arbitration agreement may include any of the following:

- the law agreed by the parties;
- the law applicable to the merits;
- Peruvian law.

Domestic courts have not developed any standard regarding any conflict of laws over the arbitration agreements. In practice, parties often do not agree on this, but tribunals tend to apply Peruvian law as the law governing the arbitration agreement.

National Courts have shown a flexible approach towards the binding effect of the arbitration agreement. Further, the Peruvian Constitutional Court (highest constitutional court in the country) has expressly recognised the binding effect of multi-tier clauses (05311-2007-PA/TC, 2009).

In annulment, recognition and enforcement of awards, courts can analyse the validity of the agreement under the applicable law. Peruvian courts generally follow a pro-arbitration approach and tend to enforce arbitration agreements.

3.4 Validity

Decree 1071 expressly recognises the rule of separability to arbitration clauses in Article 41(2).

According to this rule, an arbitration agreement forming part of a contract shall be treated to be independent from the other provisions of the contract, and thus the non-existence, invalidity or ineffectiveness of a contract containing an arbitration agreement does not necessarily imply the non-existence, invalidity or ineffectiveness of the arbitration agreement. This criterion follows Article 16(1) of the UNCITRAL Model Law.

Consequently, the arbitral tribunal may decide it has jurisdiction based on a valid arbitration agreement, although the contract is deemed invalid.

This standard is followed closely by the Peruvian courts on a commercial and constitutional level.

4. The Arbitral Tribunal

4.1 Limits on Selection

Decree 1071 adopts a highly flexible approach, therefore allowing the parties to freely select arbitrators in the arbitration agreement. It is customary for parties to adhere to the rules of an arbitral institution, which provide both a mechanism for selecting arbitrators and a list of available arbitrators.

Almost anyone can be appointed as arbitrator if the parties wish to do so. According to Article 20, a physical person (excluding entities or corporations) can be appointed if they can exercise their rights, do not have any legal incompatibility (ie, acting as a public servant or authority) and have not been criminally convicted.

In 2020, Decree 1071 was amended, forbidding appointments of arbitrators in arbitrations against the state if the person had previously participated in the case as counsel, expert witness, or legal expert. It also bans persons who have any type of personal, work-related, economic or financial interest in the dispute or the parties.

Furthermore, when the dispute must be resolved in law (as opposed to ex aequo et bono procedure), Article 22 of Decree 1071 provides that, prior agreement of the parties, the selected arbitrator does not need to be a lawyer. However, if there is no agreement, the arbitrator shall be a lawyer.

4.2 Default Procedures

Article 23 of Decree 1071 contains a default procedure in case the parties' chosen method for selecting arbitrators fails:

- If the dispute is to be decided by a sole arbitrator, the parties have 15 days to reach an agreement on the person to be appointed.
- If the dispute is to be decided by a three-member panel, each party must appoint an arbitrator within 15 days. The two appointed arbitrators will then have 15 days to appoint the third member, who will become the chair of the tribunal.
- If for any reason it is not possible to appoint one or more arbitrators, the appointment will be made, upon the request of any party, by the Chamber of Commerce of the seat of the arbitration. If there is no chamber of commerce in such place, the request must be addressed to the Chamber of Commerce of the nearest city.

In multiparty procedures, Article 23(c) provides that claimants shall jointly designate an arbitrator within 15 days after being required to do so. Defendants shall do the same (unless agreed otherwise as per the arbitration agreement or the applicable arbitral rules). The two appointed

arbitrators shall then appoint the third arbitrator within the same timeframe, who would act as president of the tribunal.

If in any of the above-mentioned procedures an arbitrator is not appointed, the parties may request the chamber of commerce of the seat of the arbitration (or the place of execution of the arbitration agreement if no seat had been agreed) to make the appointment. If there is no chamber in the seat, the nearest chamber will hear the request. In the case of international arbitrations, the appointment is performed by the Chamber of Commerce of the seat of the arbitration. Absent an agreed seat, the LCC performs the appointment.

It is important to highlight that the mechanism adopted by the LCC, which follows the international standard of the International Chamber of Commerce (ICC). Article 13 of LCC Arbitration Rules provides that the appointment will follow the parties' agreement. If there is no agreement, the Centre will give the parties sharing the claimant's position ten days to reach an agreement on the appointment of one arbitrator. The same rule applies to the parties in the respondent's position. Immediately thereafter, the two appointed arbitrators have ten days to appoint the third member and chair of the panel.

If neither of the parties appoint an arbitrator, the Centre makes the appointment.

4.3 Court Intervention

National courts do not have the power to intervene in the selection of arbitrators under any circumstances.

4.4 Challenge and Removal of Arbitrators

Decree 1071 requires arbitrators to remain independent and impartial to the parties in the arbitration proceedings. As such, they have a disclosure duty regarding any circumstances may give rise to doubts of their independence or impartiality.

Pursuant to Article 28(3) of Decree 1071, an arbitrator may be challenged if there are circumstances that lead to justified doubts regarding its independence or impartiality. This criterion is followed by the main arbitration centres, which have even considered that the lack of timely disclosure constitutes sufficient grounds to remove an arbitrator.

Therefore, Decree 1071 follows the international appearance standard, according to which an arbitrator can be challenged if there are "serious doubts" of its lack of impartiality or independence.

4.5 Arbitrator Requirements

Decree 1071 does not provide a legal standard on what is understood by independence and impartiality. However, arbitral practice and the Peruvian courts (including the Supreme Court) consider independence as the lack any relationship with the parties that might affect the freedom of the arbitrator when deciding the dispute. On the other hand, impartiality refers to the objectivity that an arbitrator may have in its decision-making, free from any external influence.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

As explained in **3.2 Arbitrability**, subject matters that may not be referred to arbitration are those that are not freely disposable (or waivable) by parties nor expressly authorised by the law.

5.2 Challenges to Jurisdiction

Inspired by the UNCITRAL Model Law, the principle of competence-competence is expressly recognised under Article 41 (1) of Decree 1071, which determines that only the arbitral tribunal can rule on its own jurisdiction, even when a party challenges it (eg, challenge on existence or validity of the arbitration agreement).

Any objection to the tribunal's jurisdiction shall be raised with the statement of defence, at the latest. Unless agreed otherwise, the tribunal rules on these objections as a preliminary matter or with the final award.

5.3 Circumstances for Court Intervention

Peruvian Courts can address issues of jurisdiction in three circumstances:

- superficially, when a claim is filed before court in which the underlying contract contains an arbitration agreement, and the defendant moves to dismiss the claim based on the arbitration agreement;
- in an annulment proceeding; and
- in recognition of foreign arbitral awards.

Under Peruvian law, courts can review the validity of both positive and negative rulings on arbitral jurisdiction under Article 41(5) of Decree 1071.

Statistics reveal that courts tend not to intervene in such matters. A study sponsored by the LCC showed that in 2022 only seven out of 101 annulment claims regarding issues of jurisdiction filed before commercial courts in Lima were successfully annulled. These issues included validity of the arbitration agreement (ten claims); abuse of authority (68 claims) and non-arbitrable matters in international arbitration (23 claims).

From the seven successful cases, three referred to abuse of authority and four referred to non-arbitrable matters. There were no successful claims regarding the validity of the arbitration agreement.

5.4 Timing of Challenge

As the jurisdiction of an arbitral tribunal can only be challenged by annulment, the parties can exercise their right to go to court only once the award has been rendered. Therefore, in accordance with Article 41 of Decree 1071, even if a jurisdictional objection referring only to certain matters is dismissed by the arbitral tribunal, the arbitration proceedings shall continue regarding the other matters, and the jurisdictional decision may only be challenged via annulment once the award on the merits is rendered.

Furthermore, partial awards can only be challenged once the final award is issued and any interpretation, exclusion or integration of the award have been resolved, in accordance with the principle of minimum judicial intervention, recognised under Article 3(4).

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

Peruvian courts generally apply a deferential judicial review standard for questions of admissibility and jurisdiction.

5.6 Breach of Arbitration Agreement

In our experience, Peruvian courts are generally reluctant towards continuing proceedings if a party has breached an arbitration agreement and the other party has objected it. Indeed, the court will only continue with the proceeding despite the defendant's objection only if the arbitration agreement is null and void and the arbitration has not commenced yet. If the defendant's objection

is filed after the arbitration has started, the court shall grant the motion to dismiss.

Courts will also continue such proceeding if the defendant waives the right to arbitrate.

There have not been reports of judicial anti-suit injunctions related to breach of arbitration agreement. Under Peruvian law, the principle of non-interference prevails, meaning a judge can be held liable if they interfere with an ongoing arbitral proceeding.

5.7 Jurisdiction Over Third Parties

National law does not allow arbitral tribunal to assume jurisdiction over third parties that are not party to the arbitration agreement.

Peru is the only jurisdiction, however, that has expressly regulated the extension of arbitral agreements to non-signatory parties. Article 14 of Decree 1071 allows the arbitral agreement to be extended to those whose consent to arbitrate, in good faith, is determined by their active and determining participation in the negotiation, execution, performance, or termination of the contract subject to the arbitration agreement.

It also extends to those who intend to derive rights or benefits from the contract. The Article provides no limitation to whether the parties are foreign or domestic, so it has been applied to both.

6. Preliminary and Interim Relief

6.1 Types of Relief

Decree 1071 followed the 2006 amendments of the UNCITRAL Model Law and allows tribunals to issue interim relief.

According to Article 47, once a tribunal is constituted, it has jurisdiction to issue the interim measures it considers appropriate to ensure the effectiveness of the award.

This relief is binding on the parties, and the tribunal can enforce the award unless public force is required or deemed convenient for enforcement. In such cases, Article 48(2) permits parties to request judicial assistance from the commercial courts if needed.

Decree 1071 does not contain an exhaustive list of reliefs but a standard of the measures that tribunals or sole arbitrators can issue. The measures must be:

- temporary;
- contained in a decision that may or may not be in the form of an award;
- issued before the constitution of the arbitral tribunal.

The relief may order one of the parties to:

- maintain or restore the status quo;
- adopt measures to avoid any present or future harm or prejudice to the arbitral process itself;
- provide a means of preserving assets out of which a subsequent award may be satisfied; and
- preserve evidence that may be relevant and material to the resolution of the dispute.

If the measures are addressed to the parties, they are generally effective since the parties are involved in the arbitral proceedings. However, if the measures are directed towards third parties to the proceedings, judicial assistance may be necessary.

6.2 Role of Courts

Courts play a significant role in interim relief of arbitral proceedings by issuing interim measures directly themselves or by assisting arbitral tribunals on the enforcement.

First, courts have the power to issue interim measures only before the constitution of the arbitral tribunal. Nonetheless, this relief can be overturned, modified or maintained by decision of the arbitral tribunal once it is constituted. The measures become ineffective automatically if (i) the request for arbitration is not submitted within ten days since the measure was granted; or (ii) the arbitral tribunal is not constituted within 90 days of the measure being granted.

Second, courts can also assist in the enforcement of interim measures granted by arbitral tribunals. Judges are prevented from interpreting the content or the scope of the interim measure issued by the arbitrators.

Furthermore, Peruvian courts have jurisdiction to recognise foreign arbitral interim measure from foreign-seated arbitral proceedings. When recognising foreign arbitral interim measures, Decree 1071 follows the 2006 amendments of the UNCITRAL Model Law. Courts may recognise and enforce foreign interim measures in application of the same requirements as those of foreign awards.

Regarding judicial interim measures in aid of foreign arbitrations, Peruvian courts have issued contradictory decisions.

Emergency arbitrations are not contemplated in the Decree 1071, but they can be agreed by the parties and are recognised under arbitration rules of several arbitration centres. In any case, emergency arbitrations are binding to the parties, and courts may not intervene to modify or revoke them in any way (only the arbitral tribunal, once it had been appointed). Some judicial cases are under discussion regarding the validity of emergency decisions.

Due to an increase of fraudulent emergency arbitrations in recent years, the Peruvian government is pushing to ban the availability of these measures. As of today, while some known arbitrations centres (eg, LCC, AMCHAM) still provide emergency arbitration proceedings in their rules (albeit with some restrictions regarding arbitrations with state entities), others (eg, PUCP) have removed emergency arbitration procedures from their rules entirely.

6.3 Security for Costs

Security for costs is not expressly recognised under Peruvian law. However, an arbitral tribunal may grant it as Article 34(3) of Decree 1071 allows a tribunal to apply principles and customs and practices in arbitration in a matter the Decree has not regulated.

7. Procedure

7.1 Governing Rules

The arbitration procedure is governed by Decree 1071, which recognises the parties' freedom to agree on the arbitral rules applicable to their proceedings (including the arbitration rules of the arbitral institutions administrating the arbitration, should the parties have chosen any).

If the parties have not agreed on the rules governing the procedure, Decree 1071 provides that the arbitral tribunal can discretionarily settle the arbitral procedure as it may deem appropriate. Pursuant to Article 34(3), this discretion is guided by the principles and costumes of arbitration.

Disputes arising from public contracts are governed by a specific set of rules outlined in the General Law on Government Contracts, which is updated annually; the latest version, Law No. 32069, was published in June 2024. Its regulations were last updated in August 2023 through Supreme Decree No. 344-2018-EF.

7.2 Procedural Steps

The autonomy of the parties is the ruling principle governing the arbitral proceeding, as long as rights such as due process and equality are respected. The arbitral tribunal also has powers to conduct the proceedings, as it may deem appropriate on a case-by-case basis.

Civil Procedure Code is not applicable to arbitrations in Peru.

7.3 Powers and Duties of Arbitrators

Under Decree 1071, arbitrators possess at least the following powers:

- to decide upon the merits of the dispute;
- to decide on their own jurisdiction, as well as dealing with any objections posed by the parties in that regard;
- to schedule hearings that they may deem necessary;
- to determine the admission, pertinence, relevance and weight of evidence;
- to appoint ex officio experts;
- to issue interim measures.

Arbitrators also have the following duties:

- to respect the confidentiality of the proceedings;
- to act in a fair and impartial manner, conducting the arbitration equally and fairly;
- to disclose any circumstances that may give rise to doubts regarding their impartiality;
- to provide reasons for their decisions.

7.4 Legal Representatives

Peruvian law is flexible and does not require any special qualifications for legal representatives. They shall nevertheless comply with general minimum requirements (ie, have legal capacity to act and have an appointment in writing). Further, it is not even a requirement to be a qualified lawyer in Peru to represent a party, which allows foreign lawyers to appear in arbitration proceedings without any further qualifications.

8. Evidence

8.1 Collection and Submission of Evidence

Article 39 of Decree 1071 mandates that parties submit all relevant documents alongside their statements of claim and defence, or reference any documents or evidence they intend to submit or propose. This requirement is similarly reflected in the rules of major arbitral institutions. However, the tribunal retains the authority to (i) request evidence at a later stage if deemed necessary, or (ii) admit evidence submitted by the parties if the delay is justified.

A US discovery phase does not exist per se. However, the parties can agree on a document production phase, whereby one party requests the tribunal to order the other party to produce documents. The other party can object to the production of such documents on grounds such as its lack of relevance or confidentiality of the documentation, including secrecy of the information or protection by legal privilege. In practice, tribunals tend to use standards such as the ones set out in rules like the IBA Rules on the Taking of Evidence.

While there is no established standard for the characteristics of the documents to be produced, they should generally not be under the control of or accessible to the requesting party, and must be material and relevant to the dispute.

The rules of evidence concerning witnesses are clearly outlined in the arbitral proceedings. Typically, the parties submit written witness statements and have the discretion to decide whether to cross-examine witnesses during the hearing.

Regarding expert witnesses, the rules of evidence are established at the start of the proceedings. Parties can submit experts reports from party-appointed experts, and the arbitral tribunal can also appoint experts ex officio. Additionally, parties have the right to cross-examine experts during hearings.

8.2 Rules of Evidence

Article 43 of Decree 1071 establishes that the arbitral tribunal holds exclusive authority over the admissibility, relevance, presentation, and weight of evidence in arbitral proceedings, allowing it to request evidence as necessary at any time. Additionally, the tribunal may disregard evidence that has been offered but not formally submitted, depending on the case's circumstances. Consequently, the rules of evidence in arbitration significantly differ from those applicable in domestic judicial matters, aligning with an international framework.

Even when a specific topic is not addressed by the parties' agreement or lex arbitri, arbitrators can resort to international practice and arbitral principles (Article 34). In practice, this enables the tribunal to exercise procedural discretion guided by various sources, including guidelines published by the International Bar Association (IBA), relevant case law, academic doctrine, and other institutional rules.

Major arbitral institutions, such as the LCC, have established certain rules of evidence that arbitral tribunals can otherwise modify by agreement.

8.3 Powers of Compulsion

Arbitrators lack the authority to compel parties to produce documents during proceedings. Nonetheless, it is a common practice, as outlined in the rules of arbitral institutions like the LCC, that if a party fails to produce required documents or evidence without justification, the Tribunal may draw appropriate inferences, including negative ones.

Arbitrators lack the authority to compel third parties to produce documents or to ensure the attendance of witnesses or experts. However, Article 45 of Decree 1071 permits the arbitral tribunal or the parties (with prior approval from the tribunal) to seek judicial assistance for evidence gathering.

Once the assistance request is submitted, the judicial authority must comply without delay, unless the request clearly violates prohibiting laws or public order. Consequently, the judicial authority cannot assess the appropriateness of the request or allow any opposition or appeal against the procedural order issued in response.

9. Confidentiality

9.1 Extent of Confidentiality

Article 51 of Decree 1071 (in accordance with the rules of the main arbitral institutions) provide that, unless agreed otherwise, any person involved in the arbitral proceedings (eg, arbitrators, tribunal's secretary, arbitral institutions, wit-

nesses, experts) has an obligation to maintain confidentiality of both the proceedings and the award. Parties, their representatives and counsel shall also maintain confidentiality, unless there is a legal mandate or legal provision that lifts such confidentiality.

Even when awards and other confidential documents are submitted to the courts during annulment, recognition, and enforcement procedures, they can remain shielded from the public. Nonetheless, some arbitral institutions advocate for greater transparency by publishing select awards with the parties' consent.

In arbitrations whereby one of the parties is a state entity, the proceedings and the arbitral award become publicly available upon their termination.

10. The Award

10.1 Legal Requirements

The legal requirements for an arbitral award consist of formal and content-related elements. Formally, the award must be in writing and signed by the arbitrators. In terms of content, it must include the reasoning behind the decision ("*motivación*"), state the date and place of issuance, and address the ruling on costs.

The Peruvian Arbitration Act has the particularity of containing a ground for annulment for specifically delivering the award out of time agreed timeline (Article 63(1)(g)). Recently in 2024, four related awards where consecutively annulled as a result.

10.2 Types of Remedies

Arbitrators can award the same remedies a judge would under Peruvian law, including specific performance, rectifications, injunctions and damages (damnum emergens, lucrum cessans, moral). Punitive damages are not recognised under Peruvian law.

10.3 Recovering Interest and Legal Costs

Parties are entitled to recover interests and legal costs, and must explicitly request interest as part of their claim and provide a justification for the rate used.

Regarding legal costs, Article 73 of Decree 1071 provides that legal costs may be recovered based on the agreement of the parties. If there is no agreement, the defeated party in the arbitration assumes the costs, regardless of the power of the arbitral tribunal to distribute costs between the parties if it considers it to be reasonable, on a case-by-case basis.

11. Review of an Award

11.1 Grounds for Appeal

Once the award is issued, parties do not have the right to appeal. Pursuant to Article 62 of Decree 1071, the only possibility to challenge an award is by a set aside (annulment) procedure, which proceeds exclusively under the following grounds in Article 63:

- the arbitration agreement does not exist or is invalid;
- one of the parties was not given notice duly of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise, by any reason, unable to present their case;
- the composition of the tribunal or the arbitral proceedings were not in accordance with the agreement of the parties or the applicable arbitration rules, unless such agreement

or rules were contrary to a mandatory legal provision of Decree 1071;
- the award deals with a matter that was not submitted to the tribunal's decision;
- in domestic arbitration, the subject-matter of the arbitration is manifestly not arbitrable under the law;
- in international arbitration, the subject matter of the arbitration is not arbitrable under the laws of Peru or the award conflicts with international public order; and
- the award was rendered after the deadline that was established by the parties, the applicable arbitral rules or the arbitral tribunal.

11.2 Excluding/Expanding the Scope of Appeal

The only possibility to challenge an award is by a set aside procedure, whose scope the parties cannot expand by agreement. However, when none of the parties in the arbitration has Peruvian nationality, is a permanent resident or has its core business in Peruvian territory, Article 63 (8) of Decree 1071 allows them to fully renounce to a set-aside procedure or limit the grounds for annulment that parties can apply for.

11.3 Standard of Judicial Review

The standard of judicial review of the merits may be deferential. The Commercial High Courts are not considered appellate bodies (second instance), which means they do not review the merits at all. They review challenges exclusively on the validity of the award, limiting the scope of the court analysis to strictly procedural matters.

For this reason, Peruvian courts make a full review of the tribunal's jurisdiction but only from a formal perspective. Thus, they have no jurisdiction to revoke decisions, even if the decision on the merits is completely wrong.

In practice, annulment courts often apply standards developed by the constitutional practice when vacating judicial judgments. Even though this approach has been criticised, courts rarely annul an award. Statistics from 2022 indicate that the lack of motivation in arbitral awards is cited as a reason for annulment in 91% of cases (399 out of 440). However, only 60 awards were actually annulled on this basis, representing 15%.

12. Enforcement of an Award

12.1 New York Convention

Peru is a signatory of the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards, without reservations. Another similar convention signed by Peru is the Inter-American Convention of International Commercial Arbitration, approved in Panama on 30 January 1975.

12.2 Enforcement Procedure

To enforce a foreign award in Peru, the interested party shall file a recognition request before the High Commercial Court and, once this has been granted, shall request its enforcement to the commercial judge.

Decree 1071 expressly provides, under Article 75(2)(e), that the enforcement of a foreign award is refused if the objecting party demonstrates that the award (i) is not still compulsory for the parties; (ii) was annulled; or (iii) has been suspended by a competent authority in the country in which the award had been rendered.

Article 75(8) states that if an award is currently undergoing a set-aside procedure at its seat, the commercial court responsible for recognising the award may postpone its decision until

the procedure is complete. Additionally, the court may require the party seeking annulment to provide appropriate guarantees on behalf of the requesting party.

Under Decree 1071, state entities cannot raise a defence of sovereign immunity at an enforcement stage.

12.3 Approach of the Courts

In general, Peruvian courts regularly recognise and enforce foreign awards. Therefore, grounds for refusal (including public policy considerations) are exceptionally granted.

13. Miscellaneous

13.1 Class Action or Group Arbitration

Peruvian arbitration legislation does not include any provisions for class action or group arbitration.

13.2 Ethical Codes

In Peru, the ethical codes applicable to lawyers derive from their professional associations, specifically their respective Bars, and they are bound by a duty of professional secrecy, which is recognised at the constitutional level in Article 2(18) of the Constitution. This right has been upheld by the courts, as demonstrated in the judicial judgment of procedure No. 7811-2005-PA/TC. In contrast, while Decree 1071 outlines duties of independence and impartiality for arbitrators, it does not specify ethical rules or professional standards; however, some arbitration centres have developed their own codes of ethics.

13.3 Third-Party Funding

To date, Peruvian law and the arbitral rules of major institutions do not include specific regulations for third-party funders.

13.4 Consolidation

Article 39 of Decree 1071 provides that, unless agreed otherwise, an arbitral tribunal cannot consolidate two or more arbitral proceedings. However, arbitral institutions do provide specific rules for consolidation under specific circumstances. For example, a common requirement is the connection between agreement and consent, which can arise from the interpretation of agreements, the conduct of the parties, or a formal agreement made after a dispute has arisen.

13.5 Binding of Third Parties

The binding effect of an arbitral decision over third parties as a form of co-operation is uncertain. Constitutional practice has rejected the incorporation of third parties, such as banks, as non-signatories.

However, no standard has been developed and, in practice, interim measures requiring the co-operation of financial institutions or other parties are often granted at the discretion of the courts, while those issued by the courts themselves are binding.

Trends and Developments

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Estudio Muñiz, Olaya, Melendez, Castro, Ono & Herrera

Estudio Muñiz, Olaya, Melendez, Castro, Ono & Herrera was founded in 1981, and since then has become a leading law firm in Peru. The firm's robust arbitration practice excels in both domestic and international arbitration, with an experienced team that has handled cases under major arbitration institutions and rules, including ICC, ICSID, PCA, LCIA and UNCITRAL, as well as local rules such as the Lima Chamber of Commerce, AMCHAM and PUCP. The arbitration department has a proven track record of dealing with high-profile cases, and extends its practice to the annulment, recognition, and enforcement of local and foreign awards. The team offers comprehensive services across various industries and sectors, including M&A, retail, oil and gas, energy, real estate, construction, telecommunications, and mining. Its strategic approach combines in-depth legal knowledge with practical insights and commercial awareness, ensuring tailored solutions for its clients.

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Emergency Arbitration

Due to its popularity as an efficient method for resolving commercial and state-related disputes in Peru, several forms of arbitration have proliferated in recent years in the country. This includes emergency arbitration, a fast-track procedure allowing parties to request urgent interim relief before a full arbitral tribunal is established, typically in situations where waiting could cause irreparable harm or loss to their rights. This mechanism is typically employed to protect the integrity of assets -whether belonging to the claimant or defendant – when it is at risk, to maintain the status quo, or to prevent ongoing harmful actions until the arbitral tribunal reaches a decision.

This is distinct from traditional arbitration, which begins after parties select and appoint their arbitrators, emergency arbitration allows for the rapid appointment of a single temporary arbitrator within two to five business days of an application. This swift process is essential for urgent matters, as the temporary arbitrator can issue binding interim orders – such as injunctions, property attachments, and other measures to protect the parties' rights – until a full tribunal is formed. Once established, the tribunal may confirm, modify, or revoke the temporary arbitrator's measures.

The enforceability of emergency arbitration decisions varies depending on each jurisdiction (ie, each national arbitration legal framework may regulate it, prohibit it, or remain silent on the issue altogether). However, many world-renowned arbitral institutions, including the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the Singapore International Arbitration Centre (SIAC), have incorporated emergency arbitration to their rules.

Even though the legal nature of these measures is contested, its binding effect is commonly recognised, at least on a contractual level. However, parties may object to the binding powers of such measures if they request interim measures before national courts prior to the constitution of the tribunal. In these cases, the exclusionary effect of the interim measures granted by an emergency arbitrator vis-a-vis national courts may be debated.

However, if managed correctly, a provisional measure granted by an emergency arbitrator can be a more efficient alternative than the interim measures granted by a national court prior to the start of an arbitration. Most national legislation provides that a party can seek provisional measures before national courts prior to the constitution of the tribunal. Local courts, however, are fully congested, especially in Latin American jurisdictions. In Peru, for instance, it may take two to four months to have a decision on the application of the interim relief. In contrast to national courts, an emergency arbitrator can issue an urgent measure within one to two weeks.

As opposed to lengthy, prone to corruption judicial procedures, emergency arbitrations are expected to be more efficient and fairer than their judicial counterparts, providing effective relief and protection to the parties' rights before the constitution of a full arbitral tribunal.

Emergency arbitration under the Peruvian legal framework

Inspired by the 2006 UNCITRAL Model Law, Legislative Decree No. 1071 ("Decree 1071"), in force since 2008, establishes a modern legal framework for arbitration in Peru and serves as the primary legislation for arbitration matters. However, because emergency arbitration is a

relatively new concept, Decree 1071 does not address it. Instead, provisions for emergency arbitration have been introduced through the rules of various arbitration centres across the country. These include some of the most prominent arbitral institutions in the country, such as the centre of the Lima Chamber of Commerce (CCL) and American Chamber of Commerce in Peru (AMCHAM).

For instance, the arbitral rules of CCL regulate the emergency arbitration procedure as follows:

- A party files an application for emergency measures for urgent relief before the CCL prior to the constitution of the arbitral tribunal.
- The opposing party is notified with the application by CCL as soon as possible, unless CCL considers it more appropriate to appoint the emergency arbitrator first.
- Upon receiving the application, CCL appoints an emergency arbitrator within two business days.
- Once appointed, the emergency arbitrator issues a procedural order regulating the steps of the proceedings, which shall be expedited (as it has a duty to resolve the application in the shortest possible time).
- After hearing the parties, the emergency arbitrator decides whether to grant the interim measures. The decision is made within 15 business days since the emergency arbitrator was notified with the party's application and its accompanying documents.
- The emergency arbitrator ceases to have jurisdiction once the full arbitral tribunal has been constituted.
- The decision of the arbitrator is binding to the parties. However, it can be upheld, modified or lifted by the full arbitral tribunal by request of the parties or, exceptionally, ex officio.
- The party requesting the interim measures is solely liable for the costs and damages that such measure may cause to any of the parties.
- The decision of the emergency arbitrator cannot be appealed, but it is not binding for the arbitral tribunal in resolving the merits of the case.

There is not an exhaustive list of interim reliefs that the emergency arbitrator could grant to the requesting party. These reliefs adhere to the same standards as other interim measures: they must be temporary, included in a final decision, and issued before the constitution of the arbitral tribunal.

Moreover, the relief may order one of the parties to:

- maintain or restore the status quo;
- adopt measures to avoid any present or future harm or prejudice to the arbitral process itself;
- provide a means of preserving assets out of which a subsequent award may be satisfied; and
- preserve evidence that may be relevant and material to the resolution of the dispute.

Even though there is no legal standard, arbitral practice often requires a higher standard of urgency in comparison to traditional emergency measures.

The most common interim measure requested in emergency arbitration is an injunction against defendant to refrain from calling on a bank guarantee. An order directly to the banks or financial institutions to refrain from paying on-demand bank guarantee in favour of the plaintiff may end up being unsuccessful as most bank institu-

tions may not comply with provisional measures issued by an arbitrator. In such cases, the parties may apply to the court for assistance on the enforcement of the interim relief.

The enforceability of interim measures in emergency arbitration and the potential for judicial assistance similar to that provided by national courts for regular arbitral interim measures remains contentious, especially regarding recognition and enforcement under the New York Convention. Peruvian courts have yet to fully address this issue and have not taken a definitive stance.

It is worth noting that the CCL Rules expressly exclude the application of an emergency arbitration in the following cases:

- if the arbitration agreement was concluded before the Rules came into force (ie, 2017);
- if the parties to the arbitration agreement have expressly and previously opted out of the application of emergency arbitration;
- if the state is a party and the arbitration agreement does not include the express consent of the parties to the emergency arbitration proceeding.

However, not all arbitration centres offer detailed rules or specific exclusions, and some may lack regulations altogether, particularly those that are newly established and may not have sufficient experience in managing expedited proceedings.

In summary, a provisional measure granted by an emergency arbitrator can be a more efficient alternative to the interim measures provided by a Peruvian court before the initiation of arbitration.

Trends in emergency arbitration in 2023-2024

Emergency arbitration experienced significant growth in Peru by 2023, becoming a prevalent mechanism. However, this expansion was marred by several corruption scandals, including instances where "emergency arbitrators" issued interim reliefs without jurisdiction from unrecognized arbitration institutions, raising serious concerns about the integrity of both the arbitrators and the institutions involved.

Subsequently, emergency arbitration started to be seen as a mechanism for abuse and even a questionable practice. The reasons identified by the Peruvian market that are behind such abuses are the following:

- The proliferation of new arbitration centres, often lacking significant oversight from government authorities, has made them susceptible to corruption scandals and insufficiently rigorous vetting processes for their lists of arbitrators.
- The urgent demand for emergency arbitrators has often resulted in the selection of arbitrators lacking sufficient experience or impartiality, leading to suboptimal interim measures in numerous cases.
- The misuse of the mechanism by some parties, who applied emergency arbitration as a strategic tool to delay proceedings and to create unnecessary burdens to the opposing party. This has been considered particularly pernicious against state entities, as they may be prevented from executing contracts and projects of significant public interest in the country, such as hospitals or public infrastructure.
- A worrying number of public contracts that have pathological or unclear arbitration agreements. Under Decree 1071, if an arbitration agreement does not determine an arbitral

institution to manage the proceedings, the arbitration is considered ad hoc. However, if a state entity is a party, the Regulations of the Law of State Contracts change this general rule, allowing claimants to choose any arbitral institution in a national registry called RENACE to manage the arbitral proceedings. Claimants often choose institutions that lack experience or have a poor reputation.

The reactions of actors in the Peruvian arbitration market have varied:

- The Peruvian congress is currently working on a bill that would prohibit the use of emergency arbitration when a state entity is a party in the arbitration. However, the enactment of such legislation would eliminate any possibility of quick relief that may be obtained by a party with a legitimate need.
- Several arbitral institutions now require an express submission to the centre's jurisdiction and an agreement of the parties to adopt the emergency arbitration rules of such centre.
- Prominent arbitration centres such as the Centre for Dispute Resolution of the Catholic University of Perú (PUCP) have even eliminated emergency arbitration from their rules. It is worth noting that this arbitration centre is renowned for being the preferred arbitral institution of many state entities.
- Practitioners and academia have recognised the need for further regulation, but have argued that the solution to the problem is not to forbid the use of emergency arbitration in its entirety (as it would be more costly than beneficial) but to tighten the requirements for the creation of new centres and increase the supervision and control over the existing ones, as well as add minimum qualification requirements for the appointment of emergency arbitrators.

Conclusion

Emergency arbitration has become a popular method for resolving urgent disputes in Peru in recent years, providing a fast-track procedure for interim relief before a full arbitral tribunal is constituted. This procedure is designed to address situations where immediate protection is needed by the parties to prevent irreparable harm or to maintain the status quo. As distinct from traditional arbitration, which begins after the full tribunal is constituted, emergency arbitration involves the quick appointment of a single temporary arbitrator who can issue binding interim orders. These orders aim to protect the parties' rights until the full tribunal is formed, which then has the authority to confirm, modify or revoke these measures.

Peruvian legislation does not specifically address emergency arbitration, but is incorporated through the rules of various arbitration centres such as the Lima Chamber of Commerce. Despite its benefits, emergency arbitration in Peru has encountered challenges, including corruption scandals and misuse by certain parties. This has led to a call for stricter regulations, including potential legislative changes that might forbid its application in disputes involving state entities. Reactions from the Peruvian arbitration community emphasize the need for improved supervision and higher standards for arbitrator qualifications, rather than advocating for an outright ban of the procedure.

PHILIPPINES

Law and Practice

Contributed by:
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SyCip Salazar Hernandez & Gatmaitan

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SyCip Salazar Hernandez & Gatmaitan (SyCipLaw) was founded in 1945 and has offices in Makati City (the business centre of the Philippines), as well as in Cebu, Davao and the Subic Freeport. SyCipLaw's litigation department consists of 13 partners, one of-counsel, two special counsel, and 27 associates doing dispute resolution work in various degrees. It has a wide-ranging litigation practice at virtually all court levels – from the municipal and regional trial courts to the Court of Appeals and the Supreme Court – and with various administrative agencies. SyCipLaw also has a very extensive arbitration practice involving international arbitrations, commercial and other domestic arbitrations, and construction arbitrations. The firm handles some of the most significant, high-value and complex Philippine commercial law disputes, a number of which involve the Philippine government. SyCipLaw represents a wide array of foreign and local clients, ranging from public utilities to large companies in industries such as mining, power, banking, construction, transportation, pharmaceuticals, hospitals, airlines, hotels, food manufacturing, and distilled spirits.

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1. General

1.1 Prevalence of Arbitration

There is a continued rise in the use of international arbitration to resolve disputes in the Philippines, in line with the public policy of favouring arbitration and increasing efforts to incorporate arbitration agreements in commercial contracts. While disputes between only domestic parties are still largely resolved through court litigation, there is now a preference to resort to international arbitration in matters involving foreign counterparties or transactions with an offshore element in the interest of expeditiousness, predictability, and ensuring minimal court intervention. International arbitration results from a combination of being the selected mode of dispute resolution (where there is a foreign counterparty) and in relation to the enforcement of foreign arbitral awards.

1.2 Key Industries

There does not appear to be any particular industry that experienced a significant increase or decrease in international arbitration activity in recent years. Although there was a slowdown in international arbitration in the Philippines at the beginning of the pandemic, probably owing to economic uncertainty, international arbitration activity has since normalised and even improved.

1.3 Arbitration Institutions

Among the domestic arbitral institutions, the one most used for international arbitration involving construction disputes is the Construction Industry Arbitration Commission (CIAC). However, the Philippine Dispute Resolution Center, Inc (PDRCI) is used the most for other commercial disputes.

Under a unique Philippine construction arbitration law, the CIAC is granted original and exclusive jurisdiction over construction disputes in which the parties have agreed to arbitration. Where the parties have named another arbitration institution in their arbitral agreement, the Supreme Court has interpreted the law to still incorporate the CIAC as an alternative choice of arbitration institution into the agreement. On the other hand, the PDRCI is the most established arbitral institution in the country for commercial disputes, having been founded in 1996.

Although no new arbitral institutions were established in the Philippines in 2023–24, Philippine advocates and practitioners continue to promote the use of the Philippine International Center for Conflict Resolution (PICCR), which was established only in 2019 by the Integrated Bar of the Philippines (IBP).

1.4 National Courts

There are no specific courts in the Philippines that are designated to hear disputes related to international arbitrations and/or domestic arbitrations. The regional trial courts, which are the regular trial courts in the Philippines, have original jurisdiction over petitions relating to arbitration under the Special Rules of Court on Alternative Dispute Resolution ("Special ADR Rules").

2. Governing Legislation

2.1 Governing Law

Republic Act No 9285, or the Alternative Dispute Resolution Act of 2004 (the "ADR Act"), is the national legislation governing arbitration in the Philippines. It provides that international commercial arbitration shall primarily be governed by the 1985 UNCITRAL Model Law (the "UNCITRAL Model Law"). The ADR Act does not diverge in

any significant way from the UNCITRAL Model Law.

2.2 Changes to National Law

There have been no significant changes to the ADR Act and related issuances. There is currently a pending bill in the Senate (Senate Bill No 1308, filed 12 September 2022) to adopt the 2006 amendments to the UNICTRAL Model Law "to update the commercial arbitration practices in the Philippines in conformity with international standards".

Philippine case law has also affirmed the public policy favouring arbitration as a mode of dispute resolution, in a 2023 ruling declaring that a CIAC arbitral award may only be challenged on limited grounds (DHY Realty & Development Corp. v Court of Appeals, GR No 250539, 11 January 2023). Further, the Revised Corporation Code, which took effect in 2019, now provides that a company's articles of incorporation or by-laws may contain an arbitration clause, which is an express recognition on the arbitrability of intra-corporate disputes. The Philippines is also now in the process of completing the requirements for its ratification of the Singapore Convention on Mediation.

3. The Arbitration Agreement

3.1 Enforceability

Consistent with the UNCITRAL Model Law, Philippine law requires that an arbitration agreement must be in writing. This requirement is satisfied if the arbitration agreement is:

- an electronic document;
- in a document signed by the parties;
- in an exchange of letters, telegrams or other means of telecommunication; or
- even in an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other party.

Furthermore, the Supreme Court has ruled that an arbitration agreement is a contract. As such, it must comply with the Philippine Civil Code's requirements for a valid contract, which are consent, object and consideration.

3.2 Arbitrability

Commercial disputes in the Philippines are generally arbitrable. However, the Implementing Rules and Regulations (IRR) of the ADR Act provide that the following matters cannot be referred to arbitration:

- labour disputes covered by the Labor Code of the Philippines and its rules;
- civil status of persons;
- validity of marriage;
- any ground for legal separation;
- jurisdiction of courts;
- future legitime;
- criminal liability;
- disputes that by law cannot be compromised; and
- disputes referred to court-annexed mediation.

3.3 National Courts' Approach

The Supreme Court has ruled that the law agreed upon by the parties in the arbitration agreement shall govern considering that party autonomy is the essence of arbitration. In the absence of such designation, the law determined by the conflict of law rules applicable shall govern.

Courts are mandated to favour arbitration. The Supreme Court has ruled that arbitration agreements are to be liberally construed in favour of proceeding to arbitration and that courts should

generally adopt the interpretation that renders an arbitration clause effective if the terms of an agreement allow for such interpretation. As such, courts must refer matters to arbitration if the case were improperly or prematurely referred to them despite an arbitration agreement.

3.4 Validity

The Supreme Court has upheld the validity of an arbitration clause despite the invalidity of the main contract, consistent with the rule of separability. It is settled that an arbitration agreement is independent of the main contract, and it does not automatically terminate when the contract of which it is part ends.

4. The Arbitral Tribunal

4.1 Limits on Selection

It is a recognised state policy to respect party autonomy in the resolution of disputes. Thus, there are no limitations on the parties' freedom to select arbitrators in international commercial arbitration or to agree on the qualifications of the arbitrators. In a similar vein, the ADR Act's IRR provides that no person shall be precluded from acting as an arbitrator because of their nationality, unless otherwise agreed by the parties.

4.2 Default Procedures

The parties are free to determine the number of arbitrators but, in the absence of such agreement, there shall be three arbitrators.

The parties are free to agree on a procedure for appointing the arbitrator or arbitrators. In the absence of such agreement, if the parties had agreed to have a sole arbitrator but are unable to agree on the arbitrator, a party may request that the arbitrator be appointed by the appointing authority.

If the parties agree to have three arbitrators, each party shall appoint an arbitrator and then the two appointed arbitrators shall appoint the third arbitrator. If a party fails to appoint the arbitrator within 30 days of receiving a request to do so from the other party – or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment – the appointing authority shall make the appointment upon request of the other party.

The appointing authority is the person or institution named as such in the arbitration agreement, or else the regular arbitration institution under whose rules the arbitration is conducted. Where the parties have agreed to submit their dispute to institutional arbitration rules, they are deemed to have agreed for arbitrators to be selected and appointed under those rules – unless they have agreed to a different procedure.

In ad hoc arbitration, the default appointment of an arbitrator shall be made by the National President of the IBP or their duly authorised representative.

However, there is no default procedure specifically for multiparty arbitrations.

4.3 Court Intervention

The court intervenes in the selection of arbitrators and may act as the appointing authority at the request of a party in the following circumstances:

- if a party fails or refuses to appoint an arbitrator, or when the parties fail to agree on the sole arbitrator, or when the two designated arbitrators fail to agree on the third arbitrator; and
- the arbitral institution fails or is unable to perform its duty as an appointing authority within

a reasonable time upon receiving a request for appointment.

In an ad hoc arbitration, the court may intervene when:

- the parties failed to provide a method for appointing or replacing an arbitrator or substitute arbitrator, or the method agreed upon is ineffective; and
- the National President of the IBP fails or refuses to act within:
  (a) such period as may be allowed under the pertinent rules of the IBP;
  (b) such period as may be agreed upon by the parties; or
  (c) 30 days of receiving such request for appointment.

4.4 Challenge and Removal of Arbitrators

An arbitrator may be challenged on any of the grounds provided for in the ADR Act and its IRR, Republic Act No 876 or the UNCITRAL Model Law. The nationality or professional qualification of an arbitrator are not grounds to challenge an arbitrator unless the parties have specified the arbitrator's nationality and/or professional qualification in their arbitration agreement.

An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to their impartiality or independence, or if they do not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by them, or in whose appointment they have participated, only for reasons of which they become aware after the appointment has been made.

4.5 Arbitrator Requirements

Arbitrators must disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence. From the time of their appointment and throughout the arbitral proceedings, an arbitrator shall disclose any such circumstances to the parties without delay – unless they have already been informed of these circumstances by the arbitrator.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

The matters that cannot be referred to arbitration under Philippine law include:

- labour disputes covered by the Labor Code of the Philippines and its rules;
- civil status of persons;
- validity of marriage;
- any ground for legal separation;
- jurisdiction of courts;
- future legitime;
- criminal liability;
- disputes that by law cannot be compromised; and
- disputes referred to court-annexed mediation.

5.2 Challenges to Jurisdiction

An arbitral tribunal has the first opportunity or competence to rule on whether it has jurisdiction to decide a dispute submitted to it, including any objections that a party may have concerning:

- the existence or validity of the arbitration agreement; or
- the fulfilment of any condition precedent before filing a request for arbitration.

Philippine courts must enforce the policy on judicial restraint and give the arbitral tribunal the first opportunity to rule upon issues on jurisdiction and competence.

Unless the court concludes (on no more than a prima facie determination) that the arbitration agreement is null and void, inoperative, or incapable of being performed, the court must suspend the action before it and refer the parties to arbitration pursuant to the arbitration agreement.

5.3 Circumstances for Court Intervention

The courts may address the issue of an arbitral tribunal's jurisdiction:

- immediately after the arbitral tribunal makes a preliminary determination of such issue; or
- at the enforcement stage, when the party against which an award is issued contests the award on the ground of the arbitral tribunal's lack of jurisdiction.

Under the Special ADR Rules, when a court is asked to rule upon issues affecting an arbitral tribunal's competence or jurisdiction, the court is mandated to exercise judicial restraint and defer to the competence or jurisdiction of the arbitral tribunal by allowing the arbitral tribunal the first opportunity to rule upon the issue of its competence or jurisdiction.

5.4 Timing of Challenge

As Philippine courts must follow the principle of judicial restraint, parties have the right to challenge the jurisdiction of an arbitral tribunal only after the arbitral tribunal makes such a determination.

This may either be:

- immediately after the arbitral tribunal makes a preliminary determination of such issue; or
- at the enforcement stage, when the party against whom an award is issued contests the award on the ground of the arbitral tribunal's lack of jurisdiction.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

Philippine courts must follow a deferential standard of judicial review for questions of admissibility and jurisdiction.

The Supreme Court has ruled that courts must uphold factual findings of arbitral tribunals and should not permit the parties to relitigate issues of facts that have been previously presented and argued before the arbitral tribunal.

As an exception, Philippine courts will allow relitigating factual issues on a de novo basis in domestic arbitration when:

- there is an allegation of a violation of the Philippine Constitution or positive law; or
- the integrity of the arbitral tribunal is challenged.

A challenge to the integrity of the arbitral tribunal includes allegations that:

- the award was procured by corruption, fraud or other undue means;
- any one of the arbitrators were evidently partial or corrupt;
- the arbitrators were guilty of misconduct;
- one or more of the arbitrators were disqualified to act and wilfully refrained from disclosing such disqualifications;
- one or more of the arbitrators wilfully refrained from disclosing any other misbehaviour by which the rights of any party have been materially prejudiced; or
- 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.

5.6 Breach of Arbitration Agreement

When a party to an arbitration agreement commences court proceedings in breach of an arbitration agreement, Philippine courts must refuse to exercise jurisdiction and instead refer the matter to arbitration, provided that at least one party so requests no later than the pre-trial conference.

5.7 Jurisdiction Over Third Parties

Philippine laws generally do not allow an arbitral tribunal to assume jurisdiction over individuals or entities that are neither party to an arbitration agreement nor signatories to the contract containing the arbitration agreement, for as long as such individuals or entities refuse to submit their dispute to arbitration.

6. Preliminary and Interim Relief

6.1 Types of Relief

An arbitral tribunal may award preliminary or interim relief, which it may consider necessary to the subject matter of the dispute, unless otherwise agreed upon by the parties to an arbitration agreement. Such relief is binding in nature and may be granted to:

- prevent irreparable loss or injury;
- provide security for the performance of any obligation;
- produce or preserve any evidence; or
- compel any other appropriate act or omission.

Such interim relief or interim measures of protection include:

- preliminary injunction directed against a party;
- appointment of receivers; and
- detention, preservation or inspection of property that is the subject of the dispute in arbitration.

The party seeking such interim relief may apply to Philippine courts for assistance with implementing or enforcing an interim measure ordered by an arbitral tribunal.

6.2 Role of Courts

Philippine courts can either be the grantor or facilitator of interim relief.

Grantor of Relief

Philippine courts may grant an application for interim relief before the constitution of an arbitral tribunal, whether before or after the commencement of arbitration proceedings.

After constitution of an arbitral tribunal and during arbitral proceedings, courts may grant a request for interim relief only if the arbitral tribunal has no power to act or is unable to act effectively. The arbitral tribunal is deemed constituted when the sole arbitrator or the chair of the tribunal has accepted the nomination and the parties are notified.

Similar to an arbitral tribunal, courts may grant interim relief to:

- prevent irreparable loss or injury;
- provide security for the performance of any obligation;
- produce or preserve any evidence; or
- compel any other appropriate act or omission.

Facilitator in the Implementation or Enforcement of Relief

Philippine laws allow a party seeking interim relief to apply to the courts for assistance with

implementing or enforcing an interim measure ordered by an arbitral tribunal.

Although Philippine laws do not specifically allow Philippine courts to grant interim relief in aid of foreign-seated arbitrations, neither do they specifically prohibit such a grant. Thus, Philippine courts may arguably grant interim relief in aid of foreign-seated arbitrations in the same way Philippine courts grant interim relief for Philippine-seated arbitrations, provided that other requirements for jurisdiction and venue are complied with.

Under the Special ADR Rules, the venue for a petition for an interim measure of protection is the regional trial court that has jurisdiction over:

- the principal place of business of any of the parties;
- the residence of any of the parties;
- the place where the acts sought to be enjoined are being performed or threatened to be performed or not performed; or
- the place where the real property subject to arbitration (or a portion thereof) is situated.

Philippine laws do not provide for the appointment of emergency arbitrators. The ADR Act was enacted by the Philippine legislature in 2004 and the Special ADR Rules were issued by the Supreme Court in 2009 – both before the appointment of emergency arbitrators was practised. Nevertheless, the rules for some Philippine arbitral institutions now provide for the appointment for emergency arbitrators.

It is therefore not clear whether Philippine courts may still entertain applications for interim measures of protection when an emergency arbitrator has been appointed, considering that the arbitral tribunal, strictly speaking, has not been constituted at that point in time. It is also not clear if Philippine courts can assist in implementing or enforcing an interim measure that has been ordered by an emergency arbitrator, given that the latter is separate and distinct from the arbitral tribunal. Having said that, Philippine courts may consider the issuance of an interim measure of protection by an emergency arbitrator at their discretion if it supports their own case for issuing interim relief.

6.3 Security for Costs

Philippine laws do not expressly permit the grant of security for costs, which would serve as an interim measure of protection to secure a future award for the legal or other costs of any party (usually the respondent) by way of a deposit or bank guarantee.

However, there are grounds to argue that Philippine law may allow security for costs to be granted on the basis that such relief:

- provides security for the performance of an obligation, in particular the obligation to arbitrate disputes; or
- compels appropriate action to provide security for legal or other costs, especially where a respondent must participate in the arbitration to avoid a default award.

7. Procedure

7.1 Governing Rules

Parties are free to agree on the procedure to be followed by the arbitral tribunal. In the absence of an agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, subject to Chapter 4, Rule 5 of the ADR Act's IRR which provides that, unless considered inappropriate by the arbitral tribu-

nal, the 1976 UNCITRAL Arbitration Rules shall apply.

Under the ADR Act, international commercial arbitration seated in the Philippines would be primarily governed by the UNCITRAL Model Law.

7.2 Procedural Steps

There are no mandatory procedural steps required by law. As mentioned in **7.1 Governing Rules**, parties are free to agree on the procedure to be followed by the arbitral tribunal during its conduct of the arbitration proceeding and, in the absence of an agreement, the arbitral tribunal may conduct arbitration proceedings in a manner it considers appropriate.

7.3 Powers and Duties of Arbitrators

Philippine law mandates that the parties shall be treated equally, and each party shall be given full opportunity to present its case. The law imposes duties on arbitrators to:

- hold hearings if requested by a party, unless the parties agreed otherwise;
- give sufficient advance notice to parties of any hearing and any meeting of the arbitral tribunal for the purpose of inspecting goods, other property, or documents;
- decide the dispute in accordance with such rules of law that:
  - (a) are chosen by the parties as appropriate for the substance of the dispute; or
  - (b) in the absence of such choice, are determined by the conflict of law rules considered applicable by the arbitrators;
- decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised them to do so; and
- decide in accordance with the terms of the contract in all cases, taking into account any applicable trade usages.

Philippine law recognises the power of an arbitral tribunal, inter alia, to:

- determine the admissibility, relevance, materiality and weight of any evidence;
- order that any documentary evidence be translated into the language of the proceedings;
- disallow amendments by a party of its statement of claim or defence when the delay in making the amendment is considered inappropriate;
- request assistance from a Philippine court in taking evidence or allow a party to make such a request;
- administer oaths to – or require affirmation from – witnesses;
- require any person to:
  - (a) attend a hearing as a witness; or
  - (b) produce documents through a subpoena;
- require the exclusion of any witness while any other witness is giving evidence; and
- order interim measures of protection.

Furthermore, in the absence of an agreement by the parties concerning the following circumstances, Philippine law recognises the power of the arbitral tribunal to:

- terminate the proceedings if the claimant fails to communicate their statement of claim;
- continue with the proceedings and make an award on the evidence before it if:
  - (a) a respondent fails to communicate their statement of defence; or
  - (b) a party fails to:
    - (i) appear at a hearing; or
    - (ii) produce documentary evidence;

- decide whether to:
  (a) hold oral hearings for the presentation of evidence (or oral arguments); or
  (b) conduct the proceedings on the basis of documents and other materials;
- appoint expert witnesses; and
- order the party to give the expert any relevant information or produce any relevant document, goods or other property for the expert's examination.

7.4 Legal Representatives

A party may be represented by any person of their choice. Philippine laws do not specify any particular qualification or requirement necessary for representing a party or appearing before an arbitral tribunal. This is true both for domestic and international commercial arbitration.

A representative who is not authorised to practise law, however, is not authorised to appear as counsel in any Philippine court or any other quasi-judicial body – even if such appearance may be in relation to the arbitration in which they appear.

8. Evidence

8.1 Collection and Submission of Evidence

There are no specific rules that apply to the collection and submission of evidence, including discovery, disclosure, privilege, use of witness statements, and cross-examination. As mentioned in **7.1 Governing Rules**, the parties are free to agree on the procedure to be followed by the arbitral tribunal during its conduct of the proceedings and, in the absence of such agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate.

8.2 Rules of Evidence

There are no specific rules of evidence applicable to arbitral proceedings seated in the Philippines. However, it is generally accepted that the technical rules of evidence that apply in Philippine court proceedings are not applicable to arbitration. As mentioned in **7.3 Powers and Duties of Arbitrators**, the arbitrators have the power and discretion to determine the admissibility, relevance, materiality and weight of the evidence submitted by the parties.

8.3 Powers of Compulsion

Arbitrators have the power to issue subpoenas to compel:

- the production of documents, where relevant and material to the case; and
- the attendance of any person at a hearing as a witness.

However, Philippine law neither expressly grants arbitrators contempt powers nor recognises that they have inherent contempt powers. Arbitrators (or a party, with the arbitrators' approval) may therefore apply to the proper court for a subpoena to assist in the evidence-taking process.

9. Confidentiality

9.1 Extent of Confidentiality

The ADR Act provides that the arbitration proceedings (including the records, evidence and arbitral award) shall be considered confidential and should not be generally published, except:

- with the parties' consent; or
- for the limited purpose of disclosing relevant documents to the court in cases where resorting to court is allowed.

However, these exceptions do not include information containing secret processes, developments, research and other sensitive matters (eg, business or trade secrets) if there is evidence that the applicant will be materially prejudiced by authorising the disclosure of such information.

Under the Special ADR Rules, any person, counsel or witness who disclosed or who was compelled to disclose information related to the subject of the arbitration in circumstances where one might reasonably expect that the information would be kept confidential may file a petition with the regional trial court for a protective order to:

- prohibit the confidential information from being divulged; or
- suppress the confidential information unless written consent is obtained from the source or the party who made the disclosure.

10. The Award

10.1 Legal Requirements

Philippine law requires the arbitral award to be in writing and signed by either the sole arbitrator or the majority of arbitrators in the arbitral tribunal, with a statement outlining the reason for any omitted signature.

The arbitral award shall state the reasons upon which it is based, unless the parties have agreed otherwise or the award is based on agreed terms. The arbitral award shall also state the date of the award and the place of arbitration. Copies of the signed award shall be delivered to each party.

Philippine laws do not specify time limits for issuing an award. However, the arbitral tribunal is expected to render a decision within a reasonable timeframe once the hearings have closed and, if an institutional arbitration is involved, within the period provided in the institution's rules.

10.2 Types of Remedies

There are no limits on the types of remedies that an arbitral tribunal may award, as long as they may be granted:

- under the rules of law as are chosen by the parties to be applicable to the substance of the dispute;
- ex aequo et bono or by amiable compositeur, if expressly authorised by the parties; or
- under the terms of the contract (in all cases), taking into account the trade usages that apply.

However, the arbitral tribunal cannot exceed its authority. Thus, it may not grant any remedy for a dispute that is not contemplated by – or does not fall within – the terms of its submission to arbitration.

10.3 Recovering Interest and Legal Costs

Philippine laws allow parties to recover their legal costs and interests.

The ADR Act's IRR provide that the arbitral tribunal shall fix the costs of arbitration in its award, which include:

- fees of the arbitral tribunal;
- travel and other expenses incurred by the arbitrators;
- cost of expert advice and other assistance required by the arbitral tribunal;
- travel and other expenses for witnesses, to the extent that such expenses are approved by the arbitral tribunal;

- cost of legal representation and assistance for the successful party, to the extent that is deemed reasonable by the arbitral tribunal, if such costs are claimed; and
- any fees and expenses for the appointing authority.

Under the ADR Act's IRR, the costs of arbitration shall, in principle, be borne by the unsuccessful party. However, taking into account the circumstances of the case, the arbitral tribunal may apportion each of these costs between the parties if it so deems reasonable.

For costs of legal representation and assistance, the arbitral tribunal is free to determine which party bears these costs. Alternatively, having taken into account the circumstances of the case, it may deem it reasonable to apportion the costs between the parties. The arbitral tribunal may also refuse to grant such costs of legal representation and assistance if none of the limited grounds for the grant of attorney's fees under the Civil Code is present.

11. Review of an Award

11.1 Grounds for Appeal

An arbitral award in an international commercial arbitration cannot be appealed merely on the ground that the arbitral tribunal committed errors of fact or errors of law. Rule 19.7 of the Special ADR Rules provides that an agreement to refer a dispute to arbitration means that the arbitral award shall be final and binding. The same provision prohibits a party to an arbitration from filing an appeal or petition for certiorari to question the merits of an arbitral award.

However, the losing party may file a petition to set aside the arbitral award in an international commercial arbitration no later than three months after receiving the award. This is the exclusive recourse against such an arbitral award.

The courts can vacate or set aside the arbitral award only on the grounds cited under the UNCITRAL Model Law, to wit:

- incapacity of a party to the arbitration agreement;
- invalidity of the arbitration agreement under the law to which the parties have subjected it or, failing any indication thereof, under Philippine law;
- lack of proper notice of an arbitrator's appointment or of the arbitral proceedings;
- inability of the party making the application to set aside the arbitral award to present their case;
- the award being beyond the scope of the arbitration agreement or resolving a dispute outside the scope of the submission to arbitration;
- the arbitration procedure or the composition of the arbitral tribunal not being in accordance with the parties' agreement or, in the absence of such agreement, not being in accordance with Philippine law;
- incapability of the subject matter of the dispute of being settled by arbitration under Philippine laws; and
- the recognition or enforcement of the award being contrary to Philippine public policy.

Philippine courts are mandated to disregard any grounds to set aside or vacate the arbitral award other than those listed.

Procedure for Setting Aside the Arbitral Award

A verified petition must be filed with the regional trial court within three months of receiving the

arbitral award; it cannot be filed after the three-month period has elapsed. If a petition to recognise and enforce the arbitral award is already pending, the petition to set aside shall be filed in opposition to the petition to recognise. Failure to file a petition to set aside shall preclude a party from raising grounds to resist enforcement of the award.

If the petition filed is sufficient both in form and in substance, the court shall issue notice to the other party directing them to file an opposition thereto within 15 days of receiving the petition.

The court will then determine whether the issue is one of law or if there are issues of fact.

- When the issues are of law – parties will be required to submit legal argument briefs within 15 days of receiving the order.
- When there are issues of fact – the court will require the parties to submit their:
  (a) witness affidavits (attaching all documents relied upon) within the same 15-day period; and
  (b) reply.

If the court finds, on the basis of the pleadings and the affidavits, that there is a need to conduct oral hearings, the court shall set the case for hearing. At such hearing, the witnesses' affidavits constitute their direct testimonies, and these witnesses will immediately undergo cross-examination. The court shall have full control over the proceedings to ensure that the case is heard without delay.

Unless a ground to set aside has been fully established, the court shall dismiss the petition to set aside. If, in the same proceedings, a petition to recognise and enforce the arbitral award was filed in opposition to the petition to set aside, the court shall recognise and enforce the arbitral award.

The decision of the regional trial court in the petition to set aside can be reviewed by the Court of Appeals via a verified petition for review filed within 15 days from notice of the court's decision or denial of petitioner's motion for reconsideration.

The decision of the Court of Appeals may be reviewed by the Supreme Court – not as a matter of right, but only of sound judicial discretion – if there are serious and compelling reasons resulting in grave prejudice to the aggrieved party, as per those grounds listed in Rule 19.36 of the Special ADR Rules, or those closely analogous thereto.

11.2 Excluding/Expanding the Scope of Appeal

Philippine laws provide that recourse to the court against an international commercial award may only be made by an application to set aside in accordance with the provisions in the UNCITRAL Model Law, which also sets out the specific grounds on which the arbitral award may be set aside.

It is generally accepted that the grounds to set aside/vacate an arbitral award are exclusive. Although there has been no Supreme Court decision on this point, it is reasonable to conclude that parties may not exclude or expand the grounds on which an arbitral award may be challenged through a contractual agreement.

11.3 Standard of Judicial Review

In Fruehauf Electronic Philippines Corporation v Technology Electronics Assembly and Management Pacific Corporation (GR No 204197, 23 November 2016), the Supreme Court ruled that

courts cannot delve into the merits of an arbitral award and substitute their judgment with regard to the findings of fact and the interpretation and application of laws.

Specifically, as regards construction disputes resolved through CIAC arbitration, as held by the Supreme Court in Global Medical Center of Laguna, Inc v Ross Systems International, Inc (GR No 230112, 11 May 2021), such awards rendered may be appealed to:

- the Supreme Court on questions of law, through a petition for review; or
- the Court of Appeals on questions of fact, through a petition for certiorari, provided that the appellant:
  (a) challenges the integrity of the CIAC arbitral tribunal; or
  (b) alleges that the arbitral tribunal violated the Philippine Constitution or positive law.

Courts can set aside or vacate an arbitral award only on the grounds provided under the Special ADR Rules and the ADR Act. Notably, these grounds do not concern the correctness of the arbitral award. Rather, they address the validity of the arbitration agreement and/or the regularity of the arbitration proceedings.

12. Enforcement of an Award

12.1 New York Convention

The Philippines signed and ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") on 6 July 1967. The Philippines declared that, on the basis of reciprocity, it will apply the New York Convention only to:

- the recognition and enforcement of awards made in the territory of another contracting state; and
- differences arising from legal relationships – whether such relationships are contractual or otherwise – that are considered commercial relationships by the national law of the state making the declaration.

12.2 Enforcement Procedure

International Commercial Arbitral Award

Rule 12 of the Special ADR Rules provides that a verified petition can be filed to recognise and enforce an arbitral award any time after the award is received, unless a timely petition to set aside an arbitral award is filed, in which case the opposing party must file in the same proceedings, and in opposition thereto, the petition for recognition and enforcement of the same award, within the period for filing an opposition.

The verified petition shall be filed with the relevant regional trial court, based on:

- where the arbitration proceedings were conducted;
- where any of the assets to be attached or levied are located;
- where the act to be enjoined will be or is being performed; or
- where any of the parties resides or has its place of business.

Alternatively, it can be filed in the National Capital Judicial Region.

The verified petition shall state the following:

- the registered addresses, or any change thereof, of the parties to arbitration;
- that the arbitration agreement or submission exists;

- the names of the arbitrators and proof of their appointment;
- that an arbitral award was issued and when the petitioner received it; and
- the relief sought.

In addition, the following shall be attached to the petition for enforcement and recognition:

- an authentic copy of the arbitration agreement;
- an authentic copy of the arbitral award;
- a verification and certification against forum shopping executed by the applicant; and
- an authentic copy or authentic copies of the appointment of an arbitral tribunal.

Upon receiving notice that the petition has been filed, the respondent may file an opposition thereto within 15 days of receiving the petition. In lieu thereof, the respondent may instead seek to oppose by filing a petition to set aside the award within the same 15-day period. The petitioner may reply within 15 days of receiving the petition to set aside filed in opposition.

The court then has the discretion to either:

- require the submission of briefs/legal memoranda only; or
- set the case for a hearing.

Based on the parties' submissions and/or hearing, the court will thereafter decide.

Foreign Arbitral Award

Rule 13 of the Special ADR Rules sets out the procedure for recognising and enforcing foreign arbitral awards. The procedure outlined above is essentially the same for the foreign arbitral awards. The court shall only recognise and enforce a foreign arbitral award made in a country that is not a signatory to the New York Convention if such country extends comity and reciprocity to awards made in the Philippines.

The contents of the verified petition, however, are not the same as those of a petition to recognise and enforce an international commercial arbitral award. In particular, the verified petition shall contain:

- the addresses of the parties to arbitration;
- the country where the arbitral award was made (if not indicated in the award) and whether such country is a signatory to the New York Convention; and
- the relief sought.

The following should also be attached to the verified petition:

- an authentic copy of the arbitration agreement;
- an authentic copy of the arbitral award; and
- a translation of the foreign arbitral award or agreement – if such award or agreement is not in English – which should be certified by:
  (a) an official or sworn translator; or
  (b) a diplomatic or consular agent.

Petition to Set Aside in the Foreign Seat

If a foreign arbitral award has been set aside by the courts in the foreign seat of arbitration, Philippine courts may refuse recognition and enforcement of the same.

The recognition of a foreign arbitration award may be refused on exclusive grounds, including where an award has:

- not yet become binding on the parties; or

- been set aside or suspended by the court in which – or under the law of which – the award was made.

There is no express rule on what Philippine courts, before which a petition for recognition and enforcement of a foreign arbitral award has been filed, will do if there are ongoing setting-aside proceedings at the seat. However, considering the exclusive grounds that justify a refusal to recognise and enforce the foreign arbitral award, it is possible that Philippine courts will suspend proceedings while awaiting the outcome of the petition to set aside in the foreign seat. It is also possible for Philippine courts to dismiss the proceedings without prejudice to the refiling of the petition for recognition and enforcement if the setting-aside petition is denied in the foreign seat.

State Immunity

State immunity is not among the grounds to set aside or resist the enforcement of an arbitral award under the Special ADR Rules. The Supreme Court ruled in China National Machinery & Equipment Corp v Santamaria (GR No 185572, 7 February 2012) that:

- an agreement to submit any dispute to arbitration may be construed as an implicit waiver of immunity from suit; and
- the doctrine of state immunity cannot be extended to commercial, private and proprietary acts.

However, money claims against the government are within the primary jurisdiction of the Commission on Audit (COA). The Supreme Court ruled in Department of Environment and Natural Resources v United Planners Consultants, Inc (GR No 212081, 23 February 2015) that the settlement of any money claim against the Philippine government is still subject to the primary jurisdiction of the COA, despite the finality of the confirmed arbitral award by the regional trial court pursuant to the Special ADR Rules.

Thus, money claims must still be approved by the COA through a petition filed before them, unless an appropriation law was already enacted to cover the prevailing party's money claim against the government. Significantly, the Supreme Court ruled in a 2022 case that the COA cannot relitigate and re-examine the issues and evidence passed upon in a CIAC arbitral award, or reverse or modify such award. The COA's jurisdiction is therefore limited only to determining the source of funds for settlement and validating the clerical or mathematical accuracy of the amounts in the award (Sunway Builders v Commission on Audit, GR 252986, 20 September 2022).

12.3 Approach of the Courts

Rule 12.12 of the Special ADR Rules provides for a presumption that an arbitral award was made and released in due course and is subject to enforcement by the court, unless a ground for setting aside the arbitral award was established. Thus, the courts tend to apply the grounds for setting aside or refusal of recognition strictly.

Under the New York Convention, a court may refuse to recognise and enforce an international commercial award if doing so would be contrary to the public policy of the State in which enforcement is sought. Philippine laws provide, therefore, that being contrary to the public policy of the State in which enforcement is sought is one of the exclusive grounds to set aside or refuse recognition and enforcement of an international commercial or foreign arbitral award. Although neither the New York Convention nor Philippine law defines this public policy ground, the follow-

ing recent Supreme Court decision offers guidance on this matter.

Mabuhay Holdings Corp v Sembcorp Logistics Limited

Here, the Supreme Court adopted the same narrow and restrictive approach in defining public policy that has been adopted by most arbitral jurisdictions pursuant to the pro-enforcement policy of the New York Convention. The court ruled that that "[m]ere errors in the interpretation of the law or factual findings would not suffice to warrant refusal of enforcement under the public policy ground. The illegality or immorality of the award must reach a certain threshold such that, enforcement of the same would be against [the Philippines'] fundamental tenets of justice and morality, or would blatantly be injurious to the public, or the interests of society" (GR No 212734, 5 December 2018). This approach was reiterated by the Supreme Court in Maynilad Water Services, Inc v National Water and Resources Board (GR No 181764, 7 December 2021).

13. Miscellaneous

13.1 Class Action or Group Arbitration

The ADR Act and the Special ADR Rules do not have provisions for class action or group arbitration. There are also no judicial precedents yet on this matter.

13.2 Ethical Codes

Various Philippine arbitration organisations and institutions have adopted ethical codes and professional standards for arbitrators and arbitration counsel. To the extent that they do not conflict with any provisions in Philippine law, the Code of Ethics for Arbitration in the PDRCI's administrative guidelines expressly incorporates:

- the IBA Rules of Ethics for International Arbitrators;
- the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration; and
- the IBA Guidelines on Party Representation in International Arbitration.

Similarly, the PICCR has expressly adopted the original IBA Rules of Ethics for International Arbitrators (1987) and the 2014 IBA Guidelines on Conflicts of Interests in International Arbitration as a Code of Ethics in its guidelines for complaints against arbitrators.

On the other hand, the Philippine Institute of Arbitrators issued its own Code of Professional Responsibility for Members, which provides a uniform benchmark for the application of professional and ethical standards that should govern its members' conduct at all times.

Further, if the counsel or arbitrator is a Philippine lawyer, they are also bound to observe and comply with the Code of Professional Responsibility and Accountability promulgated by the Supreme Court in April 2023. Lawyers are subject to discipline when they violate or attempt to violate these rules, with the most severe penalty being disbarment.

Lastly, the ADR Act expressly provides that ADR providers (which include arbitrators) and practitioners (which include arbitration counsels) are deemed public officers. Thus, they can also be held civilly liable for acts performed during their official duties that clearly show bad faith, malice, or gross negligence.

13.3 Third-Party Funding

There are no Philippine laws expressly providing for rules or restrictions on third-party funders. However, the use of third-party funders may

arguably be objectionable in that contracts with third-party funders may be deemed champertous, or a contract between a stranger and a party to a lawsuit, in which the stranger pursues the party's claim with the aim of receiving part or any of the proceeds recovered under the judgment. The Supreme Court ruled in RODCO Consultancy and Maritime Services Corp. v Ross, (GR No 259832, 06 November 2023) that champertous contracts are void for being against public policy.

Although champertous contracts are generally prohibited for lawyers only, in Nocom v Camerino (GR No 182894, 10 February 2009), the Supreme Court extended the same prohibition to a third party (ie, an attorney-in-fact) who colluded with a party's lawyer to finance the litigation and invalidated the agreement for being contrary to law and public policy.

13.4 Consolidation

Article 4.45 of the ADR Act's IRR expressly provides that there can be consolidation of arbitration proceedings only if the parties agree to the consolidation. Nevertheless, the rules of Philippine arbitral institutions now provide for the procedures for consolidation.

13.5 Binding of Third Parties

An arbitration agreement generally can only bind and be invoked by those who are parties to the agreement. However, there are certain circumstances in which third parties, who are not parties to the arbitration agreement, may be bound by it. Similarly, only parties are generally bound by an arbitral award, yet there are certain exceptional instances where the arbitral award may be enforced against third parties.

In this regard, Rule A.6 of the Special ADR Rules provides that third-party security providers will be bound by the arbitration agreement only if the third party that secures the loan has agreed in the accessory contract (either directly or by reference) to be bound by such arbitration agreement.

Furthermore, heirs and assigns are generally bound by contracts (including arbitration agreements) entered into by their predecessors-in-interest, except when the rights and obligations arising therefrom are not transmissible by their nature, by parties' stipulation, or by provision of law.

Another possible exception occurs if a representative of a corporation that is party to an arbitration agreement, who signs the arbitration agreement or a contract in which an arbitration clause is contained, is then deemed to have agreed to such arbitration agreement or clause (see **5.7 Jurisdiction Over Third Parties**).

On the other hand, an arbitral award may possibly be enforced on such third parties when the separate juridical personality of the corporation that is a party to the arbitration is disregarded – and the corporate veil pierced – on grounds recognised by Philippine law and jurisprudence.

Jurisdiction of Philippine Courts Over Foreign Third Parties

Philippine courts may bind foreign third parties only if they acquire jurisdiction over such foreign third parties. In ordinary court actions, if the defendant is a foreign private juridical entity doing business in the Philippines, summons may be served on its resident agent. If the defendant has no such resident agent, summons may be served on any of its officers, directors or trustees within the Philippines or a government official designated by law.

If the foreign private juridical entity is not registered in the Philippines and does not have a resident agent, but has transacted or is doing business in the Philippines, Philippine courts may authorise the service of summons outside the Philippines in the following ways:

- by personal service coursed through the appropriate foreign court, with the assistance of the Philippine Department of Foreign Affairs;
- by publication in a newspaper in general circulation in the country where the defendant may be found and, at the same time, by serving a copy of the summons and the court order by registered mail at the defendant's last known address;
- by facsimile;
- by electronic means with proof of service; or
- by such other means as the court may direct at its discretion.

Significantly, Rule 22.1 of the Special ADR Rules expressly provides that the provisions of the Philippine Rules of Court that apply to petitions under the Special ADR Rules have either been included and incorporated in the Special ADR Rules or specifically referred to therein. The above-mentioned rules on methods for acquisition of jurisdiction by Philippine courts have not been included and incorporated in the Special ADR Rules nor specifically referred to therein. Indeed, Rule 1.9 even provides that "in cases covered by the Special ADR Rules, a court acquires authority to act on the petition or motion upon proof of jurisdictional facts, ie, that the respondent was furnished a copy of the petition and the notice of hearing". Consequently, since the technical rules on services of summons do not apply to these proceedings, "the method of service resorted to must be such as to reasonably ensure receipt thereof by the respondent to satisfy the requirement of due process".

Trends and Developments

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SyCip Salazar Hernandez & Gatmaitan (SyCipLaw) was founded in 1945 and has offices in Makati City (the business centre of the Philippines), as well as in Cebu, Davao and the Subic Freeport. SyCipLaw's litigation department consists of 13 partners, one of-counsel, two special counsel, and 27 associates doing dispute resolution work in various degrees. It has a wide-ranging litigation practice at virtually all court levels – from the municipal and regional trial courts to the Court of Appeals and the Supreme Court – and with various administrative agencies. SyCipLaw also has a very extensive arbitration practice involving international arbitrations, commercial and other domestic arbitrations, and construction arbitrations. The firm handles some of the most significant, high-value and complex Philippine commercial law disputes, a number of which involve the Philippine government. SyCipLaw represents a wide array of foreign and local clients, ranging from public utilities to large companies in industries such as mining, power, banking, construction, transportation, pharmaceuticals, hospitals, airlines, hotels, food manufacturing, and distilled spirits.

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John Christian Joy A Regalado is a partner of SyCipLaw and is a member of the firm's litigation department. He specialises in commercial arbitration, having represented clients in disputes before the ICC's International Court of Arbitration, the Philippine Construction Industry Arbitration Commission, ad hoc arbitral tribunals, and before the Philippine courts in applications for interim relief. John's experience in arbitration covers the aviation, banking and finance, construction, distribution, e-commerce, energy, insurance, M&A and real estate sectors.

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Public Policy as a Ground to Vacate Domestic Arbitral Awards

The Philippines recognises public policy as among the exclusive grounds to set aside or refuse the enforcement of foreign arbitral awards. Republic Act No 9285, or the Alternative Dispute Resolution Act of 2004 (the "ADR Act"), provides that the New York Convention shall govern the recognition and enforcement of arbitral awards covered by the Convention. In this connection, A.M. 07-11-08-SC, or the Special Rules on Alternative Dispute Resolution (the "Special ADR Rules") promulgated by the Philippine Supreme Court provide that a foreign arbitral award may be set aside or refused recognition if its recognition or enforcement would be contrary to public policy.

The Philippine Supreme Court has adopted a narrow and restrictive definition of public policy. In Mabuhay Holdings Corporation v Sembcorp Logistics Limited (G.R. No. 212734, 5 December 2018), the Philippine Supreme Court ruled that the "illegality or immorality of the award must reach a certain threshold such that, enforcement of the same would be against [the] State's fundamental tenants of justice and morality, or would blatantly be injurious to the public, or the interests of society". This means that mere errors made by the arbitral tribunal in the interpretation of the law, or its factual findings, would not amount to a public policy violation and would therefore not justify a Philippine court to refuse the recognition and enforcement of a foreign arbitral award on the ground of public policy.

Public policy, however, is not expressly recognised under Philippine law as a ground to vacate a domestic arbitral award. Republic Act No 876, or the Arbitration Law (the "Arbitration Law"), provides that a domestic arbitral award may be vacated by a Philippine court if a party proves affirmatively that:

- the award was procured by corruption, fraud, or other undue means;
- there was evident partiality or corruption in the arbitrators or any of them;
- 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;
- one or more of the arbitrators was disqualified to act as such under Section 9 hereof, and wilfully refrained from disclosing such disqualifications or of any other misbehaviour by which the rights of any party have been materially prejudiced; or
- 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.

Under the ADR Act, a Regional Trial Court may only vacate a domestic arbitral award under the foregoing grounds enumerated under the Arbitration Law and it must disregard other grounds. In this connection, the Special ADR Rules expressly provide that a Philippine court can only vacate a domestic arbitral award "upon a clear showing that the award suffers from any of the infirmities or grounds for vacating an arbitral award" under the Arbitration Law. However, the Special ADR Rules allow a Regional Trial Court of the Philippines to entertain a ground to vacate a domestic arbitral award other than those provided in the Rules if the ground amounts to a violation of public policy.

The Philippine Supreme Court has recently applied the public policy ground under the Spe-

cial ADR Rules in vacating domestic arbitral awards.

The Protection of Indigenous Cultural Communities/Indigenous Peoples

Lone Congressional District of Benguet Province v Lepanto Consolidated Mining Company (G.R. No. 244063, 21 June 2022) involved a Mineral and Production Sharing Agreement (the "Agreement") executed in 1990 by the Republic of the Philippines and Lepanto Consolidated Mining Company and Far Southeast Gold Resources, Inc. (the "Mining Companies"). Under the Agreement, the Mining Companies were authorised to conduct mining operations in a piece of land located in Mankayan, Benguet. The Agreement was effective for 25 years and may be renewed for another 25 years. The land area of the Agreement covers part of the ancestral domain of the Mankayan Indigenous Cultural Communities/ Indigenous Peoples.

In 1997, the Philippine Congress passed the Indigenous People's Rights Act (IPRA) that enjoined the government and its agencies from granting, issuing, or renewing any concession, licence, or lease, or from entering into a production sharing agreement without a prior certification from the National Commission on Indigenous Peoples ("NCIP Certification") that the area does not overlap with any ancestral domains. One of the requirements for the issuance of an NCIP Certification is the free and prior informed consent (FPIC) of the affected indigenous cultural communities or indigenous peoples (the requirement is referred to as the "FPIC and NCIP Certification Precondition").

In 2015, the Mining Companies sought to renew the Agreement for another 25 years and were advised that they needed to secure the FPIC and NCIP Certification Precondition as a condition for the renewal. The Mining Companies argued that this requirement did not apply to them because they already had a vested right in the 25-year renewal, pursuant to the Agreement. The Mining Companies pointed out that, under the IPRA, property rights within ancestral domains already existing and/or vested upon the effectivity of the IPRA should be respected.

The disagreement resulted in the commencement of arbitration proceedings. In the arbitral award, the arbitral tribunal ruled in favour of the Mining Companies. The arbitration tribunal explained that the Mining Companies had a vested right in the renewal of the Agreement under its original terms and conditions, especially since the Mining Companies made significant investments in the mining operations in consideration of the renewal provision. The government petitioned a Regional Trial Court to vacate the arbitral award, which was granted by the Court. The decision of the Regional Trial Court was reversed by the Court of Appeals. The decision of the Court of Appeals was then appealed by the government to the Supreme Court.

In its decision, the Philippine Supreme Court reversed the Court of Appeals and vacated the arbitral award because the award was contrary to public policy. Although the Supreme Court recognised that public policy is a ground to refuse the recognition and enforcement of foreign arbitral awards and is not among the grounds to vacate a domestic arbitral award under the Arbitration Law, the Supreme Court nevertheless applied this ground and cited the Special ADR Rules to justify its ruling.

According to the Supreme Court, the arbitral tribunal's determination of exemption from the FPIC and NCIP Certification Precondition is not a mere error in the interpretation or application

of the law. Rather, such determination contravened a strong and compelling public policy on the protection of the rights of the Mankayan Indigenous Cultural Communities/Indigenous Peoples to their ancestral domains, which is recognised by the Philippine Constitution. The general requirement of consent of the indigenous cultural communities/indigenous peoples was only made specific and concrete through the FPIC and NCIP Certification Precondition as mandated in the IPRA. The Supreme Court concluded that, in so manifestly disregarding this, the arbitral tribunal undoubtedly "exceeded [its] powers, [and] so imperfectly executed them, that a mutual, final and definite award upon the subject matter submitted to [it] was not made", which is one of the grounds to vacate a domestic arbitral award under the Arbitration Law.

In vacating the arbitral award, the Supreme Court had to strike a balance between the interests of the Mining Companies and the protection of the Mankayan Indigenous Cultural Communities/Indigenous Peoples and their ancestral domain. According to the Supreme Court, the investments made by the Mining Companies in view of the renewal provision in the Agreement do not outweigh the interests of the indigenous cultural communities/indigenous peoples to their ancestral land. However, the Supreme Court gave the Mining Companies the opportunity to fully comply with the consent requirement under the IPRA for the renewal of the Agreement.

The Equal Protection Clause

In Maynilad Water Services, Inc. v National Water and Resources Board (G.R. No 181764, 7 December 2021), the Supreme Court En Banc vacated a domestic arbitral award on the ground of public policy because the award violated the equal protection clause of the Philippine Constitution.

The case involves two water concessionaries – Manila Water Company, Inc. ("Manila Water") and Maynilad Water Services, Inc. ("Maynilad"), which cover the Service Area East and the Service Area West, respectively. The Concession Agreements provide for the mechanism of setting the rates chargeable to consumers, which provided a 12% limit on the rate of return. The Concession Agreements also provide that the base from which the net rate of return is calculated shall be recomputed every five years, in an exercise called rate rebasing. In addition to the 12% return, Manila Water and Maynilad may recover by way of tariff the operational costs, capital maintenance, and investment expenditures efficiently and prudently incurred, Philippine business taxes, and payment corresponding debt service on the loans and concessionaires' loans incurred to finance such expenditures.

The controversy arose in the third exercise of rate rebasing, when the water concessionaires were prohibited from including corporate income taxes as expenditures recoverable from the consumers through the tariff, because they are not considered "Philippine business taxes". The water concessionaires instituted separate arbitration proceedings before Appeals Panels pursuant to the arbitration agreements under their respective Concession Agreements.

The Appeals Panels' rulings on the same issue on whether corporate income tax is recoverable by the water concessionaire diverged. On one hand, in the arbitration instituted by Manila Water, the Appeals Panel ruled that corporate income taxes were not an allowable expenditure. On the other hand, in the arbitration instituted by Maynilad, the Appeals Panel decided that corporate income taxes may be recovered by way of tariff.

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The arbitral award rendered in favour of Maynilad was confirmed by the Regional Trial Court and the Court of Appeals. In its decision, the Supreme Court reversed the Court of Appeals and vacated the arbitral award on the ground of public policy. The Philippine Supreme Court recognised that public policy is a ground to refuse the recognition and enforcement of foreign arbitral awards and is not among the grounds to vacate a domestic arbitral award under the Arbitration Law. However, the Supreme Court applied this ground and cited the Special ADR Rules to justify its ruling.

The Supreme Court recognised the narrow and restrictive definition of public policy that it adopted in Mabuhay. However, unlike Mabuhay that involved purely private interests, the Supreme Court emphasised that the enforcement of the Maynilad arbitral award would adversely affect the public at large. According to the Supreme Court, the arbitral award rendered in favour of Maynilad must be vacated because the enforcement of the award would result in a disproportionate price difference between the water rates in the Service Area East and Service Area West. This is because the arbitral tribunal in the arbitration instituted by Manila Water ruled that Manila Water cannot pass on its corporate income taxes to consumers. This will lead to a situation where the water prices in the Service Area East and Service Area West would differ disproportionately, without any substantial distinction between the consumers in the service areas. Thus, the enforcement of the Maynilad arbitral award would result in discriminatory water rates, which is violative of the equal protection clause under the Philippine Constitution.

The enforcement of the Maynilad arbitral award would also violate the mandate of the relevant government agency tasked to provide just, equitable, and non-discriminatory rates because a large segment of the water-consuming public will be made to pay for something that has no direct benefit to them, while some will enjoy water services without shouldering the same burden.

Moving Forward

Lone Congressional District and Maynilad are landmark decisions. For the first time, the Supreme Court vacated domestic arbitral awards on the ground of public policy using the Special ADR Rules. This notwithstanding the clear language of the Arbitration Law and the ADR Act that a domestic arbitral award may be vacated only under the exclusive grounds enumerated under the Arbitration Law. Public policy is not among those grounds.

To be clear, the Supreme Court cannot promulgate rules that are inconsistent with laws passed by Congress. Nevertheless, the Special ADR Rules shall remain effective until they are amended by the Supreme Court. Meanwhile, the rulings in Lone Congressional District and Maynilad shall remain good case law until they are modified or reversed by the Supreme Court En Banc. Until these changes take place, domestic parties and their arbitration counsels, as well as the arbitral tribunal they constitute, must consider the possible public policy implications of their commercial transaction disputes in determining how best to move forward and resolve their dispute.

POLAND

Law and Practice

Contributed by:
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Sołtysiński Kawecki & Szlęzak

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Sołtysiński Kawecki & Szlęzak is one of Poland's leading full-service law firms. With more than 180 attorneys, the firm provides legal services in all areas of business activity and is known for its work and innovative approach to complex legal problems. Its litigation and arbitration practice specialises in resolving complex and landmark cases. It is capable of handling large-scale complex disputes in any sector. Additionally, it is often called upon to act in precedent-setting disputes and to handle particularly complex matters. As a result, its lawyers have been involved in several important Supreme Court precedents that have influenced legal practice. It has represented clients before domestic and international arbitration tribunals, as well as European courts under Polish and most international law, whether the arbitration proceedings were seated in Poland or outside the country.

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1. General

1.1 Prevalence of Arbitration

In Poland, international arbitration is used, particularly in commercial cases involving cross-border transactions. International arbitration is chosen for its neutrality, expertise, confidentiality and the enforceability of awards under the New York Convention to which Poland is a party. Despite this, domestic parties in Poland often still favour litigation before common courts as a means of resolving their disputes.

1.2 Key Industries

In Poland, no particular industries have experienced a notable surge in international arbitration activity in recent years. The popularity of arbitration within various sectors has remained relatively stable. There has not been a significant event or development that would cause one industry to stand out from others in terms of choosing arbitration for dispute resolution. This stability suggests that while international arbitration continues to be a viable option, it has not seen any dramatic changes in preference within specific industries. International arbitration is most often used in the context of cross-border transactions giving rise to post-M&A disputes.

1.3 Arbitration Institutions

The most prominent and thus popular arbitral institutions in Poland are the Court of Arbitration at the Polish Chamber of Commerce in Warsaw and the Lewiatan Court of Arbitration.

These two are the biggest and most popular Polish arbitral institutions, but they are certainly not the only ones. There is also the Court of Arbitration at the Polish Bank Association, which specialises mainly in disputes concerning financial services rendered by banks, the Construction Court of Arbitration at the Association of Engineers, Experts and Advisers in Warsaw, which specialises in construction disputes and in disputes regarding public procurement, or the Court of Arbitration of the Polish Financial Supervision Authority set up to deal with disputes between financial market participants, in particular those arising from contractual relations between entities subject to the Authority's supervision and recipients of services provided by those entities.

In 2019, the Electronic Arbitration and Mediation Centre at the Association of Notaries of the Republic of Poland in Warsaw (previously named Ultima RATIO), an online arbitration court, was created.

No new arbitral institutions have been established in 2023-2024.

1.4 National Courts

In Poland, there are no specific courts designated to hear cases related to arbitration. Pursuant to the Polish Code of Civil Procedure (CPC), common courts have jurisdiction to resolve disputes related to arbitration proceedings, eg, regarding the appointment of arbitrators, assisting with obtaining evidence or the setting aside of an award. It is not a single designated court, but in each particular case, it is the common court that would have had jurisdiction to resolve the case if it had not been covered by the arbitration clause.

2. Governing Legislation

2.1 Governing Law

In Poland, international arbitration is governed by the CPC, specifically Part Five, which is dedicated to arbitration. This legislation is largely based on the UNCITRAL Model Law on International Commercial Arbitration and does not

diverge from the Model Law in any significant way, ensuring that Poland aligns with internationally recognised standards.

Poland is a party also to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the European Convention on International Commercial Arbitration.

2.2 Changes to National Law

In 2023, the CPC was amended, introducing the conversion of pending litigation to arbitration.

Conversion entails concluding a submission agreement (a compromise) during pending proceedings before a state court and directing the case to arbitration. Court proceedings are discontinued as a result of the conclusion of the submission agreement at the joint request of the parties. The plaintiff will be refunded ¾ of the court fee.

However, the discontinuation of court proceedings does result in the fall of the previously granted interim measures and consequently opens up the possibility of seeking compensation for damage caused by the execution of the interim measures. Therefore, it seems that conversion may be less advantageous for plaintiffs and counterclaimants who have obtained interim measures for a claim before filing a lawsuit or during the course of the proceedings.

The court examines ex officio whether the conclusion of the submission agreement by the parties or the circumstances of the case show that discontinuance of the court proceedings would be contrary to the law, the principles of social co-existence or would be aimed at circumventing the law, or the arbitration agreement is invalid or ineffective. If that is the case, the proceedings are not discontinued.

The limitation period for the claims covered by the arbitration agreement starts to run anew from the date on which the decision to discontinue the proceedings becomes final.

The converted case cannot go back to litigation. The court dismisses the claim or the application to commence non-litigation proceedings if it relates to a dispute which was the subject of a case discontinued as a result of conversion.

Polish law has never prohibited conversion of court proceedings to arbitration. However, regulations introduced in 2023 explicitly provide for and regulate this process.

3. The Arbitration Agreement

3.1 Enforceability

According to the CPC, an arbitration agreement must meet the following requirements.

- An arbitration agreement must be made in writing. Requirements concerning the form of an arbitration agreement are also met if such agreement is included in letters exchanged between the parties or statements made by means of remote communication which enable their content to be recorded. Reference in a contract to a document containing a decision to bring a dispute before an arbitration tribunal complies with the requirements concerning the form of an arbitration agreement if such agreement is made in writing and the reference incorporates that clause into the contract.
- An arbitration agreement must specify the subject matter of the dispute or the legal relationship from which the dispute has arisen or may arise.

- An arbitration agreement concluded with a consumer must indicate that the parties are aware of the effects of the arbitration clause, in particular that the arbitral award, once recognised by a state court, will have the same force as a judgment of a state court.
- An arbitration agreement contained in the articles of association relating to cases involving a challenge to a shareholders' resolution must provide for an obligation to announce the commencement of the proceedings in the manner required for company notices no later than one month after the start of the proceedings.
- Moreover, provisions of an arbitration agreement that violate the principle of equality of the parties – in particular provisions that entitle only one party to bring an action – are ineffective.
- In some cases, an arbitration agreement cannot cover future disputes but must be entered into in relation to a specific, already existing dispute. This applies to disputes with consumers or labour disputes.

3.2 Arbitrability

Under Polish law, all disputes over material claims are arbitrable and can be subject to arbitration. The only exception are disputes over child support (alimony) which are not arbitrable and cannot be heard in arbitration.

Disputes over non-material rights are arbitrable only if such non-material right might be a subject of a court settlement – the decisive factor is therefore whether a party can independently dispose of the right to which the dispute relates. For this reason, disputes concerning, inter alia, marital relations, parental authority or civil status are not arbitrable.

3.3 National Courts' Approach

Determining the Law Governing the Arbitration Agreement

The New York Convention and the European Convention, both of which Poland is a party to, play an important role in determining the law governing the arbitration agreement. Pursuant to Article V(1)(a) of the New York Convention, the parties may choose the law governing the validity of arbitration agreement, and if they fail to do so, the validity of the arbitration agreement shall be assessed in accordance with the law of the state in which the arbitral award was made (lex fori). According to Article VI(2) of the European Convention, the law governing the validity of an arbitration agreement is:

- the law chosen by the parties; or
- the law of the country where the arbitral award is to be issued – if the parties have not chosen any law; or
- the law determined in accordance with the conflict of law rules applicable in the country of the court hearing the case.

When neither the New York Convention nor the European Convention apply, one must resort to national law, namely Polish Private International Law (PIL). The PIL distinguishes between the law applicable to the merits of an arbitration agreement and the law governing the form of the arbitration agreement.

As regards the law governing the merits of the arbitration agreement, the PIL indicates that in the first place it is the law chosen by the parties that is applicable. If the parties have not chosen the applicable law, the lex fori is applicable. If the parties have chosen neither the applicable law nor the place of arbitration, the arbitration agreement is governed by the law applicable to the legal relationship to which the dispute relates.

In such a case, however, it is sufficient that the agreement is effective under the law of the state in which the proceedings take place or the arbitral tribunal has rendered its award.

The form of the arbitration agreement shall be governed by the law of the state of the place of arbitration. However, it is sufficient that the arbitration agreement meets the form requirements of the law applicable to the merits of the arbitration agreement.

Enforcement of Arbitration Agreements

Polish courts uphold arbitration agreements robustly, reflecting a pro-arbitration stance.

The judiciary's approach aligns with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which Poland is a signatory. Grounds for refusing enforcement are interpreted narrowly, in line with the international standards.

3.4 Validity

Polish law applies the rule of separability to arbitration clauses. The CPC expressly provides that the invalidity or extinction of the main contract containing the arbitration clause does not in itself entail the invalidity or extinction of the arbitration clause.

4. The Arbitral Tribunal

4.1 Limits on Selection

There are a few restrictions concerning the appointment of arbitrators. Firstly, the CPC provides that provisions in an arbitration agreement granting one of the parties more powers when appointing an arbitral tribunal are ineffective. Secondly, the arbitrator must be a natural person (an individual) and have full legal capacity. Lastly, the parties may not appoint a state judge as arbitrator, with the exception of retired judges.

4.2 Default Procedures

Polish law allows the parties to choose for themselves how arbitrators are to be appointed and gives them wide discretion in this regard.

If the parties agree that the arbitrator is to be appointed by a third party, but this procedure fails and the designated third party does not appoint the arbitrator in a timely manner, then either party can ask the state court to appoint the arbitrator.

However, it is not clear what happens if the parties agree that the arbitrator will be appointed in a different way than by a third party and this procedure fails. While Polish law does not explicitly say what happens in such a situation, two possibilities have been identified by the legal authorities. Firstly, it can be assumed that in such a situation, the arbitration clause becomes unenforceable. Secondly, it can be assumed that in such a situation one should apply, per analogiam, the CPC's standard procedure for the appointment of an arbitrator in the lack of the parties' chosen method of appointment. The latter solution seems more reasonable and thus preferable, but the jurisprudence has not yet clearly determined which of these solutions prevails.

The said difficulties with determining the consequences of the failure of the parties' chosen method of appointment will not emerge if the parties have agreed on the substitute appointment procedure. This can be done expressly or by agreeing that the dispute will be decided in accordance with one of the arbitral institution's arbitration rules, which provide for a substitute appointment procedure.

In the case of multiparty arbitration, Polish law provides that the persons acting jointly on one side of the dispute appoint the arbitrator unanimously, unless the arbitration agreement provides otherwise.

4.3 Court Intervention

If the parties do not agree on the method of the appointment of arbitrators, the CPC's standard procedure applies. In the course of this procedure, a party should appoint an arbitrator within one month of the request by the other party to do so. If they fail to comply with this obligation, the other party may request the appointment of an arbitrator by the state court.

When appointing an arbitrator, the state court shall take into account the qualifications that the arbitrator should have pursuant to the agreement of the parties and other circumstances that ensure that an independent and impartial person is appointed as arbitrator. If the court is to appoint either a sole arbitrator or a presiding arbitrator in a dispute between parties from different countries, the court should consider the need to appoint a person not connected with any of those countries.

4.4 Challenge and Removal of Arbitrators

The CPC provides for excluding an arbitrator by a common court. If the arbitrator is not excluded by the arbitral tribunal within one month of the party's request for exclusion, the party can request the court to exclude the arbitrator.

The time limit for submitting the request to the state court is two weeks from the expiry of the one-month period for the exclusion of an arbitrator before the arbitral tribunal.

Any provision in the arbitration agreement that modifies the aforementioned powers of the court is ineffective.

Polish law does not establish an exhaustive catalogue of reasons for the exclusion of an arbitrator. An arbitrator may be excluded when there are circumstances that raise reasonable doubts as to their impartiality or independence, as well as when they lack the qualifications set out in the parties' agreement. The International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration are often relied on when determining whether the "reasonable doubts" standard for exclusion is met.

4.5 Arbitrator Requirements

In Poland, arbitrators must maintain independence and impartiality. They are required to submit a written statement of their impartiality and independence upon accepting their role. Throughout the entire arbitration process, the appointed arbitrator must promptly disclose to the parties any circumstances that could raise doubts about their impartiality or independence.

The proper test for verifying whether an arbitrator may be deemed independent and impartial is whether the circumstances related to that arbitrator raise objective, reasonable doubts about the arbitrator's impartiality and independence.

In addition, the parties may contractually agree on the requirements for the qualifications of the arbitrator. If it turns out that the arbitrator does not have such qualifications, the arbitrator may be excluded from hearing the case.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

Under Polish law, non-arbitrable disputes are excluded from arbitration. Non-arbitrable disputes are disputes over child support (alimony) and disputes over non-material rights that cannot be subject to a court settlement (see **3.2 Arbitrability**).

In principle, consumer disputes and labour law disputes are not excluded from arbitration, but since in these types of cases an arbitration agreement can only be concluded after the dispute has arisen, in practice very few such disputes go to arbitration.

5.2 Challenges to Jurisdiction

Polish law applies the principle of competence-competence (*kompetenz-kompetenz*). The CPC explicitly stipulates that the arbitral tribunal may determine its own jurisdiction, including the existence, validity or effectiveness of an arbitration clause, as well as rule on a party's challenge to jurisdiction.

5.3 Circumstances for Court Intervention

The role of common courts in addressing the issues of jurisdiction of an arbitral tribunal is threefold.

Firstly, a court will address the issue of an arbitral tribunal's jurisdiction if a party files a claim to a state court and the respondent asks the court to reject the claim, arguing that the dispute is subject to an arbitration agreement and thus cannot be heard by the state court. The court will reject the claim unless it finds that the arbitration agreement is defective or the tribunal had already declined its jurisdiction.

Secondly, if the arbitral tribunal issues a positive decision on jurisdiction (ie, a decision rejecting the challenge to the tribunal's jurisdiction), either of the parties may challenge such decision by bringing the appeal to the state court. The common courts do not review arbitral tribunals' negative decisions on jurisdiction.

Thirdly, the common court reviews the jurisdiction of an arbitral tribunal in post-arbitral proceedings on setting-aside, recognition or enforcement of the arbitral award.

5.4 Timing of Challenge

If the arbitral tribunal issues a positive decision on jurisdiction (ie, a decision rejecting the challenge to the tribunal's jurisdiction), either of the parties may challenge such decision by bringing the appeal to the state court within two weeks of the arbitral tribunal's decision.

The state court can also address the issue of an arbitral tribunal's jurisdiction in post-arbitral proceedings on setting-aside, recognition or enforcement of the arbitral award. There is no deadline to file for the recognition or enforcement of an arbitral award. The party can bring an action before a common court to set aside the award for a period of two months after delivery of the award.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

In general, Polish courts tend to apply the de novo standard of review for questions of jurisdiction, while typically referring to the facts as established by the tribunal. However, the standard of judicial review for questions of jurisdiction has not yet been explicitly determined in Poland.

As for admissibility, Polish law does not explicitly recognise this notion. Some issues that typically

fall under the notion of admissibility in other legal systems, like a statute of limitations or compliance with claim notification obligations, are treated as matters of substantive law, and some issues, like failure to comply with pre-arbitration dispute settlement procedures, are dealt with as matters of jurisdiction and contract interpretation.

5.6 Breach of Arbitration Agreement

According to the CPC, a breach of a valid, enforceable arbitration agreement leads to the rejection of the claim. However, the court does not take it into account ex officio. The defendant must raise the objection regarding the arbitration clause within a certain time limit, ie, before entering into the dispute on the merits. It is considered that if a claimant submits a claim covered by an arbitration clause to a state court and the defendant does not object to the state court hearing the case before entering into a dispute on the merits, it means that both parties agree to hear the dispute in litigation and there is no breach of arbitration agreement.

5.7 Jurisdiction Over Third Parties

Polish law does not explicitly address the issue of jurisdiction over third parties, not bound by the arbitration clause, with one exception – an arbitration agreement included in the articles of association of a company binds not only the company and its shareholders, but also the company's bodies and managers.

Despite that, sometimes an arbitration agreement can bind its non-signatories, especially in cases of different types of legal succession. For example, heirs are bound by arbitration agreements concluded by the deceased and an acquiring company is bound by arbitration agreements entered into by the acquired company. The same applies to companies created after demerger and arbitration agreements concluded by demerged company, as well as assignees or acquirers of debt and arbitration agreements concluded by former debtors or creditors.

6. Preliminary and Interim Relief

6.1 Types of Relief

Under Polish law the arbitral tribunal has the power to award interim injunctions, if it has not been excluded by the parties in the arbitration agreement. The arbitral tribunal, acting at the request of a party who has substantiated the claim, may decide to apply interim injunctions which it deems appropriate. The interim injunction is only enforceable upon obtaining an enforceability clause from the common court.

6.2 Role of Courts

Under Polish law, the state courts play their part in granting interim relief in arbitral proceedings.

Firstly, a party may always – including prior to the commencement of arbitral proceedings – request a state court to grant interim relief. Polish courts can also grant interim relief in connection with foreign-seated arbitrations. The courts may grant interim relief to secure a claim, eg, by seizing the defendant's accounts or ordering or prohibiting the defendant to behave in a certain way.

Secondly, interim relief granted by an arbitral tribunal can only be enforced after its enforceability is confirmed by a state court.

Polish law does not provide for the institution of an emergency arbitrator.

6.3 Security for Costs

Polish law does not explicitly regulate the institution of security for costs. However, under Polish law, unless the parties have agreed otherwise, the arbitral tribunal, at the request of the party who has made the claim plausible, may decide to apply such security as it deems appropriate in view of the subject matter of the dispute. This means that if the arbitral tribunal deems it appropriate to grant security that will have similar practical effects as security for costs, it may do so.

7. Procedure

7.1 Governing Rules

Arbitration proceedings in Poland can be governed by two regimes – contractual or statutory.

The statutory regime is applicable in the absence of regulation of the proceedings by the parties to the arbitration agreement. Therefore, it is also possible that a partly contractual and partly statutory regime will apply. Such situation occurs if the parties only regulate certain procedural issues in the arbitration agreement. The statutory regulation is contained in the CPC, Part Five.

The parties may regulate the procedure entirely in the arbitration agreement between them or refer, in the agreement, to the rules of one of the arbitration institutions or the UNCITRAL Arbitration Rules.

7.2 Procedural Steps

The arbitration procedure is generally not regulated by mandatory provisions of law. The procedure may be decided by the parties in an agreement, or, in the absence of an agreement, the arbitral tribunal may, as a rule, conduct the proceedings in any manner it deems appropriate.

It is, however, a mandatory part of the arbitration procedure that the parties are notified of the hearing and of meetings of the arbitral tribunal held for the purpose of taking evidence and that each party must be served with all the letters filed by the other party, expert opinions and other written evidence that the arbitral tribunal may take into account in settling the dispute.

Moreover, the parties cannot stipulate that an arbitral award is not subject to recognition or declaration of enforceability by a common court, nor can they exclude the right to request setting aside the award of an arbitral tribunal by a common court.

7.3 Powers and Duties of Arbitrators

Polish law imposes several powers and duties upon arbitrators to ensure the fair and efficient conduct of arbitration proceedings. The key powers and duties are as follows.

- Arbitrators must maintain impartiality and independence throughout the arbitration process. They are required to disclose any circumstances that may give rise to doubts as to their impartiality or independence.
- Arbitrators have the authority to rule on their own jurisdiction (*kompetenz-kompetenz*).
- Arbitrators are responsible for managing and conducting arbitration proceedings efficiently. In doing so, they must ensure equal treatment of the parties.
- Arbitrators have the power to award interim injunctions, if this has not been excluded by the parties in the arbitration agreement.

7.4 Legal Representatives

Polish law does not provide for the qualification of representatives in arbitration proceedings – in particular, representatives do not have to be legal professionals. However, limitations may

be established in the rules of arbitration institutions. For example, the Rules of the Court of Arbitration at the Polish Chamber of Commerce in Warsaw provide that an employee of this institution and a mediator in the dispute subject to the proceedings cannot be a representative of either of the parties.

8. Evidence

8.1 Collection and Submission of Evidence

Polish law does not contain any explicit provisions regarding the collection and submission of evidence in arbitration proceedings. Arbitrators typically apply a mix of standards on the taking of evidence from civil law and common law. For example, extensive document production, following the model of document production known in common law jurisdictions, is not popular, but there are cases in which document production occurs. Arbitrators then often use the Redfern schedule. As for witnesses, depositions are not used, but written witness statements and cross-examination are. It is common for arbitrators to apply the IBA Rules on the Taking of Evidence.

8.2 Rules of Evidence

There are no specific rules of evidence in arbitral proceedings stipulated in Polish law. The CPC provides that the arbitral tribunal may take evidence from witnesses, expert opinions, documents, inspection, as well as any other evidence necessary.

The only restriction under the law is the prohibition for the arbitral tribunal to use coercive measures.

The generally applicable law also does not provide for preclusion of evidence in arbitration proceedings, leaving this issue to the discretion of the parties.

It is common practice in Polish arbitral institutions, as well as for Polish ad-hoc arbitral tribunals, to apply the IBA Rules on the Taking of Evidence.

8.3 Powers of Compulsion

Under the CPC, an arbitral tribunal may take any evidence it deems necessary, however the arbitral tribunal does not have the power of compulsion and cannot take any coercive measures.

The arbitral tribunal may request the assistance of a state court to take evidence or perform any other act that the arbitral tribunal cannot perform.

9. Confidentiality

9.1 Extent of Confidentiality

Polish law does not explicitly regulate the confidentiality of arbitration. Nevertheless, it is sometimes argued that confidentiality is an inherent feature of arbitration, so arbitration is confidential by nature. To avoid any doubts, the parties may explicitly establish the confidentiality of the proceedings in the arbitration agreement. The rules of procedure before the largest permanent arbitration courts in Poland also provide for confidentiality.

State court proceedings related to arbitration are not confidential and the hearings are open to the public.

10. The Award

10.1 Legal Requirements

The CPC stipulates that an arbitral award should be in writing and signed by the arbitrators (if issued by three or more arbitrators, the signatures of the majority of the arbitrators are sufficient).

As for the content of the award, the law stipulates that it must include the reasons for the decision, identification of parties, arbitrators and a reference to the arbitration clause, as well as the date and place of issue of the award.

The award does not require publication; however, it must be delivered to all parties. The generally applicable law does not regulate the method of delivery. The method of delivery can be specified by the parties or by the arbitral tribunal.

If the arbitral panel consists of more than one arbitrator, its awards shall be made by majority vote, unless otherwise agreed by the parties. An arbitrator who voted against the majority position may submit a dissenting opinion. The dissenting opinion should be backed up by written reasoning.

10.2 Types of Remedies

There are no explicitly established restrictions to the types of remedies that an arbitral tribunal may award. However, it should be noted that during the proceeding to set aside an award, the court examines if the award is pursuant to the fundamental principles of the legal order of the Republic of Poland. It is therefore possible that some types of remedies – for example US style punitive damages – could be challenged on these grounds.

10.3 Recovering Interest and Legal Costs

Polish law does not regulate separately the recoverability of interest in arbitration proceedings. Under Polish law, the recoverability of interest – whether in litigation before common courts or in arbitration – is a matter of substantive law governing the parties' relationship.

If the law applicable to the legal relationship giving rise to the dispute referred to arbitration is Polish law, the interest is recoverable. Interest should be ordered on the awarded monetary claim from the date on which the claim became due. The rate of interest is regulated either in an agreement of the parties (the parties cannot agree on an interest rate higher than the maximum interest set by the legislation), or – in the lack of the parties' agreement – by the pertinent legal acts applicable to the dispute.

Generally, applicable law does not prescribe the rules regarding the costs of the arbitration proceedings. This issue is also left to the discretion of the parties or the arbitral tribunal.

However, according to the rules of the principal arbitration institutions in Poland, the costs of the proceedings are borne by the losing party in accordance with the degree of defeat, applying the "costs follow the event" approach.

The costs are settled according to a schedule of costs submitted by the parties and include the costs of legal representation.

11. Review of an Award

11.1 Grounds for Appeal

The parties do not have a statutory right to appeal an arbitral award. However, the parties

can agree on the right to appeal under an arbitration agreement introducing, for example, two-instance proceedings.

Under the CPC the parties have the right to bring an action before a common court to set aside an arbitral award. The court shall set aside an award only in enumerated cases. The court sets aside an award if:

- it concerned a dispute that is not arbitrable;
- it is contrary to the fundamental principles of the legal order of the Republic of Poland; or
- it limits consumer protection.

The court may also set aside an award if:

- there was no arbitration clause;
- the dispute went beyond the scope of the arbitration clause;
- a party was deprived of the opportunity to defend its rights in the arbitration proceedings, eg, through inadequate notice;
- basic rules of procedure were violated;
- the award was obtained as a result of a criminal offence or through the use of a counterfeit document; or
- there was a final judgment of a common court in the same case.

11.2 Excluding/Expanding the Scope of Appeal

The CPC provides the parties with an absolute right to bring an action before a common court to set aside an arbitral award. The right to bring an action may not be limited, excluded or waived. Nor can the parties expand the scope of review of an arbitral award by the state court.

11.3 Standard of Judicial Review

Under the CPC, common courts reviewing arbitration awards do not examine the merits of the case. Both the procedure for the recognition, enforcement or setting aside of an award are limited to a formal examination of the content of the award and an examination of whether the correct procedure was followed.

The court refuses to recognise or enforce an award if:

- it concerned a dispute that is not arbitrable;
- it is contrary to the fundamental principles of the legal order of the Republic of Poland; or
- it limits consumer protection.

The above-mentioned conditions are also grounds for setting aside an award, following a party's application.

The court may also set aside an award if:

- there was no arbitration clause;
- the dispute went beyond the scope of the arbitration clause;
- a party was deprived of the opportunity to defend its rights in the arbitration proceedings, eg, through inadequate notice;
- basic rules of procedure were violated;
- the award was obtained as a result of a criminal offence or through the use of a counterfeit document; or
- there was a final judgment of a common court in the same case.

Polish law does not provide for any other cases of review of an arbitral award by a common court.

12. Enforcement of an Award

12.1 New York Convention

The Republic of Poland was one of the first ten signatories to the 1958 New York Convention and ratified the Convention in 1961. The Republic of Poland has signed the Convention with both reservations provided for in Article I(3) of the Convention.

12.2 Enforcement Procedure

An arbitral award has the force equal to a judgment of a common court once it has been recognised or declared enforceable by the common court. This applies to all arbitral awards, regardless of the country of issue.

The court of appeal is competent to recognise an arbitral award or declare it enforceable. The procedure takes place at the request of a party to the arbitration and is not time-barred.

Generally speaking, the court refuses to recognise or declare enforceable an award only if:

- it concerned a dispute that is not arbitrable;
- it is contrary to the fundamental principles of the legal order of the Republic of Poland; or
- it limits consumer protection.

However, the requirements for the recognition or enforcement of an arbitral award rendered outside the Republic of Poland are more restrictive. In particular, an arbitral award will not be recognised if it has not yet become binding between the parties or if it has been set aside or its enforcement has been suspended by a court in the country of issue.

If the award is subject to ongoing set-aside procedure in the country of the seat or elsewhere, Polish courts can adjourn the enforcement proceedings. Such adjournment is, however, not mandatory and thus is decided on a case-by-case basis.

Once an arbitral award has been recognised or declared enforceable, the same rules apply to its enforcement as to a judgment of a common court. This also applies to the issue of sovereign immunity.

12.3 Approach of the Courts

In enforcement proceedings and in setting-aside proceedings, Polish courts are far more likely to rule in favour of upholding an arbitral award. Situations in which courts refuse enforcement or set aside an arbitral award are in the minority.

The most common basis for refusing enforcement or setting aside an arbitral award is the public policy clause, understood as the domestic public policy clause. The basic principles of the legal order in force in Poland, constituting the domestic public policy, are the fundamental constitutional principles and the supreme principles governing individual areas of substantive and procedural law. There is no predetermined catalogue of such principles – such a catalogue is shaped by the Polish courts' jurisprudence on a case-by-case basis.

13. Miscellaneous

13.1 Class Action or Group Arbitration

In principle, there is no class action arbitration or group arbitration in Poland. However, there is an exception with respect to social arbitration in labour matters in the Collective Disputes Settlement Act which provides for group arbitration. In such disputes, the trade union representing the interests of the employees acts as a party. The dispute is adjudicated by a dedicated institution,

the College of Social Arbitration at the district courts.

13.2 Ethical Codes

There is no generally applicable code of ethical conduct for arbitrators or counsel in arbitration. Such codes are instead formulated by the most important arbitration institutions, eg, the Code of Ethics for Arbitrators of the Court of Arbitration at the Polish Chamber of Commerce in Warsaw or the Code of Ethics for Arbitrators of the Lewiatan Court of Arbitration.

In 2019, the Polish Arbitration Association prepared an Arbitrator's Pledge which reflects good practices in the management of arbitral proceedings. These are the minimum requirements to be met by the arbitrators to handle proceedings efficiently and effectively. The principles set out in this document do not prejudice further-reaching requirements that can arise from the rules of arbitration courts.

Additionally, if the counsel in arbitration are professional counsel, ie, advocats (*adwokat*) or attorneys-in-law (*radca prawny*), they are bound by their professional codes of conduct.

13.3 Third-Party Funding

There are no regulations in the CPC concerning third-party funders.

However, in the draft of the new arbitration rules of Poland's most prominent arbitral institution, namely the Court of Arbitration at the Polish Chamber of Commerce in Warsaw, information duties regarding third-party funding are to be imposed on the parties. The work on the new rules is expected to be concluded by the end of 2024 with amended rules coming into force from January 2025. If the proposed third-party funding regulations hold up, from January 2025, parties involved in PCC arbitration will be required to disclose in arbitration proceedings the identities of their third-party funders.

13.4 Consolidation

Under the CPC, when an arbitration agreement is included in the company's articles of association, the arbitration tribunal before which the case regarding a particular resolution of the shareholders' meeting was first brought shall have jurisdiction over all disputes concerning a given resolution.

Other than that, Polish law does not provide any rules for the consolidation of arbitration proceedings, so there are no restrictions in this respect either.

13.5 Binding of Third Parties

Polish law applies the principle of separateness and independence of legal entities. Thus, as a general rule, an arbitration agreement will not bind third parties. However, a third party may be bound by an arbitration agreement in the case of assignment of a contract, general succession, or acquisition of an enterprise. Moreover, there are special rules pertaining to an arbitration agreement included in the articles of association of a company which allows for extending the arbitration agreement to the company and any subsequent shareholders as well as to the bodies of the company and members of these bodies. Similar rules apply also to family foundations.

Trends and Developments

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Sołtysiński Kawecki & Szlęzak is one of Poland's leading full-service law firms. With more than 180 attorneys, the firm provides legal services in all areas of business activity and is known for its work and innovative approach to complex legal problems. Its litigation and arbitration practice specialises in resolving complex and landmark cases. It is capable of handling large-scale complex disputes in any sector. Additionally, it is often called upon to act in precedent-setting disputes and to handle particularly complex matters. As a result, its lawyers have been involved in several important Supreme Court precedents that have influenced legal practice. It has represented clients before domestic and international arbitration tribunals, as well as European courts under Polish and most international law, whether the arbitration proceedings were seated in Poland or outside the country.

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Introduction

This article delves into significant trends and developments in Polish aspects of international arbitration, providing essential insights for businesses operating or considering operations in Poland. It will explore the comprehensive revisions to the rules of leading Polish arbitration institutions, namely the procedural innovations aimed at enhancing the efficiency of state court proceeding by converting them to arbitration. Additionally, it will analyse recent landmark judicial decisions that have shaped the enforceability of arbitration agreements. Through this examination, the authors aim to equip readers with a thorough understanding of the current and future state of arbitration in Poland.

Revisions to the Arbitration Rules of Leading Polish Arbitration Institutions

Over the past decade, the nature of arbitration proceedings has evolved significantly, reflecting changes in user expectations and greater awareness of international arbitration practices. Arbitration institutions worldwide have incorporated new measures to streamline their processes, and Poland is no exception. The two most significant arbitration institutions in Poland, namely the Court of Arbitration at the Polish Chamber of Commerce (PCC) and the Lewiatan Court of Arbitration, have embarked on revising their arbitration rules to enhance efficiency and meet contemporary challenges.

New arbitration rules for the Court of Arbitration at the PCC

In early 2024, the Court of Arbitration at the PCC published a draft of its new rules, which are currently under consultation. The proposed changes aim to modernise the arbitration process and include the following key aspects.

- The Arbitral Tribunal will gain more discretion in determining the applicable law.
- It will be possible to completely abandon the exchange of letters, parties' memoranda and documents by traditional means in favour of electronic communication.
- The Director General will be able, for good reason, to suspend, extend, and reinstate the deadlines set out in the Rules and the deadlines that the Director has set.
- The Arbitral Tribunal will be authorised to take measures necessary to remove conflicts of interest in the event of a change of attorney.
- A dispute shall be decided by a sole arbitrator if the value of the subject matter of the dispute does not exceed PLN100,000.
- It will not be possible to initiate proceedings by filing a statement of claim. Arbitration proceedings will only be able to be initiated by filing a request for arbitration.
- The parties will be obliged to give information regarding the financing of the dispute by a third-party funder.
- An early determination procedure for obvious cases will be introduced.
- An emergency arbitrator will be introduced.
- The Arbitral Tribunal will be obliged to hold an organisational meeting and issue an organisational order within a short period of time after its establishment.
- The Arbitral tribunal will be authorised to decide a case without a hearing, inter alia, in cases where the value of the subject matter of the dispute does not exceed PLN100,000.
- The Arbitration Tribunal will be authorised to decide on its own initiative, without a party's request, to oblige a party to present documents and to take evidence from an expert opinion.
- The Arbitral Tribunal will be obliged to issue an award within six months of the date of the appointment of the Arbitral Tribunal, but no

later than two months after the last day of the hearing or the filing of the last letter.
- The parties will be able to request an electronic copy of the award.

The draft of the new Rules is expected to be concluded by the end of 2024 with the amended Rules coming into force from January 2025.

New arbitration rules for the Lewiatan Court of Arbitration

Similarly, the Lewiatan Court of Arbitration announced in the spring of 2024 that it is working on new arbitration rules set to take effect from 1 January 2025. The proposed changes aim to enhance the efficiency of arbitration proceedings, address new challenges and elevate service standards. These key changes include:

- the principle that service of letters, parties' memoranda and documents after the first exchange of letters will be made by electronic means only – traditional service (in writing) will only be used if the Arbitral Tribunal so decides;
- increasing the value of the subject matter of a dispute below which as a rule a dispute will be heard under an expedited procedure, unless the parties decide otherwise – now, a dispute will be heard under an expedited procedure if the value of the subject matter of the dispute does not exceed PLN200,000 (whereas currently it is PLN50,000);
- the principle that if an arbitrator resigns from their function, they are not entitled to remuneration, regardless of the reasons for the resignation;
- the possibility for the President of the Court of Arbitration to object to the appointment of an arbitrator if the President deems that such arbitrator does not warrant the proper performance of their duties;
- giving up the possibility of issuing an award by an incomplete arbitration panel in a situation where, following the conclusion of the proceedings, one of the arbitrators dies, resigns, is dismissed or de facto does not perform their function;
- the introduction of the possibility to initiate proceedings by also filing a request for arbitration;
- an amendment of the rules concerning the joinder of third parties to the arbitration proceedings – the new rules concerning joinder resemble the rules of the Polish Code of Civil Procedure (CPC), which applies to proceedings before the Polish state courts;
- the liberalisation of the prerequisites for the joinder of cases – the joined cases no longer have to concern the same legal relationship, it is sufficient that the parties wish the cases to be joined;
- a requirement that an award be issued within six months of the date on which the Arbitral Tribunal is constituted, but no later than within one month of the date on which the evidentiary proceedings are closed and a principle that failure to observe the time limit for issuing an award does not cause the Arbitral Tribunal to expire in part or in whole or affect the Arbitral Tribunal's mandate to resolve the dispute; and
- further development of the rules concerning decisions on the costs of the proceedings, including the introduction of the possibility for the Arbitral Tribunal to determine the rules for incurring costs separately for a particular stage of proceedings or for part of proceedings relating to a particular issue or in relation to particular conduct of the parties or their attorneys.

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Conversion of Court Proceedings to Arbitration

The COVID-19 pandemic significantly disrupted court operations worldwide, including in Poland, exacerbating the issue of lengthy civil proceedings in state courts. Although Polish courts resumed operations after COVID-19 as early as May 2020, there is still a backlog.

In March 2023, the CPC was amended with new regulations to provide for a possibility to convert court proceedings to arbitration. Such possibility was earlier possible. However, this amendment strived at explicitly regulating this institution and providing for some financial incentives. The main aim of the conversion is to aid the parties that suffer the consequences of lengthy court proceedings, which may last up to five years or sometimes even more in first instance, by relieving the backlog.

The new rules provide as follows.

- The parties can decide on conversion at any time up to the final determination of the case by the court.
- In order to convert ongoing court proceedings to arbitration, the parties must conclude an arbitration agreement before applying for discontinuance of the proceedings. The arbitration agreement must take the form of a submission agreement (a compromise).
- Court proceedings will be discontinued as a result of the conclusion of the submission agreement at the joint request of the parties. However, the discontinuation of proceedings will result in the withdrawal of the previously granted interim measure and, consequently, will open up the possibility of seeking compensation for damage caused by the execution of the interim measure. Therefore, it seems that conversion may be less advantageous for plaintiffs and counterclaimants who have obtained an interim measure for a claim either before filing a lawsuit or during the course of the proceedings.
- The court will examine ex officio whether the conclusion of the submission agreement by the parties or the circumstances of the case show that discontinuance of the court proceedings would be contrary to the law or the principles of social co-existence, or would be aimed at circumventing the law, or that the arbitration agreement is invalid or ineffective. If that is the case, the proceedings will not be discontinued.
- The limitation period for the claims covered by the arbitration agreement will start to run anew from the date on which the decision to discontinue the proceedings becomes final.
- The converted case cannot go back to litigation. The court will dismiss the claim or the application to commence non-litigation proceedings if it relates to a dispute which was the subject of a case discontinued as a result of conversion.
- The plaintiff will be refunded ¾ of the court fee.

Since the conversion is concluded after the dispute has already arisen, it can also apply to labour and consumer disputes, ie, matters that, under Polish law, cannot be covered by a traditional arbitration agreement, ie, an arbitration agreement concluded before the emergence of a dispute.

It is most practical to convert litigation to arbitration during first-instance proceedings, before the first hearing, or at least before the commencement of evidentiary proceedings, when the examination of witnesses or the selection of experts has not yet taken place.

In order to better facilitate the process, the parties who have decided on conversion could also conclude a so-called conversion protocol. In such a protocol, the parties could set out detailed rules for the transfer and further conduct of the converted proceedings, so that the conversion is safe for the parties and fully protects their interests. The more advanced the state court proceedings, the more issues the parties will have to agree on in the conversion protocol. In particular, it is useful to establish the following issues in the conversion protocol:

- the rules for the exchange of pleadings (whether the pleadings already filed are to be taken into account by the arbitrators or whether the parties will file new pleadings summarising their position and replacing all previous pleadings);
- the possibility of raising potential sets-off and counterclaims; and
- what happens to motions, evidence and assertions already filed in the case, in particular requests for witness evidence and expert opinions (this evidence is conducted differently in arbitration proceedings than in a general court).

The conversion protocol is not provided for in the statutory rules.

Recent Landmark Supreme Court Decisions

Recently, the arbitration community has been incensed by the Polish Supreme Court's decision of 19 January 2024 (II CSKP 897/22), in which the Supreme Court accepted that, if the plaintiff is unable to bear the costs of arbitration, the arbitration agreement is unenforceable and the plaintiff can file a lawsuit in a state court.

The Supreme Court justified its decision by referring to the following.

- If a party cannot be relieved of the obligation to pay the fees that are associated with the commencement and conduct of arbitration proceedings, the obligation to pay these costs may in practice deprive that party of access to arbitration. Therefore, the objective inability of the claimant to bear the costs, the payment of which is necessary for the initiation and conduct of the arbitration proceedings, may entail the unenforceability of the arbitration agreement, although it does not lead to the loss of the binding force of the arbitration agreement. In doing so, the court referred, inter alia, to the European Convention of Human Rights, Article 6(1); the Charter of Fundamental Rights of the European Union, Article 47; and case law from Germany, Switzerland, Liechtenstein and Portugal.
- The requirement that the inability to bear the costs of the proceedings before the arbitral tribunal must be of a permanent nature should be understood to mean a state of affairs existing objectively at the time of the court's decision, which constitutes the basis for the court's decision.
- The right to court is guaranteed by the Polish Constitution. Therefore, judicial protection cannot be denied to a person who is unable, due to their financial status, to initiate proceedings before an arbitration court. The hypothetical possibility of funding the arbitration by unspecified third parties cannot be a reason for denying such protection.

It remains to be seen whether this landmark decision will be followed by other similar ones and whether this will lead to the formation of a solid line of jurisprudence. There are already indications that this may be the case.

On 20 March 2024, the Polish Supreme Court issued another decision (II CSKP 1187/22) in

which it accepted that the unenforceability of an arbitration agreement may result from a party's inability to bear the costs of arbitration due to their living, financial and health situation.

Both decisions are highly controversial and hotly debated in the Polish arbitration community. In the course of these discussions, many question the correctness of the Supreme Court's position. It has been pointed out that it may be difficult to apply the test proposed by the Supreme Court. These difficulties may relate, for example, to the fact that it is not always possible to anticipate what the costs of arbitration would be prior to the commencement of proceedings, eg, in ad hoc arbitration. If that is the case, then it is thus impossible to show that a party will not be able to bear these unquantifiable costs of the proceedings.

Many critics also point out that the Supreme Court left the door wide open to the evasion of arbitration provisions solely on the basis of the argument of lack of funds to conduct arbitration. A party may take advantage of a temporary deterioration in its financial situation or deliberately create a temporary financial incapacity to evade an arbitration agreement. One proposal is therefore to limit the possibility of evading an arbitration agreement on the basis of a lack of sufficient funds, for example by requiring the claimant to show that, between the conclusion of the arbitration agreement and the commencement of the proceedings, theirfinancial situation deteriorated through no fault of their own or that or that the claimant had attempted to obtain third-party funding but had failed.

Overall, the recent advancements in Poland's arbitration framework are set to provide a more streamlined, transparent and accessible dispute resolution avenue, potentially benefiting investors who aim to minimise the risks associated with commercial disputes. Nevertheless, investors should remain aware of the active discussions and possible shifts in legal precedents that could influence Poland's arbitration environment, particularly concerning parties' financial difficulties, which may be leveraged to bypass arbitration in favour of state court proceedings.

ROMANIA

Law and Practice

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Zamfirescu Racoți Vasile & Partners Attorneys At Law is a leading law firm in Romania, ensuring both business and dispute resolution support and representation. ZRVP manages the biggest national and international arbitration portfolio in Romania, handling arbitrations conducted under the auspices of numerous arbitral bodies or rules, including the International Court of Arbitration, Paris (ICC), the London Court of International Arbitration (LCIA), the Camera Arbitrale Nazionale et Internazionale di Milano (CAM), the UN Commission on International Trade Law (UNCITRAL), and the International Centre for Settlement of Investment Disputes (ICSID). The firm's practice includes a wide array of disputes in the following areas: construction and infrastructure projects, energy, privatisation, engineering, insolvency, maritime law, media, banking and finance, distribution and transport, production, and real estate.

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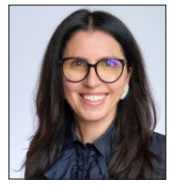

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1. General

1.1 Prevalence of Arbitration

International arbitration is well established in Romania and has experienced a steady growth since 2014, with a more or less constant rise in the number of arbitration cases per year.

Its increasing use predominantly results from disputes related to the various infrastructure projects started by the public authorities in Romania with the help of European financing (from pre-adhesion and post-adhesion funds and, most recently, from the funds associated with the Recovery and Resilience Plan for Romania). The contracts concluded for these projects generally follow the International Federation of Consulting Engineers (FIDIC) General Conditions of Contract, which include the standard International Chamber of Commerce (ICC) arbitration clause.

Starting in 2018, important legislative amendments were adopted covering a broad category of publicly financed projects subject to public procurement procedures. This led to the replacing of the FIDIC General Conditions of Contract with new forms of public procurement contracts that are mandatory for public works. The new conditions of contract bring significant changes to the claims/dispute resolution procedure, including the referral of the dispute to the national arbitration court – the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania (CICA) – as the arbitral institution within the standard arbitration clause (thus replacing the jurisdiction of the ICC International Court of Arbitration (ICC), which was applicable under the former FIDIC General Conditions of Contract).

CICA is currently the most frequently used and important international arbitration institution in Romania. Its 2018 Rules of Arbitration align with the existing rules of the ICC and other similar institutions, and seek to enhance the flexibility and efficiency of arbitration in Romania while at the same time sidestepping the formalism of domestic courts. This change has helped maintain the steady growth trend of national and international arbitration before CICA.

International arbitration is currently carried out under the auspices of the ICC, the Vienna Inter-

national Arbitral Centre (VIAC), the LCIA, and the Swiss Chamber of Commerce (SCC), but also under those of German and Italian institutions of arbitration (the German Arbitration Institute (DIS), and the Court of Arbitration attached to the German-Romanian Chamber of Commerce and Industry (AHK), mainly used by German/Italian companies and investors).

1.2 Key Industries

The majority of the international arbitration cases involve construction disputes in the context mentioned in **1.1 Prevalence of Arbitration**, but various other contractual disputes are also referred to international arbitration, including a significantly rising number of energy-related disputes (in the context of the post-pandemic political context and the ongoing energy crisis).

1.3 Arbitration Institutions

The most frequently used international arbitral institutions in Romania are (i) the ICC, mostly for international arbitrations seated in Romania or disputes with an international component, and (ii) CICA, mainly for local arbitral disputes.

No new arbitral institutions have been established in Romania in the past year.

1.4 National Courts

There are no national courts which only hear disputes related to international or domestic arbitration matters. The national courts' intervention is limited to adjudicating claims aimed at removing impediments occurred in organising or during the arbitration (eg, aiding in the process of appointing arbitrators as detailed in **4.3 Court Intervention**, challenging arbitrators) or other claims such as issuing interim measures necessary to aid the arbitral proceedings or granting protective measures and interim relief, at the parties' request, before or during the arbitral proceedings. Such claims are adjudicated by the local tribunal whose jurisdiction covers the seat of the arbitration. National courts – namely the Court of Appeal whose jurisdiction covers the seat of the arbitration – also adjudicate the set-aside proceedings.

2. Governing Legislation

2.1 Governing Law

The main body of law governing international arbitration is included in the Code of Civil Procedure, which came into force on 15 February 2013. Title IV of Book VII (International Arbitration and the Effects of Foreign Arbitral Awards) sets out specific legal provisions regarding international arbitration and the effects of foreign arbitral awards, which are supplemented by a general set of provisions included in Book IV of the Code of Civil Procedure (On Arbitration); these are applicable to international arbitration whenever the parties have not agreed on certain aspects by means of the arbitration agreement and have not vested the arbitral tribunal with settling those aspects either.

Romania does not have UNCITRAL Model Law-based legislation. However, the institutions within the newly enacted legislation follow the lines and spirit of the Model Law, but a specific analysis of each provision would have to be performed in order to determine the exact influence of the Model Law.

2.2 Changes to National Law

As the applicable legislation is relatively recent – the new Code of Civil Procedure was enacted on 15 February 2013 – no significant changes have been implemented in regard to international arbitration law and no reforms are expected in the near future. Discussions are ongoing around

the need to broaden the scope of arbitrability of disputes. Similarly, the new CICA Rules – which align with the rules of ICC and other similar institutions such as the LCIA – entered into force starting from 1 January 2018, being applicable to disputes started after this date under the purview of CICA.

3. The Arbitration Agreement

3.1 Enforceability

Under Romanian law, a valid arbitration agreement must be concluded in writing. However, the Code of Civil Procedure broadly defines this requirement to include electronic communications or any means of communication establishing the text of the agreement.

As far as requirements other than the form of the contract (such as capacity to conclude agreements, and consent), the arbitration agreement is valid provided that it fulfils the validity requirements stipulated under one of the following laws:

- the law agreed by the parties;
- the law governing the object matter of the dispute;
- the law applicable to the contract comprising the arbitration clause; or
- the Romanian law.

3.2 Arbitrability

A dispute can be referred to international arbitration provided that:

- it is of a patrimonial nature, meaning that the dispute refers to an economic relation which can be evaluated in money;
- it deals with rights the parties may freely dispose of (this excludes disputes over personal civil status and legal capacity, inheritance and family matters, and labour law disputes); and
- it falls outside the exclusive jurisdiction of the courts pursuant to the law of the seat of arbitration.

Under these circumstances, exempt from arbitration are any disputes which are not of a patrimonial nature, such as civil status litigations, litigations in respect of capacity, inheritance litigations, and family litigations, as well as litigations regarding rights that the parties cannot dispose of (eg, in matters of labour and employment litigation where the law expressly provides that a party cannot waive the legal rights established in their favour).

While the procedural rules regulating domestic proceedings may still occasionally raise questions regarding the capacity of public and state-owned bodies to conclude arbitration agreements, no such limitations are imposed in respect of international arbitration. Thus, international arbitration parties may not seek to evade arbitration to which they have previously agreed by invoking internal law provisions that purport to prohibit entering into arbitration agreements.

3.3 National Courts' Approach

National courts in Romania recognise arbitration agreements and their effects. As far as is known, there are no cases of anti-arbitration injunctions or any other similar form of court denial of arbitration agreements.

Provided that the arbitration agreement meets the legal requirements of validity and the dispute is arbitrable, the national courts respect the will of the parties and proclaim that the agreement has the force of law among them.

The national courts usually determine the law governing the arbitration agreement in case they are vested with a dispute in respect of which an arbitration agreement has been concluded and at least one of the parties invokes the existence of the arbitration clause. If the arbitration clause is valid, the national courts decline their jurisdiction to a national arbitral institution or reject the claim as not being of the Romanian state courts' competence in case the competence belongs to an international institution. If the arbitration clause is null or inoperable, the national courts will retain jurisdiction. To determine the validity of the arbitration clause, the courts need to determine the law governing the arbitration agreement, which is the law chosen by the parties. In the absence of the parties' agreement in this respect, the courts will apply the provisions of international private law, depending on the object of the agreement, in order to determine the applicable law.

3.4 Validity

The Code of Civil Procedure expressly provides for the separability of arbitration agreements, to the effect that the validity of the arbitration clause is independent from the validity of the contract containing it.

4. The Arbitral Tribunal

4.1 Limits on Selection

Party autonomy to select arbitrators is recognised and well established in Romania. The parties are free to agree whether disputes should be submitted to a sole arbitrator or an arbitral tribunal, and also to select the arbitrators. The Code of Civil Procedure provides for the nullity of an arbitration clause which allows one of the parties privileged participation in the nomination of the arbitrator(s) or which provides a party's right over the other party to nominate the arbitrator(s) or to have more arbitrators than the other party.

4.2 Default Procedures

If the parties' chosen method for selecting arbitrators fails, the Code of Civil Procedure provides that the interested party/parties may request the local courts to appoint the arbitrators.

The new CICA Rules provide that where the parties have not agreed on the procedure for the nomination of the arbitrator(s) or if the procedure failed, the nomination or the appointment of the arbitrator(s), as the case may be, shall be made as follows.

- Where the arbitral tribunal is to consist of a sole arbitrator, the parties shall be given 30 days to jointly nominate the arbitrator. If the parties fail to nominate the arbitrator within this time, the President of the Court shall make the appointment within five days.
- Where the arbitral tribunal is to consist of three arbitrators (which is also the default option where the parties have not agreed on the number of arbitrators), the claimant and the respondent shall each nominate an arbitrator and the third – the chairperson – shall be elected by those two arbitrators. Where a party fails to nominate the arbitrator within ten days, the President of the Court shall make the appointment within five days. Where the nominated arbitrators do not agree within five days on the person who shall act as chairperson, the President of the Court shall make the appointment within the same time limit.
- Where there are multiple claimants or respondents and the dispute is referred to three arbitrators, the claimants jointly and the respondents jointly shall each appoint one arbitrator.

4.3 Court Intervention

The Code of Civil Procedure provides that local courts, namely the tribunal whose jurisdiction covers the seat of arbitration, may intervene in the selection of arbitrators by appointing an arbitrator or the presiding arbitrator only in cases where the parties do not agree on the appointment of the sole arbitrator or a party fails to nominate an arbitrator or, in the case of a three-panel arbitral tribunal, where the two arbitrators do not agree on whom they should appoint as presiding arbitrator. The local courts render a decision regarding the appointment of the arbitrators after hearing the parties.

4.4 Challenge and Removal of Arbitrators

According to the Code of Civil Procedure, the parties may agree on a procedure for challenging the appointment of an arbitrator and replacing the arbitrator either by means of the arbitration agreement or subsequently. In the absence of an agreement, the parties may ask the local courts, namely the tribunal whose jurisdiction covers the seat of arbitration, to issue on the challenge or removal of arbitrators.

Pursuant to the Code of Civil Procedure, the arbitrator may be challenged on the following grounds:

- the arbitrator does not meet the qualifications provided in the arbitration agreement;
- there is a reason of challenge provided for in the rules of arbitral procedure agreed on by the parties or, in the absence of an agreement, by the arbitrators; or
- the circumstances cast legitimate doubt regarding the arbitrator's independence and impartiality.

A party may challenge an arbitrator whom it has appointed only for reasons of challenge occurring after the appointment.

Otherwise, for example, if the arbitration agreement provides for institutional arbitration, the rules of the arbitral institution will govern the whole procedure and – in the majority of cases – will cover any issues related to the challenge or replacement of arbitrators.

The CICA Rules provide for similar, yet more detailed, grounds of challenge, as detailed below.

Cases of incompatibility, namely in case the arbitrator finds himself or herself in one of the situations of incompatibility provided for judges in the Code of Civil Procedure – eg, the arbitrator previously expressed his or her opinion in relation to the solution in the dispute he or she was appointed to settle, there are circumstances which justify the doubt that he or she, their spouse, ancestors, or descendants have a benefit related to the dispute, his or her spouse or previous spouse is a relative of a maximum of the fourth degree with one of the parties, etc – or for the following reasons which cast doubt on the arbitrator's independence and impartiality:

- the arbitrator does not meet the qualifications or other requirements regarding arbitrators provided in the arbitration agreement;
- the arbitrator is a partner, has a co-operation relationship with, or is a member of the management bodies of an entity without legal personality, or of a legal person that has an interest in the case, or is controlled by one of the parties, or is under joint control together with this party;
- the arbitrator has employment or work relations with one of the parties or with a legal

person controlled by one of the parties, or is under joint control together with this party; or
- the arbitrator provided advisory services to one of the parties, assisted or represented one of the parties, or testified in the preliminary stages of the dispute.

4.5 Arbitrator Requirements

Under both the Code of Civil Procedure and the CICA Rules, the arbitrator is required to be independent and impartial and to disclose any conflicts of interest.

According to the Code of Civil Procedure, a person aware of a challenging ground regarding himself or herself shall be bound to inform the parties and the other arbitrators before accepting the office of arbitrator, or should such grounds occur after his or her acceptance of the office, as soon as he or she has knowledge of them. In this case, the arbitrator may not participate in the arbitral proceedings unless the parties, apprised thereof, notify the arbitral tribunal in writing that they do not intend to challenge the arbitrator. Even in this particular case, the arbitrator has the right to refrain from adjudicating the dispute.

In a similar manner, according to the new CICA Rules, within five days from the date when the appointment proposal was communicated to him or her, the arbitrator shall fill in and sign the statement of acceptance, independence, impartiality, and availability, where he or she shall indicate any circumstances that may give rise to justifiable doubts with respect to his or her impartiality or independence. An arbitrator shall immediately inform the parties and the other arbitrators in writing if any circumstances that may give rise to justifiable doubts as to his or her impartiality or independence arise during the course of the arbitration.

In common with other jurisdictions, Romanian law does not explicitly define these concepts but merely provides for the general principle, with the case law being left to consider these matters on a case-by-case basis.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

Please see **3.2 Arbitrability**.

5.2 Challenges to Jurisdiction

The principle of competence-competence is fully recognised under Romanian arbitration law. Once a dispute has been referred to arbitration, the arbitral tribunal is competent to decide on its own jurisdiction, and will do so even if identical disputes are pending before the courts or other arbitral tribunals, except if the arbitral tribunal finds it appropriate to suspend the proceedings. Further, the arbitral tribunal's ruling on jurisdiction may not be challenged before the courts during the arbitral proceedings, but only by means of a claim to set aside the arbitral award.

5.3 Circumstances for Court Intervention

A state court vested with a dispute in respect of which an arbitration agreement has been concluded will check its own competence; if at least one of the parties invokes the existence of the arbitration clause, it will reject the claim as not being of the Romanian State courts' competence.

The state courts will also adjudicate claims to set aside the final arbitral award which may be grounded on the lack of jurisdiction of the arbitral tribunal rendering the award.

If the arbitral tribunal in an international arbitration matter decides that it lacks competence to

decide on the matter, such a decision shall be subject to a claim to set aside the decision.

5.4 Timing of Challenge

The arbitral tribunal's ruling that it has jurisdiction may not be challenged before the courts during the arbitral proceedings. Such decision may be subject to judicial review by state courts only by means of a claim to set aside the final arbitral award. Therefore, the arbitration law provides no procedural grounds allowing a party to ask the local courts, during the arbitral proceedings, to determine whether an arbitral tribunal has jurisdiction.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

Romanian law does not provide for the concepts of deferential or de novo as standards of review. Matters of admissibility and jurisdiction may be addressed by means of a set-aside claim filed against the arbitral award.

5.6 Breach of Arbitration Agreement

A state court vested with a dispute in respect of which an arbitration agreement has been concluded will check its own competence and will declare that it lacks competence if at least one of the parties invokes the existence of the arbitration clause. In the case of a domestic arbitration, the court will decline its jurisdiction to the arbitral institution mentioned in the arbitration agreement or will reject the claim as not being of the Romanian State courts' competence in the case of ad hoc arbitration. With regards to an international arbitration, the court will admit the lack of competence plea and will reject the claim as not being of the Romanian State courts' competence.

The court will retain its jurisdiction in settling the dispute only in three exceptional situations, namely:

- if the respondent has submitted its defence without invoking the existence of the arbitration agreement;
- if the arbitration clause is null or inoperable; or
- if the arbitral tribunal cannot be constituted from causes clearly attributable to the defendant in the arbitration.

If none of the three exceptions are applicable, the court will admit the lack of competence plea.

5.7 Jurisdiction Over Third Parties

As a rule, Romanian law does not allow for an arbitral tribunal to assume jurisdiction over individuals or entities that are not part of an arbitration agreement.

However, since the entering into force of the Code of Civil Procedure in 2013, a new provision was introduced stating that third parties may take part in arbitral proceedings following the general civil procedure rules on this aspect, but only if such third party and all the parties agree. Only an accessory joinder claim – meaning that a third party bearing an interest voluntarily joins an ongoing procedure to support one of the parties' positions – is admissible, even in the absence of the consent of all the other parties. However, according to the new 2018 CICA Rules, even the accessory joinder claim is admissible only if all the parties agree.

Matters such as the extension of the arbitration clause to non-signatories, either following direct involvement in the negotiation and/or performance and/or termination of a contract containing an arbitration clause, the "group of

companies" doctrine, or other issues of debate in international arbitration regarding the ambit of the arbitration agreement, are subject to debate according to case law but are not addressed in any way by Romanian law.

The arbitration law does not distinguish between foreign or domestic third parties. Thus, the provisions are applicable to both of them.

6. Preliminary and Interim Relief

6.1 Types of Relief

During the arbitration proceedings the arbitral tribunal may grant, at the parties' request, protective (conservatory) measures and interim relief, as well as acknowledge matters of fact, unless the contrary is stipulated in the arbitration agreement. This provision is similar both in the Code of Civil Procedure and in the rules of the main arbitral institution (CICA) – however, neither defines, except for protective measures, what types of relief can be awarded on a provisional basis. Despite this, taking into account the general civil procedure rules, as an interim remedy, the interested party may apply for freezing measures on goods, provisional measures, or conservatory measures regarding evidence (ie, acknowledgement of matters of fact).

The new CICA Rules in force from 1 January 2018 provide for the possibility of the arbitral tribunal to bifurcate the proceedings and render partial awards as case management techniques aimed at increasing the efficiency of the proceedings by reducing the duration and costs of the arbitration.

The protective measures and interim reliefs are merely recommended for the parties as the award issued by the arbitral tribunal is not enforceable under Romanian law. However, according to Article 1117 of the Code of Civil Procedure, the arbitral tribunal can request national courts to enforce the award regarding the protective measures and interim relief measures.

6.2 Role of Courts

If the parties do not comply voluntarily with the interim relief rendered by the arbitral tribunal, it may request the involvement of the state courts.

The local tribunal whose jurisdiction covers the seat of arbitration may grant protective measures and interim relief, at the parties' request, before or during the arbitral proceedings. Since a similar order for protective measures or interim relief issued by the arbitral tribunal is not enforceable under Romanian law, the courts play a significant role in obtaining such measures and are preferred by the parties for the reason that the courts issue enforceable decisions.

Interim Relief in Aid of Foreign-Seated Arbitrations

Under Romanian law, there are no express provisions regarding the possibility of the national courts to grant interim relief in aid of foreign-seated arbitrations. The Code of Civil Procedure only regulates the possibility of granting such relief with respect to arbitration seated in Romania.

However, Book VII of the Code of Civil Procedure – International Civil Trial, Article 1075 – provides that national courts are competent to grant interim relief regarding individuals and goods located in Romania at the moment of the request, even if, according to national law, the Romanian courts are not competent to render an award with respect to the merits of the case. Although the legal provisions do not directly address international-seated arbitrations, they

can be included in the notion of international civil trial.

Emergency Arbitrators

The Code of Civil Procedure contains no provisions with respect to emergency arbitrators.

The 2018 CICA Rules enable the parties to resort to an emergency arbitrator when they are in need of interim relief before the constitution of the arbitral tribunal. According to Article 4 of Annex 2 of the CICA Rules, upon receiving the request, the President of the Court will appoint an emergency arbitrator within 48 hours, who will deliver a decision in a maximum of ten days.

The emergency arbitrators can allow the same types of interim relief granted by the constituted arbitral tribunal: freezing measures on goods, provisional measures, or conservatory measures regarding evidence (ie, acknowledgement of matters of fact); likewise, the protective measures or interim relief are not enforceable under Romanian law.

As noted, if the parties do not comply voluntarily with the interim relief rendered by the emergency arbitrator, the emergency arbitrator may request the involvement of the state courts.

6.3 Security for Costs

The Code of Civil Procedure does not include the concept of security for costs.

Security for costs is an interim measure – although it has never been defined as such – which in practice has been granted only by arbitral tribunals. As far as is known, no Romanian court of law has ever been requested to render a decision on such a measure.

7. Procedure

7.1 Governing Rules

The arbitration procedure is governed by the Code of Civil Procedure, which contains both substantive law provisions and procedural provisions with respect to arbitration.

Pursuant to the Code of Civil Procedure, parties may establish the procedure of arbitration as such or by reference to the set of rules applicable to a particular arbitral institution. The parties may also choose any procedural law to govern the procedure of arbitration. If the parties fail to establish such a procedure, the arbitral tribunal will do so.

Regardless of the chosen procedure of arbitration, the arbitral tribunal has to guarantee certain fundamental principles such as parties' equality and their right to be heard.

7.2 Procedural Steps

Romanian law does not provide for any specific procedural steps in respect to filing an arbitration claim.

In order to commence arbitration, a party must submit to the arbitral tribunal its written request for arbitration. If the parties have agreed on ad hoc arbitration, the first step is to establish the composition of the arbitral tribunal. If the composition is not stipulated in the arbitration agreement, the party requesting arbitration shall invite the other party in writing to proceed with the procedure to appoint the arbitrators. Where the arbitration is held under the purview of an arbitral institution, the parties shall follow the procedural rules of that institution.

In the majority of cases (including before CICA), the party that wishes to commence arbitration

must first file the request for arbitration with the secretariat of the arbitral institution. A fixed filing fee is generally required.

The parties arbitrating under FIDIC rules undergo a multi-tier dispute resolution procedure (DAB procedure, 56 days amicable settlement period).

7.3 Powers and Duties of Arbitrators

Arbitrators enjoy the powers agreed by the parties (eg, the power to determine the procedural rules applicable in the proceedings), but subject to the limitations provided under the arbitration law, where applicable. Regarding the powers conferred by law, an arbitrator can:

- decide on his or her own jurisdiction;
- assess the case according to his or her "intimate belief";
- determine the place of arbitration and the law applicable to the substance of the dispute, in the absence of the parties' agreement; and
- determine the language of arbitration, in certain circumstances and in the absence of the parties' agreement.

Similarly, the arbitrators' obligations may be agreed in the arbitration agreement, subject to the limitations imposed by law. Regarding statutory duties, an arbitral tribunal is obliged to determine a dispute within six months of its constitution (although this time limit may be readjusted). Further, the arbitrators have a duty to act impartially and independently and must disclose any circumstances that may prevent them from doing so.

7.4 Legal Representatives

There are no particular qualifications or requirements for legal representatives appearing in front of an arbitral tribunal. An authorised legal professional may duly represent a party in arbitration proceedings.

8. Evidence

8.1 Collection and Submission of Evidence

As a rule, the party that files a claim has the obligation to prove it. In general, the parties submit the evidence on which they intend to rely on in limine litis (at the start of the procedure).

The most common means of proof are written records, expert reports, witness statements, and cross-examination. All pieces of evidence are of equal value and subject to the court's evaluation and conviction. According to the traditional rules of evidence within the Code of Civil Procedure, evidence such as a witness statement or cross-examination is taken directly before the arbitral tribunal at the hearing and the expertise should be of a judicial nature (ie, it is carried out by an expert appointed by the arbitral tribunal).

However, the rules on evidence are flexible in international arbitration, which makes it possible in procedures such as ad hoc arbitration, under the ICC Rules or under the 2018 CICA Rules, to submit written witness statements and expert reports drafted by party-appointed experts, followed by cross-examinations of witnesses and experts by the arbitral tribunal.

A particular rule in arbitration is that witnesses are not heard under oath, as would happen before a local court. The arbitral tribunal can also order a party to produce certain evidence.

8.2 Rules of Evidence

In arbitral proceedings seated in Romania, the applicable rules of evidence are those provided

by Romanian law as lex loci, namely the Code of Civil Procedure.

As a matter of principle, the rules on evidence are flexible when it comes to international arbitration and thus parties may derogate from them. Parties are allowed to choose means of administering the evidence which are different from the ones provided by the national law (Code of Civil Procedure). As such, parties have the possibility to use any type of rules, such as the ICC Rules or the Rules on the Taking of Evidence in International Arbitration adopted by the International Bar Association. The 2018 CICA Rules stipulate that the arbitral tribunal, following the parties' agreement, may apply the Rules on the Taking of Evidence in International Arbitration adopted by the International Bar Association.

8.3 Powers of Compulsion

The arbitral tribunal does not have any powers to compel witnesses or experts who refuse to appear before the arbitral tribunal or to apply any sanctions. For any such measures, the parties must file a claim to this effect before the local tribunal whose jurisdiction covers the seat of arbitration.

The arbitral tribunal can also order a party to produce certain evidence. The arbitral tribunal cannot order the production of documents from non-parties. For example, the arbitral tribunal might request written information from a public authority regarding its documents and actions, but if the public authority refuses to comply with such a request and submit the information, the parties or the arbitrators have recourse to local courts to request the enforceable court's order for production of documents.

The local courts might also play a role in acknowledging certain matters of fact prior to or during the arbitration proceedings, such as the state of certain assets, or the statement of a certain witness where there is urgency due to the risk the evidence might get lost.

9. Confidentiality

9.1 Extent of Confidentiality

Arbitration is presumed to be confidential. However, the procedural rules established by the Code of Civil Procedure leave the matter of confidentiality to the parties' agreement or choice of institution.

The 2018 CICA Rules name "confidentiality" as one of the core principles of the arbitration procedure (Article 3 (3)). Unless the parties agree otherwise (in writing), the confidentiality of the arbitral proceedings is protected by the court, its president, management board, and secretariat, by the arbitral tribunal and arbitral assistants, and by all those directly involved in organising the proceedings (Article 4 (1)).

The 2018 CICA Rules provide that the award may, for scientific or academic purposes, be published in part without revealing the name of the parties or prejudicial data. Also, the case file may be studied for academic purposes, after the award is communicated to the parties, in compliance with the confidentiality obligation.

10. The Award

10.1 Legal Requirements

Article 567 of the Code of Civil Procedure stipulates that, unless the parties provided otherwise, the arbitration tribunal must render an award within six months of the constitution of the tribunal for local arbitration and, according to

Article 1115, a year with respect to international arbitration.

According to the Code of Civil Procedure, the arbitral award shall be written, reasoned, and dated and it shall bear the signatures of all the members of the arbitral tribunal. The provisions of Articles 602 and 605 of the Code of Civil Procedure stipulate that the delivery of the award can be delayed for a period of 21 days and require the decision to be communicated to the parties within a month of its delivery.

According to the CICA Rules, the arbitration award shall be drawn up in writing and shall include:

- the names of the members of the arbitral tribunal and of the arbitral assistant, and the place and date of rendering the award;
- the names of the parties, their domicile or residence or, as the case may be, name and registered office, as well as the names of the parties' representatives and of the other persons who attended the hearings of the dispute;
- an indication of the arbitration agreement based on which the arbitral proceedings were initiated;
- the object of the dispute and a summary of the parties' respective claims;
- the factual and legal grounds for the award, or, in case the arbitration was decided ex aequo et bono, the grounds considered by the tribunal;
- the operative part; and
- the signatures of all arbitrators, as well as the signature of the arbitral assistant.

CICA Rules require the award to be delivered and drawn up within a month since the final hearing, a term that can be prolonged by the CICA President, on justified grounds. Also, the award is to be communicated to the parties within three days of having been drawn up.

10.2 Types of Remedies

There is no specific provision in the arbitration law as to the types of remedies available to the parties. Therefore, there is no limitation on the types of remedies that an arbitral tribunal may grant, other than the limitation imposed by the parties' claims in the sense that the arbitral tribunal can only grant what was requested, regardless of the nature of the claim.

However, to a large extent the admissibility of the remedies depends on the substantive and procedural law applicable to the dispute. For example, if the arbitral tribunal applies Romanian procedural law, it may consider a request for a declaratory judgment (such as acknowledgement of a debt) to be inadmissible to the extent that the claimant has the option to bring a claim to enforce its rights (such as obliging the defendant to pay the debt).

10.3 Recovering Interest and Legal Costs

The parties are entitled to recover interest on the principal claim upon such request.

The legal costs of the arbitral proceedings are incumbent on the parties, according to their agreement. In the absence of any such agreement, the legal costs are incumbent on the party that lost the case, proportionally to the admission/rejection of the claim/defence.

With respect to the arbitrators' fees and expenses, according to the Code of Civil Procedure, unless the parties agreed otherwise, each party shall bear the costs of its appointed arbitrator, whereas the costs incurred by a sole arbitrator

or by the presiding arbitrator are to be equally shared by the parties.

11. Review of an Award

11.1 Grounds for Appeal

The parties may appeal an arbitral award by means of a set-aside claim, on one of the following grounds:

- the dispute was non-arbitrable;
- the arbitration agreement did not exist or was invalid or ineffective;
- the constitution of the arbitral tribunal was not in accordance with the arbitration agreement;
- the party requesting the setting aside of the award was not duly notified of the hearing when the main arguments were heard and was absent when the hearing took place;
- the arbitral award was rendered after expiry of the time limit, even though at least one party submitted its intention to object to the late issuance of the award and the parties opposed the continuation of the proceedings after expiry of the time limit;
- the award granted something which was not requested (ultra petita) or more than was requested (plus petita);
- the award failed to mention the tribunal's decision on the relief sought and did not include the reasoning behind the decision, the date and place of the decision, or the signatures of the arbitrators;
- the award violated public policy, mandatory legal provisions, or morality; or
- subsequent to issuance of the final award, the Constitutional Court has declared unconstitutional the legal provisions challenged by a party during the arbitral proceedings or other legal provisions included in the challenged piece of legislation that are closely related to, and inseparable from, those challenged.

The request to set aside the arbitral award may be filed within one month of service of the award to the parties, unless the request is grounded on the subsequent issuance of the Constitutional Court, in which case the time limit is three months after publication of that court's decision. Certain reasons for setting aside an arbitral award may be deemed waived if they are not raised before the arbitral tribunal at the start of the process (particularly those relating to the jurisdiction and constitution of the arbitral tribunal). A request to set aside is subject to a fixed court fee under the law.

The jurisdiction to settle the set-aside claim belongs to the Court of Appeal of the county where the arbitration took place. The ruling issued by the Court of Appeal is subject to a higher appeal.

11.2 Excluding/Expanding the Scope of Appeal

The parties cannot waive the right of appeal or challenge to an award by agreement before the dispute arises. The Code of Civil Procedure provides that any agreement to the contrary is null and void. The parties may waive the right to appeal only after the award is rendered.

The parties cannot expand the scope of appeal.

11.3 Standard of Judicial Review

Romanian law does not provide for the concepts of deferential or de novo as standards of review.

The merits of the case may be reviewed by the Court of Appeal subsequent to the admission of a set-aside claim in the following cases:

- the dispute was non-arbitrable;
- the arbitration agreement did not exist or was invalid or ineffective; and
- the arbitral award was rendered after expiry of the time limit, even though at least one party submitted its intention to object to the late issuance of the award and the parties opposed the continuation of the proceedings after expiry of the time limit.

In all other cases of set-aside, the Court of Appeal will refer the litigation to the arbitral tribunal for a new judgment to take place, if at least one of the parties requests it. If not, the court will make a decision on the merits of the case.

12. Enforcement of an Award

12.1 New York Convention

Romania ratified the New York Convention in 1961 by means of Decree No 186/1961, which came into force on 24 July 1961.

Romania reserved the right to apply the Convention only to:

- the recognition and enforcement of awards made in the territory of another contracting state or, for the awards made in non-contracting states, only subject to reciprocity, namely to the extent to which those states grant reciprocal treatment; and
- disputes arising from legal relationships – whether contractual or not – that are considered commercial under the national law.

Furthermore, Romania has signed multiple bilateral conventions with countries including Albania, Algeria, Belgium, Bulgaria, China, Cuba, the Czech Republic, France, Greece, Hungary, Italy, Moldova, Mongolia, Montenegro, Morocco, North Korea, Poland, Russia, Serbia, Slovenia, Slovakia, Syria, and Tunisia.

12.2 Enforcement Procedure

Domestic arbitral awards are treated and enforced in the same way as court decisions, whereas foreign arbitral awards are subject to recognition and enforcement proceedings before the Romanian courts. As a matter of principle, any foreign arbitral award is recognised and may be enforced in Romania as long as the dispute is arbitrable according to Romanian law and the award does not contain measures contrary to the public order of Romanian private international law.

In order to be granted the recognition and enforcement of an arbitral award, the parties must comply with certain formal requirements – they must file a request to this effect before a competent court and attach legalised or apostille-certified copies of the translated award and arbitration agreement. The court vested with hearing a request for the recognition and enforcement of a foreign arbitral award is prohibited from reviewing the merits of the dispute, its examination being limited to the grounds for refusal of recognition and enforcement, as set out in the Code of Civil Procedure.

The grounds for refusal of recognition and enforcement of the foreign award provided in the Code follow those established in the New York Convention, such as the parties did not have the capacity to conclude the arbitration agreement, the arbitration agreement was not valid, or the award is in regard to a dispute which was not included in the arbitration agreement or which exceeds the limits set by the arbitration agreement.

As a matter of principle, filing a set-aside claim does not influence in any way the enforcement procedure. In other words, the enforcement procedure may be commenced and continued even if a request to set aside the award was filed. However, following a request thereto, the court may suspend the enforcement of the award challenged with a set-aside claim if the debtor is about to suffer an imminent and irreparable damage arising from the enforcement (eg, the debtor carries out a public interest activity which would be affected if the enforcement continued). The enforcement is withheld only until the ruling of the first court is issued.

12.3 Approach of the Courts

The courts in Romania have a positive approach to recognition and enforcement of arbitration awards and rarely refuse recognition and enforcement requests – in these cases, refusal is generally caused by procedural non-compliances rather than substantial law infringement, such as public policy grounds.

Romanian case law is divided with respect to the recognition of partial awards enforcing DAB decisions in FIDIC disputes.

The Code of Civil Procedure refers to public policy in Article 1124, which sets out the legal grounds for the public policy exception as follows. Romanian legislature explicitly adopted the concept of international public policy, which is addressed as the "public order of the Romanian private international law". In regard to the notion of public order of private international law, the Romanian courts overtly approach it as part of the Romanian legal order.

13. Miscellaneous

13.1 Class Action or Group Arbitration

No provision under Romanian arbitration law addresses class-action or group arbitration.

13.2 Ethical Codes

Counsels are subject to strict requirements under Romanian legislation and codes of conduct regarding lawyers' practice. Regarding arbitrators, there is no specific body of law or rules regarding their ethical obligations.

13.3 Third-Party Funding

Third-party funding is not expressly regulated under Romanian law. Therefore, in the absence of any provision to interdict such procedure, third-party funding of the proceedings is permitted.

13.4 Consolidation

Although the arbitration law does not exclude the consolidation of arbitral proceedings, it makes no specific provision for it. The traditional view is that the parties' consent is required for the consolidation of separate arbitral proceedings where the arbitral tribunals are constituted of different arbitration panels. Otherwise, constitution of the arbitral tribunal may be considered to breach the arbitration agreement.

The 2018 CICA Rules provide that any party may request the consolidation of the new proceeding with another existent matter during the request for arbitration or the answer to the statement of defence. The arbitral tribunal might admit the consolidation if:

- all the parties agree with the consolidation;
- all the claims are submitted based on the same arbitration agreement; or

- the claims are made under more than one arbitration agreement, the relief sought arises out of the same transaction or series of transactions, and the arbitral tribunal considers the arbitration agreements to be compatible.

In deciding whether to consolidate, the arbitral tribunal shall consult with the parties and may have regard to, inter alia, the stage of the pending arbitration, whether the arbitrations raise common legal or factual issues, and the efficiency and expeditiousness of the proceedings.

13.5 Binding of Third Parties

Under Romanian law, the arbitration agreement and the award may not impose obligations on third parties. Debate is ongoing over the extension of the arbitration agreement to non-signatories – eg, following their direct involvement in the negotiation, performance, or termination of a contract containing an arbitration clause – but existing law provides no such remedy. Conventional or legal successors of the signatory are generally bound by the arbitration agreement.

Trends and Developments

Contributed by:
Cosmin Vasile and Alina Tugearu
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Zamfirescu Racoți Vasile & Partners Attorneys At Law is a leading law firm in Romania, ensuring both business and dispute resolution support and representation. ZRVP manages the biggest national and international arbitration portfolio in Romania, handling arbitrations conducted under the auspices of numerous arbitral bodies or rules, including the International Court of Arbitration, Paris (ICC), the London Court of International Arbitration (LCIA), the Camera Arbitrale Nazionale et Internazionale di Milano (CAM), the UN Commission on International Trade Law (UNCITRAL), and the International Centre for Settlement of Investment Disputes (ICSID). The firm's practice includes a wide array of disputes in the following areas: construction and infrastructure projects, energy, privatisation, engineering, insolvency, maritime law, media, banking and finance, distribution and transport, production, and real estate.

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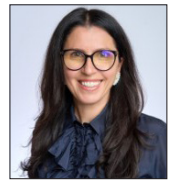

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Continuous Developments in International Arbitration in Romania

Introduction

Romania has one of the most dynamic markets when it comes to international arbitration disputes, and the past year's vitality, with its rise in energy disputes, including investment claims and an ever-increasing tally of construction cases, only confirms it.

In the era of technology, constant change and corresponding adaptation remain key words: the practice of virtual hearings and electronic submissions is no longer a development to note; it is the norm. Moreover, great progress is being brought by the latest technologies, including AI, which are being rapidly adopted in international arbitration which is seeking to develop the best instruments to enhance efficacity. In such context, the advantages of this ADR method clearly delineate it from domestic litigation; and the business community has understood that national courts will never have the same rapid pace in adapting to change and distress, which has boosted interest among companies in including arbitration clauses in their commercial agreements or opting to switch to arbitration.

With the spillover effects of the unceasing armed conflict taking place in Romania's vicinity and the wide-ranging sanctions against Russia raising concerns over Europe's energy resources and reserves, all eyes are on Romania. At the end of June 2023, in a significant move for Romania's energy sector, OMV Petrom and Romgaz gave the green light to the development plan for two offshore gas fields in the Neptun Deep area, a project which marks a major milestone: once operational, the Neptun Deep gas fields are projected to produce a staggering 100 billion cubic meters of natural gas, propelling Romania to the position of the EU's largest gas producer.

General

International arbitration has gained significant ground in Romania over the past decade and a half, with a constant increase in its use resulting predominantly from disputes relating to the various infrastructure projects started by the public authorities in Romania with the help of European financing (from pre-adhesion and post-adhesion funds). International arbitration in such projects started based on the standard International Chamber of Commerce (ICC) arbitration clause from the International Federation of Consulting

Engineers (FIDIC) General Conditions of Contract, but has further evolved and changed.

Starting in 2018, important legislative amendments were adopted, covering a broad category of publicly financed projects subject to public procurement procedures. This led to the replacing of the FIDIC General Conditions of Contract with new forms of public procurement contracts that are mandatory for public works. The new conditions of contract bring significant changes to the claims/dispute resolution procedure, including the removal of the Dispute Adjudication Board (DAB) from the contractual mechanism for dispute settlement and the referral of the dispute to the national arbitration court – the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania (CICA) – as the arbitral institution within the standard arbitration clause (thus replacing the jurisdiction of the International Court of Arbitration (ICC), which was applicable under the former FIDIC General Conditions of Contract).

CICA is currently the most frequently used and important international arbitration institution in Romania. Its 2018 Rules of Arbitration align with the existing rules of the ICC and other similar institutions, and seek to enhance the flexibility and efficiency of arbitration in Romania while at the same time sidestepping the formalism of domestic courts. This change has helped maintain the steady growth trend of national and international arbitration before CICA.

Besides the CICA Rules, international arbitration disputes in Romania are currently carried out under the auspices of the ICC, the Vienna International Arbitral Centre (VIAC), the London Court of International Arbitration (LCIA), and the Swiss Chamber of Commerce (SCC), but also under German and Italian institutions of arbitration (the German Arbitration Institute (DIS) and the Court of Arbitration attached to the German-Romanian Chamber of Commerce and Industry (AHK), mainly used by German/Italian companies and investors).

Romania is also a party to several investor-state disputes. Publicly available information shows that to this date Romania has faced 23 International Centre for Settlement of Investment Disputes (ICSID) cases, of which nine are still pending. The latest claim has been filed in the first half of 2024 following the much-debated bankruptcy of Euroins Romania, one of Romania's most accessible insurance companies, a claim filed under the bilateral investment treaty between Bulgaria and Romania. In early 2024, Romania achieved a significant victory in the long-awaited Rosia Montana multibillion-dollar mining dispute involving Canadian-based Gabriel Resources. The outcome surprised the Romanian government, which had initially anticipated paying at least USD2 billion and possibly up to USD6.5 billion in compensation.

This is the context which has allowed both international and domestic arbitration to become well established in Romania, with a steady-paced growth in the number of arbitration cases per year.

Key industries

Although the construction industry has remained the main sector experiencing international arbitration activity for quite some years now, the ongoing energy crisis, which is manifest in the increases/variations in the prices of fossil fuels, has led to a clear rise in energy disputes.

Disputes from energy contracts have historically generated an impressive number of commercial and investment arbitration cases, but the end

of 2021/beginning of 2022 has seen an overwhelming number of disputes caused by the energy crisis, with many disputes arising from breaches of contract following the vertiginous rise in the price of natural gas. In addition, there has been a plethora of investment claims, seven out of the nine pending investment cases before ICSID being based on the Energy Charter Treaty (ECT), among which three were filed during 2022. Moreover, there are other investors pursuing energy-related claims against Romania.

During 2022, the arbitration community in Romania could already sense the significant impact of the case law following Achmea, Komstroy, and the recent decision upholding Spain's intra-EU objection, which all make explicit that there is no place for intra-EU arbitration proceedings under the ECT. This trend is bound to influence the outcome of the many renewables-related ECT claims that Romania is currently facing.

Romanian courts and arbitration

Following constant engagement in settling arbitration-related disputes, the Romanian courts now have a good grasp of the arbitration concepts and, during the past few years, have started to adopt an increasingly pro-arbitration approach.

Moreover, with the new CICA Rules and best practice concepts therein, the domestic courts have started to extend their experience and comprehension beyond the typical claims for enforcement and recognition of foreign arbitral awards, setting aside arbitral awards or requests for interim measures in relation to pending arbitration proceedings, with more and more cases covering emergency arbitrator proceedings.

Also, the domestic courts' grasp of complex infrastructure disputes settled through international arbitration proceedings and stemming from publicly financed projects subject to public procurement procedures has visibly consolidated following a mid-2018 reform of the contentious administrative and public procurement laws. This reform put a stop to previous uncertainty and ruled that all disputes relating to the execution of these contracts (which have the legal nature of administrative contracts) are to be settled by the commercial/civil sections of the courts. The commercial sections within the tribunals have thus had the possibility to specialise over these past years in understanding complex construction disputes based on the FIDIC General Conditions of Contract or variations thereof, which in its turn has led to a stabilisation of the related case law and therefore to predictability regarding the potential decisions to be adopted by the domestic courts.

Landmark decision by Romania's Supreme Court on the establishment of arbitral institutions

In mid-2024, clarity was brought to bear regarding the establishment and organisation of arbitral institutions in Romania, following a legal appeal initiated by the Prosecutor General of the High Court of Cassation and Justice at the request of the Justice Minister, due to inconsistent interpretations of relevant legal provisions. This appeal specifically addressed arbitral institutions formed by associations and foundations in Romania. Prior to this landmark decision in June, Romanian courts had conflicting perspectives on the capability of such entities to establish arbitral institutions. The High Court determined that only associations and foundations designated as "organisations of public interest" can set up arbitral institutions, but only with explicit legal authorisation. While the effects of this decision will be future-oriented and its full text is pending publication, it will impact the

existence and functioning of arbitral institutions established by these entities, subjecting them to Romanian legal conditions for arbitral awards. Notably, this decision applies solely to organizations formed under Romanian law, allowing international arbitral institutions (eg, ICC, LCIA, VIAC, SCC) to continue conducting arbitrations in Romania without disruption.

Joining efforts to discuss critical developments in international arbitration – Bucharest Arbitration Days 2024, fifth edition

The Bucharest Arbitration Days (BArD) is an event dedicated to international arbitration and the necessary reforms in the field, first organised in 2019 by CICA. The fifth occasion of this conference in 2024 addressed the subject of "Critical Developments in International Arbitration" and benefited from the participation of more than 200 delegates and 40+ speakers from 12 countries and three continents, including representatives from arbitration institutions, arbitrators, in-house and external counsel, and legal practitioners.

The Bucharest Arbitration Days 2024 focused on key developments in international arbitration, addressing the ongoing legitimacy concerns within the field. Discussions included ethics and conflicts in international arbitration, highlighted by recent updates to the IBA Guidelines on Conflicts of Interest; the evolving relationship between arbitration and courts; diversity in arbitration, considering various seats and institutions; and the implications of technology on evidence.

Bucharest Arbitration Days 2024 concentrated on disputes related to foreign investments, addressing the critical regulatory landscape of states amid the transition to clean energy and international climate change commitments.

In his keynote speech, Professor Julian D. Lew from Queen Mary University in London addressed the question: "Whose arbitration is it?" He noted the significant growth of arbitration, highlighting the increase in specialised professionals, institutions, and cases over the past century. However, he warned that such booms can lead to busts unless professionals remain vigilant to necessary changes. To enhance the arbitral system's efficiency – aligned with its touted benefits of expediency, expertise, and economy – practitioners must possess strong international and commercial law skills to navigate the diverse backgrounds of parties involved. Key procedural improvements are necessary, particularly in areas such as document production and witness evidence, and should include more simplified processes and increased communication between the tribunal and parties to streamline submissions.

The participation of renowned professionals from all over the world, including keynote speakers Prof. Julian DM Lew KC, International Arbitrator, Twenty Essex, Prof. Maria Chiara Malaguti, President of UNIDROIT, Julie Bedard, Head of Skadden's International Litigation and Arbitration Group for the Americas, Jonathan Wood, President of the Chartered Institute of Arbitrators, Prof. Eduardo Silva Romero, Partner, Wordstone Dispute Resolution, confirms Romania's continuous developments in international arbitration, establishing Bucharest as a burgeoning hub alongside more established arbitration centres.

SAUDI ARABIA

Law and Practice

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Khoshaim & Associates is Saudi Arabia's only independent full-service Saudi law firm recognised as top tier by all major legal directories. The Dispute Resolution practice, led by managing partner Zeyad Khoshaim and partner Abdullah Alajlan, operates from Riyadh and Jeddah with a team of seasoned practitioners with experience in local and international law firms. The firm excels in arbitration governed by Saudi law, understands the legal needs of its clients both domestically and internationally, and has significant expertise in applying Shariah principles effectively. The lawyers frequently serve as counsel, arbitrators, and experts in proceedings before major arbitration centres like the ICC, LCIA, and SCCA. It also provided independent expert opinion on Saudi law matters before foreign courts, including the English courts. Recent successes include securing a complete dismissal of claims and a multimillion-dollar counterclaim in a USD100 million arbitration arising under Saudi law.

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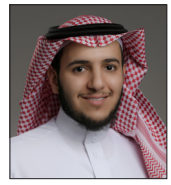
Zeyad Khoshaim is the managing and founding partner of K&A, the only independent Saudi law firm ranked top tier by all major legal directories. Qualified in New York, California, Washington DC, and Saudi Arabia, Zeyad has over 20 years of experience in energy, petrochemical, and oil and gas projects. He regularly serves as counsel, arbitrator or expert in international arbitrations related to major Saudi projects, including those administered under the SCCA and ICC Arbitration Rules. Zeyad holds a Bachelor of Engineering and a Doctor of Jurisprudence from Vanderbilt University and a Management of Law Firms certificate from Harvard Law School.



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1. General

1.1 Prevalence of Arbitration

Arbitration is a recognised method for resolving disputes in Saudi Arabia, though courts remain the primary venue if settlement efforts fail. Recent government initiatives are aimed at promoting arbitration among domestic and governmental entities.

Notably, on 19 January 2019 the President of the Council of Ministers issued High Order No. 28004, marking a policy shift that encourages ministries, government authorities, and state-owned companies to resolve disputes with foreign investors through arbitration. This directive mandates that arbitration occur within Saudi Arabia and highlights the Saudi Center for Commercial Arbitration (SCCA) as the preferred option. Additionally, it allows for arbitration under other licensed centres in Saudi Arabia.

1.2 Key Industries

In recent years, arbitration activity has notably increased in the construction and sports industries. This surge can be attributed to several factors:

- Time Sensitivity: Both industries are highly time-sensitive, prompting parties to seek expedited dispute resolution compared to traditional methods.
- Industry Expertise: Specialised knowledge is highly valued, and arbitration allows parties to select arbitrators with specific expertise relevant to their disputes.
- Confidentiality: Sensitive projects benefit from arbitration's higher confidentiality, as proceedings and awards are generally private, unlike court judgments, which are publicly published.

Additionally, with Saudi Arabia's Vision 2030 (aimed at diversifying the Saudi economy and fostering growth in various sectors), there has been a corresponding rise in disputes within these evolving industries. This shift highlights the growing importance of arbitration as a preferred method of resolving conflicts in these rapidly developing fields.

1.3 Arbitration Institutions

The SCCA is the premier arbitration institution in Saudi Arabia. Since its establishment in 2014, the SCCA has made significant strides, including the introduction of updated arbitration rules in 2023 that align with top international standards. It has also set up an arbitration court featuring globally recognised practitioners and scholars, and opened an office in Dubai to boost regional presence and accessibility. The SCCA is now the preferred centre for resolving disputes involving state-owned entities and governmental bodies.

Additionally, the SCCA has actively promoted arbitration within Saudi Arabia, notably through the successful inaugural Riyadh International Disputes Week (RIDW) held in March 2024. It has strengthened its role by signing several Memoranda of Understanding (MoUs) with major institutions and international bodies to advance alternative dispute resolution (ADR) in Saudi Arabia and the MENA region.

For example, in May 2023 the SCCA partnered with Saudi Arabia's Economic Cities and Special Zones Authority (ECZA) to enhance ADR services in economic cities and special economic zones, increasing their appeal to both local and international investors.

While less established than the SCCA, the Saudi Sports Arbitration Center is gaining traction. Created to handle disputes within the sports sec-

tor, it is becoming increasingly relevant due to Saudi Arabia's substantial investments in sports, including football. Though it is still developing its presence and capabilities, the Sports Arbitration Center is aligned with the Kingdom's growing focus on sports.

1.4 National Courts

There is no single court designated for all matters arising from arbitration agreements.

Instead, the appeal court that would have had jurisdiction without an arbitration agreement will handle disputes related to both international and domestic arbitrations (eg, the Appeal Labour Court for labour disputes and the Appeal Commercial Court for commercial disputes).

For international commercial arbitration conducted within the Kingdom or abroad, Article 7(2) of the Saudi Arbitration Law, issued under Royal Decree No. (M/34) dated 24/05/1433H (16 April 2012 AG), specifies that the territorial jurisdiction would be for the relevant Court of Appeal in Riyadh, unless the parties agree on another Court of Appeal within the Kingdom. Typically, the Commercial Court, particularly its appeal circuits, handles most arbitration cases, as most disputes arise from commercial relationships.

However, there are specialised courts dedicated to enforcement actions related to arbitral awards. The Enforcement Law, introduced by Royal Decree No. M/78 dated 19/09/1428H (1 October 2007) (the "Enforcement Law"), marked a substantial shift in Saudi Arabia's arbitration landscape by transferring enforcement proceedings from the Saudi Board of Grievances (BoG) to specialised enforcement courts.

2. Governing Legislation

2.1 Governing Law

Arbitration in the Kingdom of Saudi Arabia is governed by the Arbitration Law, established by Royal Decree No. (M/34) dated 24/05/1433H (16 April 2012), which took effect on 8 July 2012, and its Implementing Regulations dated 22 May 2017 (the "Implementing Regulation").

The Arbitration Law is based on the UNICTRAL Model Law. The most notable difference between the Saudi Arbitration Law and the UNCITRAL Model Law is that the Saudi law includes references to Shari'ah principles, specifically in Articles 5, 14, 25, 38, 50, and 55.

2.2 Changes to National Law

There have been no significant changes to the Arbitration Law in the past year. However, the introduction of the Civil Transactions Law (CTL), enacted by Royal Decree No. M/1441 dated 15 December 2023, is expected to have a notable impact on the arbitration landscape in the Kingdom of Saudi Arabia. The CTL, which came into force on 1 January 2024, introduces a comprehensive and codified framework for contract law and liabilities, which previously relied on Shari'ah principles that were not consolidated into a single code. By integrating these principles into one clear and comprehensive enactment, the CTL enhances legal predictability and consistency for both courts and arbitral tribunals.

This new framework provides clearer guidelines and reduces ambiguity in contractual relationships, which is crucial for arbitration. International parties often seek predictable and transparent legal environments, and the CTL's alignment with global commercial standards has likely made Saudi Arabia's arbitration system more attractive. As a result, the CTL is likely

to increase confidence among foreign investors and businesses, encouraging them to use arbitration more frequently in the Kingdom.

3. The Arbitration Agreement

3.1 Enforceability

Under Article 9 of the Saudi Arbitration Law, an arbitration agreement must be in writing to be valid and enforceable. While this is the primary requirement, other rules may impact its validity, as outlined below:

- The arbitration agreement can be made either before or after the dispute arises, including when the dispute is already before a court; however, if the dispute is already before a court, the arbitration agreement must clearly specify the matters/issues it covers, or it would be deemed void.
- A written arbitration agreement can be in the form of a document issued by both parties, an exchange of documented correspondence, telegrams, or other electronic or written means of communication.
- A reference to an arbitration clause in a contract or any document, or to the provisions of a model contract, international convention, or similar document, will also be considered a valid arbitration agreement if the reference clearly incorporates the clause into the contract.

Furthermore, under Article 10 of the Saudi Arbitration Law, the individual entering into the agreement must have the legal capacity to bind the party he represents to arbitration.

Article 10(2) of the Saudi Arbitration Law stipulates that government bodies can enter into arbitration agreements only with the approval of the Prime Minister, unless a specific legal provision allows otherwise. Subsequently, the Government Tenders and Procurement Law (the "GTP Law"), enacted by Royal Decree M/128 on 13 November 1440H (corresponding to 16 July 2019), and its Implementing Regulations issued by Minister of Finance Resolution No. 1242 on 21 March 1441H (corresponding to 19 November 2019), which took effect on 1 December 2019, updated this requirement. Under Article 92(2) of the GTP Law, government entities can now enter into arbitration agreements with prior approval from the Saudi Minister of Finance.

Article 154 of the Implementing Regulations of the GTP Law outlines additional requirements for government entities agreeing to arbitration:

- Arbitration applies only to contracts valued over SAR100 million, subject to adjustment by the Minister of Finance.
- Arbitration must occur in Saudi Arabia, administered by the SCCA or another licensed centre, and governed by Saudi Arabian law.
- The arbitration agreement must be included in the contract documents.
- Contracts performed outside Saudi Arabia are exempt from the value requirement, allowing arbitration regardless of contract value, but approval from the Saudi Minister of Finance is needed.

3.2 Arbitrability

Under the Saudi Arabian law, certain subject matters are excluded from arbitration. Specifically, Article 2 of the Saudi Arbitration Law states that the provisions of the law do not apply to personal status disputes or matters not subject to reconciliation.

- Personal status disputes typically involve issues related to family law such as marriage, divorce, child custody, alimony, visitation, endowments, wills, paternity, absence, death, determination of heirs, and inheritance, including real estate disputes involving endowments or wills, or matters concerning minors or absentees (see Article 33 of the Saudi Law of Civil Procedures).
- Matters not subject to reconciliation refer to issues where settlement is legally prohibited, such as criminal cases against the state, crimes with a prescribed punishment under Shari'ah and matters of public policy.

The general approach to determining whether a dispute is "arbitrable" in Saudi Arabia involves assessing whether the dispute falls within these excluded categories. If the dispute pertains to personal status or involves issues that cannot be reconciled, it is deemed non-arbitrable and cannot be resolved through arbitration.

3.3 National Courts' Approach

In Saudi Arabia, national courts generally do not have the authority to decide on the applicable law in an arbitration agreement as this is left to the parties. According to the law and practice, parties to an arbitration agreement typically have the autonomy to determine the applicable law themselves. This choice is usually specified within the arbitration agreement itself or agreed upon during the arbitration proceedings. The role of the national courts is primarily to support arbitration proceedings, enforce arbitration agreements, and assist in the recognition and enforcement of arbitral awards, rather than deciding on the substantive law applicable to the dispute.

In Saudi Arabia, national courts generally support the enforcement of arbitration agreements. They honour the parties' choice to use arbitration instead of litigation for resolving disputes. When a dispute is covered by a valid arbitration clause, courts usually enforce the agreement by directing the parties to arbitration. In fact, Article 11 of the Arbitration Law specifies that courts cannot hear a dispute subject to an arbitration clause if the respondent raises a non-jurisdictional defence based on the arbitration clause before presenting any other claims or defences.

Furthermore, Saudi courts adhere to the principle of competence-competence, which means they recognise arbitrators' authority to determine their own jurisdiction. Courts usually intervene minimally in arbitration proceedings, focusing on upholding the parties' agreement and ensuring compliance with the Saudi Arbitration Law. They also support arbitration when necessary, such as by, for instance, issuing interim orders in support of arbitration (see Article 22 of the Saudi Arbitration Law).

However, courts may refuse to enforce arbitration agreements or awards if they conflict with public policy or involve issues considered non-arbitrable under Saudi law.

3.4 Validity

Article 21 of the Saudi Arbitration Law embraces the global principle of separability, which treats the arbitration agreement as distinct from the main contract. This principle ensures that the arbitration clause is autonomous and independent from the main contract, thereby protecting it from challenges directed at the main contract itself.

4. The Arbitral Tribunal

4.1 Limits on Selection

In Saudi Arabia, parties have complete autonomy in selecting arbitrators, subject to specific conditions outlined in Article 14 of the Saudi Arbitration Law. In short, the chosen arbitrator:

- must have full legal capacity;
- demonstrate good conduct, and have a reputable standing; and
- hold at least a university degree in Shari'ah or law. However, if the arbitral tribunal consists of more than one arbitrator, this educational requirement applies only to the chairperson of the tribunal.

4.2 Default Procedures

Under Article 15 of the Saudi Arbitration Law, if the parties cannot agree on the selection of arbitrators, a default procedure is applied.

For a tribunal with one arbitrator, the competent court (refer to **1.4 National Courts**) appoints the arbitrator within 30 days of receiving a request from one of the parties.

In a tribunal with three arbitrators, each party selects one arbitrator, and these two then appoint the chairperson (or president). If a party fails to appoint their arbitrator within 15 days or if the two appointed arbitrators cannot agree on the chairperson within 15 days, the competent court will appoint the chairperson within 15 days upon receiving a petition from a party requesting to expedite the arbitration. This procedure also applies to tribunals with more than three arbitrators.

Additionally, if the parties fail to agree on appointment procedures or if procedural failures occur, the competent court will intervene to take necessary measures unless the arbitration agreement specifies alternative methods.

When appointing an arbitrator, the competent court must adhere to the conditions specified in the arbitration agreement and meet the requirements outlined in Article 14 of the Saudi Arbitration Law.

The decision of the competent court appointing the arbitrator is not subject to appeal.

4.3 Court Intervention

Please refer to **4.2 Default Procedures** above.

4.4 Challenge and Removal of Arbitrators

Under Article 16 of the Saudi Arbitration Law, the grounds for challenging an arbitrator include several key factors. An arbitrator must have no vested interest in the dispute and must disclose any circumstances that might raise justifiable doubts about his impartiality or independence, both at the time of appointment and throughout the arbitration proceedings. Additionally, an arbitrator is barred from considering or hearing a case for reasons like those that disqualify a judge, even if neither party requests it. Those reasons are:

- If the arbitrator or his/her spouse have a similar dispute to the dispute at hand.
- If the arbitrator or his/her spouse developed an animosity with one of the parties or the party's spouse after the initiation of the proceedings; provided that such animosity was not developed with the intent of challenging the arbitrator.
- If the arbitrator's divorced spouse (with which the arbitrator has a child) or if one of the arbitrator's relatives (or his/her spouse's relatives) up to the fourth degree (parents, grandparents, children, grandchildren, siblings, uncles,

aunts, and first cousins) have an ongoing dispute in court with one of the parties of the dispute or his/her spouse; provided that such dispute was not raised for the purpose of challenging the arbitrator.
- If one of the parties is the arbitrator's servant, or if the arbitrator is used to eat or live with one of the parties, or if he/she had received a gift from one of the parties shortly before or after initiating the arbitration.
- If the arbitrator has an animosity or amity with one of the parties to the point that it is likely that he/she cannot rule without bias (see Article 96 of the Saudi Law of Civil Procedures).

The Arbitration Law also specifies additional grounds for challenging an arbitrator, including:

- The presence of circumstances that create justifiable doubts about his impartiality or independence.
- If the arbitrator lacks the qualifications agreed upon by the parties.
- If the arbitrator lacks the legal requirements to be appointed as arbitrator (see **4.1 Limits on Selection** above).

Furthermore, a party cannot challenge an arbitrator he appointed or participated in appointing, except for reasons that became known after the arbitrator's appointment.

The parties to the arbitration can agree on the procedures for challenging arbitrators. However, if no procedure is agreed, then the procedure highlighted in Article 17 of the Saudi Arbitration Law will apply.

Article 17 of the Saudi Arbitration Law states that a party seeking to disqualify an arbitrator must submit a written challenge within five days of becoming aware of the arbitrator's appointment or discovering grounds permitting challenging such arbitrator, such as doubts about the arbitrator's impartiality or independence, or the lack of qualifications agreed upon by the parties.

If the arbitrator does not recuse themselves or if the other party did not accept the petition within five days, the tribunal must decide on the disqualification within 15 days. Should the tribunal reject the challenge, the party may appeal to the competent court (see **4.1 Limits on Selection**) within 30 days, with the court's decision being final and not subject to further appeal.

Filing a disqualification petition with the arbitral tribunal suspends the arbitration proceedings. However, an appeal to the competent national court against the tribunal's decision on the challenge does not suspend the proceedings.

If the disqualification is granted, either by the tribunal or the court on appeal, all prior arbitration procedures, including any awards, are rendered null and void.

4.5 Arbitrator Requirements

Under Article 16 of the Saudi Arbitration Law, an arbitrator must disclose in writing any circumstances likely to give rise to justifiable doubts about his independence and impartiality from the time of his appointment and throughout the arbitration process. Please refer to **Section 4.2 Default Procedures** above for more details.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

For matters which may not be referred to arbitration under the governing law of the jurisdiction, please refer to **3.2 Arbitrability** above.

5.2 Challenges to Jurisdiction

The Saudi Arbitration Law recognises the principle of competence-competence. Article 20 stipulates that the arbitral tribunal decides on all jurisdictional issues, including challenges to the validity of the arbitration agreement or claims that the dispute is not covered by the agreement.

5.3 Circumstances for Court Intervention

The Saudi Arbitration Law supports minimal court intervention, highlighting the arbitral tribunal's independence and the parties' autonomy. However, it permits court intervention under specific conditions. Notably, the court can review jurisdictional issues only if the arbitral tribunal rejects a plea of lack of jurisdiction. This review occurs exclusively at the annulment stage (see Article 20(3) of the Saudi Arbitration Law).

5.4 Timing of Challenge

Parties can challenge the arbitral tribunal's jurisdiction in court only after the tribunal has rendered a final award. Article 20(3) of the Saudi Arbitration Law states that a decision by the arbitral tribunal to reject a defence based on the tribunal's lack of jurisdiction can only be challenged during the annulment stage, which occurs after the final award has been issued.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

If a tribunal rejects a jurisdictional challenge and the affected party files a request for annulment under Article 50(4) of the Saudi Arbitration Law, the Competent Court will evaluate the appeal based solely on procedural aspects of the jurisdictional issue, without delving into the facts or merits of the underlying dispute. The court will review the relevant documents, particularly the arbitration agreement or clause, and render its decision accordingly. If the court upholds the award as valid, this decision is final and cannot be appealed, as outlined in Article 51(2) of the Saudi Arbitration Law. If the court decides to annul the award, the losing party may appeal the decision within 30 days of receiving the court's notification.

In general, courts rarely annul arbitration awards absent a clear violation of the law.

5.6 Breach of Arbitration Agreement

Under the competence-competence principle, the Saudi Arbitration Law outlines specific procedures when a dispute is brought before a court despite being covered by an arbitration agreement. According to Article 11, the court must dismiss the case if the defendant raises a jurisdictional defence based on the arbitration agreement before addressing any other issues.

Additionally, Article 12 requires the court to refer the parties to arbitration if an agreement to resort to arbitration is reached while the dispute is being considered before the competent court.

There have been few instances where courts have denied requests to compel arbitration due to violations of the arbitration agreement, such as failing to follow agreed upon pre-arbitration steps. Recently, however, courts have generally deferred these matters to the arbitral tribunal, in accordance with Article 20 of the Arbitration Law.

5.7 Jurisdiction Over Third Parties

Although the Arbitration Law does not address multi-party arbitration directly, Article 13 of the Implementing Regulation allows the arbitral tribunal to approve the intervention or joinder of a third party, provided all parties, including the third party, give their explicit consent. Absent

such consent, the tribunal cannot assume jurisdiction over third parties.

6. Preliminary and Interim Relief

6.1 Types of Relief

Under Article 23 of the Saudi Arbitration Law, an arbitral tribunal is permitted to award preliminary or interim relief if granted the authority to do so by the parties. The tribunal, therefore, at the request of either party, may issue provisional or precautionary measures as deemed necessary based on the nature of the dispute. The tribunal may also require the requesting party to provide a financial guarantee to cover the enforcement of these measures. If the party against whom the order is issued fails to comply, the tribunal can authorise the other party to take necessary steps to enforce the order or request enforcement from the competent authority. The tribunal's interim measures are binding and enforceable.

6.2 Role of Courts

The competent Saudi Court can order provisional or precautionary measures. Parties can file such requests prior to commencing arbitration proceedings, or upon request by the arbitral tribunal during arbitration proceedings (see Article 22(1) of the Saudi Arbitration Law).

Although the Saudi Arbitration Law does not specifically address whether interim relief can be granted in support of foreign-seated arbitration, there is no indication that it would be excluded.

The Arbitration Law does not mention emergency arbitrators. However, under the 2023 SCCA Arbitration Rules (ie, the leading arbitration rules in the Kingdom) an emergency arbitrator can issue interim orders (see 2023 SCCA Rules, Appendix III, Article 7(2)). These orders have the same effect as those issued in regular arbitration. The interim award or order is binding from the date it is issued, and the parties agree to comply immediately, waiving any rights to appeal or judicial review.

The 2023 SCCA Rules, Appendix III, Article 7(3), grants the emergency arbitrator the power to award provisional or precautionary measures deemed necessary, including maintaining or restoring the status quo, preventing imminent harm, providing injunctive relief, or preserving evidence relevant to the dispute.

If a party fails to comply with precautionary measures issued by the arbitral tribunal, the other party may seek assistance from the competent authority to enforce these measures, as outlined in Article 22 of the Arbitration Law.

6.3 Security for Costs

Saudi law does not cover security for costs when filing claims. Additionally, it is uncommon for Saudi courts to require claimants to provide security for costs in disputes before Saudi courts.

However, Article 54 of the Saudi Arbitration Law allows a court to require a guarantee or financial security when it orders the suspension of enforcement of an award. The Saudi Enforcement Law further permits enforcement courts to mandate security for claims through the precautionary sequestration of movable and immovable assets (see Articles 32 and 42 of the Saudi Enforcement Law). The applicant might need to provide cross-indemnity secured by a bank guarantee to cover any costs or losses incurred by the debtor due to these measures.

Under the 2023 SCCA Arbitration Rules, the Arbitral Tribunal can order any party to provide

security for costs upon request (see Article 35(2) of the 2023 SCCA Arbitration Rules).

7. Procedure

7.1 Governing Rules

Article 4 of the Saudi Arbitration Law provides that the parties to arbitration may determine the procedure to be followed, including the option to delegate this choice to a third party, such as an individual, tribunal, organisation, or arbitration centre, either within the Kingdom or internationally.

Article 25 of the Arbitration Law further allows the parties to agree on the procedural rules for the arbitration tribunal, including adopting the rules of any arbitration institution, whether in Saudi Arabia or abroad, as long as these rules comply with Shari'ah. In the absence of such an agreement, the arbitral tribunal may establish the procedures it deems appropriate, in accordance with Shari'ah and the Law.

7.2 Procedural Steps

The Saudi Arbitration Law does not provide for any particular mandatory procedural steps as long as public policy is preserved. The law ensures that all parties are treated equally and given a full and equal opportunity to present their case (see Article 27 of the Saudi Arbitration Law).

The Saudi Arbitration Law provides for default procedural steps/matters which generally pertain to the following:

- Arbitration proceedings begin on the day the request for arbitration is received by the respondent, unless otherwise agreed by the parties (Article 26).
- The parties can agree on the arbitration venue, whether within the Kingdom or abroad. If no agreement is reached, the tribunal will determine the venue based on the case's circumstances and may convene at any location it deems suitable for deliberation, hearings, or inspections (Article 28).
- Arbitration is conducted in Arabic unless the parties or tribunal agree on a different language. The tribunal may also require translations of documents submitted (Article 29).
- The plaintiff must submit a written statement of claim, including all relevant details and evidence, within the agreed or tribunal-determined timeframe. The defendant must respond with a written statement of defence within the same timeframe (Article 30).
- All briefs, documents, and evidence must be shared with both parties (Article 31).
- Parties may amend or supplement their claims or defences during the proceedings, provided this does not delay the arbitration (Article 32).
- The tribunal will hold hearings to allow parties to present their cases, unless otherwise agreed. Hearings must be properly notified, and minutes of hearings are recorded and shared with the parties (Article 33).
- If the plaintiff fails to submit a claim statement without justification, the tribunal must terminate the proceedings, unless the parties agree otherwise. If the defendant fails to respond, the tribunal must continue the proceedings, unless the parties agree otherwise (Article 34).
- The tribunal may proceed and issue an award based on available evidence if a party fails to attend a hearing or submit documents requested by the tribunal (Article 35).
- Unless agreed otherwise, the arbitral tribunal may appoint one or more experts to provide reports on specific issues, with the appoint-

ment and findings communicated to both parties. Each party must provide the expert with relevant information and allow access to necessary documents. The tribunal will resolve any disputes with the expert and ensure both parties can review and comment on the expert's final report (Article 36).
- The tribunal is required to render the final award within 12 months from the start of the arbitration unless otherwise agreed by the parties. The tribunal may extend this period by up to six months. If the tribunal does not issue the award within this extended time, a party can ask the competent national court to either set a new deadline for the award or terminate the arbitration. If an arbitrator is replaced, the deadline for issuing the award is extended by an additional thirty days (Article 40).
- The arbitration award must be written, reasoned, and signed by the arbitrators (Article 42(1)).

7.3 Powers and Duties of Arbitrators

Arbitrators shall exercise their mission in compliance with the duties of impartiality and independence (see Article 16 of the Saudi Arbitration Law).

As to the powers attributed to the arbitral tribunal, these include inter alia the following:

- ordering interim relief and conservatory measures if granted by the parties;
- issuing interim and partial awards;
- deciding on its own jurisdiction;
- determining procedural rules if the parties do not agree;
- appointing experts;
- assessing, admitting, and weighing evidence; and
- deciding the place of arbitration if not agreed upon by the parties and holding meetings/hearings where it deems appropriate.

However, the tribunal cannot hear challenges related to document forgery as such matters fall within the jurisdiction of national courts, which handle criminal proceedings. If issues such as forgery or other criminal acts arise the tribunal may continue with the dispute if deciding on these issues is not essential. Otherwise, it shall suspend the proceedings until a final judgment on such criminal proceedings is reached, which will also suspend the deadline for issuing the arbitration award (Article 37 of the Saudi Arbitration Law).

For more information on this point, please also see our answer to question **10.2 Types of Remedies**.

7.4 Legal Representatives

In a recent study conducted by the SCCA in co-ordination with the Saudi Ministry of Justice (MoJ) (discussed on the SCCA website on 16 August 2022), it was confirmed that Saudi legislation allows parties to choose any representative of their choosing, including foreign legal counsel, for arbitral tribunals. In addition, there are no requirements for representatives to be lawyers or Saudi nationals.

Article 14 of the Arbitration Law reflects the same principle, allowing for the selection of arbitrators without restrictions based on gender, nationality, or profession. However, it mandates that a sole arbitrator or the chair of an arbitral tribunal must hold a university degree in law or Shari'ah.

8. Evidence

8.1 Collection and Submission of Evidence

The Saudi Arbitration Law does not specifically outline the procedures for collecting and submitting evidence. Typically, parties present evidence to support their written submissions, and the relevant rules are those set out in the newly enacted Saudi Evidence Law issued by Royal Decree No. (M/43) dated 26/5/1443H (corresponding to 30/12/2021 AG) (the "Saudi Evidence Law").

Arbitral tribunals have the authority to admit, assess, and weigh evidence. They may conduct any evidentiary procedures they find appropriate, reverse previously ordered procedures, and grant or deny requests related to evidentiary matters without affecting the parties' rights of defence. The types of evidence that can be admitted include:

- documentary evidence;
- witness statements;
- expert reports;
- site inspections ordered by the tribunal.

Fact witnesses and technical experts may be examined and cross-examined during hearings, but witness testimony is not taken under oath.

It is common for tribunals to use the IBA Rules on the Taking of Evidence in International Commercial Arbitration, provided the parties agree to it and to the extent agreed upon.

However, concepts such as 'discovery' and 'legal privilege' are not recognised under Saudi Law. Some protection is acknowledged regarding clients' documents and information, with certain exceptions.

Under the Saudi Evidence Law, document disclosure is regulated by specific provisions. In sum, Articles 34 to 37 outline the framework for requesting and producing documents as follows:

Article 34

Under this article a litigant may request the court to order an opposing party to produce documents in any of the following instances:

- The law allows such a request.
- The document is a joint document that serves mutual interests or establishes reciprocal obligations and rights.
- The opposing party relies on the document at any stage of the case.

The request must include:

- a detailed description and content of the document;
- evidence indicating the document is in the opposing party's possession;
- the facts which the document will be used to evidence, and the grounds for the production of the document.

Article 35

If the opposing party acknowledges possession or remains silent, or if the applicant adequately substantiates his request, then the court will order production of the document.

If the opposing party abstains from producing the document after being granted one grace period, the document copy provided by the applicant will be considered a true copy. However, if the applicant did not have a copy, then the court will accept applicant's words on the description and content of such document.

If the defending party denies that the document exists and the applicant fails to provide sufficient evidence to support his claim, then the applicant may request the court to order the opposing party to take an oath regarding the document.

Article 36

In commercial lawsuits, a litigant may request document production if:

- the document is specified or identifiable;
- it is relevant to the lawsuit or reveals facts pertinent to it;
- it is not confidential or protected by trade secrets under the law or pursuant to the parties' agreement;
- refusal to comply with the court's order may be deemed presumptive evidence of the document's relevance.

Article 37

The court can:

- order a third party to produce a document in their possession;
- request a public entity to provide a certified copy of a document if the litigant cannot produce it. The court may also seek verbal or written information from the public entity if permitted by law.

8.2 Rules of Evidence

Unless the parties agree otherwise, the rules of evidence used in litigation will also apply to arbitration conducted in the Kingdom of Saudi Arabia.

8.3 Powers of Compulsion

Under Saudi law, arbitral tribunals lack the coercive and executive powers of courts. However, they can request the assistance of the courts.

Article 22 of the Saudi Arbitration Law empowers courts to assist arbitrators with:

- ordering provisional or precautionary measures before or during arbitration proceedings, upon request by either party or the arbitration tribunal;
- issuing orders of judicial delegation upon request by the arbitration tribunal;
- assisting with arbitration proceedings, such as summoning witnesses or experts, ordering the submission or review of documents, or other necessary actions.

Arbitral tribunals can seek court assistance to compel the production of documents or the attendance of witnesses.

9. Confidentiality

9.1 Extent of Confidentiality

Arbitral proceedings are generally confidential in Saudi Arabia. Article 43(2) of the Saudi Arbitration Law specifies that arbitration awards cannot be published, in whole or in part, without the written consent of both parties.

In the Kingdom, there is an implied duty of confidentiality regarding pleadings and documents related to the arbitration. However, initiating arbitration-related court proceedings, such as requests for enforcement or nullity actions, may result in this information becoming part of the public domain.

10. The Award

10.1 Legal Requirements

Article 39 of the Saudi Arbitration Law outlines the requirements for an arbitral award:

- The award must be made by majority vote if the tribunal consists of multiple arbitrators. Deliberations must be held in privately.
- If a majority decision is unattainable, the tribunal has 15 days to appoint a casting arbitrator. Failing that, the competent court will appoint one.
- Procedural decisions can be issued by the presiding arbitrator if both parties or all tribunal members authorise this in writing, unless agreed otherwise.
- If the tribunal is authorised to settle the dispute amicably, the settlement award must be unanimous.
- The tribunal may issue provisional or partial awards before the final award, unless the parties agree otherwise.

Article 42 of the Saudi Arbitration Law provides further requirements:

- The award must be in writing and signed by the majority of arbitrators. If any arbitrator refuses to sign, their reasons must be indicated.
- The award must include the reasoning leading to the decision.
- The award must include the names and addresses of the parties, the names, addresses, nationalities, fees, and titles of the arbitrators, a copy of the arbitration agreement, a summary of the parties' requests, submissions, and documents, the dispositive part of the award, the date and place of issuance.

Article 40 addresses the time limits for delivering an arbitral award:

- The tribunal must render the final award within the period agreed upon by both parties. In the absence of such an agreement, the award must be issued within 12 months from the commencement of arbitration proceedings.
- The tribunal may extend this period by up to six months unless the parties agree to a longer extension.
- If the award is not issued within the stipulated period, either party can request the competent court to specify an additional period or terminate the arbitration proceedings. In such cases, either party may then file a case with the competent court.
- If a new arbitrator is appointed, the period for the award extends by an additional thirty days.

Article 43 and Article 44 of the Saudi Arbitration Law outline the procedural requirements for handling and submitting the arbitration award:

- Article 43(1) specifies that the arbitration tribunal must provide each party with a true copy of the arbitration award within fifteen days from its issuance.
- Article 44 requires the tribunal to deposit the original award, or a signed copy of it, in its original language with the competent court within the same timeframe set in Article 43. If the award is in a foreign language, it must be accompanied by an Arabic translation certified by an accredited translator.

These provisions ensure that arbitral awards in Saudi Arabia adhere to clear guidelines and are delivered within a specified timeframe, providing a structured process for dispute resolution.

10.2 Types of Remedies

Arbitral tribunals in Saudi Arabia have broad authority to grant various types of remedies, including declaratory relief, specific performance, and monetary compensation for actual damages proven and suffered. However, there

are no specific limits on these remedies except those related to Shari'ah and public policy.

Arbitral tribunals cannot issue punitive damages, nor can they award interest, as these are strictly prohibited under Shari'ah.

10.3 Recovering Interest and Legal Costs

Interest is strictly prohibited under Shari'ah law, so parties cannot recover interest through arbitration proceedings. If an arbitral tribunal awards interest, the Saudi courts may annul the award, either wholly or partially (depending on how the award is drafted).

Typically, costs are allocated based on the outcome of the case (ie, they follow the event), unless the parties agree otherwise. The arbitral tribunal may also order the losing party to compensate the winning party for incurred attorneys' fees.

Under the SCCA framework, the arbitral tribunal can determine and allocate arbitration costs in its award. This includes the arbitrator's fees and costs, the parties' legal representation costs and fees as well as other related expenses. The arbitral tribunal can distribute these costs among the parties at its discretion based on what it considers reasonable, taking into account factors like each party's conduct and efforts to manage costs efficiently (Article 40(1) of the 2023 SCCA Rules).

11. Review of an Award

11.1 Grounds for Appeal

Arbitral awards cannot be appealed before Saudi courts. Instead, they can only be contested by filing an action to nullify the award within 60 days from the date of its notification to the parties (Article 51(1) of the Saudi Arbitration Law). If a Saudi court issues a judgment annulling an arbitral award, this decision can be appealed to the Saudi Supreme Court within 30 days of notification, as per Article 51 of the Saudi Arbitration Law and Article 17 of its Implementing Regulations.

The Saudi Arbitration Law provides an exhaustive list of grounds for annulling an arbitral award. Under Article 50 of the Saudi Arbitration Law, an award will only be annulled if:

- there is no arbitration agreement, or if it was void or voidable, or if its duration had lapsed;
- either party to the arbitration agreement was, at the time of the conclusion of the arbitration agreement, fully or partially incapacitated, according to the law governing said person's legal capacity;
- either party to the arbitration was unable to present its case due to not receiving proper notice of the arbitrator's appointment or the arbitral proceedings, or for any other reason beyond the party's control;
- the arbitral award excluded the application of any rules agreed upon by the parties that ought to govern the subject matter of the dispute;
- the composition of the arbitral tribunal or the appointment of arbitrators was carried out in a manner that conflicts with the Saudi Arbitration Law or the parties' agreement;
- the arbitral award ruled on matters not included in the arbitration agreement or exceeded the limits of that agreement. However, if the issues within the scope of the arbitration can be separated from those not included, the annulment will only affect the latter parts; or
- the arbitral tribunal fails to meet the necessary conditions for the award, thereby affect-

ing its substance, or if the award is based on void arbitration proceedings.

Additionally, the competent court in the Kingdom hearing a case for annulment shall annul the award on its own initiative if it concludes either that (i) the award violates provisions of Shari'ah law and public policy in the Kingdom; (ii) the award violates the arbitration agreement; or (iii) the subject matter of the dispute cannot be referred to arbitration as clarified in Article 2 of the Saudi Arbitration Law.

11.2 Excluding/Expanding the Scope of Appeal

The parties cannot alter the scope of challenge to an arbitral award, as Article 50 of the Saudi Arbitration Law provides an exhaustive list of grounds for annulment. However, they may waive their right to seek annulment after (but not before) the award has been issued (see Article 51(1) of the Saudi Arbitration Law and Article 18(1) of its Implementing Regulations).

Article 7 of the Saudi Arbitration Law states that if a party continues with the arbitration after becoming aware of a violation of the arbitration agreement or the Arbitration Law (in matters that can be agreed otherwise by the parties), and does not raise an objection before the tribunal within either (i) the agreed timeframe, or (ii) thirty days of discovering the violation, then that party is deemed to have waived the right to make this objection later. Therefore, to use such violations as grounds for annulment before the Saudi Courts, the party must have addressed them promptly during the arbitration process.

11.3 Standard of Judicial Review

Under Saudi law, a Saudi courts' review of an award focuses solely on the legality of the arbitral award, not on its merits. An annulment action is not an appeal. Consequently, Saudi courts cannot re-evaluate the case de novo. This is clear from the text of Article 50(4) of the Saudi Arbitration Law which expressly states that the competent court shall consider the action for nullification based on the grounds outlined in Article 50, "without inspecting the facts or subject matter of the dispute."

12. Enforcement of an Award

12.1 New York Convention

The Kingdom of Saudi Arabia is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, it has reserved the right to limit the Convention's application to the recognition and enforcement of awards made in the territory of other Contracting States, based on reciprocity. Additionally, Royal Decree No. M/11 specifies that the Convention does not apply retroactively to disputes initiated before Saudi Arabia's ratification.

The Saudi Government is also a party to several bilateral investment treaties and international conventions, including inter alia the 1952 Arab League Convention on the Enforcement of Judgments and Arbitral Awards; the 1985 Riyadh Convention on Judicial Cooperation between Arab League States; and the 1997 GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications.

12.2 Enforcement Procedure

The Saudi Arbitration Law and the Enforcement Law outline the procedure for enforcing an arbitral award in the Kingdom. We provide below a short summary of the process:

Enforcing a Domestic Arbitral Award

To enforce a domestic arbitral award, the party must first obtain an order declaring the award enforceable from the competent appeal court with original jurisdiction over the dispute. This involves applying to the court for this enforceability order.

To request a declaration order, as mandated by Article 53 of the Saudi Arbitration Law, the party must provide:

- the original award or a certified copy;
- an authentic copy of the arbitration agreement;
- an Arabic translation of the award, certified by an accredited entity, if the award is not in Arabic; and
- proof of the award's deposit with the competent court, as required by Article 44 of the Saudi Arbitration Law (see **10.1 Legal Requirements**).

Enforcing a Foreign Arbitral Award

To enforce a foreign arbitral award in Saudi Arabia, the following conditions must be met:

- Reciprocity between Saudi Arabia and the jurisdiction where the award was issued must be established. The burden of proving reciprocity lies with the party requesting enforcement.
- The award must be issued by a tribunal with jurisdiction according to the applicable law, and its subject matter must not fall under the exclusive jurisdiction of Saudi Arabian courts.
- The parties must have been notified of the arbitration proceedings, properly represented, and given a reasonable opportunity to present their case. If the party against whom enforcement is sought did not participate in the arbitration, then the party requesting enforcement must prove that the respondent was notified of the proceedings.
- The award must be final.
- The award must not contradict another judgment or court order issued on the same subject in Saudi Arabia.
- The award must not violate Saudi Arabia's public policy (see Article 11 & Article 12, Enforcement Law).

Enforcement Procedure

The enforcement procedure typically includes:

- Submitting the enforcement request to the Enforcement Court through the Saudi Ministry of Justice's Najiz portal.
- The court reviews the request within one to three days to assess procedural aspects and refer it to an enforcement judge.
- The enforcement judge issues an order within three to five days, requiring compliance within five days (see Enforcement Law, Article 34 and Article 46).
- If the debtor cannot be notified of the enforcement order within 20 days of its issuance, the enforcement judge will immediately order publication of the order in the most widely circulated newspaper in the area of the court. The debtor will eventually incur the cost of such publication (approximately USD100) in addition to the debt (see Enforcement Law, Article 34).
- If the debtor does not voluntarily comply with the enforcement order, the enforcement court shall then order measures such as bank account attachment, travel bans, or suspension of the commercial register. These actions can be taken five days after the debtor is notified of the order or, if notification is not possible, five days after the order is published in a newspaper (see Enforcement Law, Article 46).

Enforcement When Annulment Proceedings Are Commenced

Article 54 of the Saudi Arbitration Law specifies that filing a request for annulment does not automatically suspend the execution of the arbitral award. However, the court can grant a stay of execution if requested by a party, provided the request is based on 'sounds grounds'. The court must make a decision on the stay within 15 days of receiving the petition and may require a bail or financial guarantee. If a stay is granted, the court will decide on the annulment action within 180 days from the date of the stay order.

Under Article 55 of the Saudi Arbitration Law:

- A petition for enforcement will not be accepted before the deadline for filing a request for annulment has passed. The court will issue an order for enforcement only after verifying that:
  - (a) The award does not conflict with any existing court judgments in Saudi Arabia.
  - (b) The award does not violate Shari'ah or the public policy of the Kingdom of Saudi Arabia. If the award contains both violating and non-violating parts, only the parts that do not violate these principles may be enforced.
  - (c) The award was properly notified to the party against whom it was rendered.
- An order granting enforcement cannot be appealed, but an order denying enforcement can be appealed within 30 days.
- In practice, a competent court would not issue an order declaring the award enforceable until the request for annulment is resolved (usually one decision is issued where the court (i) rejects the annulment request, and (ii) declares the award enforceable).

Foreign Awards & Annulment Proceedings Pending at the Seat

A foreign arbitral award that has been set aside in the jurisdiction where it was issued will usually not be enforced in Saudi Arabia as long as such award is not considered a final award as per the applicable law in said jurisdiction.

If annulment proceedings are ongoing at the seat (and the award is not deemed final in accordance with applicable law in the jurisdiction where it was issued), the Saudi Enforcement court will reject enforcement as such award does not satisfy a condition for enforcement of foreign awards as per Article 11 of the Enforcement Law.

Special Cases Against Saudi State or Saudi Governmental Entity

If the award pertains to a commercial transaction with the Saudi State or a Saudi government entity, enforcement proceedings must be commenced before the specific Administrative Courts (the BoG) (see Law of Enforcement before the Board of Grievances issued pursuant to Royal Decree No. (M/15) dated 27/01/1443H (04 September 2021G)). The enforcement judge may not issue enforcement against publicly owned assets.

12.3 Approach of the Courts

Saudi Arabian courts are generally pro-enforcement regarding arbitral awards. They strictly adhere to the specified grounds for annulment and typically interpret the public policy ground narrowly.

According to data released by the SCCA in 2022, in collaboration with the Saudi Ministry of Justice, for the period from January to September 2022 (the "Study Period"), Saudi enforcement courts enforced 522 domestic and foreign arbitral awards totalling SAR871 million (equivalent

to USD232 million). Among these awards, 12 were foreign awards (representing 2% of the total awards and nearly 15% of their total value) issued in Lebanon, Morocco, South Korea, Switzerland, the UAE, and the UK.

During the Study Period, out of 131 applications to annul awards, 92% were dismissed, while only 3.8% were fully annulled due to Shari'ah violations or breaches of public policy. Additionally, Saudi Arabia's Deputy Minister for Enforcement confirmed that no court decisions during this period refused to enforce a foreign arbitral award on grounds of public policy violations, including breaches of Shari'ah principles (see here).

These statistics underscore a growing trend since the enactment of the 2012 Arbitration Law, showcasing Saudi Arabia's progression towards becoming an arbitration friendly jurisdiction.

For the enforcement of foreign arbitral awards in Saudi Arabia, one condition is that the award must not contradict Saudi Arabia's public policy. According to Article 11/3 of the Enforcement Law Implementing Regulations issued by Ministerial Decision No. (526) dated 20/09/1439H (corresponding to 5/06/2018 AG), public policy refers to Islamic Shari'ah principles as applicable in the Kingdom.

In practice, enforcement judges usually refuse to enforce foreign arbitral awards only if a significant Shari'ah violation is found (eg, awards involving interest payments), which is generally rare as shown in the statistics mentioned above.

13. Miscellaneous

13.1 Class Action or Group Arbitration

The Saudi Arbitration Law does not address class action arbitration or group arbitration.

13.2 Ethical Codes

The Saudi Arbitration Law does not specify mandatory ethical codes or professional standards for counsel and arbitrators.

However, Saudi lawyers must adhere to the ethical rules set out in the Saudi Bar Association's regulations, including the Rules of Professional Conduct for Lawyers, issued by the Minister of Justice order No.3453 dated 24/02/1442 H (corresponding to 11/10/2020 AG). The Rules governs the ethical conduct and professional standards that all Saudi lawyers must adhere to. Arbitrators and counsel generally follow widely accepted professional standards unless specific standards from their own jurisdiction apply.

Additionally, the SCCA has established its own Code of Ethics, which governs the conduct of both counsels and arbitrators involved in SCCA proceedings.

13.3 Third-Party Funding

The Saudi Arbitration Law does not explicitly address third-party funders. However, certain provisions indirectly impact them. For example, Article 16 of the Arbitration Law requires disclosure of any circumstances that might reasonably affect an arbitrator's impartiality or independence. This is relevant because a relationship between an arbitrator and a third-party funder could raise concerns about impartiality or independence.

Moreover, the 2023 SCCA Arbitration Rules explicitly address third-party funding, indicating

its recognition within the Saudi legal framework. Article 17(6) of the 2023 SCCA Rules states: "Each party must promptly disclose to the Administrator, all the other parties, and the arbitrators the identity of any non-party who has an economic interest in the arbitration's outcome, including any third-party funder."

13.4 Consolidation

The Saudi Arbitration Law does not explicitly address the consolidation of separate arbitral proceedings. However, parties are free to agree on consolidation, either directly or by adopting institutional arbitration rules that permit it.

For example, the 2023 SCCA Arbitration Rules provide a framework for consolidation in Article 13, which essentially allows the SCCA Court to consolidate multiple arbitrations into a single proceeding if the parties agree, the claims arise from the same legal relationship, or the claims are under compatible agreements. Consolidation cannot occur if any tribunal is fully constituted unless all parties agree, or all tribunal members are identical and request consolidation. The SCCA Court will consider factors like applicable law and progress of the arbitrations and will manage the appointment of arbitrators as necessary.

13.5 Binding of Third Parties

Under Saudi law, a third party can only join an arbitration if all existing parties and the third party agree to the third party's participation (see Article 13 of the Implementing Regulation). For further details, please refer to the answer to question **5.7 Jurisdiction Over Third Parties** above.

In multi-party arbitrations under the SCCA Rules, the provisions for handling joinder as specified in the 2023 SCCA Rules will apply.

Trends and Developments

Contributed by:
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Khoshaim & Associates

Khoshaim & Associates is Saudi Arabia's only independent full-service Saudi law firm recognised as top tier by all major legal directories. The Dispute Resolution practice, led by managing partner Zeyad Khoshaim and partner Abdullah Alajlan, operates from Riyadh and Jeddah with a team of seasoned practitioners with experience in local and international law firms. The firm excels in arbitration governed by Saudi law, understands the legal needs of its clients both domestically and internationally, and has significant expertise in applying Shariah principles effectively. The lawyers frequently serve as counsel, arbitrators, and experts in proceedings before major arbitration centres like the ICC, LCIA, and SCCA. It also provided independent expert opinion on Saudi law matters before foreign courts, including the English courts. Recent successes include securing a complete dismissal of claims and a multimillion-dollar counterclaim in a USD100 million arbitration arising under Saudi law.

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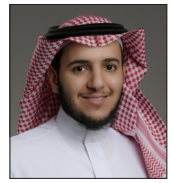

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Charting the Path: The Saudi Centre for Commercial Arbitration and Evolving Arbitration Practices in the Kingdom of Saudi Arabia

Introduction

In recent years, the Kingdom of Saudi Arabia (the "Kingdom," "KSA", or "Saudi Arabia") has emerged as a globally recognised arbitration hub. Supported by a robust private sector, an effective judicial system, and government backing, Saudi Arabia is now a prime destination for international investments. This transformation, in line with the Kingdom's 2030 Vision – ie, a strategic framework aimed at reducing oil dependency, diversifying the economy, and enhancing public services – has drawn both local and international expertise, leading to a notable rise in international arbitration cases originating from the Kingdom.

This article explores the growing significance of arbitration in Saudi Arabia through recent initiatives led by the Saudi Centre for Commercial Arbitration (SCCA). With that goal in mind, this piece provides (i) an overview of Saudi Arabia's arbitration framework and current practices; (ii) an examination of significant developments within the SCCA landscape and their impact on arbitrations in the Kingdom; and (iii) concludes by emphasising key aspects of the new 2023 SCCA arbitration rules that relevant stakeholders should keep in mind.

Arbitration in the Kingdom of Saudi Arabia

Arbitration in Saudi Arabia is governed by two key legislations: (i) the arbitration law, enacted by Royal Decree No. M/34 dated 24/5/1433 AH (corresponding to 16/4/2012 CE) (the "Arbitration Law"); and (ii) the enforcement law, enacted by Royal Decree No. M/53 dated 13/8/1433H (corresponding to 3/7/2012 CE) (the "Enforcement Law"). These laws replace the previous arbitration law issued pursuant to Royal Decree No. 46/M dated 12/7/1403 AH (corresponding to 14/09/1983 CE), and relevant provisions of the 1989 Saudi Rules of Civil Procedure and relevant provisions of the Board of Grievances Law, which mandated that enforcement procedures be commenced before the relevant administrative authority (for local awards) and before the Saudi Board of Grievances (the BoG) (for foreign awards).

The Arbitration Law is modelled after the UNCITRAL Model Law and incorporates various arbitration-friendly principles. These include, for instance, enhancing the independence of the arbitral process, granting broader procedural authority to the arbitral tribunal, and facilitating clearer enforcement of arbitration agreements and awards.

Similarly, the Enforcement Law marked a substantial shift in Saudi Arabia's arbitration landscape by transferring enforcement proceedings, previously handled by administrative authorities and the BoG, to specialised enforcement courts established under the Enforcement Law via Royal Decree No. M/53 dated 31/08/1433 (corresponding to 03/07/2012 CE).

Saudi Arabia's current arbitration framework focuses on efficiency and reliability in resolving commercial disputes. Moreover, the current framework prioritises enforcement of arbitral awards through clear and effective procedures that narrowly define and limit grounds for annulment (see, eg, Saudi Arbitration Law, at Art. 50), thereby boosting confidence among both local and international stakeholders. This regulatory environment clearly demonstrates Saudi Arabia's commitment to enhancing its arbitration infrastructure, which is increasingly acknowledged for its clarity, transparency, and well-structured

processes. This positioning makes Saudi Arabia a preferred jurisdiction for arbitration proceedings in the Middle East and beyond.

The Saudi Centre for Commercial Arbitration

The SCCA was established as a not-for-profit organisation by Saudi Cabinet Ministerial Resolution No. 257 in 1435H (corresponding to 2014 CE) with the aim of enhancing both local and foreign investment in the Kingdom. It currently operates from offices in Riyadh and Jeddah, and maintains an international presence in Dubai, United Arab Emirates. This strategic expansion highlights its regional influence and commitment to arbitration across multiple jurisdictions, enabling accessible and efficient dispute resolution services throughout the Arabian Gulf and internationally.

On 1 May 2023 the SCCA introduced its new arbitration rules, which took effect on the same day ("2023 SCCA Rules" or the "Rules"). These Rules replace the 2018 arbitration rules and emphasise party autonomy while preserving users' rights to determine how their disputes should be resolved.

The 2023 SCCA Rules were developed after a thorough public consultation process. The SCCA Rules Advisory Committee, chaired by the former senior vice-president of the International Centre for Dispute Resolution at the American Arbitration Association and composed of arbitration experts from diverse legal backgrounds and countries, collaborated closely with the SCCA for over 20 months to draft the new Rules.

The 2023 SCCA Rules are designed to compete internationally with renowned arbitral institutions like the International Chamber of Commerce (ICC) in Paris and the London Court of International Arbitration (LCIA) in London. They are also tailored to be competitive regionally, especially in the Middle East, where they rival leading arbitration centres such as the Dubai International Arbitration Centre (DIAC) in Dubai and the Abu Dhabi International Arbitration Centre ("ArbitrateAD") – which has succeeded the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC).

Recent changes to the SCCA landscape

The SCCA Arbitration Court

The entry into force of the 2023 SCCA Rules follows the establishment in 2022 of a 15-person independent court (the "SCCA Court") composed of eminent international arbitrators, former leaders of arbitral institutions, retired appellate judges, partners of international law firms, and law professors from renowned universities. The SCCA Court was created to decide on technical and administrative matters related to SCCA-administered arbitrations and mediations, and to ensure that SCCA arbitrations are administered consistently with international best practices.

Promoting SCCA arbitration for disputes with Saudi state-owned entities and Saudi government bodies

On 19 January 2019 the President of the Council of Ministers issued High Order No. 28004, marking a policy shift towards arbitration involving governmental bodies and State-owned-entities. This directive requires that disputes involving foreign investors be arbitrated within the Kingdom, either under the administration of the SCCA or other licensed arbitration centres designated by the permanent committee outlined in Council of Ministers Resolution No. 107 of 19 January 2016.

The most significant reform occurred in July 2019 with the enactment of the new Government

Tenders and Procurement Law (the "GTP Law"), enacted by Royal Decree M/128 on 13/11/1440H (corresponding to 16 July 2019 CE), along with its Implementing Regulations issued by Minister of Finance Resolution No. 1242 on 21/3/1441H (corresponding to 19 November 2019 CE), which took effect on 1 December 2019 and applies to all Saudi governmental bodies. Article 92(2) of the GTP Law now allows governmental bodies to enter into arbitration agreements with prior approval from the Minister of Finance. This marks a departure from previous requirements under the Arbitration Law, which stipulated that "government bodies may not agree to enter into arbitration agreements except upon approval by the Prime Minister, unless allowed by a special provision of law" (see Arbitration Law, Art. 10(2)). Article 154 of the Implementing Regulations provides further details on conditions for such agreements, including that arbitration is limited to contracts exceeding SAR 100 million, Saudi laws govern dispute subject matters, and arbitration terms must be stipulated within the contract itself, unless the disputes involve foreign (ie, non-Saudi) parties.

To enhance Saudi Arabia's reputation as a secure arbitration hub and commend the strides made by Saudi decision-makers in advancing the alternative dispute resolution sector in the Kingdom, on 8 November 2023 the SCCA entered into a memorandum of understanding (MoU) with the Saudi Ministry of Foreign Affairs. This partnership aims to foster co-operation in promoting institutional arbitration within Saudi Arabia as a preferred method for resolving commercial disputes involving foreign investors and international businesses. The MoU involves several key areas of collaboration between SCCA and the Ministry. It includes, among other things, the integration of SCCA arbitration clauses into the Ministry's contracts and related agreements, improving the drafting of dispute resolution clauses, and ensuring compliance with applicable laws and guidelines. Additionally, it confirms that both the SCCA and the Ministry will jointly raise awareness of Saudi Arabia's achievements in strengthening the ADR industry, in collaboration with Saudi diplomatic missions.

Under the terms of the MoU, the SCCA will support Ministry staff with professional development opportunities in ADR, particularly in arbitration, through specialised training programs offered by SCCA Academy. The MOU also facilitates the exchange of data and information to support ADR-related research and studies. This initiative underscores Saudi Arabia's progress in establishing a supportive environment for arbitration, contributing to its global ranking and fostering the growth of business sectors, and attracting international and local capital and investments.

These reforms undoubtedly play a crucial role in advancing Saudi Vision 2030, aimed at diversifying Saudi's economy beyond oil. With a target of attracting USD1.5 trillion in investments across various sectors by 2030, establishing a robust legal framework for effective dispute resolution, including arbitration involving government bodies and state-owned entities, is essential. The current framework is expected to enhance investor confidence in the Kingdom by ensuring adequate protection of international parties' legal rights through arbitration, thereby facilitating their active participation on major Saudi projects.

Promoting SCCA arbitration within the newly established Saudi Economic Cities and Special Zones Authority

As it expands its strategic partnerships to advance alternative dispute resolution (ADR) in Saudi Arabia and the MENA region, the SCCA

has signed a series of MoUs with key institutions, agencies, and international bodies.

For instance, in May 2023 the SCCA entered into an agreement with Saudi Arabia's Economic Cities and Special Zones Authority (ECZA), which oversees the country's economic cities (ECs) and special economic zones (SEZs). This agreement establishes a procedural framework for offering ADR services in ECs and SEZs that adhere to international standards, enhancing their attractiveness for local and foreign investment.

SEZs in Riyadh, Jazan, Ras Al-Khair, and King Abdullah Economic City (KAEC) operate under specific legislation to boost competitiveness in attracting investments. Following the operationalisation of SEZs, it has been confirmed that the SCCA will establish an office at the headquarters of KAEC to provide institutional arbitration and other ADR services, with potential for additional offices in other zones as needed.

In sum the SCCA and ECZA will collaborate on designing procedural mechanisms for offering arbitration and ADR services to SEZ investors. This includes, for instance, creating a roster of arbitrators specializing in SEZs to facilitate parties in selecting appropriate arbitrators. Joint efforts will also focus on raising awareness among investors, venture capitalists, and project owners about advancements in Saudi arbitration, through introductory meetings, educational resources, and responses to inquiries received by ECZA regarding commercial dispute resolution.

Easier access to arbitration resources in the KSA

While accessing arbitration resources in Saudi Arabia was previously challenging and often limited to Arabic-only materials, on 26 March 2024 the SCCA announced an expanded partnership with Jus Mundi (a world-leading arbitral global platform that provides comprehensive access to legal data and documents related to international law and arbitration).

Under this enhanced partnership, the SCCA will increase access to its analysis of Saudi judicial rulings in commercial arbitration. This includes publishing over a thousand rulings from Saudi courts of appeal and the Saudi Supreme Court. The initiative aims to simplify access to court decisions and enhance understanding of Saudi related arbitration processes among the global legal community.

Effective enforcement of arbitral awards in the KSA

Thanks to the Enforcement Law, arbitral awards in Saudi Arabia are enforced through efficient and straightforward procedures. An arbitral award with an enforcement order acts as a writ of enforcement, allowing for compulsory enforcement (eg, Enforcement Law, Art. 34 and Art. 46). Saudi Arabia is also a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which requires Saudi courts to respect private arbitration agreements and enforce arbitral awards issued in other convention states, subject to the limited grounds for setting aside listed in Article 50 of the Arbitration Law.

As reported by the SCCA, in 2021 Saudi courts enforced 204 domestic and foreign awards totalling USD2.1 billion, with an average resolution time of two weeks for enforcement proceedings. Since the enactment of the Arbitration Law in 2012, approximately 35,000 enforcement applications have been processed, totalling over USD6.16 billion in enforced arbitral awards. The number of enforcement applications filed in

2019 alone exceeded those filed between 2013 and 2018 combined.

According to data released by the SCCA in 2022 in collaboration with the Saudi Ministry of Justice, for the period from January to September 2022 (the "Study Period") Saudi enforcement courts enforced 522 domestic and foreign arbitral awards totalling SAR 871 million (equivalent to USD232 million). Among these awards 12 were foreign awards (representing 2% of the total awards and nearly 15% of their total value) issued in Lebanon, Morocco, South Korea, Switzerland, the UAE, and the UK.

During the Study Period, out of 131 applications to annul awards, 92% were dismissed, while only 3.8% were fully annulled due to Sharia violations or breaches of public policy. Additionally, Saudi Arabia's Deputy Minister for Enforcement confirmed that no court decisions during this period refused to enforce a foreign arbitral award on grounds of public policy violations, including breaches of Sharia principles. These statistics underscore a growing trend since the enactment of the 2012 Arbitration Law, showcasing Saudi Arabia's progression towards becoming an arbitration friendly jurisdiction.

Key features of the new SCCA rules

As indicated above, the SCCA plays a pivotal role in Saudi Arabia' arbitration framework. In light of its increasing significance, we outline below key features of the new 2023 SCCA Rules that stakeholders should note:

- Default Law Applicable to Arbitration Agreement: The Rules stipulate that, by default, the law governing the arbitration agreement is that of the place where arbitration takes place, unless the parties expressly agree otherwise in writing (see 2023 Rules, Art. 37(4)). Additionally, parties retain the option to resolve their dispute according to principles of equity and justice, if they explicitly choose so (see 2023 Rules, Art. 37(2)).
- Utilisation of Technology: The Rules prioritise the utilisation of technology for submitting documents and handling cases and provide for both an expedited procedure and online dispute resolution dependent on the value of the claims (see, eg, 2023 Rules, Art. 25 (2), and Appendix IV).
- Expansion of Arbitral Tribunal Powers: The Rules bring about a considerable modification in another aspect relating to the extension of the SCCA arbitral tribunals' discretionary powers. These include (i) determining the most suitable format for hearings (which may include remote hearings) (see, eg, 2023 Rules, Art. 29(2)); (ii) rejecting changes in party representation as a procedural safeguard (see 2023 Rules, Art. 9(3)); (iii) promoting mediation when suitable (see 2023 Rules, Art. 25(7)); (iv) limiting the length of written statements or requests (eg, 2023 Rules, Art. 27(1)); and (v) authorising the electronic signature of awards (see 2023 Rules, Art. 36(1)). While the above changes are no doubt made to try to ensure the time and cost effectiveness of arbitrations (ie, one of the biggest criticisms of arbitration globally), the willingness of arbitral tribunals to use such discretionary powers in SCCA arbitrations remains to be seen.
- Additional Grounds for Challenging Arbitrators: The Rules introduce two additional grounds for challenging arbitrators, namely failure to perform and an apparent lack of qualifications agreed upon by the parties (see 2023 Rules, Art. 18(1)). This marks a significant departure from the previous 2018 rules, which only allowed parties to challenge arbitrators based on reasonable doubts regarding their impartiality and independence.

In practice, these new additions could lead to more challenges and potential delays in resolving arbitration proceedings, especially when dealing with a party resistant to engaging in arbitration.

- Resolution of Multi-Contract Disputes, Consolidation, and Co-ordination of Parallel Arbitration Proceedings: The Rules also bring about several other changes aimed at tackling current challenges in international arbitration. These changes include the option for parties to resolve multi-contract disputes through a single arbitration (see 2023 Rules, at Art. 11). Furthermore, the SCCA Court (ie, an independent body from the SCCA akin to the arbitration courts of a number of arbitral institutions around the world such as the ICC) is empowered to consolidate two or more arbitrations in specific circumstances (see 2023 Rules, at Art. 13), and the arbitral tribunal can now coordinate parallel arbitral proceedings after consultation with the parties (see 2023 Rules, at Art. 14).
- Mandatory Disclosure and Publication of Awards: Under the Rules, there is now a requirement for the mandatory disclosure of interested non-parties, such as third-party funders (see 2023 Rules, Art. 17(6)), and the possibility of publishing redacted arbitral awards in cases where the parties do not raise objections (see 2023 Rules, Art. 36(3)).
- Cybersecurity and Data Protection: Provisions addressing cybersecurity, privacy, and data protection are included to safeguard arbitration proceedings and confidential information (see 2023 Rules, Art. 46).
- Specific Timelines for Efficiency: The Rules also establish specific timelines to enhance predictability and promote efficiency in arbitration. This includes the requirement that challenges to the Tribunal's jurisdiction must be raised in the answer to the request for arbitration, subject to the tribunal's discretion to extend this deadline (see 2023 Rules, Art. 6(2)(c)). This marks a significant departure from previous SCCA rules and those of other major institutions, which allow challenges to jurisdiction to be raised up to the statement of defence and counterclaim. Additionally, emergency arbitrators must issue interim awards or orders within 14 days from receiving the case file (see 2023 Rules, Appendix 2, Art. 7), and arbitral tribunals must issue final awards within 75 days from the conclusion of proceedings (see 2023 Rules, Art. 33). The effectiveness of these timeframes remains to be seen, as they can be extended by agreement of the parties or at the discretion of the SCCA Court or arbitral tribunal.
- Lack of Default Rules for the Seat and Language of Arbitration: Regarding the seat of arbitration, the 2023 SCCA Rules do not specify a default seat if the arbitration agreement does not mention one. Similarly, if the dispute resolution clause is silent on language of arbitration, the Rules do not require a default language for the proceedings. In these situations, the SCCA Court and arbitral tribunal will consider relevant factors like the languages used in the arbitration agreement and related contracts, as well as the practical convenience of the chosen language(s) and arbitration seat when making decisions.

SCOTLAND

Law and Practice

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Scottish Arbitration Centre (SAC) was established in 2011, with a focus on promoting Scottish arbitration and Scotland as a seat and venue for arbitration. Lord Glennie is chair of the board of the SAC and Andrew Mackenzie is its chief executive. The SAC launched its arbitration rules and court in September 2022, when hosting the International Council for Commercial Arbitration Congress. This development of its services provides Scotland with an arbitral institution capable of administering arbitration cases. The president of the Court of the Scottish Arbitration Centre (COSAC) is Lady Wolffe KC and the registrar is Duncan Bagshaw. The SAC also offers an ad hoc arbitral appointments service, has facilities for hosting hearings, and runs training events on arbitration, such as the Edinburgh International Arbitration Festival ("ArbFest").

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1. General

1.1 Prevalence of Arbitration

Arbitration has a long history in Scotland, with written references to arbitration in Scotland dating back to the 13th century. Arbitration tended to be used for domestic construction and property cases, as well as partnership disputes, but was not widely used in the broader commercial sphere owing to dissatisfaction with the relevant law which was not well maintained.

This all changed with the introduction of the Arbitration (Scotland) Act 2010 and arbitration is now accepted as a method of ADR. The Arbitration (Scotland) Act 2010 is not based on the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law") but instead is subject to a number of modifications and follows the approach of the Arbitration Act 1996 of England and Wales. This means there is much authority that can be used as an aid to interpretation of the Arbitration (Scotland) Act 2010 and one would expect that the Scottish courts will follow the approach adopted by the English courts in respect of the equivalent provision of the Arbitration Act 1996, unless there is a good reason not to take that approach. With the introduction of the Arbitration (Scotland) Act 2010, Scotland now has one of the most modern systems of arbitration in the world.

Arbitration clauses are being written into international and government contracts more regularly, particularly those concerned with oil and gas, and renewable energy.

1.2 Key Industries

The Arbitration (Scotland) Act 2010 is now established, with practitioners and commercial entities more used to the regime. There has been increasing adoption of arbitration clauses into commercial contracts, including in the energy sector, and work continues to increase and develop this trend.

COVID-19 and the related lockdowns had an impact on the business of the Scottish courts. This provided an opportunity to promote the flexible nature of arbitration and the use of online platforms for dispute resolution.

1.3 Arbitration Institutions

The Scottish Arbitration Centre (SAC), established in 2011, is a non-profit organisation established for the purpose of promoting Scottish

arbitration and Scotland as a seat and venue for international arbitration. The Centre offers an appointment service for ad hoc matters, facilities for arbitration hearings, mediations and conferences and events in Edinburgh, and delivers training to practitioners, including the Edinburgh International Arbitration Festival ("ArbFest").

In September 2022, the SAC announced that it would become an administrator for arbitrations, creating the first arbitration court in Scotland.

Under the Rules of the Scottish Arbitration Centre (the "SAC Rules"), the arbitral tribunal has autonomy in its decision-making. Expedited arbitrations are also provided for in the SAC Rules.

The new SAC Rules reflect a modern approach. The SAC Rules ensure that the SAC and the arbitral tribunal will consider the application of the Green Protocols as developed by the Campaign for Greener Arbitration. In addition, the SAC Rules also provide that parties that adopt the SAC Rules – along with the arbitral tribunal, respective counsel, and the Court of the Scottish Arbitration Centre (COSAC) – must have regard to the Equal Representation in Arbitration Pledge and Racial Equality for Arbitration Lawyers (REAL). Cybersecurity and data protection provisions are also enshrined within the SAC Rules, ensuring that the arbitral tribunal has regard to the International Council for Commercial Arbitration (ICCA)-New York City Bar-International Institute for Conflict Prevention and Resolution (CPR) Protocol on Cybersecurity in International Arbitration and the ICCA-International Bar Association (IBA) Roadmap to Data Protection in International Arbitration.

COSAC comprises a range of highly experienced practitioners, with Lady Wolffe KC as its president. The registrar is Duncan Bagshaw, a partner at Howard Kennedy, who was previously the registrar at LCIA-MIAC (Mauritius International Arbitration Centre) Arbitration Centre.

The SAC's Schedule of Fees provides for a progressive range of charges based on the claim amount for both the filing fee and the administrative fees. This is to ensure that the SAC remains a competitive and attractive option for all respective claim amounts. Administrative costs are some of the most competitive rates in Europe. There is also a cap of GBP2,000 for the filing fee and GBP60,000 for administrative fees. By way of example, claims of GBP500,000 have a filing fee of GBP700 and an admin fee of GBP7,750 (GBP8,450), claims of GBP1 million have a filing fee of GBP800 and an admin fee of GBP11,250 (GBP12,050) and claims of GBP10 million have a filing fee of GBP1,250 and an admin fee of GBP22,500 (GBP23,750).

The SAC has also developed an arbitrator panel model. In May 2023, it announced it was opening up for applications to its new panels and launched its initial panel of arbitrators for both domestic and international panels. In an effort to reach gender parity quickly, the SAC's initial panel comprised of only female arbitrators. In May 2024, the SAC announced an updated panel list, which includes male arbitrators and moves towards its gender parity goal.

As regards fundholding, the SAC has a collaboration with the Chartered Institute of Arbitrators ("CIArb"), whereby parties have access to CIArb's fundholding services via the SAC.

The SAC has also launched a new electronic case management system, Unicorn, for the handling of its cases. This state-of-the-art case

management system has been developed with Opus 2 for more efficient and secure arbitrations.

The SAC Rules were nominated for two Global Arbitration Review (GAR) awards (the GAR Sustainability Business Award and the GAR Equal Representation in Arbitration Award) during Paris Arbitration Week 2023. Its initial panel of female arbitrators was also nominated for the GAR Equal Representation in Arbitration Award in 2024.

The Arbitration (Scotland) Act 2010 is compatible with the SAC Rules and the rules of other major arbitral institutions allowing parties to specify Scotland, or Scottish places, as the seat of arbitration.

1.4 National Courts

The founding principles set out in Section 1 of the Arbitration (Scotland) Act 2010 include "that the court should not intervene in an arbitration except as provided by this Act". Section 13 of the Arbitration (Scotland) Act 2010 provides for court intervention in arbitrations and stipulates that legal proceedings are competent in respect of a tribunal's award – or any other act or omission by a tribunal when conducting an arbitration – in each case, only as provided for in the Scottish Arbitration Rules (in so far as they apply to that arbitration) or in any other provision in the Arbitration (Scotland) Act 2010. Notably, a tribunal's award is not subject to review or appeal in any legal proceedings except as provided for in Part 8 of the Scottish Arbitration Rules.

In such cases as set out above, the Arbitration (Scotland) Act 2010 designates the Scottish commercial courts as the competent courts in disputes related to international and domestic arbitrations. The commercial court judges are also the arbitration judges. The Scottish Courts and Tribunals Service (SCTS) has developed specific rules on arbitration, which are contained in Chapter 100 of the Court of Session Rules.

Furthermore, the SCTS set up the Arbitration Court User Group in 2017 to provide a forum for consultation, discussion and feedback between judges, legal professionals and others involved in arbitration matters in Scottish courts. This ensures that the court engages with arbitration practitioners and supports arbitration in Scotland.

2. Governing Legislation

2.1 Governing Law

International arbitration in Scotland is governed by the Arbitration (Scotland) Act 2010 (which also governs domestic arbitration). The Arbitration (Scotland) Act 2010 is similar to the Arbitration Act 1996 applicable in England and Wales, subject to some modifications, and those used to the Arbitration 1996 will be comfortable with the Arbitration (Scotland) Act 2010. It would be reasonable to assume that the Scottish courts will follow a similar approach as the English courts in respect of the equivalent provision of the Arbitration Act 1996, unless there is a good reason not to do so – meaning there is a good amount of authority despite the Arbitration (Scotland) Act 2010 being reasonably new.

The UNCITRAL Model Law has not been directly adopted in Scotland. However, the Arbitration (Scotland) Act 2010 follows the principles of the UNCITRAL Model Law.

2.2 Changes to National Law

No changes are currently pending and there are no current proposals to reform the Arbitration (Scotland) Act 2010. Having said that, the leg-

islation has not yet been implemented in full, as the provisions relating to statutory arbitration have not yet been brought into force.

3. The Arbitration Agreement

3.1 Enforceability

There are no special legal requirements for an arbitration agreement to be enforceable in Scotland.

3.2 Arbitrability

Generally, the principle in Scotland is that anything that is capable of agreement is capable of being referred to arbitration. Therefore, there is no list of matters defining those that are capable of being arbitrated, nor is there any list of matters that cannot be arbitrated.

Matters of criminal law and public law are not arbitrable, nor are matters of personal status. Therefore, matters such as divorce cannot be referred to arbitration; however, certain matters such as financial provision on divorce and access arrangements for children can be arbitrated.

To be arbitrable, a dispute must be capable of sounding in money or obligation – which is to say, there must be a practical effect – and matters that will not impact on parties' rights are not arbitrable.

3.3 National Courts' Approach

Scottish courts uphold Section 6 of the Arbitration (Scotland) Act 2010, which states that "where (a) the parties to an arbitration agreement agree that an arbitration under that agreement is to be seated in Scotland, but (b) the arbitration agreement does not specify the law which is to govern it, then, unless the parties otherwise agree, the arbitration agreement is to be governed by Scots law". The uncertainty that arose in Enka v Chubb (2020) UKSC 38 (the "Enka v Chubb case") would not therefore have arisen had the case been seated in Scotland.

The Scottish courts continue to be highly supportive of arbitration under the Arbitration (Scotland) Act 2010. If proceedings are brought in court despite the existence of the arbitration agreement, the court will put the proceedings on hold and enforce the arbitration agreement, as long as the parties have not delayed in relying upon the agreement and have not acted as though they do not wish to insist upon the arbitration agreement – for example, by lodging a response to the substance of the proceedings.

The Arbitration Court User Group has been developed and established to provide a forum for consultation, discussion and feedback between judges, legal professionals and others involved in arbitration matters in Scotland. In due course, the group may be able to offer views on the operation and effectiveness of the Arbitration (Scotland) Act 2010.

3.4 Validity

Section 5 of the Arbitration (Scotland) Act 2010 provides that:

- an arbitration agreement that forms or was intended to form part of an agreement is to be treated as a distinct agreement; and
- an arbitration agreement is not void, voidable or otherwise unenforceable because the agreement of which it forms part is invalid.

The validity of the agreement of which the arbitration agreement forms part may be arbitrated in accordance with the arbitration agreement. A dispute as to the validity of an agreement that

contains the arbitration agreement may then be arbitrated in accordance with the arbitration agreement.

4. The Arbitral Tribunal

4.1 Limits on Selection

The arbitrator must be a natural person, as opposed to a corporate entity, and must be of legal age and capacity (16 years old or more). The person must not be an incapable adult within the meaning of Section 1(6) of the Adults with Incapacity (Scotland) Act 2000. Other than this, there are no limits on the parties' autonomy when selecting arbitrators in Scotland.

4.2 Default Procedures

If the parties' chosen method for selecting arbitrators fails, either party can apply to one of the statutory arbitral appointment referees (AAR), unless parties have agreed otherwise. These AARs include the Agricultural Industries Confederation, the Chartered Institute of Arbitrators, the Dean of the Faculty of Advocates, the Institution of Civil Engineers, the Law Society of Scotland, the Royal Incorporation of Architects in Scotland, the Royal Institution of Chartered Surveyors, and the Scottish Agricultural Arbiters and Valuers Association.

The procedure is that the referring party gives notice of their intention to go to an AAR. The other party can object to an AAR appointment within seven days. If the party fails to object or waives that right, the AAR may make the necessary appointment. If one of the parties does object to the use of an AAR or the AAR fails to make an appointment within 21 days, the court may make the necessary appointment.

The AAR (or the court, as the case may be) must have regard to:

- the nature and subject matter of the dispute;
- the terms of the arbitration agreement (including, in particular, any terms relating to the appointment of arbitrators); and
- the skills, qualifications, knowledge and experience that would make an individual suitable to determine the dispute.

There is a default procedure for the appointment of arbitrators, which applies where there are two or more parties. Rule 6 of the Scottish Arbitration Rules provides the method of appointment and Rule 7 determines what happens if the method of appointment fails.

4.3 Court Intervention

The court can intervene upon the application of any party. The court may remove an arbitrator if it is satisfied that:

- the arbitrator is not impartial or independent;
- the arbitrator has not treated the parties fairly;
- the arbitrator is incapable of acting as an arbitrator;
- the arbitrator does not have a qualification that the parties had agreed upon; or
- a substantial injustice has been or will be caused to a party because the arbitrator failed to conduct the arbitration in accordance with the arbitration agreement, the applicable rules or any other agreement made by the parties relating to the conduct of the arbitration.

4.4 Challenge and Removal of Arbitrators

A party may object to the appointment of an arbitrator. This will only be competent if it is made on the ground that the arbitrator is neither impartial nor independent, has not treated the

parties fairly, or does not hold the qualification that the parties agreed that an arbitrator must have (such an agreement having been reached prior to the appointment).

The parties may, acting jointly, remove an arbitrator. In addition, an arbitrator may be removed by a third party to whom the parties have given that power (such as an arbitral institution).

4.5 Arbitrator Requirements

Arbitrators, prospective arbitrators and any appointing body are bound to disclose to the parties any circumstances known to them (or that become known to them) that might reasonably be considered relevant when assessing whether the arbitrator is impartial and independent.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

As mentioned in **3.2 Arbitrability**, matters of criminal law and public law are not arbitrable, nor are matters of personal status. Accordingly, matters such as divorce cannot be referred to arbitration.

5.2 Challenges to Jurisdiction

The tribunal has the power to rule on its own jurisdiction. The tribunal may also rule whether there is a valid arbitration agreement, whether the tribunal is properly constituted and whether matters have been submitted to arbitration in accordance with the arbitration agreement.

The parties may object to the tribunal on the ground that it does not have jurisdiction or has exceeded its jurisdiction. Such objections have to be made before or as soon as is reasonably practicable after the jurisdiction issue is first raised, subject to the tribunal's right to extend this on cause shown.

The tribunal can rule on the jurisdiction point independently from the subject matter of the dispute and can defer its ruling on jurisdiction until it makes its ruling on the merits. However, if the parties agree on which of these courses it should take, the tribunal must abide by that decision.

5.3 Circumstances for Court Intervention

A party may appeal to the court against the tribunal's ruling on a jurisdictional challenge no later than 14 days after the tribunal's ruling. The tribunal can continue to deal with the arbitration while the appeal is pending.

Alternatively, the parties may bypass the tribunal and make a direct application to the court on a jurisdictional point. This is only allowed if the parties agree that an application should be made or if the tribunal consents to the direct application and the court is satisfied that it should be dealt with. The tribunal can proceed with the arbitration while the appeal is pending.

The right to challenge the tribunal's ruling on jurisdiction may be challenged, regardless of whether it is positive or negative.

5.4 Timing of Challenge

A jurisdictional challenge can be made as soon as the arbitration has started. The right to appeal to the court against a ruling of the tribunal on its own jurisdiction is mandatory. However, the option to go directly to the court on a jurisdiction point is contained in a default rule and can therefore be excluded by agreement of the parties. A party who participates in an arbitration without making a timeous objection on the ground that the tribunal does not have jurisdiction may not

raise the objection later before the tribunal or the court.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The approach of the courts in Scotland is to defer to the tribunal on questions of admissibility, as the Arbitration (Scotland) Act 2010 makes clear that admissibility is a matter for the tribunal. On questions of jurisdiction, the court will look at the issue de novo.

5.6 Breach of Arbitration Agreement

The approach of the Scottish courts is that it is up to the responding party to plead an arbitration clause in response to proceedings brought in breach of an arbitration agreement. Bringing proceedings is not regarded as a "breach" of contract; rather, it is regarded as a procedural matter because the court retains ultimate jurisdiction.

The responding party has the right to have the matter arbitrated. Where there is a valid agreement to arbitration, the court will sist (stay) proceedings, but the responding party must plead that right before any substantive step is taken in response to the litigation. If appropriate, and if timely steps have not been taken, the responding party may be held to have waived the right to have the matter dealt with by arbitration.

5.7 Jurisdiction Over Third Parties

The tribunal has no jurisdiction over individuals or entities that are neither parties to an arbitration agreement nor signatories to the contract containing the arbitration agreement.

It is possible, where all parties involved agree, to consolidate the arbitration proceedings with another arbitration.

6. Preliminary and Interim Relief

6.1 Types of Relief

The tribunal may grant relief on a provisional basis (which it has the power to grant permanently).

The tribunal may also:

- direct any party to allow the tribunal, an expert or other party to inspect, photograph, preserve or take custody of any property that a party owns or possesses that is the subject of the arbitration; and
- preserve any document or other evidence that the party possesses or controls.

6.2 Role of Courts

The courts take various measures to preserve evidence and generally preserve the status quo pending determination by the tribunal. Examples include the court's power to grant an interim interdict (injunction) and orders to arrest funds or the grant of an inhibition (a charge that prevents the sale of property). If the arbitration has started, these measures can be taken with the consent of the tribunal or without consent in cases of urgency.

6.3 Security for Costs

The default position is that the tribunal has the power to make an order for security for costs against a party making a claim in the arbitration, which may be the principal claim or a counterclaim. The order may include security for the tribunal's own fees and expenses. If an award for security of expenses is not complied with, the tribunal has the power to dismiss the claim.

7. Procedure

7.1 Governing Rules

The Scottish Arbitration Rules apply to all arbitrations seated in Scotland. They are to be found in Schedule 1 of the Arbitration (Scotland) Act 2010. Some of the rules are mandatory and are therefore effectively part of the law. Some rules have "default" status, which can be deleted or amended by agreement.

The default position is that the procedure is a matter for the tribunal. However, it is open to the parties to adopt a defined procedure if that is their preference or incorporate rules that provide procedural steps and/or time limits.

7.2 Procedural Steps

There are no procedural steps required by the law. The default position is that procedure is a matter for the tribunal, in terms of Rule 28 of the SAC Rules. Accordingly, there are no compulsory procedural steps, unless the parties agree otherwise.

7.3 Powers and Duties of Arbitrators

The Arbitration (Scotland) Act 2010 confers a wide range of powers on arbitrators. The tribunal has the power to rule on its own jurisdiction and may award damages and interest. The tribunal also has the power to make interim and partial awards.

The tribunal has the power to appoint a clerk, but must first seek the consent of the parties for such an appointment if significant expense is likely to be incurred. The tribunal also has the power to obtain an expert opinion on any matter arising in the arbitration. The tribunal has the power to order a party to allow the inspection, recording and testing of property in the possession of that party if such property is the subject matter of or has a bearing on the arbitration.

As regards duties, the tribunal must be impartial and independent, treat the parties fairly, and conduct the arbitration without unnecessary delay and without incurring unnecessary expense. As mentioned in **4.5 Arbitrator Requirements**, an arbitrator has a duty to disclose any circumstances that might reasonably be considered relevant when assessing whether the arbitrator is impartial and independent.

The default position under the Arbitration (Scotland) Act 2010 is that the tribunal and the parties are bound by a duty of confidentiality and a breach of this duty is actionable.

7.4 Legal Representatives

There is no requirement to be legally qualified in Scotland or in any other jurisdiction – or to hold any particular qualification – to represent a party in an arbitration in Scotland. Only a person aged 16 or over is eligible to act as an arbitrator, and that person must not be an incapable adult within the meaning of Section 1(6) of the Adults with Incapacity (Scotland) Act 2000. In practice, Scottish arbitrators tend to belong to professional bodies. There is no requirement that an arbitrator be admitted to the Scottish Bar or solicitor profession, and there is no restriction based on nationality.

8. Evidence

8.1 Collection and Submission of Evidence

Rule 45 of the SAC Rules gives the court the power to order attendance of witnesses and disclosure of evidence.

Scottish arbitrators tend to adopt an approach similar to that used in the Scottish commercial courts as regards production, discovery, legal privilege, the use of witness statements, and cross-examination. Generally, the approach in the Scottish courts is that the parties are expected to produce all documents on which they found their case. There is no general duty of disclosure other than to the extent that the tribunal (or court) orders disclosure. An arbitrator from Scotland is likely to be less inclined to grant open discovery than one from common law jurisdictions, given there is no duty of disclosure in Scottish courts.

In general, an order for discovery is only granted to support a factual averment within the pleadings, not to recover documents in the hope that further factual averments can then be made (which is known as "fishing diligence").

Even where documents are otherwise recoverable on relevancy grounds, parties can claim confidentiality on the grounds of privilege. In Scotland, legal privilege is applicable to a range of communications, including the usual categories of lawyer–client communications, documents prepared in contemplation of litigation, and communications relating to settlement negotiations.

Witness statements or affidavits are commonly used in arbitration (and it is increasingly common to see these used in the commercial courts). However, it is also quite routine for the tribunal to allow cross-examination – or at least oral questioning through the tribunal – in relation to higher-value claims.

8.2 Rules of Evidence

It is for the tribunal to determine the admissibility, relevance, materiality and weight of any evidence. It is also for the tribunal to determine whether to apply rules of evidence used in legal proceedings or to apply any other rules of evidence.

8.3 Powers of Compulsion

The courts have the power to grant orders for the attendance of witnesses and the production of evidence, including evidence held by parties to the arbitration and non-parties. In an application to the court, there is no difference between parties and non-parties; the rules provide that the court may order "any party" to attend a hearing or disclose evidence.

9. Confidentiality

9.1 Extent of Confidentiality

Scotland has detailed statutory provisions dealing with the confidentiality of arbitration. These provisions are contained in a default rule, which can be deleted or modified if the parties so wish. This rule provides that disclosure by the tribunal, any arbitrator, or any party to confidential information relating to the arbitration is actionable as a breach of an obligation of confidence – unless the disclosure is authorised by the parties or is subject to one of the exceptions listed. "Confidential information" means any information relating to the dispute, to the arbitral proceedings, to the award, or to any civil proceedings relating to the award – in respect of which, an anonymity order has been granted by the court.

The tribunal and the parties are required to take reasonable steps to prevent the unauthorised disclosure of confidential information by any third party involved in the arbitration.

As stated in **7.3 Powers and Duties of Arbitrators**, a breach of confidentiality is actionable; therefore, the innocent party can recover dam-

ages where the breach can be shown to have caused loss. In addition, an interdict (an injunction) can be obtained to prevent an anticipated breach or further breaches where a breach has already occurred.

Confidentiality in relation to arbitration can be easily lost where there are incidental court proceedings relating to the arbitration. That is a problem in many jurisdictions. The Arbitration (Scotland) Act 2010 addresses this by providing for anonymity in legal proceedings. In terms of the Arbitration (Scotland) Act 2010, a party to any civil proceedings relating to an arbitration may apply to the court for an order prohibiting the disclosure of the identity of a party to the arbitration in any report of the proceedings. These provisions have been fully implemented by the courts.

The court rules provide that until such time as the court makes a ruling on anonymity, any petition or note relating to an arbitration is not to be made available for inspection except by court staff or the parties involved. The parties' names do not appear on the rolls of court and the court proceedings are heard in private.

10. The Award

10.1 Legal Requirements

The award must be signed by all arbitrators or all those assenting to the award. It must state the seat of the arbitration, when it was made and when it takes effect, the tribunal's reasons for the award, whether any previous provisional or partial award has been made and the extent to which any such award is superseded or confirmed.

There is no set time limit for the making of the award within the Arbitration (Scotland) Act 2010 – although parties can adopt rules setting this. The tribunal is under a general duty to avoid unnecessary delay.

If parties do agree on a time limit, the tribunal, or any party, may apply to the court to have this varied under Rule 43 of the SAC Rules. An application to vary the time limit should be brought before the expiry of the time limit. Applicable institutional rules will also apply.

10.2 Types of Remedies

The tribunal has wide powers to award damages, order specific performance or rectification, and grant injunctions. The tribunal also has the power to make declaratory awards (ie, declaring a contract provision to have a particular effect).

Punitive or exemplary damages cannot be awarded under Scots law and are not available where Scots law is the substantive law. In theory, such an award could be made where another jurisdiction permits damages of that nature and is specified as the law of the contract – although that is an open question, given the Arbitration (Scotland) Act 2010 makes no specific provision in this regard.

10.3 Recovering Interest and Legal Costs

The tribunal has the power to order the unsuccessful party to pay some or all of the costs of the dispute. The tribunal can also order whatever allocation it considers appropriate, except where that would be inappropriate in the circumstances.

The SAC Rules contain a mandatory ban on pre-dispute agreements with regard to arbitration expenses. However, an agreement reached

after the dispute has arisen does bind the tribunal, and the parties may agree to limit or exclude expenses recoverable from each other. As far as the tribunal's costs are concerned, the parties have no power to limit those, but they can agree on an allocation after the dispute has arisen.

11. Review of an Award

11.1 Grounds for Appeal

An arbitral award can be challenged on three different grounds – namely, that:

- the tribunal lacked substantive jurisdiction;
- there has been a "serious irregularity" as defined in the rules; and
- the tribunal made an error of Scots law.

It should be noted that the "error of law" route applies only to errors of Scots law. Thus, if the substantive law of the contract is not the law of Scotland, legal error appeals are not available. Legal error appeals can in any event be excluded, as noted below.

The procedure for an appeal on the grounds that the tribunal lacked substantive jurisdiction or that there has been a serious irregularity is that a petition is brought before the Outer House of the Court of Session (a single judge). It is possible to appeal to the Inner House of the Court of Session (the appeal court) with leave of the Outer House judge; however, leave to appeal may only be granted if the judge considers that the proposed appeal raises an important point of principle or practice or that there is some other compelling reason. The decision of the Outer House judge on whether or not to grant leave is final. If leave is granted, the decision of the Inner House on the appeal is likewise final. Unlike in the rest of the UK, there is no appeal to the UK Supreme Court.

In respect of legal error appeals, the rules are different. Such appeals can only be made with the consent of the parties or with the leave of the court. The court may only grant leave where:

- the court is satisfied that deciding the point will substantially affect a party's rights;
- the court is satisfied that the tribunal was asked to decide the point in question and that the tribunal's decision was "obviously wrong"; or
- the court considers the point to be of general importance and open to serious doubt.

The judge determines the application for leave without a hearing and their determination is final.

11.2 Excluding/Expanding the Scope of Appeal

The rule allowing error of law appeals is a default rule. Accordingly, the parties can agree to exclude such appeals. However, the parties cannot contract out of the right of challenge on grounds of jurisdiction or serious irregularity, which are necessary safeguards.

11.3 Standard of Judicial Review

The standard of judicial review depends on the nature of the challenge. The standard is not specified in the legislation, but the courts have set out their approach in a number of cases. Jurisdictional challenges are dealt with on a de novo basis.

However, serious irregularity challenges are considered on a deferential basis. The court will not intervene on the basis that it might have done things differently or expressed its conclusions on the essential issues at greater length.

Where the substantive law of the contract is Scots law and a legal error appeal is proceeding with the agreement of the parties or by leave of the court, the court will look at the legal point on a de novo basis but will not allow new evidence.

12. Enforcement of an Award

12.1 New York Convention

Scotland is one of the three legal jurisdictions within the UK, the others being England and Wales (covered by one jurisdiction) and Northern Ireland. The UK ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention") in 1975. The New York Convention was implemented in Scotland by Sections 18–22 of the Arbitration (Scotland) Act 2010.

12.2 Enforcement Procedure

Section 12 of the Arbitration (Scotland) Act 2010 provides for the enforcement of domestic, UK and non-New York Convention awards. Enforcement of an award can happen in two ways. It is possible for the parties to register their arbitration agreement in the public records (Books of Council and Session). If they have done that, any award granted in terms of the arbitration agreement can be registered and enforced as though it were a decree of the court.

In practice, the registration of an arbitration agreement is confined to documents relating to land, which are registered for the purposes of creating a real right. As arbitration agreements are generally contained within the related contract and the parties tend not to register commercial agreements because they are confidential and the register is public, it is rare to see registered arbitration agreements outside the property context. It is, however, possible to register a separate agreement to arbitrate in respect of a contract.

If the arbitration agreement has not been registered, the relevant procedure is a petition to the court seeking an order that the arbitral award be enforced as if it were a court decree.

Section 12 of the Arbitration (Scotland) Act 2010 also stipulates that an enforcement order cannot be made if the court is satisfied that the award is the subject of an appeal, review, or correction (as specifically designated by the Arbitration (Scotland) Act 2010 – for example, under Rule 58 or under Part 8 of the Scottish Arbitration Rules) that has not been finally determined.

If an application for the setting aside or suspension of a New York Convention award is made to a competent authority, Section 20 of the Arbitration (Scotland) Act 2010 allows the court to sist the decision on recognition or enforcement of the award or – on the application of the party claiming recognition or enforcement – to order the other party to give suitable security. Here, "competent authority" means a person who has the authority to set aside or suspend the New York Convention award concerned in the country in which (or under the law of which) the New York Convention award concerned was made.

12.3 Approach of the Courts

The general approach of the courts is that arbitration awards should be recognised and enforced. As such, Scotland is rightly seen as an arbitration-friendly jurisdiction.

It has been observed in the Scottish courts that the Arbitration (Scotland) Act 2010 is closely modelled on the Arbitration Act 1996 applicable in England and Wales and that English cases provide a useful guide to the interpretation of

the Arbitration (Scotland) Act 2010. It is therefore reasonable to conclude that a Scottish court will adopt a similar approach to questions of public policy, including international public policy, as the courts of England and Wales.

13. Miscellaneous

13.1 Class Action or Group Arbitration

There is no specific form of class arbitration or group arbitration in Scotland. Where a number of arbitrations arise from the same incident, it is possible to consolidate these arbitrations with the consent of the parties.

13.2 Ethical Codes

As noted in **7.4 Legal Representatives**, technically anyone can become an arbitrator in Scotland. There is no overarching code of ethics. However, in practice, arbitrators tend to be drawn from professions that have codes of conduct.

Arbitrators are generally subject to codes and standards of their profession, so a lawyer will be subject to the ethical rules of the Law Society of Scotland, an advocate to those of the Faculty of Advocates, a surveyor to those of the Royal Institution of Chartered Surveyors, and so on. Arbitrators are often members of the Chartered Institute of Arbitrators, and therefore are subject to their codes. Appointing bodies will also have their own rules and procedures that must be followed.

13.3 Third-Party Funding

Third-party funding in litigation is governed by the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. This is a new act and is still being brought into operation. Although the act refers to "civil proceedings", there does not appear to be any intention for this to cover arbitration.

Scotland has never had a rule against champerty and maintenance, so there is no restriction on third-party funding in arbitration in Scotland. The ability to recover the cost of such funding is not yet clear.

13.4 Consolidation

Rule 40 of the Arbitration (Scotland) Act 2010 allows parties to agree to consolidation or to agree to hold concurrent hearings. The tribunal may not order such consolidation – or the holding of concurrent hearings – on its own initiative. However, parties to a statutory arbitration may not agree to consolidate the arbitration with another arbitration, hold concurrent hearings, or authorise the tribunal to order such consolidation or the holding of concurrent hearings unless the arbitrations or hearings are to be conducted under the same enactment.

13.5 Binding of Third Parties

A tribunal's award is final and binding on the parties and any person claiming through or under them, but does not in itself bind any third party. Notably, an award ordering the rectification or reduction of a deed or other document is of no effect in so far as it would adversely affect the interests of any third party acting in good faith.

The Scottish courts do have the power to make orders binding foreign third parties, if such third parties are subject to the jurisdiction of the court in accordance with the rules of private international law.

SERBIA

Law and Practice

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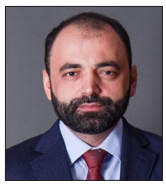
Nikcevic Kapor has been established by lawyers with long and distinguished experience built in the biggest multinational construction company from SEE that operated various areas of trade and commerce worldwide. Its experts combine experience from construction and real estate projects completed in various markets such as Serbia, Montenegro, Bosnia and Herzegovina, Croatia, Hungary, Russia, Belarus, Kazakhstan, Georgia, Jordan, Qatar, Nigeria, Zambia, Ghana, etc, offering a comprehensive approach, commitment and trust in finding or making solutions for clients' needs. The firm is focused on dispute resolution, construction, energy, real estate, mining and infrastructure sectors and provides services in English, Russian and Serbian.

Authors



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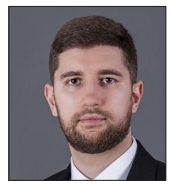

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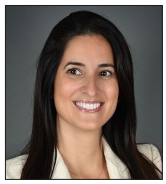

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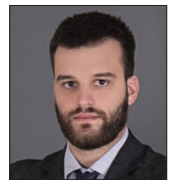

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1. General

1.1 Prevalence of Arbitration

Serbia, and Belgrade in particular, has established itself as a premier venue for international arbitration in the Balkan peninsula.

The arbitration community is highly developed, featuring a number of experts – both in academia and in practice. Many arbitration-related events take place every year in Serbia.

Arbitration as a mode of dispute settlement is charting continuous growth, although litigation is still prevalent. Domestic parties are not reluctant to resort to international arbitration. To that end, the most frequently selected institutions are ICC and VIAC, but there are also international arbitration cases before the Serbian arbitration institutions (Belgrade Arbitration Centre and Permanent Arbitration at the Chamber of Commerce and Industry of Serbia).

1.2 Key Industries

Arbitration is especially prevalent in the construction industry in recent years. This is due to the fact that a significant number of large international projects that were ongoing during the COVID-19 crisis and the Russia-Ukraine war are now being completed and claims are being brought for adjustments of price due to the significant changes in prices of elements used to form the prices for these projects, caused by these crises.

1.3 Arbitration Institutions

International arbitrations are administered by two institutions in Serbia: the Permanent Arbitration of the Serbian Chamber of Commerce and Industry and the Belgrade Arbitration Centre (BAC).

Recently, a new institution was established: the Construction Dispute Resolution Centre (CDRC) at the Association of Consulting Engineers of Serbia (ACES).

1.4 National Courts

Set-aside proceedings and proceedings for the recognition and enforcement are conducted before the Higher Courts or the Commercial Courts as the first instance, the Court of Appeal or the Commercial Court of Appeal as the second and the Supreme Court of Serbia as the final instance.

2. Governing Legislation

2.1 Governing Law

The arbitration procedure in Serbia is primarily governed by the Law on Arbitration, which aligns closely with the UNCITRAL Model Law on International Commercial Arbitration. Serbia,

as a Model Law jurisdiction, has adopted the core principles and framework established by the UNCITRAL Model Law, ensuring consistency with international standards and practices. The national legislation aims to provide a predictable and efficient legal framework for the conduct of international arbitration, thereby promoting Serbia as a favourable seat for arbitration.

The Serbian Law on Arbitration rarely diverges from the UNCITRAL Model Law, maintaining a high degree of fidelity to the original text. However, where deviations exist, they are generally minor and pertain to procedural specifics tailored to the domestic legal context.

2.2 Changes to National Law

There have been no changes to Serbian arbitration law in the past year, nor are there any changes planned in the immediate future.

Moreover, there are no current indications or announcements of pending legislation that might alter the arbitration framework in the immediate future.

3. The Arbitration Agreement

3.1 Enforceability

Under Serbian law, an arbitration agreement must be concluded in a written form to be enforceable. This requirement can be satisfied in several ways. The agreement may be embedded within a contract as an arbitration clause or exist as a separate agreement. The written form is deemed to be fulfilled even if the agreement is reached through an exchange of communications – such as letters, faxes, emails, or other electronic messages – that can serve as evidence of the parties' consent, irrespective of whether these messages are signed. Additionally, an arbitration agreement is considered valid if a written contract between the parties references another document containing an arbitration clause, as long as it is clear that the parties intended to incorporate the arbitration clause by reference.

3.2 Arbitrability

Under Serbian law, the concept of arbitrability plays a crucial role in determining the scope of matters that can be resolved through arbitration. Generally, arbitration can be utilised for disputes concerning rights that are freely available to the parties, meaning that they can dispose of these rights without restriction. However, certain subject matters are deemed non-arbitrable due to the mandatory jurisdiction of state courts or public policy considerations.

For instance, disputes related to family law matters, such as divorce or child custody, are not arbitrable because they involve personal status and public interest, which require the oversight of state courts. Similarly, disputes concerning property claims regarding immovables, such as real estate ownership issues, are typically excluded from arbitration as they often involve public records and state control. Additionally, patent disputes, which may involve state-granted rights and public interest considerations, are generally considered non-arbitrable.

Serbian courts scrutinise the arbitrability of disputes ex officio, meaning they independently assess whether a dispute is suitable for arbitration, even if the parties do not raise this issue. This ensures that arbitration is only used for appropriate disputes, maintaining the integrity and proper jurisdictional boundaries of arbitration as a dispute resolution mechanism.

3.3 National Courts' Approach

In Serbia, the arbitration law does not specify a rule for determining the law governing the arbitration agreement. Consequently, the determination of the applicable law is subject to interpretation by the courts. There is a notable decision by the Supreme Court of Serbia that suggests the law governing the main contract should also govern the arbitration agreement, particularly when the issue has not been explicitly addressed by the parties. However, this stance has not been definitively established as the standard approach, as the decision did not primarily focus on this issue.

Regarding the enforcement of arbitration agreements, Serbian courts generally respect and uphold these agreements, provided that they are properly invoked by the parties. If a party asserts the existence of an arbitration agreement before engaging in the merits of the case, the court is obligated to enforce the agreement by referring the parties to arbitration. This process ensures that the parties honour their contractual commitments to resolve disputes through arbitration, thereby promoting the autonomy and efficiency of arbitration as a dispute resolution mechanism.

3.4 Validity

Serbian law explicitly endorses the doctrine of separability concerning arbitration agreements. As stated in Article 28(2) of the Law on Arbitration, an arbitration clause is considered autonomous and independent from the other provisions of the contract in which it is contained. This means that if a dispute arises regarding the existence or validity of the contract as a whole, the arbitration clause remains unaffected and can still be invoked to resolve the dispute.

Furthermore, Article 28(3) reinforces this principle by clarifying that a declaration of the main contract's invalidity does not automatically invalidate the arbitration clause. This legal framework ensures that the agreement to arbitrate remains enforceable even if other parts of the contract are contested or deemed void. The separability doctrine thus safeguards the parties' agreement to arbitrate and ensures that disputes are resolved in accordance with their chosen method of dispute resolution, irrespective of the overall contract's status.

4. The Arbitral Tribunal

4.1 Limits on Selection

The parties are free to select any natural person that possesses contractual capacity as an arbitrator. The arbitrator has to comply with the conditions laid out by the parties in their agreement and be independent and impartial in regard to both the parties and the subject of the dispute.

Any person selected as an arbitrator has to disclose any circumstances that could raise doubts as to his/her independence and impartiality. This duty exists from the moment of appointment and extends to the end of the arbitration process.

4.2 Default Procedures

Serbian law provides a default mechanism for appointing arbitrators if the parties' chosen method fails. In ad hoc arbitrations, where no institutional rules apply, the court of the seat of arbitration steps in to appoint the arbitrator(s). This judicial intervention ensures that the arbitration process can proceed smoothly even if the parties cannot agree on the arbitrator(s).

For arbitrations administered by an institution, such as the Permanent Arbitration at the Chamber of Commerce and Industry of Serbia or the Belgrade Arbitration Centre (BAC), the institu-

tion's rules dictate the appointment process. Typically, the president of the institution appoints the arbitrator if the parties' method fails. This rule applies equally to multiparty arbitrations, where the involvement of multiple parties may complicate the appointment process. The institutional rules often provide detailed procedures for such scenarios, ensuring a fair and balanced composition of the arbitral tribunal.

4.3 Court Intervention

In Serbia, courts have a limited but essential role in the selection of arbitrators, primarily stepping in when the parties' agreed method of selection fails and when the arbitration is not administered by an arbitral institution. Courts can appoint arbitrators to ensure that the arbitration process is not stalled due to disagreements or deadlock among the parties. This intervention is crucial in ad hoc arbitrations where no institutional rules are available to fill procedural gaps.

Additionally, courts can play a role in the challenge and removal of arbitrators. If a party challenges an arbitrator based on allegations of bias, lack of independence, or failure to meet the qualifications specified in the arbitration agreement, and if the parties have not agreed on another procedure, the competent court can decide on the challenge. This judicial oversight provides a safeguard against partiality and ensures that the arbitration process adheres to principles of fairness and impartiality.

4.4 Challenge and Removal of Arbitrators

Serbian arbitration law includes provisions governing the challenge and removal of arbitrators. These default provisions apply unless the parties have agreed otherwise. An arbitrator can be challenged or removed if there are circumstances that raise justifiable doubts about their impartiality or independence. This could include prior relationships with one of the parties, financial interests in the outcome of the dispute, or any other situation that might reasonably lead to a perception of bias.

The process for challenging an arbitrator involves submitting a written request for disqualification within 15 days of learning about the appointment or the grounds for the challenge. This timeframe ensures that challenges are raised promptly and do not unduly delay the arbitration process. If the parties do not agree on the removal of the arbitrator, the competent court can make the final decision. Notably, a party that appointed an arbitrator can only request their removal if the grounds for removal arose after the appointment, ensuring that challenges are not made in bad faith or as a strategy to delay proceedings.

4.5 Arbitrator Requirements

Under Serbian law, arbitrators must uphold the principles of independence and impartiality throughout the arbitration proceedings. Before accepting an appointment, an arbitrator is required to disclose any facts or circumstances that might reasonably cause doubts about their impartiality or independence. This disclosure obligation continues after accepting the mandate, ensuring ongoing transparency and maintaining the parties' confidence in the arbitration process.

The rules of prominent arbitration institutions in Serbia, such as the Permanent Arbitration at the Chamber of Commerce and Industry of Serbia and the BAC, mirror these national legal requirements. They mandate that arbitrators submit a written statement affirming their impartiality and independence and disclosing any potential conflicts of interest. This written declaration is a critical part of the arbitrator's appointment process, providing a formal record of the arbitrator's com-

mitment to neutrality and the parties' informed consent to their role in the proceedings.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

Under Serbian law, certain disputes are reserved exclusively for the jurisdiction of state courts and cannot be resolved through arbitration. These exclusions are based on public policy considerations and the need to maintain state control over specific matters. Primarily, disputes concerning immovable property, such as issues related to ownership, rights, and transactions involving real estate, are not arbitrable. This is because such disputes often involve public records and require authoritative rulings by state courts to ensure clarity and legal certainty.

Additionally, family law matters, including those related to marriage, divorce, child custody, and inheritance, are also excluded from arbitration. These issues involve personal status and public interest considerations that necessitate judicial oversight to protect the rights and interests of individuals, especially vulnerable parties like children. Furthermore, certain administrative and criminal law matters, which inherently involve state sovereignty and public order, cannot be referred to arbitration.

For a more detailed discussion on arbitrability, please refer to **3.2 Arbitrability**.

5.2 Challenges to Jurisdiction

The principle of competence-competence is expressly recognised in Serbian arbitration law. According to Article 28(1) of the Law on Arbitration, an arbitral tribunal has the authority to determine its own jurisdiction, including any questions regarding the existence or validity of the arbitration agreement. This principle allows the tribunal to address challenges to its jurisdiction as a preliminary issue, providing a streamlined and efficient resolution to jurisdictional disputes without immediate recourse to the courts.

5.3 Circumstances for Court Intervention

In Serbia, courts can intervene in matters of jurisdiction under specific, limited circumstances. If a party initiates court proceedings despite the existence of an arbitration agreement, the court must declare itself incompetent and dismiss the claim upon the opposing party's objection, provided the objection is raised before the discussion of the case's merits begins.

However, the court may intervene and hear the claim if it determines that the arbitration agreement is clearly void, without effect, or incapable of being executed. This intervention ensures that parties are not forced into arbitration when there is a legitimate legal reason preventing it. Serbian courts generally show a willingness to enforce arbitration agreements, reflecting a pro-arbitration stance, but they will exercise their jurisdiction if necessary to ensure fairness and justice.

5.4 Timing of Challenge

The timing of the parties' challenge of a tribunal's decision on its jurisdiction depends on whether it was made as part of the arbitral awards or as a separate decision. If the tribunal rules on its jurisdiction as a preliminary question, any party can challenge this decision in a time frame of 30 days after it receives the decision on jurisdiction. The proceedings may, in any case, be continued while the challenge is pending before the competent court. There are several decisions of the Supreme Court indicating that not raising a challenge before the courts would not stop a party from later raising a jurisdictional objection as part of its request for setting aside. There-

fore, while a party can request judicial control immediately after a ruling on jurisdiction is made, failing to do so does not pre-empt it from raising it after the award is made.

If the tribunal rules on its jurisdiction in the final award, any party can make a jurisdictional objection in its application for the setting aside of the award.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

In Serbia, courts review questions of admissibility and jurisdiction de novo, meaning they assess the issues independently and without deference to the arbitral tribunal's findings. This standard of review allows the courts to thoroughly examine the legal and factual basis of the tribunal's decision regarding its jurisdiction and the admissibility of claims. The de novo review ensures that any errors or oversights by the tribunal can be corrected, maintaining the integrity of the judicial system and safeguarding the parties' rights.

This approach reflects a balance between respecting the autonomy of the arbitration process and ensuring that tribunals do not overstep their authority. It provides a robust mechanism for judicial oversight, especially in cases where there are significant questions about the tribunal's jurisdiction.

5.6 Breach of Arbitration Agreement

Serbian courts generally uphold the parties' agreement to arbitrate and show a strong reluctance to allow court proceedings in breach of an arbitration agreement. When a party commences court proceedings in violation of an existing arbitration agreement, the court will typically dismiss the action and refer the parties to arbitration, provided the arbitration agreement is valid and enforceable. This judicial deference to arbitration agreements reflects a pro-arbitration stance, recognising the parties' autonomy in choosing their preferred method of dispute resolution.

However, if the arbitration agreement is found to be void, inoperative, or incapable of being performed, the court may proceed with hearing the case.

5.7 Jurisdiction Over Third Parties

Serbian law has a limited scope for extending the jurisdiction of an arbitral tribunal to third parties who are not signatories to the arbitration agreement. The law explicitly addresses the assignation of claims, stipulating that the arbitration agreement remains binding on the debtor and the assignee to whom the claim is transferred. This provision ensures that the obligation to arbitrate can continue despite the transfer of rights under the contract.

Beyond this specific scenario, there is no explicit legal provision in Serbian law that extends the tribunal's jurisdiction to other third parties, whether domestic or foreign. The extension of an arbitration agreement to non-signatories, such as through doctrines like piercing the corporate veil or group of companies, has not been extensively explored or ruled upon by Serbian courts. As such, any application of these principles would likely depend on the circumstances of the case and the tribunal's interpretation of applicable laws and doctrines.

6. Preliminary and Interim Relief

6.1 Types of Relief

Under Serbian law, arbitral tribunals have the authority to grant preliminary or interim relief, provided that the parties have not expressly

agreed otherwise. This relief can be requested by one of the parties and is granted at the tribunal's discretion if deemed necessary, considering the specifics of the dispute. The power to order interim relief allows the tribunal to take measures aimed at preserving the status quo, safeguarding assets, or preventing actions that could harm the arbitration process or the enforcement of a potential award.

While Serbian law does not explicitly specify the types of interim relief that can be awarded, the tribunal has broad discretion to tailor the relief to the circumstances of the case, ensuring that the interim measures are appropriate and effective.

6.2 Role of Courts

Serbian courts can play a crucial role in granting preliminary or interim relief in connection with arbitration proceedings. The courts have the authority to issue such relief both before and during the arbitration process. This judicial intervention is particularly significant when a party seeks urgent measures that require enforcement capabilities beyond the tribunal's reach or when the tribunal has not yet been constituted.

Serbian law explicitly allows courts to grant interim relief in support of foreign-seated arbitrations. This means that even if the arbitration is not seated in Serbia, the parties can still seek the assistance of Serbian courts for measures such as asset freezing, preservation orders, and other necessary interim measures. The availability of court-ordered interim relief in cross-border contexts underscores Serbia's supportive stance toward international arbitration.

The types of relief that Serbian courts can grant are not exhaustively listed in the law, providing the judiciary with flexibility to issue orders suited to the specific needs of the case. This can include various forms of injunctive relief, orders for the preservation of assets or evidence, and other measures designed to support the arbitral process and ensure the enforceability of a future award.

The national legislation of Serbia does not explicitly provide for the use of emergency arbitrators. However, this absence does not preclude the possibility of parties agreeing to an emergency arbitrator mechanism through the rules of an arbitral institution. In such cases, the decisions of emergency arbitrators, typically granted as urgent interim measures before the constitution of the tribunal, are generally binding on the parties. The enforceability of these decisions depends on the agreement of the parties and the institutional rules under which the arbitration is conducted.

While Serbian law does not specifically address the role of courts concerning emergency arbitrators, general principles suggest that courts retain the power to intervene if necessary. For instance, if the relief sought requires enforcement capabilities beyond the scope of the emergency arbitrator's authority, the courts may provide supplementary support. However, such intervention would typically respect the principle of party autonomy and the arbitral process, avoiding unnecessary interference.

6.3 Security for Costs

Serbian arbitration law does not explicitly mention the power of arbitral tribunals to order security for costs. However, this power is generally considered to be implied within the broader authority of tribunals to issue preliminary relief.

7. Procedure

7.1 Governing Rules

The arbitration law (based on the UNCITRAL Model Law) contains default procedural rules. It also grants the parties extensive autonomy, allowing them to tailor the procedure in accordance with their preferences.

Arbitrations seated in Serbia are typically governed by the rules of one of the country's permanent arbitration institutions. The most commonly used rules are the 2016 Rules of the Permanent Arbitration at the Chamber of Commerce and Industry of Serbia and the 2014 Rules of the Belgrade Arbitration Centre (Belgrade Rules).

7.2 Procedural Steps

The Law on Arbitration in Serbia does not prescribe a rigid procedural framework, allowing significant flexibility in how the arbitration is conducted. The parties have the liberty to agree on the procedural rules that will govern the arbitration, including the sequence and nature of procedural steps. If the parties do not specify otherwise, the arbitral tribunal has the authority to determine the appropriate procedure.

The arbitration law leaves a possibility for the tribunal to conduct the procedure without an oral hearing, if the parties have not agreed otherwise, or if one of the parties does not request an oral hearing to be held.

7.3 Powers and Duties of Arbitrators

Under Serbian law, arbitrators possess a range of powers to manage and adjudicate the arbitration process. Key powers include:

- Deciding on Jurisdiction: Arbitrators have the authority to rule on their own jurisdiction, including the existence and validity of the arbitration agreement.
- Granting Interim Relief: They can issue orders for interim measures to protect the interests of the parties during the arbitration.
- Conducting Proceedings: Arbitrators have the discretion to determine the procedure of the arbitration, including the admissibility, relevance, and weight of evidence.
- Deciding on the Merits: The tribunal is responsible for making the final decision on the substantive issues of the case.

In terms of duties, arbitrators must ensure fairness and impartiality throughout the proceedings. They are obligated to treat all parties equitably and to provide each party with a full opportunity to present their case. Additionally, arbitrators must maintain independence from the parties and avoid any conflicts of interest, ensuring that the arbitration is conducted in a fair and unbiased manner.

7.4 Legal Representatives

Serbian arbitration law does not impose specific qualifications or restrictions on who may represent parties in arbitration proceedings. Any person with contractual capacity can act as a legal representative, regardless of nationality or professional qualifications. This inclusivity applies to both domestic and international arbitrations, allowing parties the flexibility to choose representatives based on their specific needs and preferences, including expertise in a particular area of law or familiarity with the subject matter of the dispute.

8. Evidence

8.1 Collection and Submission of Evidence

The Serbian arbitration law specifically mentions only witnesses and experts. Both witnesses and experts are, if the parties do not agree otherwise, examined during the oral hearings.

The arbitral tribunal can also ask the court's assistance in taking evidence of performing actions that are not available to the arbitral tribunal. In case the tribunal requests a court to assist in taking evidence, the competent court would go through the procedure in accordance with the law that governs the procedure before the state courts.

8.2 Rules of Evidence

There is not a default set of rules for evidence to be applied to arbitration proceedings seated in Serbia. In practice, it is usual for the tribunals to incorporate the IBA Rules on the Taking of Evidence in International Arbitration through the procedural orders.

8.3 Powers of Compulsion

Arbitral tribunals in Serbia do not possess inherent powers of compulsion to enforce the production of documents or the attendance of witnesses. However, they can request state courts' assistance in taking evidence. When a party refuses to produce certain evidence, the tribunal can draw adverse inferences, potentially affecting the tribunal's assessment of the case's merits.

- Parties: Tribunals can request parties to produce documents or provide witness testimony, but they cannot enforce these requests directly. Non-compliance may result in adverse inferences or other procedural consequences.
- Non-parties: Similarly, arbitral tribunals cannot compel non-parties to participate in the proceedings. However, the tribunal can request a competent state court to summon witnesses or order the production of documents by non-parties. The court's involvement ensures that the procedural requirements are met, and the necessary evidence is collected.

In summary, while arbitral tribunals in Serbia lack direct powers of compulsion, they can leverage state court assistance to ensure the effective gathering of evidence. This mechanism ensures that the arbitration process remains fair and that the tribunal has access to the necessary information to make a well-informed decision.

9. Confidentiality

9.1 Extent of Confidentiality

The Serbian arbitration law does not have a provision that proceedings must be confidential.

Likewise, there is no such rule in the rules of the Permanent Arbitration at the Chamber of Commerce and Industry of Serbia.

The BAC rules, however, provide that the BAC, the parties to the proceedings, arbitrators, witnesses and experts are required to keep the proceedings and the arbitral awards confidential.

10. The Award

10.1 Legal Requirements

An arbitral award is made in written form and needs to be signed by the arbitrators. The award

is made after discussion within the tribunal and requires a majority of votes. The arbitral award is valid even if signed by the majority of the arbitrators (if the refusal of signature is determined in the decision).

The award contains a reasoning if the parties have not excluded it by agreement. The arbitral awards always specify the date and the place in which they are rendered.

10.2 Types of Remedies

Serbian law does not prescribe the types of remedies that are available to the tribunal. However, punitive damages would be contrary to the basic principles of Serbian law and would therefore, likely, not be available to the tribunal.

10.3 Recovering Interest and Legal Costs

The Serbian arbitration law does not deal with the issue of recovery of interest. Therefore, the recovery of interest will depend on the law applicable to the merits of the case.

The general legal framework for the costs of the proceedings is that the parties split the costs of arbitration and pay them in advance. The arbitration law specifies that arbitral awards must contain a decision on the costs of the arbitration. This decision will specify the total costs and will also allocate them between the parties, taking into account all circumstances of the case, with an emphasis on the outcome of the proceedings.

11. Review of an Award

11.1 Grounds for Appeal

The Serbian arbitration law, as mentioned, is based on the UNCITRAL Model Law – as such, it contains the set-aside grounds similar to those of the Model Law. Therefore, a party may seek to set aside an arbitral award on the following grounds:

- 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 Serbia;
- 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;
- a dispute that was not covered by the arbitration agreement was resolved by an arbitration decision or the decision exceeded the limits of that agreement. If it is determined that the part of the decision that exceeded the limits of the arbitration agreement can be separated from the rest of the decision, only that part of the decision can be annulled;
- the composition of the arbitral tribunal or the arbitral procedure did not comply with the arbitration agreement (ie, with the rules of the permanent arbitration institution entrusted with the organisation of the arbitration) unless the agreement conflicts with a provision of arbitration law. If no agreement exists, the composition of the tribunal or the procedures must align with the applicable arbitration law;
- the arbitration decision is based on a false testimony of a witness or an expert or is based on a falsified document or the decision was made as a result of a criminal act by the arbitrator or a party, if these reasons are proven by a final judgment;
- the subject matter of the dispute is not capable of settlement by arbitration under the law of Serbia;
- the award is in conflict with the public policy of Serbia.

Requests for setting aside are made with the competent court – the Basic Court or the Commercial Court, depending on the subject matter and the parties involved. In any case, the parties can further appeal against a decision in the set-aside proceedings to a court of higher instance. Finally, under certain conditions an appeal with the Supreme Court of Serbia is also possible.

11.2 Excluding/Expanding the Scope of Appeal

The parties cannot agree to exclude or expand the scope of an appeal.

11.3 Standard of Judicial Review

The courts do not re-examine the merits of the case in set-aside proceedings. The judicial review is limited by the grounds for setting aside specified in the arbitration law. The grounds for setting aside are the ones mentioned in **11.1. Grounds for Appeal**.

12. Enforcement of an Award

12.1 New York Convention

Serbia has signed and ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, with no reservations.

12.2 Enforcement Procedure

Domestic arbitral awards are equated to final and binding court judgements – as such, they are immediately enforceable and go through the same procedure as a judgment. A foreign arbitral award needs to go through the procedure for recognition and enforcement. There are two possible approaches to the procedure. One involves separate procedures for recognition and enforcement; the other involves entering an enforcement procedure before recognition.

If recognition is sought as the main request, the recognition procedure can result in the court either approving or refusing recognition. The recognition procedure is a non-litigation procedure.

There is also a possibility of seeking enforcement on the basis of a foreign arbitral award that is not yet recognised. In this case, recognition is a preliminary issue that the court must rule on before continuing the enforcement proceedings. Even if the court decides that an arbitral award cannot be recognised, this part of the decision does not have the res judicata effect. In practical terms, a party can start the recognition procedure again, notwithstanding an existing ruling of non-recognition as a preliminary issue. Therefore, this is the standard way of enforcing a foreign arbitral award in practice.

The New York Convention's provisions apply to the recognition of foreign arbitral awards. It is possible to appeal against a first instance decision on either the recognition or the enforcement of a foreign arbitral award.

Once recognised, the arbitral award has the same status as a final and enforceable court judgment.

If setting-aside proceedings are initiated in another state, the Serbian courts do not have a duty to suspend the recognition and/or enforcement proceedings, but they may decide to do so at the request of one of the parties.

The state cannot raise a defence of sovereign immunity at the enforcement stage.

12.3 Approach of the Courts

The courts may only control the arbitral award in respect of the grounds for refusal of recogni-

tion and enforcement as laid out in the New York Convention.

Public order, as a ground for the refusal of recognition and/or enforcement of a foreign arbitral award under the New York Convention, is interpreted to mean the key principles of the Serbian public order – not any mandatory norm of Serbian laws.

13. Miscellaneous

13.1 Class Action or Group Arbitration

Serbian law does not allow for class action arbitration or group arbitration. The general notion of arbitrability (see **3.2. Arbitrability**) applies to class action and group arbitrations as well.

13.2 Ethical Codes

There are no specific formal ethical codes or professional standards exclusively governing arbitration proceedings in Serbia. However, Serbian attorneys, whether acting as counsel or arbitrators, are generally bound by the Code of Professional Ethics of the Bar Association of Serbia. This code establishes ethical guidelines and standards of professional conduct that must be adhered to by legal practitioners.

Additionally, it is common practice to incorporate the IBA Guidelines on Conflicts of Interest in International Arbitration as part of the procedural framework governing the arbitration. These guidelines provide comprehensive standards for ensuring impartiality and independence in international arbitration. The inclusion of these guidelines can be agreed upon by the parties or mandated by the arbitral tribunal through a procedural order.

For arbitrations conducted under the Belgrade Arbitration Centre (BAC), the BAC Code of Ethics for Arbitrators also applies. This code provides specific ethical guidelines for arbitrators, emphasising integrity, impartiality, and fairness throughout the arbitral process.

13.3 Third-Party Funding

Serbian law does not currently have any specific provisions or regulations concerning third-party funding in arbitration. As a result, there are no formal restrictions or guidelines governing the use of third-party funding in arbitration proceedings seated in Serbia. However, the absence of explicit regulation does not preclude the parties from utilising third-party funding arrangements, provided that they comply with general legal and ethical standards applicable to contractual relationships and financial transactions.

13.4 Consolidation

The arbitration law in Serbia does not explicitly address the issue of consolidation of separate arbitral proceedings. Nonetheless, the possibility of consolidation is not inherently precluded under Serbian law. Given that consolidation is permissible under Serbian civil procedure law for litigation, it stands to reason that similar principles could be applied in arbitration. For instance, if all parties involved in the separate proceedings consent to consolidation and the consolidation would facilitate a more efficient and equitable resolution of the disputes, it may be allowed. However, in the absence of specific provisions, the feasibility and procedure for consolidation would largely depend on the arbitration agreement and the tribunal's discretion.

13.5 Binding of Third Parties

In general, only signatories are bound by the arbitration agreement and the ensuing arbitral award.

Serbian law contains an explicit rule only for the assignation of claims. In that case, it specifies that the arbitration agreement remains in force and binds the debtor and the party that the claim is transferred to. The courts have not yet dealt with other ways of extending the subjective scope of the arbitration agreement. Therefore, while it would be possible to apply the group of companies doctrine or similar theories, there is, as of today, no practice to indicate whether this would be acceptable to the courts in Serbia.

Trends and Developments

Contributed by:
Jovan Nikčević, Filip Živanović, Milica Cicmil and Matija Savović
Nikcevic Kapor

Nikcevic Kapor has been established by lawyers with long and distinguished experience built in the biggest multinational construction company from SEE that operated various areas of trade and commerce worldwide. Its experts combine experience from construction and real estate projects completed in various markets such as Serbia, Montenegro, Bosnia and Herzegovina, Croatia, Hungary, Russia, Belarus, Kazakhstan, Georgia, Jordan, Qatar, Nigeria, Zambia, Ghana, etc, offering a comprehensive approach, commitment and trust in finding or making solutions for clients' needs. The firm is focused on dispute resolution, construction, energy, real estate, mining and infrastructure sectors and provides services in English, Russian and Serbian.

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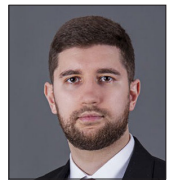

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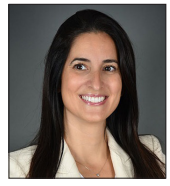

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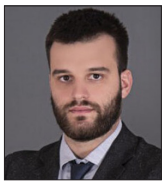

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Introduction

International arbitration has increasingly become a preferred method for resolving commercial disputes, offering parties a neutral and flexible forum. In Serbia, this trend mirrors the global movement towards arbitration as an efficient alternative to litigation. As the country continues to harmonise its legal framework with international standards, the Serbian judiciary has played a crucial role in shaping the arbitration landscape. This article explores recent developments in Serbian international arbitration, focusing on key decisions by the Serbian Supreme Court.

The discussion starts with two pivotal issues: the treatment of non-signatories to arbitration agreements and the judicial review of arbitral tribunal decisions on jurisdiction under Article 16(3) of the UNCITRAL Model Law on International Commercial Arbitration (hereinafter referred to as "UNCITRAL Model Law"). These issues highlight the evolving interpretation and application of arbitration law in Serbia, reflecting broader trends in international arbitration.

Further, the article looks at a recent decision by the Supreme Court of Serbia dealing with the limits of judicial control of arbitral awards, the limits of public policy and decisions based on equity.

By examining the Supreme Court's rulings, this article aims to provide insights into the current state of arbitration practice in Serbia and its alignment with international norms.

The Serbian approach to the subjective scope of the arbitration agreement

The extension of the subjective scope of arbitration agreements, ie, the binding of non-signatories, has become a critical issue in contemporary international arbitration. As global business transactions become increasingly complex and involve multiple parties, the question of who can be bound by an arbitration agreement has gained significant relevance. Traditionally, arbitration agreements bind only the parties who have expressly consented to them. However, modern commercial relationships often blur the lines between signatories and non-signatories, leading to disputes over whether entities or individuals who did not sign the arbitration agreement can be compelled to arbitrate.

This topic is especially pertinent in today's globalised economy, where corporate structures and contractual arrangements are often intricate and multi-layered. Non-signatories may include parent companies, subsidiaries, third-party beneficiaries, or even individuals within a company. The inclusion or exclusion of these parties from arbitration can significantly impact the resolution of disputes, the enforceability of awards, and the overall fairness and efficiency of the arbitration process.

In this context, courts and arbitral tribunals around the world have developed various doctrines and principles to address the issue, such as group of companies, alter ego, estoppel, and third-party beneficiary theories. These legal theories aim to balance the principle of consent, which is foundational to arbitration, with the need to ensure that arbitration remains a viable and effective method of dispute resolution.

The Serbian Arbitration law deals with the issue in its Article 13. It specifies that the arbitration agreement remains in force in case of assignment of contracts or claims, unless otherwise agreed. It also remains in effect in the event of subrogation, unless otherwise agreed. Finally, these provisions also apply in other cases of

transfers of claims, unless otherwise agreed. Therefore, the law only specifically addresses one reason for extending the subjective scope of the arbitration agreement. The possibility of extending the arbitration agreement's subjective scope to non-signatories in other cases is therefore uncertain.

The Supreme Court of Serbia dealt with the issue of extending the subjective scope of the arbitration agreement in its decision from 25 October 2018 (case number 37/2018).

An arbitral tribunal's partial decision rejected the first defendant's challenge to the tribunal's jurisdiction. The case involves a 2007 share purchase agreement between the Serbian Privatization Agency and a consortium from Lithuania and Sweden, which included an arbitration clause designating the Foreign Trade Arbitration at the Serbian Chamber of Commerce as the dispute resolution forum. In 2010, the Privatization Agency initiated arbitration, seeking substantial damages for alleged breaches of the agreement by the consortium. In 2011, the Agency expanded the complaint to include a third party, originating from a split-off from one member of the consortium. That party objected to the tribunal's jurisdiction, arguing they had no agreement with an arbitration clause. The objection was dismissed by the tribunal, but the third party sought annulment of this decision before the Serbian courts.

Based on these facts, the first-instance court concluded that the annulment of the contested arbitral award was justified. The court found that the arbitration clause does not apply to the plaintiff, even though it originated from a split-off from AA. The appellate court, however, disagreed, arguing that the arbitration clause applied to the plaintiff because the same individuals involved in signing the arbitration agreement also established the plaintiff and transferred most claims to it.

The Supreme Court of Cassation overturned the appellate court's decision, citing a misapplication of substantive law. According to the imperative provision of Article 4 of the Arbitration Act, the disputed relationship can only be resolved through arbitration based on the parties' agreement. Article 12 of the same law (corresponding to Article 7(2) of the UNCITRAL Model Law) stipulates that the arbitration agreement must be in written form. The Supreme Court found no evidence of such an agreement between the plaintiff and the defendants. Additionally, the conditions for transferring the arbitration clause to the plaintiff were not met, as no claims from the privatisation agreement were transferred to the plaintiff (the above-mentioned Article 13). Thus, the Supreme Court reinstated the first-instance court's decision, confirming that the arbitration tribunal's jurisdiction could not be established over the plaintiff, regardless of any potential joint liability for the obligations of the original signatories.

The findings from the recent case law demonstrate that the Supreme Court of Serbia interprets Article 13 of the Arbitration Act (binding non-signatories in the case of transfer of claims) as the sole method for extending the subjective scope of arbitration agreements. This strict interpretation reveals the court's reluctance to accept other means of binding non-signatories, even in scenarios where there is evident malice, such as intentional avoidance of arbitration through corporate restructuring and asset transfers to newly created entities.

As such, while the current judicial interpretation ensures a high degree of legal certainty

and adherence to the letter of the law, it also highlights the need for ongoing dialogue and potential reform to accommodate the practical realities of international arbitration in Serbia.

Article 16(3) of the UNCITRAL Model Law in the practice of Serbian courts

Article 16(3) of the UNCITRAL Model Law provides that where an arbitral tribunal rules on its jurisdiction as a preliminary question, any party may request, within 30 days after having received notice of that ruling, the competent court to decide the matter. Such a decision is not subject to appeal. Furthermore, while the request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

The Serbian Arbitration law has adopted Article 16(3) verbatim in its Article 30(2). Since Serbia adopts the UNCITRAL Model Law in this regard, the Serbian courts should, in general, follow the already established practice of courts worldwide when deciding on the interpretation of the Model Law.

The purpose of the provision proposed by Article 16(3) is to ensure immediate, more efficient control of jurisdictional decisions by the arbitral tribunal. This is evidenced by the shorter timeframe compared to that of an application for setting aside (three months) and the lack of appeal procedure. It allows the party wishing to apply for judicial control of a jurisdictional decisions to do so at once, instead of having to wait for the opportunity to initiate the set-aside proceedings.

At the same time, interpretation has leaned towards the conclusion that not requesting judicial control pursuant to Article 16(3) would preclude a party from later invoking a jurisdictional objection in the request for annulment.

Despite the established interpretation of Article 16(3) of the UNCITRAL Model Law on International Commercial Arbitration, Serbian courts have adopted a distinct approach that diverges from international standards. This divergence primarily concerns the judicial control mechanism outlined in Article 16(3), which allows a party to request the court to decide on the jurisdiction of the arbitral tribunal if the tribunal has ruled as a preliminary question that it has jurisdiction. Internationally, this mechanism is considered as a unique, standalone procedure specifically designed to address jurisdictional challenges during arbitration.

This is evidenced by a case where a preliminary ruling on jurisdiction made by the arbitral tribunal was challenged through an application for setting aside. This approach conflates the focused jurisdictional review with the broader and more intensive annulment procedure, which typically involves a thorough judicial review of the entire arbitration process and the award.

The divergence is further highlighted by the fact that this application for setting aside made its way to the Supreme Court as a third instance. This progression contradicts Article 30(3) of the Serbian Arbitration Law, which specifies that there is no right of appeal against a decision of the court made pursuant to Article 30(2) (corresponding to Article 16(3) of the UNCITRAL Model Law).

Preconditions for arbitration, public policy and decisions based on equity

The Supreme Court of Serbia recently upheld decisions dealing with the limits of judicial control of arbitral decisions, the limits of the public policy arguments and what constitutes a decision based on equity.

The parties had entered into a contract on 20 December 2007 for the procurement of a software application for the real estate cadastre. The contract included general and special conditions, which provided for arbitration under the UNCITRAL Arbitration Rules in case of disputes. The contract specified a procedure for resolving disputes through consultations and, if necessary, arbitration.

The dispute arose after the plaintiff terminated the contract and the defendants initiated arbitration proceedings. The plaintiff argued that the defendants did not fulfil the preconditions for arbitration, specifically the requirement to notify the plaintiff of their intent to initiate arbitration within 56 days of the dispute being referred to an adjudicator.

The lower courts concluded that the conditions for annulling the arbitral award, as specified in Article 58(1)(1) of the Serbian Arbitration Law, were not met, according to Article 7 of the Serbian Arbitration Law, that states that state courts are limited to examining the nullity conditions of the arbitration clause, not the fulfilment of procedural preconditions. The arbitral tribunal itself is responsible for assessing such procedural issues. The arbitration agreement was deemed valid under both the chosen applicable law and Serbian law. The agreement met all formal requirements and was not influenced by coercion, threats, fraud, or error.

The plaintiff also contended that the arbitral award was contrary to public policy because it included amounts already performed and thus extinguished. However, this argument was dismissed as it challenged the factual determinations made during the arbitration, which are not subject to review in annulment proceedings.

The plaintiff's claim that the arbitral award was made based on equity without mutual agreement was also rejected. The court found that the award was based on an assessment of the evidence and the principles of good faith and fairness under the Law on Obligations, not solely on equitable considerations.

The Serbian courts upheld the arbitral award and found no grounds for annulment. They emphasised the limited scope of judicial review concerning the nullity of arbitration agreements and the irrelevance of procedural preconditions and factual determinations made by the arbitral tribunal. This decision reinforces the autonomy and finality of arbitral awards within the framework of Serbian arbitration law.

Conclusion

In conclusion, while the practice of Serbian courts in certain areas of international arbitration diverges from the prevailing norms, Serbia continues to uphold its reputation as an arbitration-friendly jurisdiction. The country's adherence to the New York Convention ensures that enforcement proceedings align with internationally recognised standards, providing a robust framework for the recognition and enforcement of arbitral awards.

Furthermore, the ongoing efforts to improve arbitration practices in Serbia are promising. The increasing number of conferences and seminars on arbitration, which actively involve judges, demonstrate a commitment to fostering a deeper understanding and appreciation of arbitration principles. These initiatives are expected to promote good practices and enhance the consistency and predictability of court decisions related to arbitration.

As Serbia continues to engage with the international arbitration community and refine its legal and judicial approaches, it is poised to strengthen its position as a favourable venue for arbitration. The evolving jurisprudence, coupled with dedicated efforts to educate and train legal professionals, bodes well for the future of arbitration in Serbia, ensuring that it remains a reliable and effective mechanism for resolving international commercial disputes.

SOUTH AFRICA

Law and Practice

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Herbert Smith Freehills South Africa LLP

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Herbert Smith Freehills South Africa LLP (HSF) is a leading global law firm with over 5,000 people, including 2,600 lawyers, in 24 offices across Africa, Asia, Australia, Europe, the Middle East and the US. It is recognised as a global leader in international arbitration, with a multidisciplinary global disputes team of world-leading sector specialists and regional experts. HSF advises clients on arbitrations under a broad spectrum of civil and common laws as well as public international law. HSF's specialist arbitration practitioners around the globe are experienced in arbitrating under the rules of all major arbitration institutions, and ad hoc arbitrations.

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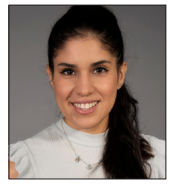

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HERBERT SMITH FREEHILLS

1. General

1.1 Prevalence of Arbitration

International arbitration is being increasingly utilised in South Africa, particularly in cases involving complex, cross-border commercial disputes. At the end of 2017, South Africa's legal framework was modernised and brought in line with the UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law") through the adoption of the International Arbitration Act 15 of 2017 (IAA). The IAA now provides a comprehensive legal regime that is conducive to international arbitration, addressing all stages of the arbitral process and limiting court intervention to specific grounds, such as procedural or jurisdictional issues. South Africa is also a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), which facilitates the recognition and enforcement of foreign arbitral awards in the country.

Since the adoption of the IAA, the prevalence of international arbitrations seated in South Africa has increased. Recent statistics published by the Arbitration Foundation of Southern Africa (AFSA) show this increased prevalence. According to AFSA's 2022 report, international arbitrations constituted 65% of the overall disputes lodged with AFSA, while domestic arbitrations accounted for the remaining 35%. The composition of parties involved in AFSA international arbitrations reflects significant international engagement, with 71% hailing from the Southern African Development Community (SADC) region and the remaining 29% originating from non-African nations.

South Africa is increasingly being chosen as a seat of arbitration in parties' commercial contracts, particularly due to the availability of skilled arbitrators and the supportive judiciary that respects the autonomy of the arbitration process. This has made international arbitration in South Africa an attractive option for parties, particularly those hailing from the SADC region. South Africa's courts are also currently overburdened with a high volume of cases, leading to delays and inefficiencies. The courts' workload is exacerbated by systemic issues, which undermine public confidence in the legal system, and commercial litigants appear to be resorting to

arbitration (whether international or domestic) more frequently for this reason as well.

Notwithstanding this, court litigation remains the dominant dispute resolution mechanism in certain sectors, particularly those involving public procurement and regulatory compliance. This is largely because those matters often involve government or regulatory bodies, and statutes require that these issues be resolved in the courts. There are also certain disputes which cannot be arbitrated in South Africa, such as criminal matters and matters involving status (eg, liquidations and divorces).

1.2 Key Industries

In light of the fact that arbitration awards and proceedings are not publicised in South Africa, it is difficult to determine whether there are any industries that have experienced significant international arbitration activity in recent years.

However, the data collected by AFSA from 2013 to 2023 indicates that the arbitrations launched under the auspices of its rules (both international and domestic) have predominantly been from the financial sector, which accounts for 33% of its total cases. This is followed by the energy and resources sector at 20%, industrial and manufacturing at 12%, and commodities and trading at 10%.

It is likely that the players in these industries, which often experience complex, high-value contractual disputes, have in recent years opted to include dispute resolution mechanisms requiring arbitration in their contracts. This has likely been done in order to ensure that the parties are able to appoint arbitrators with specialist subject matter expertise and resolve their disputes confidentially and as efficiently and cost-effectively as possible (which is not assured through the South African court systems).

1.3 Arbitration Institutions

AFSA is South Africa's leading arbitral institution, and it has played a significant role in the development of international arbitration in South Africa.

Although it is not a new institution, in 2021, the AFSA International Court was established under the revised AFSA International Arbitration Rules and AFSA began to offer services that catered to both domestic and international disputes in diverse sectors, reflecting its capacity to manage complex cases and its importance in the South African arbitration landscape.

The AFSA International Court is the first of its kind in South Africa and is tasked with taking decisions on behalf of AFSA, including the appointment of arbitrators and resolution of any challenges to appointments and issues of jurisdiction.

The China-Africa Joint Arbitration Centre ("CAJAC Johannesburg") is a subsidiary of AFSA and was established in response to the need for a credible China-Africa dispute resolution mechanism, necessitated by the increasing trade between China and Africa.

1.4 National Courts

There are no specific courts in South Africa that are designated to hear disputes related to international arbitration and/or domestic arbitrations.

2. Governing Legislation

2.1 Governing Law

The statute governing international arbitration in South Africa is the IAA, which came into force in December 2017.

The IAA explicitly incorporates the UNCITRAL Model Law into South African law. As a result, the UNCITRAL Model Law serves as the foundational framework for international arbitration in South Africa, ensuring alignment with global standards and offering a predictable legal environment for international commercial disputes. The IAA also provides for the recognition and enforcement of foreign arbitral awards, thus replacing South Africa's prior legislation (the Recognition of Foreign Arbitral Awards Act, 1977).

While the IAA closely follows the UNCITRAL Model Law, there are a few notable distinctions:

Public Policy and State Parties

The IAA emphasises public policy considerations, particularly concerning state parties involved in arbitration. It mandates that arbitration proceedings involving public bodies be held publicly, diverging from the UNCITRAL Model Law's typical confidentiality provisions.

Investor-State Dispute Settlement

The IAA does not provide for automatic recourse to investor-state dispute settlement (ISDS) mechanisms (such as International Centre for Settlement of Investment Disputes (ICSID) arbitration), reflecting a cautious stance towards ISDS.

This stance is also reflected in the Protection of Investment Act, which makes international arbitration voluntary but not compulsory for the South African government in ISDS matters.

2.2 Changes to National Law

There have been no significant amendments to the IAA in the past year; however, the ongoing interpretation and application of the IAA by the courts continues to shape its implementation and effectiveness.

This judicial involvement has been crucial in refining the arbitration landscape in South Africa, ensuring that the IAA evolves together with emerging legal and commercial needs.

Currently, there is no pending legislation which may significantly alter the international arbitration landscape in South Africa.

3. The Arbitration Agreement

3.1 Enforceability

Arbitration agreements are contractual in nature and accordingly, the general requirements for the existence of a contract must be met. These include:

- The parties must be aligned in respect of the rights and obligations that they wish to create;
- The parties must intend to be bound by the agreement;
- The agreement must be lawful; and
- The parties must have the legal capacity to contract.

The IAA also specifically provides that for an arbitration agreement to be enforceable, it must be in writing (Article 7 of Schedule 1 to the IAA).

In order for the "in writing" requirement to be satisfied, it is not necessary that the agreement be signed, provided that all of the parties adopted and acted on the agreement. However, it is

recommended that the agreement be signed to avoid potential disputes.

3.2 Arbitrability

In South Africa, the arbitrability of disputes is determined based on public policy considerations and statutory provisions.

Generally, commercial disputes are arbitrable, but certain matters are deemed not to be arbitrable, due to public interest concerns or in light of specific statutory provisions requiring a court to determine the dispute.

Examples include:

- disputes involving issues of status (such as solvency and liquidation proceedings);
- criminal matters;
- administrative review proceedings (for example, the review of government/public procurement decisions); and
- family and marital disputes.

These limitations ensure that matters with broader societal implications or requiring state intervention remain within the judicial domain.

3.3 National Courts' Approach

South African courts generally uphold arbitration agreements, honouring the parties' autonomy and the principle of separability.

The South African courts have consistently demonstrated a pro-arbitration stance, referring matters to arbitration when a valid arbitration agreement exists, and enforcing arbitral awards. This is consistent with both the statutory framework under the IAA and the common law principles that have been developed by the courts over the years.

By way of example, the South African courts have demonstrated their pro-arbitration stance in the following cases, where party autonomy was emphasised and judicial intervention was avoided:

- *Tee Que Trading Services (Pty) Ltd v Oracle Corporation South Africa (Pty) Ltd and Another (case no 065/2021) [2022] ZASCA 68 (17 May 2022) ("Tee Que case"):* The Supreme Court of Appeal decisively limited its own discretion in disputes where the contracts contained international arbitration clauses. It mandated that unless an arbitration agreement is void or inapplicable, court litigation must be stayed in favour of arbitration. This case reinforced the autonomy of arbitration agreements and streamlined the enforcement process.
- *Lukoil Marine Lubricants DMCC v Natal Energy Resources and Commodities (Pty) Ltd [2023] ZAKZPHC ("Lukoil case"):* The High Court stayed a court application for the return of goods and the repayment of certain funds pending finalisation of arbitration proceedings in England. In making this order, the court emphasised that the agreement between the parties provided for disputes arising from the agreements to be resolved by way of arbitration in England, in terms of English law, and saw no reason to depart from the terms of those agreements.

As can be seen from the above, South African courts are supportive of enforcing arbitration agreements, provided they meet the legal requirements and do not contravene public policy. This support extends to both domestic and international arbitration agreements, reflecting a consistent judicial approach aimed at upholding arbitration as a legitimate and effective means of dispute resolution.

3.4 Validity

In South Africa, an arbitration clause may be considered valid and enforceable even if the main contract in which it is contained is found to be invalid. This principle is grounded in the doctrine of separability, which treats the arbitration agreement as distinct and independent from the main contract.

The Lukoil case illustrates this principle. The court held that allegations that the agreement in question was invalid did not call into question the parties' agreement to resolve any dispute by way of arbitration.

4. The Arbitral Tribunal

4.1 Limits on Selection

Under the IAA, parties have significant autonomy in selecting arbitrators, a principle that aligns with international arbitration standards. The IAA allows parties to agree on the number of arbitrators, the selection process and the qualifications required. However, this autonomy is subject to the requirement that the appointed arbitrators must be impartial and independent.

4.2 Default Procedures

If the parties fail to agree on the method of selecting arbitrators and there is no chosen method, or if their chosen method fails, the IAA provides a default mechanism.

Article 11 of Schedule 1 to the IAA stipulates that:

- in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, they will be appointed, on request of a party, by the relevant court with jurisdiction (which is determined with reference to Article 6 of Schedule 1 to the IAA); and
- in an arbitration with three arbitrators, each party must appoint one arbitrator, and the two appointed arbitrators will appoint the third arbitrator. If a party fails to appoint an arbitrator within 30 days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment will be made, on request of a party, by the relevant court with jurisdiction (which is determined with reference to Article 6 of Schedule 1 to the IAA).

4.3 Court Intervention

The South African courts may only intervene in the selection of arbitrators under specific circumstances, as outlined in the IAA.

This intervention can occur in the following circumstances:

- when there is a failure in the agreed procedure for appointment and the court is requested to intervene; or
- when a party challenges an arbitrator's appointment on grounds such as bias or lack of independence, and if its challenge under the agreed procedure is not successful (although the arbitral proceedings will continue pending this determination).

The court's role is generally limited to upholding the integrity of the arbitration process and ensuring that arbitrators are impartial and independent.

4.4 Challenge and Removal of Arbitrators

Under the IAA, arbitrators can be challenged and potentially removed if:

- there are justifiable doubts concerning their impartiality or independence; or
- they do not possess the qualifications agreed upon by the parties.

The process for challenging arbitrators is outlined in Articles 12 and 13 of Schedule 1 to the IAA.

4.5 Arbitrator Requirements

The IAA mandates that arbitrators must:

- be independent and impartial; and
- disclose any potential conflicts of interest at the time of their appointment and throughout the arbitration process.

The AFSA International Arbitration Rules reflect these standards, requiring arbitrators to disclose any circumstances that might give rise to justifiable doubts regarding their independence or impartiality.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

In South Africa, not all disputes can be referred to arbitration. The IAA specifically states that if a dispute is not capable of determination by arbitration under any law of the Republic, then it may not be determined by arbitration.

For instance, the below-mentioned matters have been held not to be arbitrable under South African law and are therefore excluded from arbitration:

- Disputes involving divorce, custody or maintenance are deemed inappropriate for arbitration due to their personal nature and the need for judicial oversight;
- Criminal offences cannot be resolved through arbitration as they involve public prosecution and punishment, which are exclusive state functions;
- Insolvency proceedings, which affect the rights of third-party creditors and involve the public interest, cannot be arbitrated; and
- The review of decisions of public and governmental bodies, such as public procurement decisions, cannot be arbitrated.

These exclusions are premised on the view that certain matters require the protections and procedural guarantees provided by the court systems, and the arbitrability of these issues could undermine public policy or result in unjust outcomes.

5.2 Challenges to Jurisdiction

The principle of Kompetenz-Kompetenz is entrenched in South African law through the IAA and judicial precedent.

The IAA

Article 16 of the UNCITRAL Model Law is incorporated into South African law through the IAA. This provision allows arbitral tribunals to rule on their own jurisdiction, including making determinations on the validity and scope of the arbitration agreement.

Judicial Precedent

The principle was also upheld by the Supreme Court of Appeal, prior to the IAA, in the case of Zhongji Development Construction Engineering Co Ltd v Kamato Copper Co Sarl 2015 (1) SA 345 (SCA), where the court held that the arbitration agreement must be given effect to and that it was for the arbitrator to determine the issues of jurisdiction that had been raised.

The doctrine ensures that tribunals have the first opportunity to resolve jurisdictional disputes, promoting the efficiency and autonomy of the arbitration process.

However, a party may request any such ruling by the arbitral tribunal to be reviewed by a court review, either at the stage of the enforcement of the award or during the proceedings and before the award (although the arbitration proceedings will not be suspended pending the outcome of the review).

5.3 Circumstances for Court Intervention

South African courts respect the autonomy of arbitral tribunals and intervene only in specific circumstances, where this is allowed by the IAA. According to the IAA, no court may intervene except where expressly provided therein and the South African courts have, to date, shown a general reluctance to intervene.

In the context of a jurisdictional dispute, a court is entitled, under the IAA, to intervene in the following scenarios:

- When the tribunal has ruled on its jurisdiction as a preliminary issue, a party can, within 30 days, seek a judicial determination on this ruling, although the judicial review will not suspend the arbitration proceedings (Article 16 of Schedule 1 to the IAA).
- When the tribunal has ruled on its own jurisdiction in the final award:
  (a) a party can apply to have the award set aside on the basis that the agreement is invalid or the award deals with a dispute which is not within the scope of the matters referred to arbitration (Article 34 of Schedule 1 to the IAA);
  (b) a court may refuse to enforce the award on the basis that the tribunal has gone beyond the scope of the dispute (Article 36 of Schedule 1 to the IAA).
- If court proceedings are launched and, when analysing whether the dispute should be referred to arbitration, the court finds that the arbitration agreement is null and void, inoperative, or incapable of being performed, it can proceed to hear the dispute (Article 8 of Schedule 1 to the IAA).

5.4 Timing of Challenge

Parties may challenge the tribunal's jurisdiction at the outset of the arbitration process; however, it is only once the tribunal has made a ruling on this issue that a party has the right to go to court to challenge its jurisdiction.

According to the IAA, objections to the tribunal's jurisdiction must be raised no later than the submission of the statement of defence (unless the delay is justified in the view of the tribunal) and a party is not precluded from doing so by virtue of the fact that it has participated in the appointment of the arbitrator (Article 16(2) of Schedule 1 to the IAA). If the tribunal makes a preliminary ruling on jurisdiction, the court review process must be launched within 30 days after the preliminary ruling has been handed down; however, the arbitration proceedings will not be suspended during the court review.

If the tribunal makes a ruling in the final award, the court review process must be launched within three months after the award is received.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The standard of judicial review for questions concerning issues of admissibility and jurisdiction involves a deferential approach.

Courts respect the tribunal's findings unless there is a clear and compelling reason to intervene, such as manifest error or inconsistency with public policy.

5.6 Breach of Arbitration Agreement

The IAA mandates that courts must stay judicial proceedings and refer the matter to arbitration unless the agreement is found to be null and void, inoperative, or incapable of being performed. This stance has since been reinforced in several cases, including the Tee Que case and the Lukoil case.

5.7 Jurisdiction Over Third Parties

The IAA does not explicitly allow an arbitral tribunal to assume jurisdiction over parties that are neither party to an arbitration agreement nor signatories to a contract containing an arbitration agreement. However, if those parties subsequently agree to become a party to the arbitration, jurisdiction may be assumed.

The 'group of companies' doctrine, which allows for possibly extending arbitration agreements to non-signatory companies within the same group, is not recognised in South African law. However, South African law does recognise the doctrine of the 'piercing of the corporate veil', and in exceptional circumstances, the separate legal personality of a company may be disregarded in order to hold the associated companies accountable. It should be noted that this doctrine has not, to date, been applied by the South African courts to justify the extension of an arbitration agreement to non-signatories.

6. Preliminary and Interim Relief

6.1 Types of Relief

Arbitral tribunals have the authority to award preliminary or interim relief, at the request of a party, in terms of the provisions of the IAA.

The type of interim measures which are permitted include an award requiring a party to:

- maintain or restore the status quo, pending determination of the dispute;
- prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- provide a means of preserving assets out of which a subsequent award may be satisfied;
- preserve evidence that may be relevant and material to the resolution of the dispute; or
- provide security for costs (only against a claiming or counter-claiming party).

The interim measure is recognised as binding and must be enforced, upon application, by a court unless there are specific grounds for refusing the recognition and enforcement.

The AFSA International Arbitration Rules also recognise the tribunal's power to grant interim relief, ensuring that these measures are enforceable and effective.

6.2 Role of Courts

The Role of the Courts in Granting Interim Relief

The IAA allows the South African courts to order interim relief upon the application of a party only in the following circumstances:

- the arbitral tribunal has not yet been appointed and the matter is urgent;

- the arbitral tribunal is not competent to grant the order; or
- the urgency of the matter means that obtaining the order form the arbitral tribunal would be impractical.

A court may not grant such an order if the arbitral tribunal, being competent to grant the order, has already determined the matter, nor may it grant such an order beyond the scope of the above-listed circumstances.

Interim Relief in Aid of Foreign-Seated Arbitrations

The IAA allows courts to issue orders in support of arbitration, irrespective of whether the seat of arbitration is within South Africa or abroad. The interim measures that may be ordered are the following:

- an order for the preservation, interim custody or sale of any goods that are the subject matter of the dispute;
- an order securing the amount in dispute, but not an order for security for costs;
- an order appointing a liquidator;
- any other orders to ensure that any award that may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party; and
- an interim interdict or other interim order.

Furthermore, the South African courts are required to stay any proceedings which are brought before them, if the dispute is subject to an arbitration agreement, regardless of the seat of the dispute.

Anti-suit Injunctions/Interdicts

In South Africa, the only reported case pertaining to anti-suit injunctions is the case of Vedanta Resources Holdings Limited v ZCCM Investment Holdings PLC 2019 JDR 1425 (GJ), which has confirmed that South African courts are prepared to issue anti-suit injunctions in appropriate circumstances. The High Court held that the following requirements must be satisfied in order to obtain such relief:

- The arbitration clause must indicate that arbitration is mandatory;
- The dispute referred to the foreign courts must fall within the ambit of the arbitration agreement and the nature of the dispute must be one capable of resolution by arbitration (arbitrability); and
- The applicant must also show the requirements for an interdict under South African law, namely, that:
  - (a) it has a clear right to the relief;
  - (b) it has a well-grounded apprehension of irreparable harm in the event that the injunction is not granted;
  - (c) the balance of convenience favours the granting of the injunction; and
  - (d) there is no adequate alternative remedy available to it.

Emergency Arbitrators

Provisions under national legislation and arbitral rules

The IAA is silent on the use of emergency arbitrators, and this has not been expressly dealt with under South Africa's national legislation.

To the extent that the dispute has been referred to arbitration under the auspices of AFSA, the AFSA International Arbitration Rules permit the use of emergency arbitrators to grant urgent interim or conservatory relief, before the arbitral tribunal has been constituted.

Status of decisions of emergency arbitrators

According to the AFSA International Arbitration Rules, emergency arbitrators may make any decision or order which the arbitral tribunal could make under the arbitration agreement. These decisions are binding on the parties, although they may be subject to review, modification or revocation by the subsequently appointed tribunal.

Court intervention in the context of emergency arbitrators

As mentioned above, South African national laws do not expressly deal with emergency arbitrators. However, the IAA defines an "arbitration" as "any arbitration whether or not administered by a permanent arbitral institution" and an "arbitral tribunal" as a "sole arbitrator or a panel of arbitrators".

An "emergency arbitrator" and the proceedings conducted under that arbitrator's appointment are likely to fall within the definitions of "arbitration" and "arbitral tribunal" and, given the South African courts' approach to limiting interference in arbitrations, it is likely that they would adopt a similar approach in the context of proceedings under an emergency arbitrator. South African courts are generally supportive of arbitration, recognise the principle of party autonomy and favour the approach that court interference in arbitration should be restricted.

However, as noted previously, the South African courts do retain the power to enforce or set aside arbitral awards if there are grounds to do so, such as when the decision is contrary to public policy or when the arbitrator exceeded their mandate (although the courts' intervention is limited to ensuring the proper administration of justice and upholding the integrity of the arbitral process). It is anticipated that the courts would continue to have such powers in the context of an emergency arbitration.

6.3 Security for Costs

Under the IAA, arbitral tribunals have the power to order security for costs, although this is limited only to the claimant and counter-claimant. This measure can be crucial in preventing frivolous claims.

The South African courts are not empowered to order security for costs, but they can make an order securing the amount in dispute.

7. Procedure

7.1 Governing Rules

The IAA

International arbitration in South Africa is primarily governed by the IAA, which incorporates the UNCITRAL Model Law.

It sets out the framework for the conduct of international arbitration, ensuring compliance with international standards and contains fallback provisions relating to various procedural aspects which may not have been agreed by the parties (or in the event that their elected mechanism failed) including the appointment of arbitrators, the conduct of the proceedings, the presentation of evidence and the issuing of awards.

AFSA

The main arbitral institution in South Africa, AFSA, has also published the AFSA International Arbitration Rules, which provide detailed procedural guidelines and which parties may adopt if they choose to arbitrate under the auspices of AFSA.

7.2 Procedural Steps

Arbitral proceedings seated in South Africa are governed by the arbitration agreement, and parties can decide on the rules that are to regulate the proceedings or agree to submit to the rules of an arbitral institution.

The majority of the procedural steps set out in the IAA are subject to any other agreement having been reached by the parties and are not mandatory. While the IAA provides a flexible framework, it does require that proceedings to which a public body is a party must be held in public, unless there are compelling reasons for the tribunal to direct otherwise (Section 11 of the IAA).

7.3 Powers and Duties of Arbitrators

The IAA confers the following powers and duties on arbitrators.

Powers of Arbitrators Under the IAA

The powers of arbitrators under the IAA include:

- the power to rule on their own jurisdiction;
- the power to grant interim measures at the request of a party (unless otherwise agreed by the parties);
- the power to order security for costs (only as against the claimant and counter-claimant);
- the power to modify, suspend or terminate an interim measure they have granted;
- the power to require the party requesting an interim measure to provide appropriate security in connection with the measure;
- the power to award any costs and damages to the party requesting an interim measure at any point during the proceedings;
- the power to conduct the arbitration in a manner as they consider appropriate, in the absence of the parties' agreement. This includes the power to determine the admissibility, relevance, materiality and weight of any evidence;
- the power to determine the language of the arbitration, in the absence of the parties' agreement; and
- the power to decide whether it is necessary to hold oral hearings for presentation of oral arguments (subject to any contrary agreement by the parties).

Duties of Arbitrators Under the IAA

The duties of arbitrators under the IAA include:

- the duty not to exceed the limits of the powers granted by the arbitration agreement or as agreed between the parties;
- the duty to act impartially and disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence, at the time of appointment and throughout the proceedings; and
- the duty to maintain confidentiality of the award and all documents created for the arbitration.

7.4 Legal Representatives

In South Africa, there is a traditional division between advocates and attorneys, although the distinction has become less prominent since the enactment of the Legal Practice Act in 2014. Traditionally, however, advocates specialise in court advocacy, and attorneys are less involved in this aspect of practice unless they have specifically obtained the right to appear in the High Court.

In respect of international arbitrations seated in South Africa (and domestic arbitrations), there is no specific requirement for a "right of appearance" or any additional local qualification, and the distinction between advocates and attorneys in this area is becoming less rigid. Historically,

although advocates primarily handled advocacy, attorneys are increasingly taking on this role.

Legal representatives may also be from different jurisdictions, provided they are qualified and capable of representing their clients' interests effectively. This flexibility aligns with international arbitration's transnational nature, allowing parties to select legal representatives who possess specific expertise or experience relevant to the dispute, regardless of their jurisdictional qualifications.

8. Evidence

8.1 Collection and Submission of Evidence

General Approach to Evidence in International Arbitrations Seated in South Africa

In international arbitration proceedings seated in South Africa, the approach to evidence collection and submission is generally governed by:

- the rules agreed upon by the parties;
- the rules of the chosen arbitral institution; or
- in the absence of such agreement, the discretion of the arbitral tribunal.

The IAA and AFSA International Arbitration Rules also offer guidance in this regard but are not as prescriptive as the rules which are applied in the domestic courts.

South Africa is a common law jurisdiction and, to the extent that the parties choose to appoint a South African arbitrator, the arbitrator would generally expect disclosure to take place, as well as witnesses to be called at the hearing.

Until recently, the collection and submission of evidence in South African arbitrations often closely mirrored the High Court procedure, with many parties agreeing to apply the High Court rules. However, in recent years there has been a marked shift from this practice and a noticeable modernisation in the way arbitrations are conducted in this regard.

Discovery/Disclosure of Evidence

The process of discovery (also referred to as disclosure) in arbitrations is usually less formal and more flexible compared to court litigation. Unlike court litigation, there is no automatic right to broad discovery.

Parties in international arbitrations often agree to apply the International Bar Association Rules on the Taking of Evidence in International Arbitrations ("IBA Rules") and typically agree to exchange Redfern Schedules where requests for relevant documents which are material to the outcome of the proceedings (subject to the relevant exclusions in the IBA Rules) are exchanged, before disclosure takes place.

However, the extent and scope of disclosure can vary significantly depending on the agreement between the parties or the tribunal's orders.

Privilege

South African law recognises the concept of legal privilege, which protects certain communications from being disclosed. This takes the form of:

- *Legal advice privilege:* Communications exchanged between a legal adviser, acting in their professional capacity, and their client, for the purposes of obtaining legal advice; and

- *Litigation privilege:* Communications exchanged and documents prepared in contemplation of litigation.

These rules of privilege apply equally in international arbitration proceedings.

Witness Statements

There is no set requirement that witness statements should be exchanged in international arbitrations; however, parties often agree to exchange witness statements in written form, which stand as the evidence-in-chief of the witness.

Depending on the type of matter and the agreement between the parties, witness statements are sometimes submitted together with the pleadings (memorial-style pleadings). However, parties may also agree to exchange witness statements after pleadings have been exchanged and discovery has taken place.

There are no set rules as to the content of those statements, and the parties are free to agree on this as they see fit. Witness statements usually provide a comprehensive account of the witnesses' evidence, and the witnesses are then subjected to cross-examination by theopposing party, followed by re-examination by theparty that called them. The tribunal may also question the witnesses.

8.2 Rules of Evidence

The IAA (and AFSA International Arbitration Rules) do not impose any rules of evidence, granting the parties the ability to agree on such rules, and the tribunal considerable discretion in determining the admissibility, relevance, materiality and weight of evidence.

As mentioned above, if a South African arbitrator is appointed, they may be more inclined to apply the South African rules of evidence.

The IBA Rules are also often used as a guide, although these are not binding unless agreed upon by the parties. The IBA Rules adopt a more flexible and pragmatic approach than the formal rules of evidence found in South African domestic litigation.

While South African domestic arbitration may adhere to more structured rules similar to those found in court proceedings, international arbitration enjoys greater flexibility. The strict rules of evidence applicable in the South African courts, such as the hearsay rule, may not apply unless the parties agree to their application.

8.3 Powers of Compulsion

Arbitral tribunals seated in South Africa do not possess the same powers as courts to compel the production of documents or the attendance of witnesses. However, under the IAA, tribunals can request the assistance of South African courts in these matters (Article 27 of Schedule 1 to the IAA).

Parties Involved in the Arbitration

For parties involved in the arbitration, compliance with the tribunal's orders regarding evidence and witness attendance is generally expected, as failure to do so may result in adverse inferences being drawn.

Non-parties to the Arbitration

The courts can issue subpoenas or orders compelling non-parties to produce documents or appear as witnesses, if such assistance is requested. The South African courts are generally supportive of arbitration and are likely to

enforce such requests, provided they are reasonable and necessary for the proceedings.

9. Confidentiality

9.1 Extent of Confidentiality

The General Position

In South Africa, arbitration proceedings are generally considered confidential, although there are some exceptions to the rule.

In this regard, the IAA provides that where the arbitration is held in private, the award and all documents, which are not otherwise in the public domain, must be kept confidential by the parties and tribunal, except where disclosure of those documents may be required for legal reasons (Section 11(2) of the IAA).

The confidentiality of these components is also often explicitly stated in the arbitration agreement or the rules of the chosen arbitral institution. For instance, the AFSA International Arbitration Rules include provisions for maintaining the confidentiality of the arbitration process.

Confidentiality typically extends to pleadings and submissions, documents submitted as evidence, the hearing process and the arbitral award.

Exceptions to the Rule

While confidentiality is a default position, it is not absolute. There are circumstances under which information from arbitral proceedings may be disclosed in subsequent proceedings. These exceptions include:

- If there is a legal duty or right to disclose, such as in the case of court-ordered disclosure or a statutory requirement, confidentiality may be overridden.
- Disclosure may also be permitted in situations where it is necessary to protect the public interest, such as in cases involving allegations of corruption or criminal activity.
- The parties to the arbitration may agree to waive confidentiality, allowing the information to be disclosed.
- In instances where a party challenges an arbitral award in court, the court may require disclosure of certain aspects of the arbitration, such as the pleadings or the award, to assess the validity of the challenge.

Arbitrations Involving Public Bodies

A further exception can be found in Section 11(1) of the IAA, which directs that arbitration proceedings to which a "public body" is a party must be held in public, unless there are "compelling reasons" and the arbitral tribunal directs otherwise. However, the law is not yet settled as to whether this would also extend to disclosure of the pleadings and other documents exchanged during the course of those arbitral proceedings.

10. The Award

10.1 Legal Requirements

The IAA contains specific requirements with which an arbitral award in an international arbitration seated in South Africa must comply, as follows:

- The award must be in writing (Article 31(1) of Schedule 1 to the IAA).
- The award must be signed by the arbitrator(s). If there is more than one arbitrator, the signatures of the majority are sufficient, provided the reason for any omitted signature is stated (Article 31(1) of Schedule 1 to the IAA).

- The 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 on agreed terms (Article 31(2) of Schedule 1 to the IAA).
- The award must state its date and the place of arbitration as determined in accordance with the agreement of the parties or, failing such agreement, the place determined by the tribunal (Article 31(3) of Schedule 1 to the IAA).

The IAA does not specify a strict time limit for the delivery of the award, unless the parties have agreed otherwise. However, the chosen arbitral institution may have its own rules regarding the timeframe for delivering awards.

10.2 Types of Remedies

Arbitral tribunals in South Africa have a broad discretion when awarding remedies, but there are some limitations. These limitations are not explicitly set out in the IAA, but arise in the context of a risk that the award may be set aside, or the South African courts refusing to enforce the award.

The IAA provides specific circumstances when an award may be set aside or where enforcement may be refused, which highlights the limits of the arbitrator's power to hand down certain awards, namely:

- A tribunal cannot make an award which conflicts with the public policy of South Africa. A typical example of this is punitive or exemplary damages, as such awards are not recognised under South African law.
- A tribunal cannot make an award where the subject matter of the dispute is not capable of settlement by arbitration. For example, an arbitrator cannot make an award placing a company in liquidation or imposing a criminal sanction.
- A tribunal cannot make an award which is outside of the scope of the dispute that has been referred to it.

Tribunals can order specific performance, rectification and injunctions, provided such remedies:

- are within the scope of the arbitration agreement;
- are within the scope of the dispute referred to it;
- do not conflict with South African public policy; and
- do not fall outside the scope of an arbitrable dispute under South African law.

10.3 Recovering Interest and Legal Costs

Recovery of Interest

Arbitral tribunals in South Africa can award interest.

The rate and the period for which interest is awarded will depend on the agreement of the parties, the applicable law, or the tribunal's discretion if no specific agreement exists.

The South African default position is set out in the Prescribed Rate of Interest Act, 1975, which states that if the rate at which the interest is to be calculated is not governed by any other law, agreement or trade custom or in any other manner, such interest shall be calculated at the South African "repurchase rate" plus 3.5% (currently 11.75%).

Interest shall commence running:

- *In the case of a liquidated debt:* On the date that the debt becomes due.

- *In the case of an unliquidated debt:* On the date on which the creditor sends a demand or takes steps to initiate arbitration proceedings, whichever is the earlier.

Unless otherwise agreed, "simple interest" is generally utilised.

Legal Costs

Legal costs are not governed by the IAA; however, they are generally awarded in South Africa based on the principle that costs follow the event (the losing party pays the legal costs of the winning party). However, this is dependent on the agreement of the parties, or the rules of the chosen arbitral institution.

The general position which is adopted in court proceedings and agreed in domestic arbitrations is that the costs awarded are the "taxed" costs of the parties' legal representatives (which is based on a "tariff" published in the rules of the High Court), the arbitrators' fees, experts' fees, fees and disbursements payable to the arbitration institution, and similar fees and disbursements.

The "tariff" does not reflect the actual legal costs incurred by the parties and therefore the winning party does not always recover their full legal spend. Although agreeing to apply this "tariff" means that the winning party may not be made "whole", it does mitigate the potential liability of the losing party.

However, there is no reason why the parties need to agree to apply the "tariff" and they are entitled to agree that costs will be awarded in the award, at the discretion of the arbitrators. It should be noted, however, that to the extent that a South African arbitrator is appointed, the arbitrator may be inclined to revert to the "tariff" approach, unless expressly agreed otherwise between the parties.

11. Review of an Award

11.1 Grounds for Appeal

Appeals of Arbitration Awards

In South Africa, unless the parties have expressly agreed that there will be a right to appeal the merits of the award, arbitral awards are not appealable.

Judicial Reviews of the Arbitration Award

Parties are entitled to judicially review the award in one of two ways:

- By way of application to set the award aside. This application must be made to the High Court within three months of the date on which the party making the application received the award.
- By opposing an application to enforce the award.

Under the IAA, an award may only be judicially reviewed on the following grounds:

- if the arbitration agreement is found to be invalid;
- if there were procedural irregularities in the arbitration, on the following grounds;
  - (a) a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present their case; or
  - (b) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement or the IAA;
- if 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 (lack of jurisdiction);
- if the court finds that the subject matter of the dispute is not capable of settlement by arbitration under South African law; or
- if the court finds that the award is in conflict with the public policy of South Africa.

11.2 Excluding/Expanding the Scope of Appeal

Inclusion of an Appeal Mechanism

Parties in international arbitrations seated in South Africa can agree to include an appeal mechanism in their arbitration agreement, even though this is not expressly provided for under the IAA.

Excluding/Expanding the Judicial Review Grounds

There is no precedent for a situation where parties have attempted to exclude or expand the grounds of judicial review as set out in the IAA, in South Africa. It appears unlikely that they will be able to do so, as the provisions of the IAA which set these grounds are mandatory provisions which do not expressly allow the parties to vary them, and as their purpose is to protect the integrity, finality and efficiency of arbitration in South Africa.

11.3 Standard of Judicial Review

The standard of judicial review for arbitral awards in South Africa is typically deferential rather than de novo.

South African courts respect the autonomy of the arbitral process and will not re-examine the merits of the case. Instead, judicial reviews are aimed at ensuring that the arbitral proceedings were conducted fairly and in accordance with the agreed procedural rules and applicable law. The courts will intervene only on the narrow grounds set out above, such as serious procedural irregularities, lack of jurisdiction, or if the award contravenes public policy.

This deferential standard is viewed as necessary in order to uphold the integrity, finality and efficiency of arbitration as a dispute resolution mechanism.

12. Enforcement of an Award

12.1 New York Convention

South Africa has signed and ratified the New York Convention without any reservations.

The New York Convention was initially incorporated into domestic law through the Recognition and Enforcement of Foreign Arbitral Awards Act, but this was subsequently repealed following the enactment of the IAA. The IAA now incorporates the New York Convention (Chapter 3 read with Schedule 3).

12.2 Enforcement Procedure

Procedures and Standards for Recognising and Enforcing a Foreign Arbitral Award

The IAA states that a foreign arbitral award must be recognised and enforced in South Africa, except as expressly provided for in the IAA.

The procedure for enforcing an arbitral award (whether foreign or otherwise) requires an application to be made to the High Court, producing:

- the original (if foreign, this must be authenticated) or certified copy of the award;
- the authenticated original (if foreign, this must be authenticated) or certified copy of the arbitration agreement; and
- if the agreement or award is in a foreign language, an authenticated sworn translation.

The IAA states, however, that the court may accept other documentary evidence regarding the existence of a foreign arbitral award and arbitration agreement as sufficient proof where the court considers it appropriate to do so.

Grounds for Refusing to Recognise and Enforce a Foreign Arbitral Award

The court must enforce the award unless one of the grounds for refusal under the New York Convention is established, namely:

- if the court finds that:
  - (a) a reference to arbitration of the subject matter of the dispute is not permissible under the law of South Africa; or
  - (b) the recognition or enforcement of the award is contrary to the public policy of South Africa; or
- if the opposing party proves to the satisfaction of the court that:
  - (a) a party to the arbitration agreement had no capacity to contract under the law applicable to that party;
  - (b) the arbitration agreement is invalid under the law to which the parties have subjected it, or where the parties have not subjected it to any law, the arbitration agreement is invalid under the law of the country in which the award was made;
  - (c) they did not receive the required notice regarding the appointment of the arbitrator or of the arbitration proceedings or was otherwise not able to present their case;
  - (d) the award deals with a dispute not contemplated by, or not falling within the terms of the reference to arbitration, or contains decisions on matters beyond the scope of the reference to arbitration (partial recognition and enforcement may be awarded if certain decisions did fall within the scope);
  - (e) the constitution of the arbitral tribunal or the arbitration procedure was not in accordance with the relevant arbitration agreement or, if the agreement does not provide for such matters, with the law of the country in which the arbitration took place; or
  - (f) the award is not yet 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, the award was made.

Foreign Awards That are Subject to Ongoing Set-Aside Proceedings

The IAA states that if an application for the setting aside or suspension of an award has been made to a competent authority at the seat, the South African court may, if it considers it appropriate:

- adjourn its decision on the enforcement of the award; and
- on the application of the party claiming enforcement of the award, order the other party to provide suitable security.

South African courts will not enforce an arbitral award that has been set aside by the courts at the seat of arbitration.

Awards Subject to Ongoing Set-Aside Proceedings at the Seat

When an award is subject to ongoing set-aside proceedings at the seat of arbitration, South African courts may suspend the enforcement proceedings pending the resolution of those proceedings. There has not been any case law around this point, but this approach would avoid conflicting judgments and respect the authority of the courts at the seat of arbitration.

State and State Entity Immunity

In South Africa, the Foreign States Immunities Act, 1981 (FSIA) provides foreign states with general immunity from the jurisdiction of South African courts. However, Section 10 of the FSIA states that if a foreign state has agreed in writing to submit a dispute to arbitration, it shall not be immune from the jurisdiction of the courts of South Africa in any proceedings *which relate to arbitration*.

12.3 Approach of the Courts

General Approach of the South African Courts to the Recognition and Enforcement of Arbitration Awards

- *Foreign arbitral awards:* As mentioned above, the IAA states that a foreign arbitral award must be recognised and enforced in South Africa, except as expressly provided for in the IAA. The grounds provided for in the IAA accord with the grounds set out in the New York Convention.
- *Arbitral awards in South African-seated arbitrations:* The IAA also states that arbitral awards in international arbitrations which are seated in South Africa must be recognised, except as provided for in the IAA. Those grounds for refusal essentially mirror the grounds for refusing to recognise a foreign arbitral award.

The IAA has reduced the scope for challenging awards for tactical reasons. For example, in early 2023, the Supreme Court of Appeal in the case of Snowy Owl Properties 284 (Pty) Ltd v Mziki Share Block Limited (the "Snowy Owl case") found that, although it is contrary to public policy to enforce an arbitral award that is at odds with legislation, the force of the prohibition must be weighed against the important goals of private arbitration. The court's ultimate decision to enforce the award reflected the concern that if such a defence is only raised after the arbitrator has handed down their award, this "self-evidently" erodes the utility of arbitration as an expeditious, out-of-court means of finally resolving the dispute.

Another example can be seen in the case of GFE MIR Alloys and Minerals SA (Pty) Ltd v Momoco International Limited (the "Momoco case"), where the High Court rejected a request for leave to appeal against an order enforcing an arbitral award and ordered that the award should be enforced pending any future appeals the losing party may wish to lodge, in order to avoid delays (under South African law, further appeals generally suspend the enforcement of court orders). The court emphasised that public policy considerations support the general rule that arbitration awards should be enforced by South African courts.

Refusal of Foreign Arbitral Awards on Public Policy Grounds

While the South African courts are supportive of arbitration, they will refuse enforcement on public policy grounds if the award is fundamentally offensive to the country's notions of justice and morality.

As can be seen from the Snowy Owl and Momoco cases, this standard is applied narrowly to ensure that only awards that egregiously violate public policy are refused at the enforcement stage. Grounds for refusal include fraud, corruption, serious procedural irregularities, and awards that contravene fundamental principles of South African law.

13. Miscellaneous

13.1 Class Action or Group Arbitration

South Africa does not specifically provide for class action arbitration or group arbitration under its current legal framework. As far as we are aware, no such arbitrations have been instituted in South Africa, and the IAA primarily focuses on bilateral arbitrations between specific parties that have consented to the arbitration of their disputes..

Given that South African law does not explicitly address class action arbitration or group arbitration, there are likely to be inherent limitations to the arbitrability of such claims. The fundamental principle of arbitration in South Africa is based on the consent of the parties to resolve their disputes through arbitration. In class action or group arbitration, the collective nature of the claims may complicate this principle of consent.

13.2 Ethical Codes

Legal Counsel

Lawyers practising in South Africa are bound by the ethical codes and professional standards applicable to legal practitioners in the country. These standards are primarily governed by the Legal Practice Act, 2014, which regulates the conduct of attorneys and advocates.

South African attorneys are members of the Law Society of South Africa and must adhere to its code of conduct, which includes duties of honesty, integrity, confidentiality, and the avoidance of conflicts of interest. South African advocates are members of the General Council of the Bar of South Africa and they are similarly bound by the ethical rules of the Bar, emphasising independence, diligence and fairness.

There are no specific restrictions or codes applicable to non-South African legal counsel who may appear in an international arbitration seated in South Africa; however, those practitioners will be bound by their own domestic standards of ethics, regardless of where the arbitration is seated. Unethical conduct by a party during the arbitration which affects the award may result in grounds for judicial review of the award or grounds to impose higher costs against that party.

Arbitrators

Arbitrators in South Africa are expected to adhere to the ethical standards set by their professional bodies and the arbitral institutions they may be affiliated with.

AFSA and the Association of Arbitrators (Southern Africa) provide guidelines and codes of conduct for arbitrators. These codes emphasise impartiality, independence, and the duty to disclose any potential conflicts of interest. The IBA Guidelines on Conflicts of Interest in International Arbitration and the IBA Rules of Ethics for International Arbitrators are also often referenced and adhered to, ensuring that the proceedings are conducted fairly and transparently.

13.3 Third-Party Funding

Third-party funding in South Africa is not prohibited, but it is not comprehensively regulated by specific legislation.

The arbitral rules chosen by the parties may, however, expressly deal with third-party funding. For example, the AFSA International Arbitration Rules require a party that is funded by a third-party funder to disclose the existence of a funding agreement and the identity of the funder, in the Request for Arbitration, or as soon as prac-

ticable after the third-party funding agreement has been entered into.

13.4 Consolidation

In South Africa, parties to an arbitration agreement are entitled to agree that the arbitral proceedings be consolidated with other arbitral proceedings, according to Section 10 of the IAA. The section specifically stipulates that the arbitral tribunal may not order consolidation unless the parties have agreed.

The AFSA International Arbitration Rules also allow for consolidation in these following instances, and subject to the following:

- Prior to the constitution of any arbitral tribunal in the arbitrations sought to be consolidated, a party may file an application to consolidate provided that:
  - (a) all parties have agreed; or
  - (b) all the claims in the arbitrations are made under the same arbitration agreement.
- After the constitution of any arbitral tribunal in the arbitrations sought to be consolidated, a party may file an application to consolidate, provided that:
  - (a) all parties have agreed to the consolidation;
  - (b) all the claims in the arbitrations are made under the same arbitration agreement; or
  - (c) the same arbitral tribunal has been constituted in each of the arbitrations, or no arbitral tribunal has been constituted in other arbitrations.

13.5 Binding of Third Parties

In South Africa, the general principle is that only the parties that have agreed to an arbitration agreement are bound by it.

However, there are certain circumstances under which third parties can be bound by an arbitration agreement or award. This may occur through doctrines such as agency, assignment, succession or subrogation. For example, if a third party steps into the shoes of an original party to the contract (eg, through assignment of rights or obligations), they may be bound by the arbitration agreement contained in that contract. Additionally, third parties can be bound if they have explicitly consented to the arbitration agreement.

Group or multi-party arbitration can also bind third parties if the arbitration agreement explicitly includes provisions that bind such parties, or if all parties consent to a consolidated or joint arbitration process. The AFSA International Arbitration Rules and other institutional rules may facilitate such arrangements, provided there is clear consent and agreement from all parties involved.

South African national courts do not generally have the jurisdiction to bind foreign third parties to an arbitration agreement or award unless those third parties have a direct connection to the arbitration agreement or the underlying contractual relationship. The principle of privity of contract dictates that arbitration agreements typically bind only the parties that have expressly agreed to them. However, there may be exceptions based on reciprocity principles, or if the foreign third party has engaged in conduct that brings them within the jurisdiction of South African courts.

SOUTH KOREA

Law and Practice

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Yulchon LLC is a full-service international law firm headquartered in Seoul, with a broad client base comprising major domestic and foreign companies. It employs more than 600 professionals (of whom more than 60 are licensed in jurisdictions outside South Korea) and has offices in Shanghai, Hanoi, Ho Chi Minh City, Moscow, Jakarta and Yangon. Yulchon is a market leader in the development and practice of law, and has been voted "Most Innovative Law Firm in South Korea" three times by the Financial Times. The firm is frequently retained to negotiate complex transactions, help draft new legislation and regulations, and represent clients in high-stakes adversarial proceedings.

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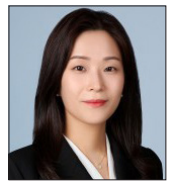

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1. General

1.1 Prevalence of Arbitration

Arbitration in South Korea

The Republic of Korea ("South Korea" or "Korea") ratified the New York Convention in 1973. Until the late 1990s, however, there was very little arbitration activity in South Korea owing to its efficient court system, non-litigious culture, and relatively insulated economy.

The Asian financial crisis in 1998 was a watershed moment for international arbitration in South Korea. As foreign investors flooded the market and bought South Korean companies in fire sales, arbitration clauses were introduced in M&A transactions. With the drastic increase in the number of contracts containing arbitration clauses, international arbitration quickly became a well-known mechanism for dispute resolution for South Korean practitioners and members of the business community.

Enacting an arbitration act

With the sudden and rapid growth of arbitration, institutional support and the legal infrastructure for international arbitration also began to grow in parallel. The Korean Arbitration Act (KAA), which was first enacted in 1966, was completely revised in 1999 to adopt the 1985 United Nations Commission on International Trade Law Model Law (the "UNCITRAL Model Law").

In 2016, further amendments to the KAA were made, incorporating the 2006 amendments to UNCITRAL Model Law into domestic law. The most significant changes in 2016 were:

- alleviating the requirement for arbitration agreements to be in writing;
- the granting of interim measures by a tribunal;
- the Korean court's assistance in taking evidence for the arbitration; and
- simplifying the process for the recognition and enforcement of arbitral awards.

In the same year, the Korean Commercial Arbitration Board (KCAB) adopted significant revisions to both its international arbitration rules and domestic arbitration rules.

Trends in South Korean Arbitration

Since the 2016 amendments to the KAA and KCAB International and Domestic Arbitration Rules, South Korea has seen substantial developments in various legal issues related to arbitration.

In addition, as of 1 January 2024, the KCAB enacted and implemented the KCAB International Mediation Rules to bolster dispute resolution through international mediations, further strengthening South Korea's position as an attractive hub for alternative dispute resolution.

Moreover, the South Korean government is eager to promote arbitration in the hope of making Seoul the new Asian hub for international arbitration. The Arbitration Industry Promotion Act came into effect in 2017, the aim of which is to provide for long-term planning and government financial support for the promotion of international arbitration in South Korea.

Pursuant to the Arbitration Industry Promotion Act, the South Korean Ministry of Justice implemented the first Master Plan for Promotion of the Arbitration Industry for 2019–2023 (the "Master Plan"). The Master Plan aims to promote the arbitration industry, provide support personnel to the KCAB, and create policies that will make South Korea an attractive potential arbitral seat or physical venue for hearings. The South

Korean Ministry of Justice plans to establish the second Master Plan for 2024-2029.

In line with these legislative initiatives to foster an arbitration-friendly environment, South Korean courts have also become increasingly supportive of arbitration by consistently upholding arbitration agreements, assisting the arbitral tribunal in taking evidence and enforcing arbitral awards.

Today, arbitration is not merely an alternative to traditional court litigation, but the preferred dispute resolution mechanism for cross-border disputes in South Korea.

1.2 Key Industries

Key industries in South Korea have undoubtedly been affected by the COVID-19 pandemic. Nevertheless, as South Korea emerges as a North-East Asian international arbitration hub, certain industries – such as construction, commerce, IT, trade, entertainment, IP, real estate, maritime, M&A, joint venture and finance – are continuing to experience growth in international arbitration activities.

Investment treaty arbitrations involving the South Korean government have also experienced rapid growth since 2019. In 2019, the South Korean government introduced the Regulation on International Investment Dispute Prevention and Response (the "ISDS Regulation"), a presidential directive that provides for an effective prevention and response system and a channel facilitating co-operation among relevant government departments. In particular, the South Korean Ministry of Justice has created a response team composed of lawyers and high-ranking officials to effectively prevent and respond to international investment disputes.

1.3 Arbitration Institutions

The KCAB remains the only officially recognised arbitral institution in South Korea and is often selected by parties for arbitrations seated in South Korea. It is statutorily empowered to settle all types of commercial disputes under the KAA. It also conducts and administers mediation.

The KCAB was established in 1966 with the main purpose of resolving disputes quickly and impartially through arbitration, mediation and conciliation. In April 2018, the KCAB established a separate division, KCAB International, which exclusively manages international arbitration. The KCAB International is a relatively young arbitration institution in Asia, but is gradually progressing and steadily catching up with its neighbouring counterparts such as the Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Centre (HKIAC).

The KCAB has adopted separate rules for domestic and international arbitrations. Arbitrations between South Korean parties are usually conducted pursuant to the domestic arbitration rules of the KCAB in the absence of a specific agreement to the contrary. For international arbitrations in which at least one of the parties has its principal place of business outside South Korea, the KCAB International Arbitration Rules (the "KCAB Rules") apply as the default rules.

Parties choosing Seoul as the seat of arbitration often opt for the rules of other leading international arbitral institutions, such as the ICC, SIAC, and HKIAC. The SIAC and the HKIAC are more frequently used for arbitrations seated outside South Korea between Asian parties. The ICC and the London Court of International Arbitration (LCIA) are also often used for arbitrations between a South Korean party and a western

party. Although less common, there are also ad hoc arbitrations under the UNCITRAL arbitration rules.

1.4 National Courts

The South Korean judicial system does not have any specific courts designated for disputes related to international or domestic arbitration. However, South Korean judges are generally well versed in international or domestic arbitration, and, when dealing with the validity of arbitration agreement or enforcement of an arbitral award, Korean courts tend to take an arbitration-friendly approach.

2. Governing Legislation

2.1 Governing Law

The primary legislation governing international arbitrations in South Korea is the KAA, which is based on the UNCITRAL Model Law. The KAA governs both domestic arbitrations and international arbitrations seated in South Korea.

The latest major revisions to the KAA came into effect on 30 November 2016, when many provisions of the 2006 amendments to the 1985 UNCITRAL Model Law were adopted. The primary changes to the KAA in 2016 included:

- the expansion of the scope of arbitration to non-property/non-monetary disputes that may be resolved by the parties' settlement;
- the relaxation of the requirements concerning the written form of the arbitration agreement;
- detailed provisions for interim measures ordered by an arbitral tribunal and their enforcement by the South Korean court;
- simplified procedures for recognition and enforcement of arbitral awards in South Korean courts; and
- provisions addressing the South Korean courts' co-operation in collecting evidence in arbitral proceedings.

It should be noted that the KAA, as amended in 2016, and the UNCITRAL Model Law are not completely identical. In particular, the KAA does not incorporate Article 34(4) of the UNCITRAL Model Law, which allows a court to suspend its set-aside proceedings at the request of a party in order to give the arbitral tribunal an opportunity to resume arbitration or to eliminate grounds for setting aside the proceedings. Neither does the KAA limit its application to solely "international" or "commercial" arbitrations, which in turn broadens its application.

Additionally, Article 17 of the KAA also deviates from the UNCITRAL Model Law by providing that, where an arbitral tribunal rules on its jurisdiction or scope of authority at the preliminary stage, either party may appeal the decision by challenging the arbitral tribunal's jurisdiction to the South Korean district court within 30 days.

2.2 Changes to National Law

Further to the aforementioned most recent amendments to the KAA in 2016 (see **2.1 Governing Legislation**), South Korea's Act on Private International Law was revised comprehensively for the first time since its complete amendment in 2001 (the "Revised Act"). The Revised Act became effective as of June 2022. Notably, the Revised Act includes new provisions on the general and special jurisdiction of South Korean courts and the jurisdiction clause in a contract.

3. The Arbitration Agreement

3.1 Enforceability

Article 8 of the KAA, in line with Article 7 of the UNCITRAL Model Law, requires an arbitration agreement to be in writing either as an arbitration clause included in a contract or as a separate agreement.

An arbitration agreement is considered to be "in writing" when:

- the terms and conditions of an arbitration agreement have been recorded, regardless of whether such agreement was made orally, by conduct, or by any other means;
- an arbitration agreement is evidenced by electronic communication; or
- one party asserts that an application or a written answer exchanged between the parties contains an arbitration agreement, and the other party does not deny such assertion; likewise, a reference in a contract to a document containing an arbitration clause (such as general terms and conditions) can constitute a valid arbitration agreement.

3.2 Arbitrability

The KAA does not provide specific rules for determining the arbitrability of claims. However, the 2016 amendments to the KAA extended the definition of "arbitration" to include a procedure to settle a dispute over "non-property rights" (non-monetary), which can be resolved by settlement of the parties, as well as "property rights" (monetary).

As is the case in many other jurisdictions, matters of criminal law, family law and administrative law are not arbitrable in South Korea.

To date, there is no clear South Korean court precedent on whether claims related to economic regulatory laws (eg, antitrust and insolvency regulations or IP rights) are arbitrable. Legal commentators, however, have noted a trend in international arbitration favouring the arbitrability of disputes in such areas, and at least one South Korean court has enforced a foreign arbitral award (in 1995) based on a licensing agreement that allegedly violated South Korean fair trade laws.

3.3 National Courts' Approach

South Korean courts generally respect the parties' agreement to arbitrate. Pursuant to Article 9 of the KAA, if one party brings an action in court against another party when there is a valid arbitration agreement between the parties and the other party raises a defence based upon the existence of an arbitration agreement before making any defence on the merit of the case, the court is required to dismiss the action – unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

South Korean courts tend to interpret arbitration agreements broadly. They are also considered generally friendly toward arbitration. However, what is commonly referred to as an "optional" arbitration clause, which merely gives parties an option to pursue arbitration in lieu of court litigation, will not be deemed a valid agreement to arbitrate by the South Korean courts. The South Korean Supreme Court held that an optional arbitration clause stating that "the dispute shall be referred to adjudication/arbitration in accordance with the laws of the purchaser's country" cannot be regarded as a valid arbitration agreement if a party, in response to the other party's request for arbitration, asserts that there is no agreement to arbitrate and opposes arbitration

to resolve a dispute (Supreme Court Decision 2003Da318, rendered on 22 August 2003).

Furthermore, the Seoul District Court determined that a dispute resolution clause that states "if a dispute cannot be resolved by settlement, it will be resolved by the KCAB arbitration. If any party objects to the arbitral award, the dispute will be finally resolved at the national court" is not a valid arbitration agreement because it simply allows re-examination of the arbitral award by the national court (Seoul District Court Decision 2002Gahap8808, rendered on 24 October 2002).

Regarding the question of the governing law of arbitration agreements, the South Korean Supreme Court held that the validity of an arbitration agreement shall be determined by the substantive governing law of the underlying contract if the parties have designated one. Otherwise, it will be determined by the law of the seat of arbitration if the parties have not designated the governing law in the contract, pursuant to Article 5(1) of the New York Convention (Supreme Court Decision 2017Da225084, rendered on 26 July 2018).

3.4 Validity

Article 17(1) of the KAA provides that when an arbitral tribunal is ruling on its own jurisdiction, the arbitral tribunal shall treat the arbitration clause as separate and independent from the main contract in which the arbitration clause is included. In essence, the KAA adopts the principle of separability by allowing the arbitral tribunal to exercise jurisdiction over the dispute with respect to the validity of the arbitration agreement.

The South Korean courts, however, can review the decision of an arbitral tribunal on its own jurisdiction at the request of a party within 30 days of the decision, as per Article 17(6) of the KAA.

Also, pursuant to Article 9 of the KAA, the South Korean courts have the authority to review whether an arbitration agreement is null and void, inoperable, or incapable of being performed, if a party to a lawsuit raises a defence that there is a valid arbitration agreement and thus the lawsuit should be dismissed.

4. The Arbitral Tribunal

4.1 Limits on Selection

The KAA and the KCAB Rules do not limit the parties' autonomy to select arbitrators and there are no set legal requirements when it comes to the qualifications, and characteristics of arbitrators. Therefore, there are no restrictions such as being a qualified lawyer in order to serve as an arbitrator. Parties are free to agree on the specific qualifications of potential arbitrators and the procedure for appointing them. While the KCAB maintains an active roster of domestic and international arbitrators for the purpose of facilitating arbitrations, the parties are free to appoint other arbitrators who are not listed in the roster.

4.2 Default Procedures

Parties are free to agree on the procedure for selecting arbitrators. When their chosen method fails, or in the absence of such an agreement, Articles 11 and 12 of the KAA provide default mechanisms for the constitution of arbitral tribunals for arbitrations seated in South Korea.

One such example is the provision in Article 11 that for cases where the parties fail to determine the number of arbitrators, the number shall be three. However, under the KCAB Rules, in the absence of the parties' agreement on the num-

ber of arbitrators, the default is to appoint a sole arbitrator (KCAB Rules, Article 11).

Article 12(3) provides that where the parties fail to agree on the procedure for appointing arbitrators, they shall be appointed as follows.

- Sole arbitrator arbitration – if the arbitrator is not appointed within 30 days of a party receiving the counterparty's request to appoint the arbitrator, the competent court or arbitral institution designated by the competent court shall appoint the arbitrator at the party's request.
- Three-arbitrator arbitration – each party shall appoint one arbitrator, and the two party-appointed arbitrators shall agree on the third arbitrator. If one party fails to appoint its party-appointed arbitrator within 30 days of the counterparty's request – or if the two party-appointed arbitrators fail to agree on the third arbitrator within 30 days of their appointment – the competent court or arbitral institution designated by the competent court shall appoint the third arbitrator upon a party's request.

In 2022, the South Korean Supreme Court rendered that if an application for the appointment of an arbitrator is made, the court will immediately select an arbitrator, unless there are special circumstances. Such circumstances include an arbitration agreement not meeting the requirement under Article 8 of the KAA, or the non-compliance of the appointment procedure agreed by the parties under Article 12, resulting in the court being unable to review the existence or validity of an arbitration agreement and dismissing the application upon such review (Supreme Court Decision 2020Gu633, rendered on 29 December 2022).

Article 12(4) of the KAA applies where the parties have agreed on the procedure for selecting arbitrators but the method fails. A court's decision on the appointment of an arbitrator is not subject to appeal.

The international arbitration community in South Korea has recently witnessed increased interest in multi-party arbitrations. To date, the KAA does not provide default mechanisms for selecting arbitrators in multi-party arbitrations. However, the 2016 amendments to the KCAB Rules do include such default procedures for multi-party arbitrations under Rule 12(3).

4.3 Court Intervention

The South Korean court may intervene at the request of a party in the following matters as prescribed under the KAA:

- rendering orders for provisional measures before the commencement of the arbitration or during the arbitration proceedings under Article 10;
- appointing arbitrators under Articles 12(3) and (4);
- challenging the appointment of arbitrators under Article 14(3);
- terminating the mandate of an arbitrator, if there is a dispute between the parties, under Article 15(2);
- reviewing the jurisdiction of the arbitral tribunal under Article 17(6); and
- recognising and enforcing the interim measures rendered by the arbitral tribunal under Article 18(7).

The South Korean court may also provide assistance for evidence gathering, pursuant to Article 28.

4.4 Challenge and Removal of Arbitrators

Article 13 of the KAA provides that an arbitrator may be challenged if:

- there are circumstances that give rise to justifiable doubts about the arbitrator's impartiality or independence; or
- the arbitrator does not possess qualifications agreed by the parties.

Under Article 14(1) of the KAA, the parties are free to agree on a procedure for challenging an arbitrator. Failing such an agreement, under Article 14(2), the party challenging an arbitrator shall send a written statement of the grounds for challenge to the arbitral tribunal within 15 days:

- from the date of the constitution of the arbitral tribunal; or
- from when the party becomes aware of the grounds for the challenge.

If the challenged arbitrator does not resign, or the other party does not agree to the challenge, the arbitral tribunal shall decide on the challenge.

If the arbitral tribunal does not uphold the challenge, the challenging party may file an objection with the competent court within 30 days of receiving the arbitral tribunal's decision, pursuant to Article 14(3) of the KAA. The South Korean court's decision on the challenge cannot be appealed (Article 14(4) of the KAA).

Regarding the deadline for challenging arbitrators, the South Korean Supreme Court has held that even if circumstances give rise to justifiable doubts as to an arbitrator's impartiality or independence, which are not as severe as grounds for challenging judges under the South Korean Civil Procedure Act, such circumstances do not constitute grounds for setting aside an arbitral award unless they were raised in a timely manner (Supreme Court Decision 2004Da47901, rendered on 29 April 2005). Therefore, any challenge against an arbitrator must be raised within the period set forth in Article 14 of the KAA.

Article 14 of the KCAB Rules also sets forth similar grounds for the challenge of arbitrators (for lack of independence or impartiality), and Article 15 of the KCAB Rules deals with the replacement and removal of arbitrators.

4.5 Arbitrator Requirements

The KAA requires potential arbitrators to disclose all circumstances likely to give rise to justifiable doubts as to their impartiality or independence. The South Korean Supreme Court has ruled that the disclosure requirement is a mandatory provision, meaning that it cannot be waived by the parties (Supreme Court Decision 2004Da47901, rendered on 29 April 2005). The KAA also includes a mandatory provision (Article 19) that parties must receive equal treatment during arbitral proceedings, the failure of which can result in the setting aside of the final award under Article 36 of the KAA.

Similarly, the KCAB Rules stipulate that all arbitrators must be impartial and independent and remain so at all times (Article 10). The KCAB has also issued a Code of Ethics for Arbitrators that all arbitrators appointed to hear arbitrations administered by the KCAB must accept and abide by.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

The KAA does not address subject matter arbitrability. Article 3(1) of the KAA nonetheless sheds some light on the scope of arbitration by

defining the term "arbitration" as a procedure to resolve property/monetary or non-property/non-monetary disputes that can be settled between parties. Therefore, as in most other jurisdictions, matters that are not capable of being settled by agreement between the parties – such as matters of criminal law, family law and administrative law – are generally considered non-arbitrable.

On the other hand, the arbitrability of matters relating to IP, insolvency, and antitrust remains unclear under South Korean law. Although IP licensing disputes (claims for violation of IP licenses) are generally considered arbitrable, there are conflicting views on whether validity claims of registered IP rights (eg, patents) can be referred to arbitration.

5.2 Challenges to Jurisdiction

The principle of competence-competence is recognised in Article 17(1) of the KAA, under which an arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

Pursuant to Article 17(1), the challenging party must raise its jurisdictional objections to the arbitral tribunal no later than its submission of the statement of defence on the merits. However, if the party's jurisdictional objection is that the arbitral tribunal exceeded the scope of its authority, the objection can be raised as soon as it occurs. The arbitral tribunal may rule on the jurisdictional challenge either as a preliminary matter or as a final award on the merits.

However, Article 17(6) of the KAA authorises South Korean courts to review the arbitral tribunal's decision on its own jurisdiction when the arbitral tribunal made the decision as a preliminary matter. A party can make an appeal to the South Korean court against the arbitral tribunal's decision on its own jurisdiction within 30 days of receiving notice of such decision.

5.3 Circumstances for Court Intervention

Although the arbitral tribunal may rule on its own jurisdiction under the competence-competence rule, Article 17(6) of the KAA bestows the final decision-making authority on the South Korean courts by allowing a party to appeal an arbitral tribunal's jurisdictional ruling.

Prior to the 2016 amendments to the KAA, only affirmative decisions (eg, an arbitral tribunal's decision that jurisdiction exists) were subject to appeal before the Korean court. However, Article 17(6) has been amended to allow parties to challenge not only affirmative jurisdictional decisions but also an arbitral tribunal's negative decision (eg, denying its jurisdiction).

The provision, however, is not often invoked in practice. The South Korean courts are generally reluctant to intervene and overturn the decision of the arbitral tribunal on its jurisdiction.

5.4 Timing of Challenge

Pursuant to Article 17(2) of the KAA, a challenge to the jurisdiction of the arbitral tribunal must be raised with the arbitral tribunal no later than when the statement of defence on the merits is submitted. A party disputing the arbitral tribunal's jurisdiction can raise such an objection even after the party has participated in the process of constituting the arbitral tribunal.

An appeal against the arbitral tribunal's jurisdictional ruling before the national court under Article 17(6) of the KAA must be filed within 30 days of receiving notice of such ruling.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

South Korean courts conduct a de novo review of an arbitral tribunal's jurisdiction. Therefore, courts are not bound by the arbitral tribunal's decision on its own jurisdiction. However, the South Korean courts generally tend to respect the arbitral tribunal's decision on its own jurisdiction.

Whether a claim is arbitrable or whether the claim falls within the scope of the arbitration agreement between parties is also reviewed de novo by the courts when there is any challenge to the arbitral award or award enforcement proceedings.

However, South Korean courts will not review questions about the nature of the claim and its admissibility in the arbitration (other than questions about arbitrability or scope of the arbitration agreement) or questions about the admissibility of evidence, as these matters concern the merits of the case.

5.6 Breach of Arbitration Agreement

When a party commences court proceedings in breach of an arbitration agreement, the defendant may raise a defence based on the existence of an arbitration agreement and request the court to dismiss the lawsuit pursuant to Article 9(1) of the KAA. This must be done before the first submission on the merits of the case is filed.

Under Article 9(1), a court must dismiss the legal action brought in violation of the arbitration agreement unless the court finds the arbitration agreement to be null and void, inoperable or incapable of being performed.

5.7 Jurisdiction Over Third Parties

The KAA does not address whether an arbitral tribunal may exercise jurisdiction over a third party that is a non-signatory to the arbitration agreement.

However, a third party may be bound to an arbitration agreement as a successor, heir or assignee to the contracting party. There is at least one lower court decision in which the court held that the assignee of receivables under a contract containing an arbitration clause is entitled to raise the existence of an arbitration agreement as a defence to a civil lawsuit pursuant to Article 9(1) of the KAA (Seoul Western District Court Judgment 2001GaHap6107, rendered on 5 July 2002).

Furthermore, third parties may definitively be bound to an arbitration agreement by their subsequent consent – whether by affirmative consent in writing at the request of a party or by failure to object to the jurisdiction of the arbitral tribunal. These rules apply equally to foreign third parties.

As will be explained below, there are no clear precedents on whether the "group of companies" or "piercing of the corporate veil" doctrines can be used to exercise jurisdiction over non-signatories to the arbitration agreement.

Group of Companies Doctrine

There is no clear South Korean court precedent that allows arbitral tribunals to exercise jurisdiction over a third party on the grounds that the third party is an affiliate company of the contracting party (eg, parent or subsidiary), which is not a party to an arbitration agreement.

Piercing of the Corporate Veil Doctrine

Although South Korean jurisprudence generally recognises the "piercing of the corporate veil" doctrine, the South Korean courts have yet to rule on whether this doctrine allows an arbitral tribunal to exercise its jurisdiction over third parties. Some commentators have argued that where the corporate veil is lifted in the case of a party to an arbitration agreement, an arbitral tribunal may assume jurisdiction over the third party (individual or entity) behind the corporate veil – particularly if the third party is without substantial business activities of its own and is the parent of a contracting party.

6. Preliminary and Interim Relief

6.1 Types of Relief

The KAA allows the arbitral tribunal to award preliminary or interim relief, as deemed necessary, at the request of either party.

The 2016 amendments to the KAA incorporated more detailed provisions on the types of interim relief that an arbitral tribunal can order. Article 18(2) of the KAA provides that an arbitral tribunal may order interim measures requiring either party to perform any of the following actions:

- maintain or restore the status quo until an arbitral award is rendered on the merits of the case;
- adopt measures to prevent an existing or imminent danger or impact to the arbitral proceeding itself, or prohibit measures that are likely to endanger or impact the arbitral proceeding;
- provide methods for preserving assets subject to the enforcement of an arbitral award; and
- preserve evidence relevant and essential to the resolution of the dispute.

An interim measure issued by an arbitral tribunal is binding and can be enforced upon application to the competent court if the arbitration is seated in South Korea (Article 18-7 of the KAA).

6.2 Role of Courts

South Korean courts play two major roles in interim relief procedures in arbitration:

- granting interim measures (Article 10 of the KAA); and
- recognising and enforcing the interim measures issued by the arbitral tribunal (Article 18-7 of the KAA).

First, in accordance with Article 10 of the KAA, the South Korean courts can issue interim measures upon a party's request made before or during the arbitral proceedings. Although Article 10 is silent on the type of interim measures that the courts may grant, it is generally understood that they include provisional attachment or preliminary injunctions. The South Korean courts may issue interim measures regardless of the seat of arbitration (even when the seat is outside South Korea) or even when the seat of arbitration is yet to be determined (Article 2(1) of the KAA).

Second, in accordance with Article 18-7 of the KAA, the South Korean courts assist with the recognition and/or enforcement (eg, compulsory execution) of interim measures issued by the arbitral tribunal upon the request of the parties only if the arbitration is seated in South Korea.

Emergency Arbitrator

In recent years, the notion of the "emergency arbitrator" in the context of expedited proceedings for parties to obtain interim measures has

gained much attention. To date, the KAA is silent as to the emergency arbitrator. However, the 2016 revisions to the KCAB Rules introduced proceedings for an emergency arbitrator in Appendix 3 of the KCAB Rules, under which a party may seek interim measures through an emergency arbitrator before the constitution of the arbitral tribunal.

Once appointed, emergency arbitrators must make a decision within 15 days of their appointment (Article 3(4) of Appendix 3 of the KCAB Rules).

The types of relief that can be granted by an emergency arbitrator are the same as the types of relief that an arbitral tribunal may grant under Article 18 of the KAA (Article 32 of the KCAB Rules). The parties are bound by the decision of the emergency arbitrator until the main arbitral tribunal – once constituted – modifies, suspends, or terminates such decision. The decision of the emergency arbitrator is not binding on the arbitral tribunal (Article 4 of Appendix 3 of the KCAB Rules). The power of the emergency arbitrator shall be terminated upon the constitution of the arbitral tribunal (Article 3(7) of Appendix 3 of the KCAB Rules).

6.3 Security for Costs

Courts and arbitral tribunals are both authorised to order security for costs with respect to the parties' requests to obtain, recognise or enforce interim measures under the KAA.

Under Article 18-4 of the KAA, an arbitral tribunal may order the party requesting interim measures to provide security. Similarly, if deemed necessary, South Korean courts are empowered under Article 18-7(3) of the KAA to order security against the party requesting recognition or enforcement of interim measures when the arbitral tribunal has not ordered to provide security, or when there is a risk of infringing the rights of a third party.

7. Procedure

7.1 Governing Rules

Generally, parties are free to choose their own procedural rules either by agreement or by the rules of the chosen arbitral institution. In principle, the agreement between the parties shall prevail over default provisions and be recognised as the dominant rules of the arbitration. Parties are free to agree on the specific procedures for the arbitration, and the KAA operates as a default rule where there is no agreement between the parties. Article 20(1) of the KAA states that the parties can agree on the arbitration procedures except for the mandatory provisions under the KAA.

Where parties fail to agree on certain procedural terms (eg, place of arbitration, language to govern arbitration), arbitral tribunals have wide discretion to determine how the arbitration should proceed under Article 20(2) of the KAA.

In tandem with the parties' agreement and arbitrators' discretion, the KAA also provides applicable procedural rules. There are mandatory procedural rules in the KAA to ensure that arbitrations conducted in South Korea comply with notions of fair and due process, such as Article 19 of the KAA stipulating that all parties receive equal treatment during the proceedings and are given a full opportunity to present their cases.

7.2 Procedural Steps

In line with the principle that arbitration is a creature of "consent", procedural steps are generally implemented by the agreement of the parties or

rules of the arbitral institution chosen by the parties.

In the absence of such an agreement, the KAA provides for a general arbitration process for an arbitration seated in South Korea as per the following.

- Commencement of Arbitration (Article 22) – arbitral proceedings shall commence on the date the respondent receives the request for arbitration.
- Language (Article 23) – language of the arbitration will be determined by the parties' agreement and, in absence of such agreement, by the arbitral tribunal. If the arbitral tribunal does not make the determination, the default language shall be Korean.
- Submissions (Article 24) – the parties shall submit their respective written submissions, laying out their claims and defences to the other party's claims within the timeframe agreed by the parties or decided by the arbitral tribunal. The parties may submit, along with their statements of claim or defence, all documents they consider to be relevant or which may indicate other evidence they will use in the documents.
- Hearings (Article 25) – subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings or to render an award solely based on written submissions and documents.
- Failure of the Parties (Article 26) – subject to any contrary agreement by the parties, the arbitral tribunal shall terminate arbitral proceedings if the claimant fails to submit its statement of claim. If the respondent fails to submit its statement of defence, the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations.

7.3 Powers and Duties of Arbitrators

The KAA grants powers to an arbitral tribunal to:

- decide on matters of its jurisdiction (Article 17(1) of the KAA);
- order interim relief (Article 18);
- determine the admissibility and weight of the evidence (Article 20(2));
- determine the seat and language of the arbitration in the absence of the parties' agreement (Articles 21, 23);
- decide on the allocation of the arbitration costs as well as the pre- and post-interest unless agreed otherwise by the parties (Article 34-2, 3); and
- issue arbitral awards on the dispute referred to arbitration.

Under the KAA, arbitrators are required to provide equal treatment to the parties during the proceedings and the parties must be allowed sufficient opportunity to argue their case (Article 19). Arbitrators are also required to disclose any circumstances that may raise doubts as to their fairness or independence (Article 13(1)).

7.4 Legal Representatives

The KAA does not prescribe particular qualifications or other requirements for legal representatives appearing in arbitrations seated in South Korea. Thus, legal representatives appearing in arbitrations seated in South Korea are not required to be members of the South Korean Bar. The Foreign Legal Consultant Act in South Korea clearly stipulates that a foreign legal consultant registered in South Korea and a foreign licensed lawyer can represent a party in an international arbitration.

8. Evidence

8.1 Collection and Submission of Evidence

The KAA does not provide specific procedures for the collection and submission of evidence at the pleading or hearing stage. It does, however, provide that:

- parties may submit evidence together with their written submissions (Article 24);
- the arbitral tribunal should give sufficient advance notice to the parties of any oral hearing and of any meeting for the purpose of inspection of other evidence (Article 25(2));
- all statements, documents or other materials submitted by either party to the arbitral tribunal should be conveyed to the other party without delay (Article 25(3)); and
- any expert report or evidentiary document on which the arbitral tribunal intends to rely in making its decision should be conveyed to both parties (Article 25(4)).

Parties are free to agree on the scope and procedure for "discovery" during the arbitral proceedings. It is common practice in international arbitrations seated in South Korea or involving South Korean parties to include some form of document production. In such cases, the scope of document production would be much broader than the scope allowed in South Korean civil litigation proceedings. The International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration (the "IBA Rules"), although not binding, are generally taken into account in international arbitrations seated in South Korea.

It is also common for parties to arbitrations in South Korea to submit witness statements as part of the pleading stage. Parties may also appoint their own experts and submit expert reports, if necessary, during the pleading stage. These witnesses and experts may be cross-examined at the hearing.

With respect to experts, Article 27 of the KAA allows the arbitral tribunal to appoint one or more experts for consultation on specific issues, unless agreed otherwise by the parties. In such cases, the arbitral tribunal may require a party to provide the expert with any relevant information or to produce – or provide access to – any relevant documents, goods or other articles for inspection. A challenge to the expert appointed by the arbitral tribunal can be made on the same grounds and through the same process as a challenge to the appointment of an arbitrator (Article 27(3) of the KAA).

8.2 Rules of Evidence

South Korea does not have specific rules of evidence that apply to arbitrations for either domestic or international arbitrations. Rules of evidence in arbitration are generally determined in accordance with the rules under which the arbitration is being conducted, and at the discretion of the arbitral tribunal. The KAA provides that the arbitral tribunal has the discretion to determine the admissibility, relevance, and weight of the evidence (Article 20(2)). Although not automatically binding, the IBA Rules are commonly adopted in international arbitrations seated in South Korea.

8.3 Powers of Compulsion

Article 28 of the KAA, as amended in 2016, provides that an arbitral tribunal may, either on its own initiative or at the request of a party, request the South Korean court to examine evidence or co-operate in examining evidence.

When an arbitral tribunal requests a court to directly examine evidence, the arbitrators or the

parties involved may attend the examination of evidence with the permission of the presiding judge (Article 28(3) of the KAA). When a court is requested to co-operate in the examination of evidence, the court may order witnesses, holders of documents, or others (including non-parties to the arbitration) to make an appearance before the arbitral tribunal, or to submit the necessary documents to the arbitral tribunal (Article 28(5) of the KAA).

9. Confidentiality

9.1 Extent of Confidentiality

The KAA does not contain any provisions relating to the confidentiality of arbitral proceedings. In addition, there is no South Korean court precedent addressing this issue. Thus, there is no automatic requirement of confidentiality in arbitrations seated in South Korea unless the parties agree otherwise – for instance, by entering into a separate confidentiality agreement or by adopting institutional rules that require confidentiality of arbitral proceedings. Despite the absence of a specific provision in the KAA, arbitral proceedings in South Korea have generally been treated in strict confidence.

For its part, Article 57 of the KCAB Rules provides that the arbitral procedure and records are confidential and that the arbitral tribunal, the Secretariat, the parties, and their representatives and assistants are prohibited from disclosing facts related to the arbitration or facts learned through the arbitration, except where disclosure is consented to by the parties or required by law or court proceedings.

10. The Award

10.1 Legal Requirements

Article 32(1) of the KAA provides that the award shall be made in writing and signed by all the arbitrators. If a minority of the arbitral tribunal has any reason not to sign the award, the award shall become effective with the signature of the majority of the arbitrators and the reason for the failure or refusal to sign will be stated in the award.

In accordance with Article 32(2) of the KAA, the award shall state the reasons upon which it is based unless the parties have agreed otherwise or if the award is a consent award, which is an award on agreed terms of a settlement between the parties under Article 31 of the KAA. The award shall also state its date and place of arbitration (Article 32(3) of the KAA). The KAA, however, does not specify any time limit for rendering the award.

For KCAB international arbitrations, Article 38 of the KCAB Rules provides a time limit for a final award (eg, within 45 days from the date the final submissions are made or the hearings are closed, whichever is later). Such time limit can be extended.

10.2 Types of Remedies

The KAA does not place any restrictions on the types of remedies that an arbitral tribunal can render. In practice, when choosing the remedies, the arbitral tribunal must take into consideration the enforceability of its award in South Korea, if the award is to be enforced in South Korea.

For example, South Korean courts do not allow punitive damages as a matter of public policy, unless expressly allowed under applicable laws, such as the South Korean Product Liability Act.

Therefore, an arbitral award ordering punitive damages for breach of contract or tort liability would not be enforced in South Korean courts.

Additionally, if the award is to be enforced in South Korea, the parties and the arbitral tribunal should be careful in specifying the relief in sufficient detail to allow enforcement under applicable South Korean laws (eg, specifying the exact asset to be transferred, the monetary amount to be paid or the actual action a party must perform). In one case, the Seoul High Court found that, although an award was enforceable, the decision of the arbitral tribunal was not specific enough to be actually executed by the execution officer. Thus the court did not pronounce the provisional execution in its judgment (Seoul High Court Judgment 2013Na13506).

10.3 Recovering Interest and Legal Costs

With respect to interest, claimants generally seek interest on the principal claims and related costs from the respondent, and the arbitral tribunal must decide on such claims. Pursuant to Article 34(3) of the KAA, the arbitral tribunal may order either party to pay pre- and/or post-award interest after considering all the circumstances of the relevant arbitration case if deemed appropriate – unless the parties have agreed otherwise.

As for arbitration costs, unless the parties have agreed otherwise, an arbitral tribunal has explicit authority under Article 34(2) of the KAA to allocate arbitration costs between the parties, taking into consideration all pertinent circumstances of the case. The "loser pays" rule generally applies to arbitrations in South Korea, but the arbitral tribunal has discretion to decide otherwise in light of relevant factors.

11. Review of an Award

11.1 Grounds for Appeal

An arbitral award has the same effect on the parties as a "final and conclusive judgment of the court" under Article 35 of the KAA, unless the court refuses to recognise or enforce the award under either Article 38 (awards made in South Korea) or Article 39 (awards made in foreign jurisdictions) of the KAA. This means that parties may not appeal an award per se. Nevertheless, parties may file a lawsuit to set aside the award under Article 36 of the KAA, which closely mirrors Article 5(1) of the New York Convention.

In order to set aside an award, parties must file a lawsuit with the court within three months of its receipt of the duly authenticated copy of the award (Article 36(1) and (3) of the KAA) and state the grounds upon which the party seeks to set aside the award. Grounds for setting aside an award must be proven by the party seeking the setting aside and are limited to the following.

- A party to the arbitration agreement was incapacitated when the agreement was entered into, or the arbitration agreement is not valid under the law selected by the parties to govern the agreement (or, failing any such indication, under South Korean law).
- The party making the application was not given proper notice of the appointment of arbitrators, or of the arbitral proceeding, or was otherwise unable to present its case.
- The award deals with a dispute not contemplated by the parties or not subject to the arbitration agreement, or contains decisions on matters beyond the scope of the arbitration agreement.
- The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the KAA.

The court may also set aside the award if it finds, on its own initiative, that the subject matter of the dispute is not arbitrable under South Korean law, or that the award is in conflict with the public policy of South Korea. South Korean courts tend to interpret such grounds for setting aside narrowly.

An application to set aside an arbitral award is filed at a district court of first instance within three months from the receipt of the award (Article 36(3) of the KAA). Thereafter, an appeal of the district court's judgment may be pursued at the applicable appellate court, followed by the Supreme Court. Generally, however, an enforcement order issued by the district court will be provisionally enforceable even if an appeal is pending.

11.2 Excluding/Expanding the Scope of Appeal

The grounds for setting aside an arbitral award are limited to the grounds explicitly provided in Article 36 of the KAA. To date, no precedent exists as to whether the parties may agree to expand or limit such a scope.

11.3 Standard of Judicial Review

The merits of the final award are not reviewable by the courts because they cannot review the arbitral tribunals' findings of law and facts. This means that errors of law or fact made by an arbitral tribunal generally do not qualify as grounds for setting aside an arbitral award by the courts.

12. Enforcement of an Award

12.1 New York Convention

South Korea signed the New York Convention on 8 February 1973, which came into effect on 9 May 1973.

South Korea is also a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention") on 21 February 1967, which came into effect on 23 March 1967.

12.2 Enforcement Procedure

Article 37

Article 37 of the KAA provides general procedures for the enforcement of an arbitral award.

Under Article 37(2), an arbitral award may be enforced only by a court's decision to enforce it upon the request of the parties. The party applying for recognition or enforcement of an arbitral award must submit the authentic award or a copy of the award (Article 37(3). A South Korean translation must also be provided if the award is in a foreign language.

Once the application for recognition or enforcement of an award is filed with the court, it will set a hearing date for both parties to present their case. The court's decision on the recognition or enforcement of an award must contain the reasons for the decision (Article 37(4)(5)).

The 2016 amendments to the KAA allowed enforcement based on a "decision" of the district court rather than a "judgment". The purpose of this amendment was to expedite enforcement proceedings as the "decision process" takes less time than the "judgment process".

Articles 38 and 39 provide the grounds to refuse the recognition or enforcement of an arbitral award – more specifically, Article 38 for an award made within South Korea, and Article 39 for an award made outside of South Korea.

Article 38

Article 38 of the KAA provides that an arbitral award made in South Korea must be recognised and enforced unless a party proves that:

- there are grounds for setting aside the award under Article 36(2) 1 of the KAA;
- the award is yet to be effective and binding upon the parties; or
- the award has already been set aside by a national court.

The court can also, at its own discretion, refuse to recognise and enforce the arbitral award made in South Korea if the dispute is not arbitrable under South Korean law, or the recognition or enforcement of the award is in violation of public policy, as stipulated in Article 36(2) 2 of the KAA.

Article 39

Article 39(1) of the KAA provides that arbitral awards made outside of South Korea shall be recognised or enforced according to the requirements under the New York Convention where it applies.

Under Article 39(2) of the KAA, arbitral awards made outside of South Korea where the New York Convention does not apply shall be recognised or enforced in the same manner as a foreign court judgment pursuant to the Civil Procedure Act and the Civil Execution Act regarding the recognition and enforcement of a foreign court judgment (Article 39(2) of the KAA).

Lastly, there is no clear indication of whether South Korean courts would enforce an award that is subject to ongoing set-aside proceedings at the seat of arbitration. Presumably, however, the South Korean courts would adjourn the enforcement proceedings per Article 6 of the New York Convention.

12.3 Approach of the Courts

South Korean courts will generally recognise and enforce arbitral awards unless there are clear grounds for setting aside the award under the KAA. Furthermore, courts tend to interpret the grounds for setting aside very narrowly and are generally reluctant to refuse enforcement of foreign arbitral awards based on public policy grounds.

13. Miscellaneous

13.1 Class Action or Group Arbitration

The KAA is silent on the issue of class action arbitration or group arbitration. Also, there is no precedent from the South Korean courts on class action arbitration or group arbitration.

13.2 Ethical Codes

Under the KAA, there are no mandatory ethical codes or professional standards applicable to either counsel or arbitrators. The KAA does, however, require arbitrators conducting proceedings in South Korea to disclose whether there are any circumstances likely to give rise to justifiable doubt about their impartiality or independence in advance (Article 13(1)). Arbitrators are subject to challenge if any such circumstances exist.

The KCAB has also issued a Code of Ethics for Arbitrators, which must be accepted by all arbitrators appointed to hear arbitrations administered by the KCAB.

13.3 Third-Party Funding

With the growth in acceptance and use of third-party funding in international arbitration around the globe, many third-party funders have also begun to express their interest in entering the South Korean market. Although third-party funding remains an issue of increased interest in

South Korea, no legislation has been introduced so far in order to directly address this issue.

There is currently no express rule or restriction on third-party funders in South Korea, nor is there a law that specifically allows for it. Also, there are no notable court precedents on this issue.

13.4 Consolidation

The KAA does not expressly preclude or permit the consolidation of separate arbitral proceedings.

Nevertheless, Article 23 of the KCAB Rules provides for "consolidation of claims" under which an arbitral tribunal may, at a party's request, consolidate claims brought in separate but pending arbitrations if:

- the arbitrations are under the KCAB Rules;
- the arbitrations are between the same parties; and
- no arbitrator has been appointed in any of the arbitrations.

Article 22 of KCAB Rules also allows a "single arbitration under multiple contracts". This means claims arising under multiple contracts may proceed as one single arbitration. Under Article 22, claims arising under multiple contracts will be conducted in one single arbitration if all multiple contracts – to the satisfaction of the Secretariat – provide for the KCAB Rules, contain arbitration agreements that are compatible with one another, and the claims arise out of the same transaction or series of transactions.

13.5 Binding of Third Parties

The KAA is silent on the issue of whether an arbitral tribunal may assume jurisdiction over a non-signatory to the arbitration agreement, regardless of the non-signatory's nationality. To date, there is no clear instruction from the courts on the type of doctrines a court may adopt in exercising jurisdiction over third parties. More information on this topic may be found in **5.7 Jurisdiction Over Third Parties**.

However, under the KCAB Rules, the arbitral tribunal may allow third parties to join the arbitration proceedings if all parties and the third parties have agreed to the joinder of third parties or if the third parties are a party to the same arbitration agreement and have agreed to the joinder (Article 21).

Regarding a similar issue involving third parties, there have been recent discussions on whether the arbitral award may be enforced against non-signatories to the arbitration agreement. However, South Korean courts have yet to rule on this issue.

Trends and Developments

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Yulchon LLC is a full-service international law firm headquartered in Seoul, with a broad client base comprising major domestic and foreign companies. It employs more than 600 professionals (of whom more than 60 are licensed in jurisdictions outside South Korea) and has offices in Shanghai, Hanoi, Ho Chi Minh City, Moscow, Jakarta and Yangon. Yulchon is an acknowledged market leader in the development and practice of law, and has been voted "Most Innovative Law Firm in South Korea" three times by the Financial Times. The firm is frequently retained to negotiate complex transactions, help draft new legislation and regulations, and represent clients in high-stakes adversarial proceedings. As one of South Korea's premier law firms, Yulchon maintains its high standards of excellence by valuing a culture of collaborative problem-solving.

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Introduction

Throughout the past decade, the field of international arbitration has experienced rapid development and significant expansion within the South Korean legal market. This growth has been accompanied by a notable increase in the number of Investor-State Dispute Settlement (ISDS) cases filed against the government of the Republic of Korea (ROK). ISDS is an international arbitration mechanism that allows foreign investors, whether individuals or private entities, to file claims against host states for alleged breaches of investment treaties.

Among several ISDS cases filed against the ROK, some have gained substantial international attention. Notable examples include Lone Star Funds-KEB Holdings SCA and others v. Republic of Korea, ICSID Case No. ARB/12/37, Elliott v. Republic of Korea, PCA Case No. 2018-51, and Mason Capital L.P. and Mason Management LLC v. Republic of Korea, PCA Case No. 2018-44. These cases are currently being challenged by the ROK, highlighting the contentious nature of such disputes.

However, one recent ISDS case, Fengzhen Min v. Republic of Korea, ICSID Case No. ARB/20/26 ("Min Case"), stands out as particularly significant. It is the first ISDS case in which the ROK achieved a complete victory after the merits stage, with the Tribunal dismissing the entirety of the investor's claims. This article delves into the Min Case, examining how its final award will impact the evolving landscape of ISDS in the ROK and the broader implications for international investment law.

Factual Background of the Min Case

In 2007, a Chinese investor named Fengzhen Min ("Mr Min") established a company incorporated in the ROK, called Pi Investment Co., Ltd. ("Pi Korea"). Mr Min wanted to acquire a building (the "Building") in central Beijing. To finance the acquisition of the Building, Pi Korea and Mr Min borrowed necessary funds in the total amount of KRW380 billion from two Korean financial institutions by way of loans arranged by Woori Bank, a Korean financial institution. The loans were later assigned by those two financial institutions to Woori Bank. Mr Min executed an agreement pledging all the Pi Korea shares that he owned to secure the loans. Eventually, Woori Bank enforced this security, selling the Pi Korea shares to another company, resulting in Mr Min losing ownership of Pi Korea.

Between July 2013 to July 2017, Mr Min brought civil proceedings against Woori Bank ("the Korean Civil Proceedings"), and between December 2010 and December 2017, Mr Min was subjected to criminal investigations and was convicted of bribery and embezzlement ("the Korean Criminal Proceedings").

In 2013, Mr Min commenced the Korean Civil Proceedings in the Seoul Central District Court against Woori Bank, seeking a declaration that he was the sole shareholder of Pi Korea. In 2015, Mr Min's claim substantially failed when the Seoul Central District Court upheld the validity of Woori Bank's transfer of the Pi Korea shares. His appeal to the Seoul High Court in 2016 and a further appeal to the Supreme Court in 2017 were both dismissed.

From both legal proceedings, Mr Min alleged that procedural flaws and irregularities were present, which seriously undermined his rights to a fair trial. As a result, Mr Min commenced an ISDS against the ROK under the ICSID Convention and Agreement between the Government of the People's Republic of China and the Government of the Republic of Korea on the Promotion

and Protection of Investments (the "Treaty"), by filing a Request for Arbitration on 16 July 2020 with the following claims.

Mr Min's Claims

Mr Min's primary complaint regarding the Korean Civil Proceedings was that the Korean courts wrongfully refused his repeated applications for Woori Bank to produce the final version of the sale and purchase agreement for the Pi Korea shares. He argued that if this document had been produced, he would have succeeded in his claim against Woori Bank and been restored as the owner of the Pi Korea shares, which would have been free of the pledge under Korean law.

Mr Min's complaints in connection with the Korean Criminal Proceedings relate to the allegedly unfair and unjust conduct both of the investigation and of his trial, and to travel bans imposed on him during the course of the process.

Mr Min alleged that the ROK failed to treat his investment fairly and equitably under Article 2(2) of the Treaty as the ROK breached its obligation to provide fair and equitable treatment to his investment, including the obligation not to deny justice to him, through the Korean Civil Proceedings, which were deemed discriminatory, unfair and lacking due process. Also, he stated that the Korean courts and other state organs improperly handled the Korean Criminal Proceedings, which were discriminatory, and led to his wrongful conviction and incarceration.

Mr Min also argued that under Article 4(1) of the Treaty, it is stipulated that the ROK is prohibited from directly or indirectly expropriating or taking any similar measures against qualifying investments unless all of the conditions set out in Article 4(2) of the Treaty are satisfied, which entail that the expropriation is (i) for the public interest; (ii) in accordance with domestic and international standards of due process; (iii) without discrimination; and (iv) with compensation. Mr Min argued that Woori Bank's wrongful enforcement of its security over Pi Korea shares and the unlawful handling of the Korean Civil Proceedings by the Korean courts expropriated his entire investment in Korea, and this was not carried out for the public interest per international standards of due process and/or with compensation.

Initially, Mr Min claimed damages of approximately USD1.4 billion, but reduced this figure to around USD191.5 million by the time the award was issued. He had also sought the restoration of his equity in Pi Korea.

The ROK's Claims

The ROK raised six objections as to the lack of jurisdiction. First, the ROK argued that the Pi Korea shares were not used as an investment by Mr Min, "in accordance with the applicable laws and regulations" of the ROK as host state at the time of investment as required under Article 1(1) of the Treaty. Second, as Mr Min engaged in unlawful misconduct by engaging in bribery and embezzlement, he is barred from pursuing his claims. It is also important to note that the judgments rendered in the Korean Civil Proceedings and the Korean Criminal Proceedings, as well as the investigations conducted by investigative authorities were lawful. Third, Mr Min did not have a qualifying "investment" within the meaning of Article 1(1) of the Treaty and Article 25 of the ICSID Convention. Fourth, the Pi Korea shares were not "used as investment" by the Claimant "within the territory of" Korea as host state, as required by Article 1(1) of the Treaty. Fifth, Mr Min was not considered an "investor" as defined under Article 1(2) of the Treaty, and finally, Mr Min's claims were considered time-

barred due to the three-year limitation period under Article 9(7) of the Treaty.

Additionally, the ROK argued that Mr Min failed to establish his case on the merits by proving that Korea breached the Treaty.

Final Award

On 31 May 2024, the Tribunal rendered a Final Award in complete favour of the ROK. The Tribunal decided that to fulfil the requirements of Article 1(1) of the Treaty, the asset must be "used" in accordance with the applicable laws of the host state at the time of investment. The Tribunal further rendered that in the case of an asset created at the time of investment, that must mean that the company and the shares are required to be brought into existence for use in accordance with such laws.

The Tribunal found that the Pi Korea shares were used in a scheme with a criminal purpose under Korean law and based on the evidence presented in this arbitration, "the purpose of the use of the investment" did not comply with the laws and regulations of the ROK. These investments did not fulfil the requirements under Article 1 of the Treaty to constitute investments protected by the Treaty since Pi Korea was established by Mr Min for the illegal purpose of obtaining loans from Woori Bank by bribery. Consequently, it was determined that the Tribunal lacked jurisdiction, and all of Mr Min's claims in this arbitration were dismissed, which consequently led to the dismissal of all other issues of jurisdiction as well as the merits.

Broader Implications for International Investment Law

The Min Case recently gained public attention and press coverage, as it is the first ISDS case in which the ROK successfully achieved a win through the merit proceeding. It is important to highlight that this case evidently establishes the principle that investments that are deemed illegal under a host state's applicable laws and regulations are not protected under the ISDS regime. The ISDS mechanism aims to protect legitimate and legal foreign investors and promote foreign investments. This landmark decision will likely influence future ISDS cases and contribute to the development of more robust legal frameworks governing international investments.

While not all violations of a host state's laws will necessarily disqualify an investment from treaty protection, it is widely accepted by tribunals that serious illegality, including bribery and corruption, falls within the scope of the legality requirement. For instance, the tribunal in Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2 and Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3 held that serious illegality could disqualify an investment from protection.

In addition, it is established that the illegality in question need not render the existence of the asset comprising the purported investment void or illegal under the host state's laws. It is sufficient for the illegality to be connected with the alleged investment. For example, in Metal-Tech v. Uzbekistan, the tribunal held that corruption (illegal payments made under a sham consultancy agreement) violated Uzbek law in connection with the establishment of the claimant's investment in Uzbekistan, based on a treaty requiring investments to be implemented in accordance with applicable law.

The Min Case reinforces the importance of adherence to legal and regulatory standards in investment activities and underscores the boundaries of protection offered by the ISDS regime. This

landmark case will likely influence the future approach to ISDS cases involving allegations of illegality and strengthen the framework for fair and equitable treatment of foreign investments within the ROK's legal system. The decision also serves as a critical reminder for investors to ensure that their investments comply with the host state's legal and regulatory frameworks to avail themselves of the protections offered under international treaties.

Conclusion: Moving Forward

The Min Case's significance extends beyond the immediate context of the ROK and touches upon broader themes in international investment law. It highlights the delicate balance between protecting foreign investments and upholding the sovereignty of host states to enforce their laws. The principle that investments must be legal and compliant with local regulations to receive protection under investment treaties reinforces the need for foreign investors to conduct thorough due diligence and maintain transparent and lawful business practices. It reinforces the importance of legality and adherence to local regulations in foreign investments and underscores the critical role of ISDS tribunals in upholding these principles. The decision will likely influence future cases and contribute to the development of more robust legal frameworks for international investments.

Moreover, the Min Case underscores the role of ISDS tribunals in scrutinising the legality of investments and the conduct of both investors and host states. The decision in the Min Case exemplifies how tribunals can serve as arbiters not only of investment disputes but also of adherence to broader principles of international law, including the prohibition of corruption and the enforcement of legal standards.

The Min Case also has implications for the drafting and negotiation of future investment treaties. States may seek to include more explicit provisions regarding the legality of investments and the conditions under which they can be protected as in the Treaty. Such provisions could provide greater clarity and predictability for both investors and states, reducing the potential for disputes and fostering a more stable investment climate.

As the field of international arbitration continues to evolve, the lessons learned from the Min Case will be invaluable for both investors and host states. By promoting transparency, good governance, and adherence to legal standards, the international community can foster a more stable and equitable investment environment that benefits all parties involved. The Min Case stands as a testament to the enduring principles of fairness and legality that underpin the international investment regime and the ongoing efforts to balance the interests of investors and host states in a complex and interconnected world.

SPAIN

Law and Practice

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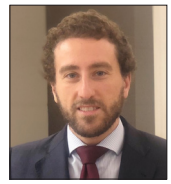

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CASES & LACAMBRA

1. General

1.1 Prevalence of Arbitration

In Spain, arbitration is the dispute resolution procedure of choice. Indeed, arbitral awards are automatically enforceable before ordinary courts (Article 517.2.2 of the Spanish Procedural Law, Act 1/2000, of 7 January 2000).

However, some domestic parties are still reluctant to use arbitration to resolve their disputes, although the prevalence of arbitration has increased because judicial proceedings are too slow in some parts of Spain.

With respect to international arbitration proceedings, Article 3 of the Spanish Arbitration Act 60/2003 of 23 December 2003 (SAA) states that arbitration proceedings shall be considered international when any of the following circumstances apply:

- At the time of the conclusion of the arbitration agreement, the parties have their domiciles in different countries.
- The place of arbitration, determined in or pursuant to the arbitration agreement, the place of performance of a substantial part of the obligations in dispute or the place with which the dispute is most closely connected, is outside the state in which the parties have their domiciles.
- The legal relationship in dispute is connected to international trade interests.

Therefore, under Spanish law, arbitration proceedings will be considered international only in those cases.

1.2 Key Industries

Between 2021 and 2024, international arbitration has increased exponentially in fields that require higher levels of expertise.

This is the case for the construction and energy industries, in which it is quite common for the contracting parties to agree to submit their disputes to international arbitration due to the specific expertise required for the resolution of those kinds of proceedings.

Moreover, litigation has increased considerably in the construction and energy industries. It is difficult to identify any industries that have experienced decreased international arbitration activity.

1.3 Arbitration Institutions

In Spain, the most frequently used international arbitration court is the Court of Arbitration of the International Chamber of Commerce (ICC).

Moreover, until 2020 there were four arbitral institutions in Spain used for international arbitration:

- the Madrid Court of Arbitration (*Corte de Arbitraje de Madrid*);
- the Civil and Commercial Court of Arbitration (*Corte Civil y Mercantil de Arbitraje* – CIMA);
- the Spanish Court of Arbitration (*Corte Española de Arbitraje*); and
- the Arbitration Court of Barcelona (*Tribunal Arbitral de Barcelona*).

However, on 1 January 2020, the Madrid International Arbitration Center (*Centro Internacional de Arbitraje de Madrid* – CIAM) began its activity.

CIAM was created following an agreement reached between the Madrid Court of Arbitra-

tion, CIMA and the Spanish Court of Arbitration to promote international arbitration in Spain.

1.4 National Courts

In Spain, there are no specific national courts to hear disputes related to international arbitrations and/or domestic arbitrations.

However, there are some national courts that have specific powers regarding international arbitration.

For instance, the courts of first instance (*Juzgados de Primera Instancia*) are entitled to recognise and enforce international arbitration awards per Article 8.6 of the SAA, while the high courts of justice (*Tribunales Superiores de Justicia*) have jurisdiction to hear appeals for the annulment of awards.

2. Governing Legislation

2.1 Governing Law

In Spain, the governing law on arbitration is the SAA, which includes both domestic and international arbitration.

This law draws heavily on the United Nations Commission on International Trade Law of 21 June 1985 (the UNCITRAL Model Law). Key similarities include the requirements for a valid agreement to submit to arbitration and the adoption of interim measures in arbitration proceedings.

However, it should be noted that, in addition to the SAA, Spanish law also incorporates the provisions relating to international arbitration established in treaties ratified by Spain or contained in national laws with special provisions on arbitration.

The main differences between the SAA and the UNCITRAL Model Law include:

- in accordance with Section 9.6 of the SAA, in international arbitrations, the arbitration agreement will be valid and the dispute shall be arbitrable if it meets the requirements stated by the law chosen by the parties to govern the arbitration agreement, by the law governing the merits of the case or by Spanish law; and
- in accordance with Article 15 of the SAA, unless otherwise agreed by the parties, in arbitrations that are not to be decided in equity, when the arbitration is to be decided by a sole arbitrator, the arbitrator shall be an attorney.

2.2 Changes to National Law

The Spanish arbitration legislation has not been modified in recent years.

3. The Arbitration Agreement

3.1 Enforceability

According to Article 9.1 of the SAA, to be valid under Spanish law, an arbitration agreement has to express the parties' willingness to submit to arbitration all or some disputes that may arise from their legal relationship. In this sense, the Spanish law follows Article 7 of the UNCITRAL.

Therefore, the key aspect to be considered in an arbitration agreement is to clearly state the intention of the parties to submit their dispute to arbitration.

In addition, an arbitration agreement must be made in writing and signed by both parties or exchanged in communications between the

parties which provide a record of the agreement (Article 9.3, SAA).

On the other hand, in international arbitrations, the SAA expressly provides that the arbitration agreement will be valid if it meets the requirements stated by the law chosen by the parties to govern the arbitration agreement, by the law governing the merits of the case or by Spanish law (Article 9.6, SAA).

3.2 Arbitrability

Under Spanish law, the matters that cannot be submitted to arbitration are matters excluded from the free disposition of the parties. These would be considered non-arbitrable matters (Article 2.1, SAA). Moreover, Article 1.4 of the SAA excludes labour disputes from the scope of the law and, in addition, there are matters excluded from arbitration for reasons of public order, such as disputes related to personal capacity or filiation.

3.3 National Courts' Approach

Regarding the determination of the law applicable to the arbitration agreement, the main rule is the freedom of choice of the parties. In international arbitration, if there is no choice, Article 9.6 of the SAA provides that the arbitration agreement will be valid if it meets the requirements stated by the law governing the merits of the case or by Spanish law.

The Spanish courts follow this rule and do not intervene in those cases in which they lack jurisdiction unless expressly provided for by the SAA, as set forth in Article 7 of the SAA.

In this regard, in cases where there is an arbitration agreement, the national courts will refrain from hearing the dispute and will accept the decision of the parties to submit to arbitration.

Likewise, if there is an arbitration agreement between the parties, the opposing party may also allege the lack of jurisdiction of the court through a motion for lack of jurisdiction.

3.4 Validity

If the contract in which the submission to arbitration clause is contained is invalid, the arbitration clause will not be affected by the invalidity. The arbitration clause is considered a separate legal stipulation from the main contract regardless of whether it is set as a clause within the contract itself or as a separate contract.

In this sense, the principle of competence-competence is expressly recognised in Article 22 of the SAA. This principle states that arbitrators are empowered to decide on their own jurisdiction, including any plea related to the existence or validity of the arbitration agreement, or any other pleas, the acceptance of which would prevent the consideration of the merits of the case.

4. The Arbitral Tribunal

4.1 Limits on Selection

According to Article 15 of the SAA, in arbitrations of law, the only limit set to the parties' autonomy is that at least one of the arbitrators must be an attorney. On the other hand, there is no such limitation in equity arbitrations, and there is no requirement that an arbitrator be an attorney, not even in cases in which it is solved by a sole arbitrator.

In addition, it should be noted that the arbitrators cannot be legal entities, and there is no maximum limit to the number of arbitrators as long as they are odd-numbered.

4.2 Default Procedures

The parties are free to agree on a procedure to appoint the arbitrator(s), but, if the arbitrator(s) cannot be appointed under that procedure, any party may apply to the competent court to appoint the arbitrators or, as appropriate, to adopt the necessary measures.

For those cases, Article 15 of the SAA establishes the following procedure to appoint the arbitrator(s):

- In an arbitration with a sole arbitrator, they will be appointed by the competent judicial court at the request of any of the parties.
- In an arbitration with three arbitrators, the parties will appoint one arbitrator each, and these two arbitrators will appoint the third arbitrator, who will be the chairperson of the arbitral tribunal. If a party fails to appoint the arbitrator within 30 days of the latest acceptance, the appointment will be made by the competent judicial court at the request of any of the parties.
- Where more than one claimant or respondent is involved, the claimants will appoint one arbitrator and the respondents will appoint another. If claimants or respondents cannot agree on the appointment, all arbitrators will be appointed by the competent judicial court at the request of any of the parties.

If the arbitration is administered by an arbitration institution, the latter will apply its own rules for appointing arbitrators.

4.3 Court Intervention

As stated in Article 8.1 of the SAA, the Spanish courts will intervene in the selection of the arbitrators when it has not been possible to appoint the arbitrator(s) by the method stipulated by the parties, in the following cases:

- when the arbitration should be overseen by a single arbitrator and the arbitrator could not be determined in accordance with the stipulations agreed by the parties;
- when the arbitration should be overseen by three arbitrators but one of the parties has not selected the corresponding arbitrator within a period of 30 days; or
- when there are several plaintiffs or defendants and they do not reach an agreement on appointing an arbitrator.

4.4 Challenge and Removal of Arbitrators

The SAA is flexible in relation to the procedure for challenging arbitrators. It allows the parties to agree on the challenge procedure they deem most appropriate.

However, in the absence of an agreement, the party challenging an arbitrator shall state the reasons for the challenge within 15 days of becoming aware of the acceptance or of any circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence.

Unless the challenged arbitrator withdraws from their position or the other party accepts the challenge, it shall be for the arbitrators to decide on the challenge.

The grounds on which the arbitrators may be challenged must be based on whether there are circumstances giving rise to justifiable doubts as to their impartiality or independence, or as to whether they possess the qualifications agreed upon by the parties.

4.5 Arbitrator Requirements

The arbitrator must be impartial and independent. To avoid being challenged, they must remain

independent and impartial throughout the arbitration (Article 17.1, SAA).

Despite the fact that no definitions of independence and impartiality are established in Spanish law, they usually consist of maintaining the absence of any personal, professional or commercial relationship with the parties, and should an arbitrator have any impediment that prevents them from meeting these requirements, they must disclose this information at the time of their appointment and without delay.

In this regard, we must point out that the Spanish Arbitration Club approved the Code of Best Practice, which includes recommendations regarding the arbitrators' standards of independence.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

As set out in Article 2.1 of the SAA, only disputes on matters of free disposal according to law can be the subject of arbitration procedures.

In this sense, matters for which arbitration is not freely accessible to the parties include the following:

- personal capacity, filiation, marriage and minors (Article 751, Spanish Civil Procedural Law);
- rights for which a waiver may be contrary to the public interest (Article 6.2, Spanish Civil Code); and
- labour matters (Article 1.4, SAA).

5.2 Challenges to Jurisdiction

In accordance with Article 22 of the SAA, the arbitrators appointed in an arbitration procedure are fully empowered to decide on their own jurisdiction (the competence-competence principle). This includes the power to decide if the arbitration agreement exists or if it is valid.

5.3 Circumstances for Court Intervention

A court may address issues of jurisdiction of an arbitral tribunal if a party files a claim with the court despite the fact that the parties have agreed on an arbitration clause. In this case, the defendant could file a motion for lack of jurisdiction invoking the existence of the arbitration agreement and could request the court to refrain from ruling on the matter. All of this is settled in accordance with Article 11.1 of the SAA and Article 63 of the Spanish Civil Procedure Law.

If the existence of the arbitration agreement can be clearly proved, the Spanish courts will refrain from intervening in the procedure.

The SAA does not establish the option for Spanish courts to review negative decisions on jurisdiction by arbitral tribunals, although jurisdiction may be reviewed by means of an action for annulment of the award (Article 41, SAA).

5.4 Timing of Challenge

The parties can only challenge the jurisdiction of an arbitral tribunal before the courts when an award has been issued (interim or final), since Article 22 of the SAA grants exclusive jurisdiction to the arbitrators to decide on their own jurisdiction.

Therefore, the decision of the arbitrators on their own jurisdiction can only be challenged through the exercise of an action for annulment of the award, without prejudice to the fact that the parties could allege before the arbitral tribunal its lack of jurisdiction in their first writ of allegations.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The Spanish courts will analyse the specific jurisdiction of the arbitral tribunal through a deferential review.

5.6 Breach of Arbitration Agreement

In the event that a party files a claim when it should have initiated arbitration proceedings due to the existence of an arbitration agreement, the court should act in accordance with the arbitration agreement unless it considers it to be invalid.

It should also be noted that the parties may modify the submission made to arbitration by tacitly submitting the dispute to the courts. Thus, if a claim has been filed with a court despite the fact that the parties have agreed on an arbitration clause and the opposing party replies to the claim without objecting to the jurisdiction of the tribunal within ten days, it will be understood that the parties have agreed to submit their dispute to the jurisdiction of that court.

5.7 Jurisdiction Over Third Parties

Spanish law does not recognise the capacity of arbitral tribunals to uphold jurisdiction over persons or entities that are not parties to the arbitration agreement.

However, there are certain cases in which it has been accepted that arbitration agreements may affect non-signatory parties if they have a close and strong relationship with the signatories or play a relevant role in the execution of the contract submitted to arbitration.

6. Preliminary and Interim Relief

6.1 Types of Relief

Article 23 of the SAA establishes that arbitrators may, at the request of a party, adopt the precautionary measures that they deem necessary in relation to the object of the proceedings. In such cases, arbitrators may require the claimant to furnish sufficient security.

The SAA does not detail any specific interim measures and, therefore, arbitrators commonly apply by analogy some of the measures listed in Article 727 of the Spanish Procedural Law (Act 1/2000, of 7 January 2000), such as preventive seizure of goods, judicial intervention or administration of productive goods, goods depository, etc.

6.2 Role of Courts

The competence to adopt precautionary measures in the framework of arbitration procedures vests in the arbitrators themselves. However, to achieve effective compliance, the collaboration of the courts is often necessary.

Moreover, it is worth mentioning that the national courts can grant interim measures in aid of international arbitration in accordance with Article 722 (first paragraph) of the Spanish Procedural Law (Act 1/200, of 7 January 2000), which regulates interim measures in arbitration proceedings and foreign litigation. This provision determines that whoever can prove to be a party to an arbitration agreement may seek injunctions from the court prior to or during the arbitration proceedings.

According to Article 722 of the Spanish Procedural Law, whoever can prove to be a party to any judicial or arbitration proceedings being conducted in a foreign country can request inter-

im measures in Spain, except in the cases where the main matter at issue should lie solely within the competence of Spanish courts.

Although the SAA does not regulate the use of emergency arbitrators, the Madrid International Arbitration Center's Arbitration Rules include a specific procedure for the request of urgent interim measures by any of the parties.

In this sense, the decision of the emergency arbitrators will be binding for the parties and will cease to be binding if the court terminates the request for emergency arbitration or if the request for arbitration has not been filed within the established time limit, among other reasons.

In this regard, the arbitrators of the main proceedings will have the ability to modify, suspend or revoke the decision of the emergency arbitrator, provided that one of the parties requests it.

6.3 Security for Costs

When interim relief is requested in an arbitration procedure, the arbitrators can, in accordance with Article 23 of the SAA, require the requesting party to pay a bond to ensure that they can repay the damages that the requested measure could potentially cause to the other party.

7. Procedure

7.1 Governing Rules

In Spain, the principle of party autonomy, regulated in Article 25.1 of the SAA, governs the arbitration procedure.

Therefore, the only mandatory rule that governs the arbitration procedure is respect for due process rights (ie, the right to be heard and the equal treatment and contradiction of the parties).

7.2 Procedural Steps

As mentioned in **7.1. Governing Rules**, the principle of party autonomy will govern the arbitration procedure, respecting the principles of due process and equal treatment in all cases.

7.3 Powers and Duties of Arbitrators

Spanish national law does not contain a list of arbitrators' duties and powers. However, they include the following.

- Duties:
  - (a) they must act in a fair and impartial manner, treating both parties equally;
  - (b) their performance has to fall within the established legal or contractual framework; and
  - (c) they must keep the procedure confidential.
- Powers:
  - (a) the power to decide on their own competence; and
  - (b) the power to adopt interim reliefs.

It should be pointed out that the Spanish Arbitration Club has approved the Code of Best Practice, which includes recommendations regarding the arbitrators' duties.

7.4 Legal Representatives

The SAA does not include legal provisions that provide for particular qualifications or other requirements for legal representatives, beyond requiring that the representative has sufficient powers to act as such.

8. Evidence

8.1 Collection and Submission of Evidence

As regards the collection and submission of evidence at the pleading stage and at the hearing in the Spanish jurisdiction, it should be noted that the parties are free to choose the applicable rules of evidence, subject to the requirements adopted by the arbitration institution where the arbitration takes place.

Thus, as for the existence of specific rules applicable to the different types of evidence, the arbitrator may order the disclosure of documents and the appearance of witnesses. They may even request the assistance of the competent court in the submission of evidence, in accordance with Article 33 of the SAA.

In this regard, with respect to the possibility of one party to disclose documents to the other party or the arbitrator, it should be noted that the parties may fix the rules and scope of disclosure by mutual agreement, which must be approved by the arbitrator.

8.2 Rules of Evidence

According to the SAA, the parties and the arbitrator will have full freedom and flexibility in the evidence phase. Thus, as long as the principles of equality and contradiction are complied with, there is no difference between international arbitration and national proceedings.

In this regard, if the arbitration is administered by an arbitral institution, the rules of evidence could be those established by that particular institution.

On the other hand, if the arbitration is an ad hoc arbitration and the parties have not agreed on the rules of evidence, the arbitrators shall determine how it is to be regulated, provided that the principle of equal treatment is granted.

8.3 Powers of Compulsion

According to Article 33 of the SAA, the assistance of the courts in the collection or submission of evidence may be requested whenever necessary.

It is the first instance court of the place of arbitration or of the place where the assistance is requested that will assist the parties or the arbitrators in the taking of evidence. Such assistance may consist of the collection or submission of evidence by the court itself or the adoption of specific measures to enable the collection or submission of certain evidence.

9. Confidentiality

9.1 Extent of Confidentiality

Article 24.2 of the SAA expressly establishes that the arbitrators, the parties, and the arbitral institutions must respect the confidentiality of the information and documentation provided for in the arbitration proceedings.

The principle of confidentiality affects both the information and documentation related to the merits of the case, as well as the documentation and evidence related to the arbitration proceedings.

10. The Award

10.1 Legal Requirements

The legal requirements for an arbitral award to be valid and enforceable in Spain are set forth in

Article 37 of the SAA. They can be summarised as follows:

- The time limit for rendering the award is six months from the filing of the statement of defence or from the expiration of the time limit for filing it, unless otherwise agreed.
- The award must be made in writing and signed by the arbitrators.
- The award must include a statement of the reasons on which the decision is based, unless it is rendered by termination by mutual agreement of the parties.
- The award must contain a specific decision on the costs of the arbitration.
- The award must be expressly notified to the parties, in the manner and within the period agreed by the parties or, failing this, by delivery of a signed copy of the award to each party.

The six-month period for delivery of the award, unless otherwise agreed, may be extended in a duly justified manner by the arbitrators for a period not exceeding two months.

10.2 Types of Remedies

As to the types of remedies that an arbitral tribunal may award, arbitrators can award both declaratory relief and monetary compensation.

At the same time, arbitrators have the possibility of ordering the specific performance of a contract by one of the parties or the pursuit of a certain action.

However, as regards the existing limits on such remedies, it is necessary to specify that punitive damages do not exist in Spain and, consequently, it could be understood that they are contrary to public policy.

10.3 Recovering Interest and Legal Costs

Pursuant to Article 37.6 of the SAA, the arbitrators' award on the costs of the arbitration shall include the following:

- the fees and expenses of the arbitrator and, if applicable, the fees and expenses of the defence and of the representatives of the parties;
- the cost of the services rendered by the arbitration institution; and
- all other expenses incurred within the arbitration proceedings.

Also, the payment of legal interest concerning the principal sum awarded is generally imposed.

Unless otherwise agreed by the parties, the arbitrators shall decide on the distribution of the costs generated by the arbitration proceedings. Thus, the arbitrators can decide whether to distribute the costs depending on the costs incurred by each party, or whether one party should compensate the other for the costs incurred.

11. Review of an Award

11.1 Grounds for Appeal

According to Article 41 of the SAA, an award may be set aside if any of the following circumstances is proved:

- The arbitration agreement does not exist or is invalid.
- It has not been possible to give proper notice of the appointment of an arbitrator or of the arbitral proceedings, or a party has not been able to assert its rights.
- The arbitrators have ruled on matters not submitted to their decision.

- The appointment of the arbitrators or the arbitration proceedings have not been in accordance with the agreement of the parties, unless such agreement would be contrary to a mandatory rule of the SAA, or, in the absence of such agreement, they have not been in accordance with the SA.
- The arbitrators have ruled on matters not subject to arbitration.
- The award is contrary to public policy.

The party requesting the award to be declared null and void must file a claim with the high court of justice of the Autonomous Community in which the award has been rendered.

Generally, the application for annulment of the award may be filed within a maximum period of two months from the date of receipt of the award by the applicant party. However, when one party (or both) applies for rectification, clarification or supplementation of the award, the time limit will begin from the date of receipt of the decision on the application by the applicant party or from the date of expiration of the time limit for deciding on the application.

The annulment action will be substantiated through the channels of the verbal proceedings, but with the following particularities:

- The claim must contain the documents supporting the claim, the arbitration agreement and the award, and, if applicable, it shall contain a proposal for the measure that is of interest to the plaintiff.
- The time limit for replying to the appeal by the opposing party shall be 20 days and must contain the means of proof for the measure that is of interest to them.

11.2 Excluding/Expanding the Scope of Appeal

The SAA does not regulate the possibility of excluding or expanding the scope of appeal of the awards since, in the Spanish legal system, there is no second instance in arbitration matters. Instead, there is the possibility of filing an action for annulment on the grounds set out in the law, which in no case affects the merits of the case.

Thus, the voluntary submission of the parties to arbitration has the consequence that the possibilities for appealing the decision arising from the proceedings are limited.

In this regard, it should be noted that the exclusion by the parties of the action for annulment of the award is not allowed under Spanish law.

11.3 Standard of Judicial Review

The standard of judicial review is deferential, since the courts cannot review the merits of the dispute resolved by the arbitrator.

According to Article 41 of the SAA, an award may be set aside if any of the following circumstances is proved:

- The arbitration agreement does not exist or is invalid.
- It has not been possible to give proper notice of the appointment of an arbitrator or of the arbitral proceedings, or a party has not been able to assert its rights.
- The arbitrators have ruled on matters not submitted for their decision.
- The appointment of the arbitrators or the arbitration proceedings have not been in accordance with the agreement of the parties, unless such agreement would be contrary to a mandatory rule of the SAA, or, in the

absence of such an agreement, they have not been in accordance with the SAA.
- The arbitrators have ruled on matters not subject to arbitration.
- The award is contrary to public policy.

As can be seen, the law does not recognise the possibility of applying for the annulment of an award on the grounds that the rules applicable to the merits of the case have been violated.

12. Enforcement of an Award

12.1 New York Convention

In July 1977, Spain enforced the Convention on the Recognition and Enforcement of Arbitral Awards, as adopted in New York in June 1958, which is the instrument that generally governs the enforcement of international awards in Spain.

This is established in Article 46 of the SAA. However, it also mentioned that the aforementioned New York Convention will be applicable in the absence of international conventions that are more favourable.

12.2 Enforcement Procedure

In Spain, the procedure and rules for the enforcement of an award depend on whether the award to be enforced is national or international.

If the award is national, the party seeking to enforce the award simply has to apply for enforcement before the court of first instance of the place in which the award was rendered.

On the other hand, if the award is international, the general rule is that a party must apply for its recognition before the court of justice of the domicile of the party against whom the award is to be enforced, or in the place where the award should produce its effects.

Once it is recognised, enforcement may be sought before the court of first instance of the domicile of the person against whom the award is to be enforced, or where it should produce its effects.

The international relevance of annulment decisions made by the courts in the country in which arbitration took place is controversial. In general, if an award is annulled in the state of origin, it will not be subject to recognition in another state, since, if it is not valid in its state of origin, it cannot be valid in any other jurisdiction.

In any case, denying a foreign award because it has been annulled by a foreign court decision means giving effect, indirectly, to the award in Spain.

In conclusion, there is a wide margin of manoeuvre for Spanish courts not to deny the exequatur of foreign arbitral awards that have been annulled on grounds contrary to Spanish public policy.

On the other hand, if the appeal for annulment of the foreign award is still pending, the Spanish exequatur court may postpone the decision on the enforcement of the award.

Regarding the possibility for a state or state entity to successfully raise a defence of state or sovereign immunity in the enforcement stage, Article 2.2 of the SAA prevents the possibility of a state to oppose the prerogatives of its own law to breach the obligations contained in an arbitration agreement.

Therefore, in 2015, Spain passed Act 16/2015, on State Immunity, which covers the content of the UN Convention on State Immunity (UNCSI) of 2004. In this regard, according to Article 16 of the UNCSI, there is an exception to jurisdictional immunity when there is an arbitration agreement relating to a commercial transaction between the state and a private individual from a different state.

Thus, Article 17 of the UNCSI provides for the immunity of the state from enforcement measures, as it allows enforcement proceedings against assets located in Spain and used for purposes other than official non-commercial ones. In turn, enforcement will be possible when there is a tacit or explicit consent of the state by means of an international agreement, a written contract or a declaration within a judicial proceeding.

12.3 Approach of the Courts

The case law of the Spanish courts in relation to the exequatur of foreign awards respects the autonomy of the will of the parties to submit their dispute to arbitration and, consequently, interprets the principle of public policy in a restrictive manner.

Occasionally, there are some decisions that cause some controversy as to the scope and extent of the concept of public policy, but generally the exceptionality of its nature is recognised.

13. Miscellaneous

13.1 Class Action or Group Arbitration

In Spain, the only dedicated regulation pertaining to class-action arbitration is the Royal Decree 231/2008, of 15 February 2008, which regulates the consumer arbitration system.

In general, class action in arbitration is neither ruled out nor adequately covered by current legislation. However, due to the specific characteristics of class actions, it is difficult to carry out an arbitration procedure without specific regulation of these procedures.

In this sense, in class actions brought before the ordinary courts, Spanish law requires, for example, the publicity of the actions in order for the plaintiffs to join the proceeding and request their individual compensation.

Regarding class actions before courts, the bill on representative actions for the protection of the collective interests of consumers is pending approval by the Spanish Parliament. This bill transposes the Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

13.2 Ethical Codes

The Arbitration Law does not include ethical codes binding arbitrators and lawyers. Thus, the only requirements are independence and impartiality. However, it is true that arbitrators and lawyers admitted to the bar are obliged to comply with the professional code and the ethical rules applicable to lawyers.

Spanish practitioners are also aware of the guidelines accepted by the International Bar Association and the Spanish Arbitration Club, which include ethical rules.

13.3 Third-Party Funding

Arbitration and national laws do not regulate third-party funding. However, there is also no regulation applicable to arbitration or civil procedure that prevents third-party funding.

Regarding class actions filed before courts, the aforementioned Directive (EU) 2020/1828 regulates third-party funding and the draft of the Spanish Law on this matter also foresees third-party funding.

The use of third-party funders in arbitration is commonly accepted. However, the lack of regulation causes some doubts, for example, regarding the costs to be imposed in the award.

13.4 Consolidation

The SAA does not regulate the possibility for an arbitral tribunal or court in Spain to consolidate several separate arbitration proceedings.

However, the fact that this aspect is not regulated does not mean that it is prohibited, since it will depend on the procedural rules agreed upon by the parties, in accordance with Article 26 of the SAA.

In this sense, the Madrid International Arbitration Centre provides for the consolidation of several arbitration proceedings.

In conclusion, the agreement of the parties and the internal regulations of the arbitration institution in which the arbitration is being administered must be followed.

13.5 Binding of Third Parties

It must be taken into account that the scope of the award must be limited to the parties who entered into the arbitration agreement and who participated in the arbitration process. An award does not have effects on third parties who were not able to exercise their right of defence within the arbitration process itself.

When the effects of the award are intended to be extended to third parties who did not participate in the arbitration, they must challenge the award through constitutional channels, as long as there is a direct impact and they affect their constitutional rights.

However, there are certain cases in which it has been admitted that arbitration agreements may affect non-signatories if they have a close and strong relationship with the signatories or play a relevant role in the execution of the contract submitted to arbitration.

SRI LANKA

Law and Practice

Contributed by:
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Law Chambers of Amrit Rajapakse is the chambers of an independent advocate, arbitrator and mediator practising in Sri Lanka, specialising in intellectual property and commercial disputes.

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1. General

1.1 Prevalence of Arbitration

International arbitration is a popular method of resolving disputes in Sri Lanka.

Where a choice is available, domestic parties generally prefer to resort to litigation over international arbitration.

International arbitration is mostly used in Sri Lanka when an arbitration clause is included in the parties' contract, usually at the request of the foreign party to the contract.

1.2 Key Industries

There were no particular industries that experienced significant international arbitration activity in Sri Lanka in recent years.

1.3 Arbitration Institutions

The arbitral institutions that are most used for international arbitration in Sri Lanka are the Sri Lanka National Arbitration Centre (SLNAC) and the CCC-ICLP International ADR Centre (IADRC). Both institutions administer ad hoc arbitrations and arbitrations under their own rules. They provide hearing room facilities, interpretation and transcription services and secretarial services, which make them a popular choice for international arbitrations.

No new arbitral institutions have been established in Sri Lanka in 2023–24.

1.4 National Courts

The High Courts of Colombo, Jaffna and Kandy have been designated by the Minister of Justice to hear matters arising under the Arbitration Act, No 11 of 1995 of Sri Lanka. The courts' jurisdiction covers both domestic and international arbitrations. The jurisdiction of the High Court of Colombo is presently exercised by the Commercial High Court.

Decisions of the High Court in the exercise of its enforcement or setting aside jurisdictions may be appealed to the Supreme Court by way of leave to appeal.

2. Governing Legislation

2.1 Governing Law

The Arbitration Act, No 11 of 1995 (the "Act") is the national legislation governing international arbitration in Sri Lanka. The Act was based on the draft Swedish Arbitration Act of 1994, which was in turn influenced by the UNCITRAL Model Law of 1985. The Act could therefore be said to be indirectly based on the 1985 Model Law. In fact, many of the Act's provisions are either identical to, or very close re-enactments of, the Model Law.

The Act diverges from the Model Law in that the Act applies to both domestic and international arbitration, whereas the Model Law applies only to international commercial arbitration. In addition, Articles 3, 4, 5, 9, 16(2), 22, 23(1), 26 and 32 of the 1985 Model Law have no corresponding provision in the Act.

2.2 Changes to National Law

The Act has not been amended to date. A draft new Arbitration Act intended to repeal and replace the Arbitration Act 1995 was prepared by a committee of experts appointed by the Minister of Justice and circulated for public comments in 2022. The draft act, which is yet to be enacted, will include features of the UNCITRAL Model Law 2006 and current international best practice.

3. The Arbitration Agreement

3.1 Enforceability

The Act, in common with Article 7(2) of the 1985 Model Law, requires an arbitration agreement to be in writing for it to be enforceable. In addition, Section 4 of the Act requires that the arbitration agreement should not be in respect of a matter that is either contrary to public policy or not capable of determination by arbitration.

3.2 Arbitrability

The Act does not specify any subject matters that may not be referred to arbitration. While arbitrability is a requirement under Section 4 of the Act (see **3.1 Enforceability**), and lack of arbitrability is a ground for setting aside an award and for refusing recognition and enforcement of a foreign award, this area has not received the attention of the Sri Lankan courts. In common with other jurisdictions, it is likely that criminal matters, certain family law and employment matters and certain statutory claims (for example, shareholder remedies and applications to wind up a company) would not be arbitrable.

3.3 National Courts' Approach

There are no reported decisions by Sri Lankan courts with respect to determining the law governing the arbitration agreement. Over the last 25 years, the Sri Lankan courts have moved from a pro-intervention approach to a pro-arbitration one. Arbitration agreements are usually enforced by courts, as seen in Elgitread Lanka (Pvt) Ltd v Bino Tyres (Pvt) Ltd (2010), where an arbitration clause that referred to a non-existent arbitration institution was enforced by the Supreme Court.

However, an exception was made by the High Court in The Garment Services Group Ltd v Aitken Spence & Co Ltd (2003), where it was held that an arbitration clause in a shareholders' agreement did not preclude a shareholder from applying to court to obtain statutory remedies for oppression and mismanagement under the Companies Act. The High Court reasoned that the court's jurisdiction under the Companies Act was an extraordinary one, which included the power to impose a just and equitable settlement on the parties. The court reasoned that an arbitrator cannot grant such relief. An application for leave to appeal against the judgment of the High Court was dismissed.

The cases of Unicorns Clearing and Forwarding (Pvt) Ltd v Murughasan Chandrika and Romav Ltd (2018) and K K D Aruna Chaminda v Janashakthi General Insurance Ltd (2019) underscore the importance of raising timely objection when a party institutes action in court in respect of a dispute covered by an arbitration agreement. These cases are discussed further in **5.6 Breach of Arbitration Agreement**.

3.4 Validity

In Sri Lanka, an arbitral clause may be considered valid even if the rest of the contract in which it is contained is invalid. The rule of separability of arbitration agreements is contained in Section 12 of the Act, although there is no express provision to state that a finding that the contract is null and void will not necessarily entail the invalidity of the arbitration clause (as provided in Article 16(1) of the Model Law).

4. The Arbitral Tribunal

4.1 Limits on Selection

The Sri Lankan courts give full effect to party autonomy in the selection of arbitrators. This was reaffirmed by the Supreme Court in Wakachiku Construction Co Ltd v Road Development Authority (2013), where the court noted that par-

ties may select arbitrators from any nationality or professional background.

4.2 Default Procedures

Section 7(3) of the Act provides for the situation where an appointment procedure agreed upon by the parties fails, due to a party failing to act under such procedure or the parties or arbitrators being unable to reach a necessary agreement or a third-party appointing authority being unable to act. In such cases, a party may apply to the High Court to make the necessary appointment. Section 7(4) of the Act requires the High Court to have due regard to any qualifications agreed on by the parties, as well as the need to promote independence and impartiality, in making its appointment. The Act does not make any specific provision for multiparty arbitrations.

4.3 Court Intervention

Under Section 7 of the Act, court intervention in the selection of arbitrators is confined to cases where the parties have either not agreed on an appointment procedure, or the chosen appointment procedure fails. In the former case, Section 7(2) provides that a party may apply to the High Court to appoint an arbitrator if the parties are unable to agree on a sole arbitrator or a party fails to appoint an arbitrator or the two arbitrators are unable to agree on the third arbitrator. In the latter case, the procedure referred to in **4.2 Default Procedures** will apply.

4.4 Challenge and Removal of Arbitrators

The Act includes particular provisions governing the challenge or removal of arbitrators in Sections 8 to 10, which are broadly comparable with Articles 12 to 15 of the Model Law. Thus, Section 10(2) provides that an Arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to their impartiality or independence. Unlike Article 12(2) of the Model Law however, the Act does not include the failure to possess any qualifications agreed to by the parties as a ground of challenge.

Section 8(1) provides that the mandate of an arbitrator terminates if such arbitrator becomes unable to perform the functions of that office or for any other reason fails to act without undue delay, dies, withdraws from office or the parties agree on the termination. An application to remove an arbitrator on the ground of delay must be made to the High Court under Section 8(2).

4.5 Arbitrator Requirements

Section 10(1) of the Act stipulates an initial and ongoing duty to disclose any potential conflicts of interest, using nearly identical language to Article 12(1) of the Model Law. The duty covers any circumstances likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence. Where the circumstances arise subsequently, the disclosure should be made "without delay" to all the parties "and to the other arbitrators" (not required in the Model Law), unless they have already been informed. Section 15(2) of the Act provides that an Arbitral Tribunal shall deal with any dispute submitted to it in an impartial, practical and expeditious manner.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

As noted in **3.2 Arbitrability**, the Act does not specify any subject matters that may not be referred to arbitration. In common with other jurisdictions, it is likely that criminal matters, certain family law and employment matters and certain statutory claims (for example, shareholder remedies and applications to wind up a company) would not be arbitrable.

5.2 Challenges to Jurisdiction

The principle of competence-competence is given statutory recognition in Section 11(1) of the Act, where it is stated in somewhat broader terms than the corresponding Article 16(1) of the Model Law. According to Section 11(1), an arbitral tribunal may rule on its jurisdiction, including any question as to the existence or validity of the arbitration agreement, or (which is not found in Article 16(1)) as to whether such agreement is contrary to public policy or is incapable of being performed.

5.3 Circumstances for Court Intervention

A court can address issues of jurisdiction of an arbitral tribunal in one of three situations in Sri Lanka. Under Section 11(1) of the Act, any party to the arbitral proceedings may apply to the High Court to determine a jurisdictional question instead of raising it before the arbitral tribunal. The court may also address issues of jurisdiction in proceedings to set aside an award under Section 32 or to refuse recognition or enforcement of a foreign arbitral award under Section 34, which correspond to Articles 34 and 36 of the Model Law. Under these provisions, an award may be set aside or refused recognition or enforcement upon proof that the arbitration agreement is not valid or that the award deals with a dispute outside the terms of the submission to arbitration, which are jurisdictional matters.

In Perera v China National Technical Imports & Export Corporation (2017), the High Court held that Section 11(1) requires a choice to be made between raising a jurisdictional question before the arbitral tribunal or the High Court. Once the parties have agreed to refer a jurisdictional question to the arbitral tribunal, a party cannot invoke the jurisdiction of the High Court to decide that question. The court held further that the Act did not provide for an appeal to the court against a preliminary ruling on jurisdiction by the arbitral tribunal, as in Article 16(3) of the Model Law. The only recourse available under the Act to a party who was dissatisfied with the arbitral tribunal's ruling on jurisdiction was an application to set aside the final award under Section 32.

Sri Lankan courts have shown a general willingness to intervene in setting aside proceedings where it has been proved that the arbitral tribunal lacked jurisdiction. In Hatton National Bank Ltd v Atapattu and another (2013) the Supreme Court set aside part of the arbitral award that dealt with a dispute that had not been included in the parties' notice of arbitration and response or in their subsequent statements of claim and defence. In doing so, the court described it as "trite law" that an arbitral tribunal's mandate to decide any dispute is confined to the limits of the power conferred to it by the parties in express terms or by necessary implication.

In Perera v China National Technical Imports & Export Corporation (2017), the High Court held that negative rulings on jurisdiction by arbitral tribunals are not subject to review under the Act. Based on its finding that the only recourse available to a party was an application to set aside the award under Section 32, the court held that a negative ruling on jurisdiction would not qualify as an "award" under the Act, which defines an award to mean "a decision of the arbitral tribunal on the substance of the dispute".

5.4 Timing of Challenge

The Act does not prescribe a time limit for referring a jurisdictional question to the High Court under Section 11(1). An application to set aside an award is required to be made to the High Court within 60 days of the receipt of the award.

In Hatton National Bank Ltd v Atapattu and another (2013), the Supreme Court held that a challenge to the jurisdiction of the arbitral tribunal could be taken for the first time in setting aside proceedings under Section 32, at least where the alleged lack of jurisdiction was partial as opposed to total. The court held that the failure to take up such a jurisdictional objection at an earlier stage of the arbitral proceedings did not amount to a waiver of the right to challenge the award under Section 32. It is to be noted that the Act does not contain a provision corresponding to Article 16(2) of the Model Law, which requires any objection to jurisdiction to be raised not later than the submission of the statement of defence, or as soon as the tribunal has allegedly overstepped its authority.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The standard of judicial review for questions of admissibility and jurisdiction has not been specifically addressed by the Sri Lankan courts. The case law suggests that the courts adopt the de novo standard of review.

5.6 Breach of Arbitration Agreement

Section 5 of the Act is similar to Article 8(1) of the Model Law and provides that a court shall have no jurisdiction to hear and determine a matter covered by an arbitration agreement, if the party against whom the proceedings are brought objects to the court exercising jurisdiction in the matter. However, the Act is silent as to whether the court should stay the proceedings before it or terminate them, upon such an objection being successfully taken. This question was considered by the Supreme Court in Elgitread Lanka (Pvt) Ltd v Bino Tyres (Pvt) Ltd (2010), where it was held that the court in fact had a discretion, which was to be exercised according to the facts and circumstances of each case, either to dismiss the action or to grant a stay of proceedings. The court held further that in the vast majority of cases no useful purpose would be served by staying the proceedings, and the court will in the normal course dismiss the action or terminate the proceedings.

In Unicorns Clearing and Forwarding (Pvt) Ltd v Murughasan Chandrika and Romav Ltd (2018), the plaintiff filed action in court against the defendants upon certain bills of lading. The second defendant filed answer objecting to the court exercising jurisdiction in the matter on the basis that the bills of lading contained an arbitration clause. The second defendant also raised an issue at the trial as to the court's lack of jurisdiction. However, the second defendant did not move court to decide the said issue as a preliminary legal issue, and instead allowed the court to proceed with the trial on the merits. The Supreme Court held that the second defendant's conduct amounted to a submission to jurisdiction.

In a later case, K K D Aruna Chaminda v Janashakthi General Insurance Ltd (2019), the plaintiff sued the defendant in court upon an insurance policy. The defendant filed answer admitting the court's jurisdiction, and the admission was also recorded at the start of the trial. At a later stage of the trial, the defendant sought to withdraw its admission as to jurisdiction and raised an issue challenging the court's exercise of jurisdiction on the basis of an arbitration clause contained in the policy. The High Court dismissed the action and the plaintiff appealed to the Supreme Court. The Supreme Court held that the objection to jurisdiction had not been taken at the earliest opportunity and ordered the High Court to decide the case on the merits.

5.7 Jurisdiction Over Third Parties

The Act does not provide any circumstances under which an arbitral tribunal may assume jurisdiction over third parties to the arbitration agreement. Since arbitration is a consensual process, it is difficult to conceive of such circumstances unless it is possible to invoke a legal principle such as agency or piercing the corporate veil. Sri Lanka has not recognised the group of companies doctrine and does not have a Contracts (Rights of Third Parties) Act.

Under Section 21 of the Act, the High Court may order a third party to the arbitration agreement to appear before court for examination or to produce a document or do anything required by the arbitral tribunal, where such party had earlier refused or failed to respond to a summons by the arbitral tribunal or to do such thing.

6. Preliminary and Interim Relief

6.1 Types of Relief

Section 13 of the Act authorises the arbitral tribunal to order interim measures of protection needed "to protect or secure the claim which forms the subject matter of the dispute". The types of relief that can be awarded are not further elaborated in the Act.

Section 13(1) provides that such an order may in exceptional cases be made ex parte. The arbitral tribunal may also require the party seeking interim relief to deposit security.

Under Section 13(2), a party may apply to the High Court to enforce an order of an arbitral tribunal requiring the taking of interim measures.

6.2 Role of Courts

In Sri Lanka, the courts play a role in preliminary or interim relief in arbitral proceedings in two circumstances. Firstly, under Section 13(2) of the Act, a party may apply to the High Court to enforce an order of an arbitral tribunal requiring the taking of interim measures. Secondly, pursuant to the Court of Appeal decision in Baksons Textile Industries Ltd v Hybro Industries Ltd (1997), a party may apply directly to court to obtain interim relief to maintain the status quo until such time as a final order resolving any dispute or an interim order is made by an arbitral tribunal.

There are no express legal provisions or reported judgments that recognise the courts' power to grant interim relief in aid of foreign-seated arbitrations.

The Act does not allow the use of emergency arbitrators. The draft Arbitration Act of 2022 (see **2.2 Changes to National Law**) recognises emergency arbitrators.

6.3 Security for Costs

Under Section 13(1) of the Act, an arbitral tribunal may require a party seeking interim relief to provide security to the party ordered to take such measures for any expense, loss or damage that may be caused by reason of such interim relief. Section 29 of the Act provides that the arbitral tribunal may order the parties to deposit security for the payment of the arbitral tribunal's compensation. Apart from these provisions, there is no provision in the Act authorising the arbitral tribunal to order security for a party's own costs.

The court may order security where a party seeks to adjourn an application to recognise or enforce a foreign arbitral award pending the out-

come of challenge proceedings brought before the courts of the seat of arbitration.

7. Procedure

7.1 Governing Rules

Section 17 of the Act provides that the parties are free to agree on the procedure to be followed by the arbitral tribunal, subject to any mandatory provisions of the Act. This allows the parties to agree on a set of institutional or ad hoc arbitration rules.

7.2 Procedural Steps

The Act does not set out any particular procedural steps that are required by law. Instead, as noted in **7.1 Governing Rules**, the parties are given autonomy to agree on the procedural rules.

However, the Act prescribes certain overarching principles that will have to be observed by the parties and the arbitral tribunal in formulating the arbitral procedure. Under Section 15(1), an arbitral tribunal has a duty to deal with any dispute submitted to it in an impartial, practical and expeditious manner. Section 15(2) requires an arbitral tribunal to afford all parties an opportunity of presenting their respective cases in writing or orally and to examine all documents and other material furnished to it by the other parties or any other person. An arbitral tribunal is not bound to hold an oral hearing unless the parties have agreed for such hearing to take place.

7.3 Powers and Duties of Arbitrators

Section 17 of the Act provides that an arbitral tribunal shall have the power to determine the admissibility, relevance and weight of any evidence. Section 22(2) provides further that an arbitral tribunal may administer an oath or affirmation to a witness unless the parties have agreed otherwise. Subject to any contrary agreement by the parties, an arbitral tribunal is not bound by the provisions of the Evidence Ordinance (Section 22(3)).

In the absence of a relevant designation by the parties, an arbitral tribunal has the power to determine the place of arbitration (Section 16(1)), the venue for hearings and for consultations (Section 16(2)) and the law applicable to the substance of the dispute (Section 24(2)). Other powers include the power to rule on its own jurisdiction (see **5.2 Challenges to Jurisdiction**), to order interim relief (see **6.1 Types of Relief**), to order security for the arbitral tribunal's fees and expenses (see **6.3 Security for Costs**) and to award interest (see **10.3 Recovering Interest and Legal Costs**).

Unlike certain jurisdictions, an arbitral tribunal in Sri Lanka does not have the power to withhold an award for non-payment of its fees (Section 30).

As noted in **7.2 Procedural Steps**, an arbitral tribunal has a duty to deal with any dispute submitted to it in an impartial, practical and expeditious manner (Section 15(1)) and to afford all parties an opportunity of presenting their respective cases in writing or orally and to examine all documents and other material furnished to it by the other parties or any other person (Section 15(2)).

7.4 Legal Representatives

Section 23 of the Act provides that unless the parties have agreed otherwise in writing, a party may appear before the arbitral tribunal personally or, where a party is a body of persons (whether corporate or unincorporated), may be represented by an officer, employee or agent of that body, and may in addition be represented by an attorney-at-law. The term "attorney-at-law"

would be understood to mean an attorney-at-law of the Supreme Court of Sri Lanka. A foreign lawyer may appear as an agent of a party.

8. Evidence

8.1 Collection and Submission of Evidence

Section 22(1) of the Act provides that unless the parties have agreed otherwise, evidence before the arbitral tribunal may be given orally, in writing or by affidavit. Under Section 20(2), a witness who has been issued with summons to give evidence or produce a document in any arbitral proceedings shall not be compelled to answer any question or produce any document that they could not have been compelled to answer or produce in court.

The general approach followed in arbitrations in Sri Lanka is to file witness statements in the form of affidavits followed by oral cross-examination. Discovery and disclosure are rarely used in ad hoc arbitrations and in arbitrations under Sri Lankan institutional arbitration rules. Affidavits tendered as evidence should comply with the provisions of the Oaths and Affirmations Ordinance.

8.2 Rules of Evidence

Section 17 of the Act provides that an arbitral tribunal shall have the power to determine the admissibility, relevance and weight of any evidence. Under Section 22(3), subject to any contrary agreement by the parties, an arbitral tribunal seated in Sri Lanka is not bound by the provisions of the Evidence Ordinance. However, as mentioned in **8.1 Collection and Submission of Evidence**, rules of privilege applicable in court proceedings will also apply to arbitral proceedings.

Although an arbitral tribunal thus has considerable freedom, it will have to follow certain basic norms of the law of evidence, such as those relating to the burden and standard of proof. For example, in Atapattu v Janashakthi General Insurance Co Ltd (2013), the Supreme Court reviewed the arbitral tribunal's approach to the standard of proof in relation to an allegation of fraud.

8.3 Powers of Compulsion

Sections 20 and 21 of the Act provide for court assistance in collecting evidence. Under Section 20(1), a party may, with the prior written consent of the arbitral tribunal, apply to the High Court for a summons requiring any person to attend before the arbitral tribunal and give evidence or produce any document or thing specified in such summons. Under Section 21(1), if a third party to the arbitration agreement refuses or fails to appear before the arbitral tribunal or to answer any question or produce a document or do any other thing required by the arbitral tribunal, the High Court may order such third party to appear before court for examination or to answer such question or produce such document or do such thing. An application to the High Court for an order under Section 21(1) may be made by a party to the arbitration proceedings with notice given to the other parties and the prior sanction or consent of the arbitral tribunal.

9. Confidentiality

9.1 Extent of Confidentiality

The Act is silent as to confidentiality of arbitral proceedings or their constituent parts (eg, pleadings, documents, the award). However, confidentiality obligations are included in the main institutional arbitration rules in Sri Lanka. Confidentiality is also often included as an item

on the agenda of most preliminary hearings in arbitrations in Sri Lanka.

Court proceedings in Sri Lanka are in general open to the public and documents filed in support of enforcement or setting aside applications would ordinarily be accessible to the public.

10. The Award

10.1 Legal Requirements

Under Section 25 of the Act, an award should:

- be in writing;
- be signed by the arbitrators constituting the arbitral tribunal or by a majority of them, in which case the award should give the reason for any omitted signature;
- state the reasons upon which it is based, unless the parties have agreed to dispense with reasons or the award is an award on agreed terms under Section 14;
- be dated; and
- state the place of arbitration.

Under Section 25(4), an original signed copy of the award should be delivered to each party to the arbitration.

The Act does not prescribe any time limits for delivery of the award. However, most institutional arbitration rules specify time limits.

10.2 Types of Remedies

The Act is silent on the types of remedies that an arbitral tribunal may award. Remedies normally awarded by arbitral tribunals in Sri Lanka are declaratory relief, damages, specific performance, rectification, injunctions, interest and costs. Punitive damages are not available in Sri Lanka.

10.3 Recovering Interest and Legal Costs

Section 28 of the Act provides that unless the parties have agreed otherwise, the arbitral tribunal may award interest on any principal sums ordered to be paid in the award. The power to award interest includes both pre-award and post-award interest. Interest shall be awarded at the rate agreed by the parties in the arbitration agreement or failing such agreement at the legal rate of interest.

The act is silent on awarding of legal costs. However, in the absence of any statutory indication to the contrary, arbitral tribunals in Sri Lanka normally assume a power to award costs. Such a power may also be conferred on the arbitral tribunal by the parties either explicitly or implicitly (as where both parties pray for costs in their pleadings). Typically, the general rule that costs follow the event applies, however if there is no clear winner and loser the arbitral tribunal will engage in some form of apportionment of costs. Arbitral tribunals will also consider whether the costs were reasonable and proportionate, the conduct of the parties (eg, whether any party engaged in any dilatory tactics) and any settlement offers.

11. Review of an Award

11.1 Grounds for Appeal

An arbitral award is not subject to appeal in Sri Lanka. A party seeking recourse against an arbitral award is confined to the following remedies:

- correction of computational errors, clerical or typographical errors or similar errors (Section 27(1)(a)(i));

- modification of the award where part of the award is on a matter not referred to arbitration (Section 27(1)(a)(ii));
- interpretation of a specific point or part of the award (Section 27(1)(b));
- additional award as to claims presented in the arbitral proceedings but omitted from the award (Section 27(4));
- setting aside the award (Section 32); or
- refusing recognition or enforcement of a foreign arbitral award (Section 34).

11.2 Excluding/Expanding the Scope of Appeal

The right to seek an interpretation of the award or an additional award is made subject to the agreement of the parties. In the absence of such agreement, these remedies will not be available. The remaining remedies are statutory and cannot be excluded by agreement.

The Act is silent as to whether parties can agree on additional appeal procedures before a second arbitral tribunal or before an arbitral institution. Such an agreement may run foul of Section 26 of the Act, which provides that subject to the provisions of Part VII of the Act (which deals with setting aside or refusing recognition or enforcement of awards), the award made by the arbitral tribunal shall be "final and binding on the parties to the arbitration agreement."

The parties would not be able to expand the court's power to set aside an award under Section 32 or refuse recognition or enforcement of a foreign award under Section 34. However, parties may enter into a written agreement to exclude any right of appeal from the High Court to the Supreme Court.

11.3 Standard of Judicial Review

Under the scheme of the Act, the court is precluded from reviewing an award on the merits.

12. Enforcement of an Award

12.1 New York Convention

Sri Lanka signed the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 30 December 1958 and deposited its instrument of ratification on 9 April 1962. Sri Lanka has not formulated any reservations at the time of ratifying the Convention.

12.2 Enforcement Procedure

An application for enforcement of an award (including a foreign award) should be made to the High Court within one year after the expiry of 14 days of the making of the award. Such application shall be accompanied by:

- the original award or a duly certified copy thereof; and
- the original arbitration agreement or a duly certified copy thereof.

Where the award or the arbitration agreement is not in one of the official languages of the court or English, a duly certified translation of such document into such official language or English, shall also be filed.

Under Section 31(6), where an application has been made to enforce an award and there is no application under Section 32 to set aside the award or the court sees no cause to refuse recognition and enforcement of the award under Sections 33 and 34, the court shall proceed to file the award and give judgment according to the award on a day of which notice shall be given to the parties.

The grounds on which an award may be set aside under Section 32 or a foreign award may be refused recognition or enforcement under Sections 33 and 34 correspond to the grounds contained in Articles 34 and 36 of the Model Law and Article V of the New York Convention. An award made in Sri Lanka may be set aside on the following grounds:

- a party to the arbitration agreement was under some incapacity;
- the arbitration agreement was invalid;
- the respondent was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present their case;
- the award deals with a dispute outside the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the parties' agreement or the law;
- the award concerns a matter not capable of settlement by arbitration; or
- enforcement of the award would be contrary to public policy.

In addition to the grounds mentioned above, a foreign award may also be refused recognition or enforcement if the award has not yet become binding on the parties or it has been set aside or suspended by a court in the seat of arbitration. Since the words "may be refused" appear in the section, it would follow that even an award that has been set aside by the courts in the seat of arbitration could be enforced in Sri Lanka.

When a foreign award is subject to ongoing set-aside proceedings at the seat, the Sri Lankan court may adjourn the enforcement proceedings and may order the party resisting the enforcement application to provide security (Section 34(2)).

Sri Lanka is not a party to the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property. Sri Lanka follows the restricted theory of sovereign immunity in terms of which only acts jure imperii (acts of a state in its capacity as a state) would receive immunity. However, it is likely that a separate waiver would be necessary for enforcement measures to be taken against a foreign state.

12.3 Approach of the Courts

The Sri Lankan courts have generally followed a strong pro-enforcement approach towards recognition and enforcement of arbitral awards. In particular, the courts have confined refusing enforcement on the ground of public policy to very strict limits. In Light Weight Body Armour Ltd v Sri Lanka Army (2007), the Supreme Court held that not every error of law on the face of the award would amount to a violation of public policy. The court held that instances such as corruption, bribery, fraud and similar serious cases would be grounds for setting aside an award on this basis. In Atapattu v Janashakthi General Insurance Co Ltd (2013) the Supreme Court reiterated that while public policy was a dynamic concept, it was important to exercise "extreme caution" when applying it.

13. Miscellaneous

13.1 Class Action or Group Arbitration

The Act does not provide for class action arbitration or group arbitration. It may be possible to consolidate arbitration proceedings by application of some institutional arbitration rules.

13.2 Ethical Codes

Attorneys-at-law of the Supreme Court of Sri Lanka are subject to ethical standards prescribed by the Supreme Court, which are found in the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules 1988. There are no separate ethical codes or professional standards that mandatorily apply to arbitrators in Sri Lanka.

13.3 Third-Party Funding

The Act does not recognise third-party funding arrangements. Such arrangements are likely to breach domestic rules against maintenance and champerty. Accordingly, third-party funding arrangements are unlikely to be permitted in Sri Lanka.

13.4 Consolidation

There is no provision in the Act that authorises an arbitral tribunal or court in Sri Lanka to consolidate separate arbitral proceedings. This could be done if all the parties agree to it, or agree on a set of arbitration rules that permits consolidation.

13.5 Binding of Third Parties

See **5.7 Jurisdiction Over Third Parties**.

SUDAN

Law and Practice

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Omer Ali Law Firm provides legal consultancy services in Sudan to international, multinational and local clients in areas including corporate and commercial, foreign investments, arbitration, banking and financial services, employment, intellectual property, mergers and acquisitions, real estate, construction, oil and gas, mining, and telecommunications. The firm is the Sudan member of the Africa Legal Network (ALN), an alliance of leading corporate law firms currently in 15 key African jurisdictions. In the field of international arbitration, Dr Omer Ali (i) acted as co-counsel in an arbitration between oil companies and a governmental agency under the UNCITRAL Arbitration Rules, conducted in London, and in an arbitration on a real estate development project at the Dubai International Arbitration Centre; (ii) acted as expert witness in an arbitration before the Court of Arbitration, ICC, London; (iii) acted as co-arbitrator in an arbitration between a Gulf-based company and a governmental agency; and (iv) acted in an arbitration between a Sudanese company and an Indian company on an energy project.

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1. General

1.1 Prevalence of Arbitration

The Sudanese Arbitration Act 2016 (the "Arbitration Act") is applicable to both international and domestic arbitration. Generally speaking, international arbitration is prevalent when one party or both parties to the arbitration are foreigners. The main business areas where international arbitration is prevalent are oil, infrastructure, mining and construction.

However, it should be noted that Sudan was subject to US and other sanctions from 1993, as a result of which there was a sharp drop in the number of foreign investors investing in the country, with the exception of the above industries, and hence there were a limited number of international arbitration cases. These sanctions were lifted recently, and subject to positive resolution of the current political crisis in Sudan, there is potential for an increased number of foreign investors coming to the country.

Domestic parties prefer litigation as a method of dispute resolution; however, arbitration is chosen for dispute resolution in contracts between sophisticated local businesses when the contract value is relatively high. An area where there is significant referral to domestic arbitration is banking, due to the fact that there is legislation which makes it mandatory to refer disputes regarding assets mortgaged to banks to arbitration (The Sale of Assets Mortgaged to Banks Act 1990).

International arbitration is used mainly as the chosen means of dispute resolution by the parties in their contracts, when referred to arbitration by a court upon agreement of the parties to a dispute, as well as the method of dispute resolution or for enforcement of foreign arbitral awards.

1.2 Key Industries

As already mentioned, the industries which witness international arbitration cases more than others are oil, infrastructure, mining and construction. The reason is that the contracts in these industries are mainly with foreign companies which prefer to resort to international arbitration for dispute resolution. The majority of these contracts being with the government, foreign companies prefer international arbitration for reasons such as the negative perception by multinationals towards local courts in developing countries including delays in dispute resolution, the perception that international arbitrations are conducted in an impartial and neutral manner, and the fact that foreign arbitration awards are enforceable by Sudanese courts.

1.3 Arbitration Institutions

The arbitral institutions most used for international arbitration in Sudan are the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and UNCITRAL. Recently, the Dubai International Arbitration Centre has been used, though in a limited manner.

In Sudan there are no recognised institutions for international arbitration, and only a few small centres for domestic arbitration.

However, theoretically a window for a wider range of international arbitration institutions is available for foreign investors in Sudan whether under various investment protection treaties to which Sudan is party, or under the Investment Act 2021, which gives the foreign investor the option to refer any dispute regarding its investment in Sudan to a specialised court or to resort

to whichever is applicable from the following investment agreements (to all of which Sudan is party):

- the Unified Agreement for the Investment of Arab Capital in Arab States 1980;
- the Agreement for Settlement of Investment Disputes among Arab States 1974;
- the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965;
- the General Agreement for Economic, Technical and Commercial Cooperation among Member States of the Organisation of the Islamic Conference 1977; or
- indeed to any other relevant agreement to which Sudan is party.

1.4 National Courts

For international arbitrations the court designated to hear disputes related to arbitration is the Khartoum General Court unless the parties agree on another General Court in Sudan as the court to hear the dispute, and for domestic arbitrations it is the competent court (which is the court which would have jurisdiction over the dispute if it had not been referred to arbitration). However, for a dispute regarding the annulment (setting aside) of an arbitration award, the Court of Appeal is designated to hear the case.

2. Governing Legislation

2.1 Governing Law

Law Governing Arbitration

The national legislation which governs international arbitration is the Arbitration Act 2016. The same legislation governs domestic arbitration as well. Section 7 of the Arbitration Act provides that an arbitration is categorised as "international" if: (i) the main centres of the businesses of the parties to the arbitration are in two different countries; and (ii) the subject matter of the arbitration is related to more than one country.

Divergence From UNCITRAL Model Law

Broadly speaking, it can be said that there are several areas where the Arbitration Act diverges from the UNCITRAL Model Law. The main areas of divergence are as follows.

- The rules regarding interim measures are relatively restricted under the Arbitration Act compared with those under the Model Law. The Arbitration Act simply refers to the domestic rules under the Civil Procedures Act 1983 without any elaboration. The domestic rules are narrower compared with the rules under the Model Law. Also, the Model Law sets rules for recognition and enforcement of interim measures; there are no similar rules under the Arbitration Act.
- The definition of "international arbitration" is much narrower under the Arbitration Act (Section 7) compared with the Model Law (Article 1 (3)).
- The Model Law limits the applicability of the Law only if the place of arbitration is in the territory of the enacting State with specific exceptions, which is not the case in the Arbitration Act.
- The Model Law provides a high level of guarantee against intervention by local courts in the arbitration proceedings by limiting court intervention to cases provided by the Law. There is no similar provision in the Arbitration Act.
- In case there is a challenge to an arbitrator, the Model Law provides that, pending the court ruling, the arbitral tribunal (including the challenged arbitrator) may continue the arbitral proceedings and make an award,

whereas the Arbitration Act provides that the arbitration proceedings shall be suspended.
- Under the Model Law, if there is a plea by a party that the arbitral tribunal does not have jurisdiction, the tribunal may rule on the plea either as a preliminary question or in an award on the merits, whereas the Arbitration Act directs the tribunal to make its ruling before hearing the case.
- The Model Law gives the arbitral tribunal the power to decide on the language to be used in the arbitration proceedings if the parties fail to agree, whereas the Arbitration Law makes the Arabic language the default language.
- As regards the rules governing the substance of the dispute if such rules were not designated by the parties, the Model Law empowers the arbitral tribunal to apply the law determined by the conflict of laws rules which it considers applicable; the Arbitration Act provides for the application of the rules the arbitral tribunal deems appropriate in the law most related to the subject matter of the dispute. In a related matter, the Sudanese law does not give the arbitral tribunal the power to decide the dispute ex aequo et bono or as amiable compositeur (the tribunal to consider the dispute according to what is fair and just under the particular circumstances of the case, rather than strictly according to the rule of law), if so authorised by the parties, as the case is under the Model Law. Under the Sudanese law, this rule can be applied only if the parties authorise the arbitral tribunal to conciliate.
- A condition for recognition and enforcement of an arbitral award under the Sudanese law is reciprocity, which is not a condition under the Model Law.

2.2 Changes to National Law

There have been no significant changes to the national arbitration law in the past year. From the authors' private contacts, it was learned that there are ongoing discussions over changes to the law such that the arbitration law would be more in line with the UNCITRAL Model Law. However, the authors do not expect any attempt for such change to take place except after restoration of political and security stability to the country.

3. The Arbitration Agreement

3.1 Enforceability

For any arbitration agreement to be enforceable in Sudan, it must satisfy the basic requirements for enforceability of contracts, which are provided for in the Civil Transactions Act 1984, namely capacity of the parties to contract, validity of the contract, and compliance with any form required by law.

Under Section 42 of the Arbitration Act, causes for annulment of an arbitration award include, inter alia, if the arbitration agreement was:

- non-existent;
- void or voidable;
- its term has expired; or
- a party was under incapacity under the law governing such party's capacity.

Section 8 of the Arbitration Act requires that an arbitration agreement must be in writing, otherwise it will be considered void. Correspondence between the parties through various communication means would be considered as writing. Under Section 10 (1), an agreement among parties to a dispute before a court to refer their dis-

pute to arbitration would be considered as an agreement made in writing.

In Mohamed Abdalla Mohamed Effendi v Terhaga Engineering Trading Limited, SC/CA/5/2003, the Supreme Court ruled that an agreement to arbitrate must be clear and unambiguous, and may not be inferred from reading between the lines; accordingly, an agreement to appoint an expert to examine accounts would not be considered an agreement to refer to arbitration.

3.2 Arbitrability

The Arbitration Act limits arbitration to civil transactions, whether contractual or otherwise; however, it excludes any matter regarding which no conciliation (*sulh*) can be made. In Sudanese law (the Civil Transactions Act 1984), conciliation is defined as a contract whereby a dispute is resolved and litigation ceases between the contracting parties in a mutual manner. Under Shari'a, which must be respected in all legal aspects, there are certain matters which cannot be the subject of conciliation, such as personal status matters.

Another matter which the Supreme Court (in Flatco International Engineering v Amer Mohamed Ibrahim, SC/CA/645/2009) ruled as not referable to arbitration is a dispute regarding an employment contract between an employer and an individual employee, as distinct from a collective agreement, which the Sudanese labour law has permitted to be referred to arbitration.

3.3 National Courts' Approach

Sudanese courts respect the law governing the arbitration agreement. The courts enforce arbitration agreements, which are usually enforced once an application for enforcement has been made and the court is satisfied that there was ground for enforcement.

In Sas Building and Construction Company v Abdelfatah Abdelmo'ati Mohamed, SC/CA/1053/2008, the court referred the parties to arbitration because there was an arbitration clause in the contract between the parties. An arbitration agreement was prepared by the arbitrators; however, it was not signed by one of the parties. The award was challenged on the basis, inter alia, that it was not made within three months as stipulated in the arbitration agreement. The court took the view that even if an arbitration agreement becomes void due to the tribunal's failure to deliver an award within the agreed timeframe, non-validity would not extend to the arbitration clause which did not fix a timeframe for delivery of award, and hence the six months' term in the law would prevail, and as the award was delivered within the term fixed by law, the award shall stand. On the same basis, if an arbitration clause under a contract is invalid because it did not set out the matters which would be the subject of arbitration, such matters can be determined later by the parties' agreement.

3.4 Validity

An arbitration clause will be considered valid even if the rest of the contract in which it is contained is invalid. The courts apply the rule of separability to arbitration clauses contained in invalid agreements.

Section 6 (2) of the Arbitration Act provides that an arbitration clause shall be considered an agreement independent from the other terms of the contract, and the invalidity or termination of the contract shall not have any effect on the arbitration clause in the contract.

4. The Arbitral Tribunal

4.1 Limits on Selection

The parties are free to appoint the arbitrators. However, under Section 12 of the Arbitration Act, the number of arbitrators shall be either one or a higher odd number; if the parties fail to agree, their number shall be three.

4.2 Default Procedures

If the parties' chosen method of selecting arbitrators fails, Section 14 of the Arbitration Act provides that in the case of an arbitration with more than one arbitrator each party shall appoint a similar number of arbitrators, and the arbitrators shall agree on the chairperson or on how to appoint the chairperson. If a party refuses or fails to appoint, or if the arbitrators fail to agree on a chairperson, such appointment shall be made by the competent court at the request of a party, and its decision shall be final. In the case of an arbitration with one arbitrator, the parties shall choose him or her or agree on the mechanism for his or her appointment, otherwise the competent court shall appoint him or her at the request of a party.

4.3 Court Intervention

Section 14 (2) of the Arbitration Act provides that if a party fails to appoint an arbitrator, or if the arbitrators appointed by the parties fail to appoint a chairperson, such appointment shall be made by the competent court upon the application of a party, and the court's decision shall be final. There are no limitations on the competent court's power to appoint.

4.4 Challenge and Removal of Arbitrators

Under Section 16 of the Arbitration Act, a party may challenge an arbitrator if: (i) there arise circumstances which give rise to serious doubts regarding his or her impartiality or independence; (ii) the arbitrator becomes incapable of conducting arbitration proceedings, or he or she refrains from or discontinues from conducting the proceedings in such a manner as to cause unjustifiable delay in the proceedings and the parties cannot agree on removing him or her. Subject to the above, a party may not challenge an arbitrator appointed by it or in whose appointment it has participated, except for reasons it becomes aware of after the appointment was made.

4.5 Arbitrator Requirements

Section 15 of the Arbitration Act requires an arbitrator: (i) to agree to act as arbitrator in writing; and (ii) to disclose, in writing, any interest he or she may have or any circumstance which may raise doubts as to his or her impartiality and independence, such disclosure to be made at the time of appointment or at any later time.

In Sudan Cotton Company v Metcot International Trade Limited 674/2014, one of the reasons why the arbitration award was set aside was the fact that one of the arbitrators had acted as lawyer of a party and as such had given advice on the subject matter of the dispute.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

As discussed in **3.2 Arbitrability**, any matter regarding which no conciliation (*sulh*) can be made is excluded from arbitration. Based on court precedents, an employment contract (as distinct from a collective labour agreement) may not be referred to arbitration.

5.2 Challenges to Jurisdiction

Section 6 (1) (b) of the Arbitration Act provides that the arbitral tribunal shall rule on any chal-

lenge as regards the tribunal's jurisdiction; hence, Sudanese law recognises the principle of competence–competence.

5.3 Circumstances for Court Intervention

The Arbitration Act is silent regarding any reference to courts on the decision of an arbitral tribunal under Section 6, which provides that in case a party challenges the tribunal's jurisdiction on the basis that the arbitration agreement does not exist, is void or does not cover the subject of the dispute, the arbitral tribunal shall make a ruling on jurisdiction before hearing the case.

In Ansan Wikfs (Sudan) Limited v Sudan Government & Another (KFIC/90/2014), Khartoum Court of First Instance ruled to set aside an arbitration award on the basis that the arbitral tribunal based its award on both an Exploration and Production Sharing Agreement (EPSA) and a Joint Operating Agreement (JOA) despite the fact that the arbitration proceedings were made under the EPSA, and a party to the arbitration was not party to the JOA which contained an arbitration clause different from that under EPSA.

5.4 Timing of Challenge

In the case referred to in **5.3 Circumstances for Court Intervention**, the court treated the matter of challenging the tribunal's jurisdiction as a cause for annulment (setting aside), the time limit for which is explained in **11.1 Grounds for Appeal** (ie, two weeks from the date when the applicant became aware of the award).

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

Generally speaking, it can be said that the standard of judicial review is deferential. Sudanese courts generally support arbitration proceedings; only in the case of setting aside an arbitration award may a party refer the dispute to the competent court.

5.6 Breach of Arbitration Agreement

Sudanese courts are directed to suspend proceedings if brought in breach of an arbitration agreement. Section 9 of the Arbitration Act provides that the court before which a dispute has been brought regarding which there is an arbitration agreement must dismiss the case for lack of jurisdiction if the respondent challenges the court's jurisdiction before or at the time of making its response to the statement of claim, otherwise the respondent shall be considered as having waived its right to challenge based on the arbitration clause.

5.7 Jurisdiction Over Third Parties

There is no express provision in Sudanese law which allows an arbitral tribunal to assume jurisdiction over individuals or entities that are neither party to an arbitration agreement nor signatories to a contract containing an arbitration agreement.

6. Preliminary and Interim Relief

6.1 Types of Relief

An arbitral tribunal is permitted to award preliminary or interim relief, and such relief is binding. If the relief is required prior to the arbitrators' appointment, it can be sought from the competent court. Section 11 of the Arbitration Act provides that any of the parties may request interim relief from the competent court before the tribunal is formed or from the tribunal after its formation. The competent court or the arbitral tribunal, as the case may be, shall make its orders pursuant to the interim relief provisions in the Civil Procedures Act 1983, and its decision shall be final. Such orders shall be enforced

by the competent court pursuant to the provisions of the Civil Procedures Act 1983, and its enforcement order shall be final.

6.2 Role of Courts

The types of preliminary measures which a court, or an arbitral tribunal, can grant are as outlined in the Civil Procedures Act 1983, Sections 139 to 156 (inclusive). These measures include:

- power to arrest the respondent if there are grounds to suspect that he or she is about to leave Sudan, or dispose of or remove his or her property, pending his or her provision of a deposit or guarantee;
- power to attach property;
- injunction against waste, damage or alienation of property in dispute;
- injunction against breach of contract or cause of injury; and
- appointment of receiver for the property in dispute.

An injunction directed against a company shall be binding also on all its members and officials for whose personal acts the injunction is intended.

Relief in Aid of Foreign Arbitration

As regards whether the courts in Sudan can grant interim relief in aid of foreign-seated arbitrations, there is at least one precedent, albeit before the current Arbitration Act and its predecessor the Arbitration Act 2005, where the Court of Appeal ordered the freezing of certain payments due to a foreign entity with no domicile or residence in Sudan, pending the outcome of a foreign-seated arbitration (Mo Myson Group of Companies v Domen Anderman Reven, CA/CA/276/1981). In this case the court both exercised jurisdiction and referred the case to international arbitration despite the objection of the respondent that the court lacked jurisdiction in light of the governing law clause which provided for a foreign law as the governing law, and took the interim measure of freezing money.

There are no rules regarding emergency arbitrators in Sudanese law.

6.3 Security for Costs

The law allows the courts and/or the arbitral tribunal to order security for costs. Section 155 of the Civil Procedures Act 1983 provides that the court may prescribe not to issue the warrant/order requested unless the claimant pays into court such amount of money as the court may deem sufficient to cover the cost.

7. Procedure

7.1 Governing Rules

Under Section 21 of the Arbitration Act, the arbitral tribunal is directed to apply the substantive and procedural laws as agreed by the parties in the arbitration agreement or arbitration clause. In the absence of such agreement, the arbitral tribunal shall apply the procedural and substantial rules which it deems suitable in the law which is most related to the subject matter of the arbitration, provided the parties are treated on an equal footing.

7.2 Procedural Steps

Certain procedural steps are required by law under the Arbitration Act.

- Arbitration proceedings are deemed to commence on the date when the respondent receives the statement of claim, unless the parties agree on another date.

- The place of arbitration shall be determined by the arbitral tribunal unless the parties have already agreed on such place.
- Arabic shall be the language of arbitration unless the parties shall agree on another language; however, there could be translations into other languages as requested by the parties.
- The contents of the statement of claim shall be:
  (a) the name, capacity, nationality and address of the claimant;
  (b) the name, capacity, nationality and address of the respondent;
  (c) a description of the dispute and facts; and
  (d) the claimant's claims.
- The statement of claim shall be presented in writing to the respondent and the arbitral tribunal, enclosing a copy of the contract and the arbitration agreement if not part of the contract.
- The respondent shall present its defences and claims for the claimant to make response.
- The arbitral tribunal shall arrange for hearing sessions in order to enable each party to explain the subject matter of the arbitration and present its arguments and evidence; however, the arbitral tribunal may limit the proceedings to exchange of written submissions and documents if the parties shall so agree.
- If a party shall abstain despite being notified without an acceptable reason, the arbitral tribunal may carry on with the proceedings at the request of the other party; however, such abstention shall not be taken as admission by the abstaining party.
- A party may request the arbitral tribunal to summon a witness to appear or a third party to produce evidence. The arbitral tribunal may refer such request to the competent court for action.
- The arbitral tribunal may appoint experts, in which case the parties are required to provide each expert with all information regarding the arbitration. A copy of the expert's report shall be sent by the arbitral tribunal to each party.

7.3 Powers and Duties of Arbitrators

The powers and duties which the Sudanese law imposes upon arbitrators are as follows.

- To decide on any challenge by a party to the arbitrator's own jurisdiction.
- To decide on any application for interim relief.
- To determine the applicable procedural and substantive law in case it is not agreed by the parties.
- To determine the place of arbitration in case it is not agreed by the parties.
- To seek the assistance of experts.
- To seek the assistance of the competent court regarding summoning of witnesses or provision of evidence.
- In the event of a challenge that a matter is outside the scope of its jurisdiction, or an allegation that a certain document presented is forged, the arbitral tribunal may decide either to continue proceedings if the alleged matter or document would not have substantial impact on the proceedings, or to suspend proceedings pending the ruling of the competent court on the disputed matter or document.

7.4 Legal Representatives

There are no specific qualifications or other requirements in order for a legal representative to appear in arbitral proceedings.

Legal representation before courts is regulated by the Advocacy Act 1983. The law requires cer-

tain qualifications including a degree in law and undergoing professional training for the granting of an advocacy licence. A licensed advocate must be Sudanese; exceptionally, a foreign lawyer may be licensed on the basis of reciprocity and he or she can appear with a domestic advocate. These rules are applicable to domestic court proceedings.

8. Evidence

8.1 Collection and Submission of Evidence

There are no specific rules regarding collection and submission of evidence at the pleading stage and at the hearing, such as discovery, disclosure, privilege, use of witness statements and cross-examination. However, in theory all these evidential approaches may be used.

8.2 Rules of Evidence

The main legislation regarding rules of evidence applicable in Sudan is the Evidence Act 1994. However, this Act expressly provides that it is not applicable in cases of arbitration or conciliation unless the parties agree for it to be applicable.

There are no specific legislative provisions regarding rules of evidence applicable to arbitral proceedings in the absence of the parties' agreement to apply the Sudanese domestic evidence rules. This is left to the arbitral tribunal under Section 21 of the Arbitration Act, which provides that in case the parties have not agreed on the substantial or procedural laws governing the arbitration, the arbitral tribunal shall determine such laws.

8.3 Powers of Compulsion

Section 28 of the Arbitration Act provides that a party may request the arbitral tribunal to summon any witness to be heard or any third party to present evidence. The arbitral tribunal, if it considers it necessary, shall refer such request to the competent court, which shall enforce such request within the limits of its own jurisdiction.

The law is silent regarding whether the arbitral tribunal can take such action on its own motion without the request of a party.

9. Confidentiality

9.1 Extent of Confidentiality

There are no specific rules regarding confidentiality of arbitral proceedings or their constituent parts. However, in practice, the arbitral proceedings and their constituent parts, such as pleadings, documents and the award, are usually kept confidential. A case where parts of such proceedings may become public is where a challenge arises before the courts regarding any aspect of the arbitration, and the ruling of the court is published.

10. The Award

10.1 Legal Requirements

Legal Requirements for an Award

Section 34 of the Arbitration Act provides the requirements for an arbitral award. The arbitral award must be:

- in writing;
- reasoned;
- dated and signed by the arbitrators or the majority of the arbitral tribunal; and
- the dissenting opinion, if any, shall be recorded in a separate document.

Time Limits

Under Section 33 of the Arbitration Act, the award shall be delivered during the timeframe agreed by the parties, and within six months if no such agreement exists. However, if no award is delivered within the timeframe stated above, the parties may agree on a time extension, and in the case of disagreement between the parties the extension can be determined by the arbitral tribunal, which decision shall be final. Section 35 (d) of the Arbitration Act provides that arbitration proceedings terminate, inter alia, upon the expiry of the time fixed for the arbitration.

In Sudan Cotton Company v Metcot International Trade Company Limited 674/2014, the Supreme Court decided to set aside the arbitration award for several reasons including, inter alia, that the award was delivered after the expiry of the time fixed by law (six months) in the absence of parties' agreement on a timeframe for the proceedings.

10.2 Types of Remedies

Generally speaking, there are no legal provisions limiting the types of remedies an arbitral tribunal may award. Under Section 31 of the Arbitration Act, the arbitral tribunal shall take into consideration the terms of the contract, the subject of the dispute and the customs prevailing in the relevant industry. A reason for which an arbitral award may be set aside in Section 42 is if the award disregards the applicable law under the arbitration agreement or if it includes points not within the arbitration agreement. The authors have already seen that Section 25 of the Arbitration Act requires that the parties' submissions shall include their respective claims. Accordingly, it may be said that the remedies awarded should fall within one or more of the following:

- the parties' claims;
- the contract, the subject of the arbitration and the arbitration agreement;
- the law applicable to the arbitration; and
- the customs prevailing in the relevant industry.

10.3 Recovering Interest and Legal Costs

Recovering Interest

In Sudan, interest would be considered illegal and unenforceable, because Section 110 of the Civil Procedures Act 1983 provides that a court in Sudan shall under no circumstance whatsoever make a decree ordering payment of interest on the principal sum adjudged, and also because the dominant view in Islamic legal literature is that any interest would be considered as usury (*riba*) disallowed under Shari'a rules, and it is the authors' view that a Sudanese court would follow such view because Sudanese courts are directed to follow Shari'a. Further, there is at least one Sudanese precedent where the Supreme Court rejected a claim for payment of interest due to late payment under a contract, holding that pursuant to Section 110 of the Civil Procedures Act 1983 payment of interest shall not be made under any circumstance whatsoever, and that this rule is a matter of public order. Invalidity would be limited to the interest only, and would not extend to the principal debt. A recent legislation introduced in May 2021 has excluded "financial and banking business adopting the conventional system" from this ban. Accordingly, if an award contains payment of interest, Sudanese courts would not enforce the part of the award on interest, except if the underlying transaction that is the subject of arbitration is regarding financial or banking business adopting the conventional, as opposed to Islamic, system of finance.

Legal Costs

As regards legal costs, the general rule under the Civil Procedures Act 1983 is that the cost shall be borne by the party against whom the judgment is made, unless the court decides otherwise. In practice, in arbitration cases a "costs follow the event" approach is followed.

11. Review of an Award

11.1 Grounds for Appeal

An arbitration award is final, binding and shall be executed automatically or upon written application to the competent court (Section 41 of the Arbitration Act).

The only ground to appeal an arbitration award to courts is under Section 42 of the Arbitration Act and only on the ground of annulment (setting aside) of the award for one of the following reasons, namely:

- if the arbitration agreement is non-existent, void or voidable or its term has expired;
- if, at the time of making the arbitration agreement, a party was under incapacity according to the law governing such party's capacity;
- if a party could not present its case due to lack of proper notice as regards appointment of arbitrators, the arbitration proceedings or for any other reason beyond the party's control;
- if the award excludes application of the applicable law as agreed by the parties;
- if the arbitrators were appointed in a manner contrary to law or the parties' agreement;
- if the award contains matters not within the scope of the arbitration agreement – however, if it is possible to separate the parts of the award within the scope of the arbitration agreement from those which are not within such scope, nullity can be as regards the parts not within the scope of the agreement; or
- if the award or the proceedings were induced by nullity in a manner affecting the award.

Application for nullity shall be made to the court of appeal, which may annul an award on its own motion if the award is contrary to public order in Sudan. Application shall be made within two weeks from the date when the applicant became aware of the award, or the date when the award was declared if the applicant was given proper notice but failed to appear.

11.2 Excluding/Expanding the Scope of Appeal

The general rule followed by Sudanese courts is that the parties cannot bar a court from exercising its jurisdiction, such exercise being a matter of public policy. Accordingly, despite the fact that the law is silent as regards whether the parties can agree to exclude or expand the scope of appeal or challenge an award, in light of the above general rule, the courts would not allow such exclusion or expansion.

11.3 Standard of Judicial Review

If an arbitration award is set aside, the dispute may be referred to the competent court at the request of a party (Section 45 of the Arbitration Act).

12. Enforcement of an Award

12.1 New York Convention

In 2018, Sudan acceded to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and thus became the 159th Contracting State to this Convention. On 26 March 2018, Sudan deposited its instrument

of accession to the Convention with the UN Secretary General, and in accordance with Article XII (2) of the Convention, the Convention entered into force in Sudan on 24 June 2018.

12.2 Enforcement Procedure

Under Section 41 of the Arbitration Act, an arbitration award shall be enforced by the competent court if not complied with voluntarily.

Section 47 of the Arbitration Act sets out the requirements for enforcing an arbitration award as follows.

- A copy of the award is enclosed with the application for enforcement.
- The time during which an annulment application may be made (two weeks from the date on the applicant became aware of the award, or from the date when the award is declared if the applicant has been properly given notice) has expired.
- The other party has been properly notified.
- The award, or any part of the award, does not contain a matter contravening public order in Sudan; the court shall enforce the part of the award in compliance with public order and abstain from enforcement of the part in contravention of public order.

If an award has been set aside by the courts in the seat of arbitration, it cannot be enforced in the courts of Sudan, because one of the conditions for enforcement of foreign arbitration awards under Section 48 of the Arbitration Act is that the award must become final in accordance with the laws of the seat of arbitration. No application for enforcement would be accepted by the court pending a resolution of the proceedings at the seat of arbitration.

Enforcement Against the Government

The Civil Procedures Act 1983 provides that no court proceedings against any governmental agency may commence except after giving two months' notice to the Minister of Justice, unless the Minister of Justice gives permission to start proceedings before the expiry of the two-month period. In Sudanese Telecommunications Company v The Postal and Telegram Public Corporation, SC/CA/382/2002, the Supreme Court held that no arbitration award against a government agency may be filed with a court for enforcement except after complying with the above requirement of giving notice to the Minister of Justice.

Sovereign Immunity

Sovereign immunity is regulated under the Privileges and Immunities Act 1956, which provides for privileges and immunities of diplomatic missions and members thereof, including immunity against civil and criminal cases. Sudan is a signatory to the Vienna Convention on Diplomatic Relations, and generally speaking the Sudanese courts would recognise the doctrine of sovereign and diplomatic immunity as a principle of public international law. However, as international arbitration normally regards commercial matters, which are not included within the scope of immunities in international law, there would be no room for a state or state entity to successfully raise a defence of sovereign immunity at the enforcement stage, unless the award is against a diplomatic mission based in Sudan and not the state itself.

12.3 Approach of the Courts

Generally speaking, the general approach of the Sudanese courts towards the recognition and enforcement of arbitration awards is positive. A main ground for refusing enforcement is the public policy ground. As we have already seen in **12.2 Enforcement Procedure**, under Section

47 of the Arbitration Act, one of the conditions for enforcement of an international arbitration award in Sudan is that the award shall not contain any matter which is contrary to public order in Sudan. The standard applied as regards refusing enforcement of an award is domestic public policy.

In Sudan Cotton Company v Metcot International Trade Company Limited 674/2014, the court decided to set aside the arbitration award for several reasons including that the subject matter of the arbitration was at the time of the proceedings under criminal investigation, and as such the arbitration proceedings were in violation of public order, because the criminal law system is designed for the purpose of protecting the interests of society at large, whereas civil proceedings are for the protection of the private interests of individuals.

Section 49 of the Arbitration Act provides that an order by the competent court for enforcement of an arbitration award is not appealable. However, the Supreme Court did allow an appeal because the competent court interfered in the arbitral award by deducting tax from the amount awarded (Sas Building and Construction Limited v Zhang Construction Limited, SC/CA/2032/2016).

13. Miscellaneous

13.1 Class Action or Group Arbitration

The Arbitration Act does not provide for class-action arbitration or group arbitration.

Under the Sudanese Labour Act 1997, a dispute between an employer and all or a group of its employees (ie, collective agreement) shall be referred to arbitration if such dispute could not be resolved through negotiation or conciliation. This is a special arbitration regime for which the Labour Act 1997 sets specific rules.

13.2 Ethical Codes

There are no specific ethical codes or other professional standards applicable to arbitrators, other than the general rules in the Arbitration Act regarding impartiality, independence and duty of disclosure of interest. As regards counsel, the Advocacy Act 1983 sets certain rules including: to exert maximum effort for the client's interest; to be bound by the rule of confidentiality; not to provide legal service to the client's opponent; not to buy the disputed rights directly or indirectly; the fees not to be a percentage or part of the disputed right or the outcome of the case; and return of documents, files and property to the client upon termination of the engagement.

13.3 Third-Party Funding

In Sudan, there are no specific rules or restrictions on third-party funding. As regards counsel, the authors have seen that the Advocacy Act 1983 prohibits that the legal fee be agreed as a percentage or part of the disputed right or related to the outcome of the case.

13.4 Consolidation

The Arbitration Act is silent regarding consolidation of separate arbitration proceedings. However, in theory, it can be argued that consolidation should be possible if the parties so agree and no third-party's interest is affected as a result.

13.5 Binding of Third Parties

There is no provision in Sudanese law as to third parties being bound by an arbitration agreement or award, or for the courts to bind foreign third parties.

Trends and Developments

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Omer Ali Law Firm provides legal consultancy services in Sudan to international, multinational and local clients in areas including corporate and commercial, foreign investments, arbitration, banking and financial services, employment, intellectual property, mergers and acquisitions, real estate, construction, oil and gas, mining, and telecommunications. The firm is the Sudan member of the Africa Legal Network (ALN), an alliance of leading corporate law firms currently in 15 key African jurisdictions. In the field of international arbitration, Dr Omer Ali (i) acted as co-counsel in an arbitration between oil companies and a governmental agency under the UNCITRAL Arbitration Rules, conducted in London, and in an arbitration on a real estate development project at the Dubai International Arbitration Centre; (ii) acted as expert witness in an arbitration before the Court of Arbitration, ICC, London; (iii) acted as co-arbitrator in an arbitration between a Gulf-based company and a governmental agency; and (iv) acted in an arbitration between a Sudanese company and an Indian company on an energy project.

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Arbitration in Sudan in 2024

Historical background

Historically, arbitration in Sudan used to be regulated by a few sections in the Civil Procedures Act 1983 and its predecessors. A piece of legislation exclusively governing arbitration, whether domestic or international, was introduced for the first time in the form of the Arbitration Act 2005, which has been repealed and replaced by the current Arbitration Act 2016.

International arbitration

Under the Sudanese Arbitration Act 2016, an arbitration is considered "international" in case if: (i) the main centres of the businesses of the parties to the arbitration are in two different countries; and (ii) the subject matter of the arbitration is related to more than one country.

So far, there have been relatively few international arbitration cases in Sudan. This was due to the fact that, until recently, Sudan was under severe US and other sanctions, and thus was isolated to a large extent from international trade activities, and international investors were, to a great degree, blocked from investing in the country, with the exception of limited investments by Chinese, Malaysian and Indian companies in the oil industry, and Turkish and Gulf companies in construction, agriculture and other sectors. Most of international arbitration cases were related to governmental contracts in the few business areas where international companies had such contracts with governmental entities, such as oil, infrastructure, mining and construction.

Current situation

Currently, Sudan is undergoing major transformation both economically and politically. In 2019, following a popular uprising, a transitional government succeeded the regime of former President, Omar Al-Bashir, which was the cause of sanctions and international isolation. On 4 August 2019, after the African Union's intervention, the Sudanese civilian and military factions agreed to share power in a three-year transition period, with elections scheduled for 2023 after the end of the transitional period. The transitional government that took power had ambitious plans for economic reform and the restoration of peace after many years of civil war. As a result of its efforts, US Treasury OFAC sanctions were lifted and Sudan's name was lifted from the US State Sponsor of Terrorism status. The transitional government's efforts towards securing Sudan's debt relief through the Heavily Indebted Poor Countries (HIPC) Initiative proved to be successful; the World Bank's International Development Association (IDA) and the International Monetary Fund (IMF) have determined that Sudan had taken the necessary steps to begin receiving debt relief under the enhanced Heavily Indebted Poor Countries (HIPC) Initiative. Sudan is the 38th country to reach this milestone, known as the HIPC Decision Point. This would have resulted in much of Sudan's external public debt being dramatically reduced/cancelled, and opened the door for the country to have access to financial resources.

These were welcome developments in a country suffering from acute economic problems, under investment and huge external debts. However, a major setback occurred. On 25 October 2021, the Sudanese military leader, General Abdel Fattah al-Burhan, took control of the government in a coup, as a result of which the military component in the Sovereignty Council had confiscated the powers of the Prime Minister as stipulated in the constitutional charter. The civilian Prime Minister, Abdalla Hamdok, as well as several top government officials and political activists were detained for resisting the coup. As a result of civil resistance against the military

regime, in November 2021, the military leaders and Abdalla Hamdok announced a deal that included his reinstatement as Prime Minister, and, in January 2022, Prime Minister Hamdok announced his resignation after failing to name a government amid continued anti-military protests in the country, which are still continuing. A trilateral mechanism comprising the United Nations, the African Union and a regional body, the Intergovernmental Authority on Development (IGAD), has been set up with the aim of facilitating intra-Sudan talks; however, so far, no agreement has been reached to resolve the political crisis in Sudan. Unfortunately, due to differences between the Sudanese Armed Forces (which is the official army of the Sudanese government) and the Rapid Support Forces (paramilitary forces set up by the former government), a nasty war erupted between them on 15 April 2023 with devastating consequences in the capital city of Khartoum, Darfur and other parts of Sudan.

Legal developments

As part of the transitional government's legal and regulatory reform, it has introduced certain legislation such as:

- the Encouragement of Investment Act 2021, providing, inter alia, for incentives and guarantees to foreign and local investors;
- the Public–Private Partnerships Act 2021, setting rules governing public–private partnerships as a tool of investment in the country;
- the Anti-Corruption Commission Act 2021, for the purpose of tackling and eradicating corruption from transactions with public entities; and
- a law permitting conventional banking side-by-side with Islamic banking, which was the only banking system allowed previously.

Before the 2021 coup, plans for other laws and regulations were underway, particularly those designed to reform banking and financial services to pave the way for Sudanese banks to be integrated into the international banking system.

Current arbitration law

The main legislation governing arbitration (both domestic and international) in Sudan is the Arbitration Act 2016 (the "Arbitration Act"). This Act has been the focus of controversy among Sudanese lawyers from its inception, and the controversy is still going on. The main criticism of the Act is that it is not in line with the UNCITRAL Model Law on International Arbitration, and thus the foreign investors would not look upon it favourably.

Another point of criticism is that it has left the door open for prolonged appeals in case of challenge to an international arbitration award. The Act provides for certain grounds to apply for the setting aside of an arbitration award (which in Sudan is called an action of annulment). Under the previous law (the Arbitration Act 2005), such an application was a one-step procedure; once the competent court had decided on the application, its decision was final. In Faisal Islamic Bank v Othman Ismael Mousa (SC/CA/86/2007; REV/21/2008), the Supreme Court held that an annulment case under the Arbitration Act 2005 was not intended to be subject to the applicable appeal rules under the civil procedures law, because one aim of the arbitration proceedings is to shorten the time and scope of the dispute.

Under the current Act, an application for annulment shall be submitted to the Court of Appeal; however, a newly introduced provision allows for appeal against the decision of the Court of Appeal. Appeals from the Court of Appeal are submitted to the Supreme Court. Decisions of

the Supreme Court are open to further appeal by way of an application to review on grounds of violation of Islamic law. Theoretically, a further appeal to the Constitutional Court on grounds of violation of constitutional rights may be made. These appeals could be used tactically to delay execution of arbitration awards.

A counterargument against this criticism raised by some lawyers is that opening the door for multiple appeals is important to ensure justice by allowing higher courts to oversee the rulings of lower courts.

Yet another point of criticism of the Arbitration Act is that it sets fixed figures as arbitrators' fees in case such fees have not been determined under the arbitration agreement/clause. The fees in a scaling belong to a sliding scale based on the amount disputed and are set out in a schedule attached to the Arbitration Act. With the ongoing deterioration of the Sudanese currency against other currencies, the figures in the schedule are very low, and would discourage experienced arbitrators from participating in an arbitration where their fees are based on the schedule.

Interest as part of award

Another point which raises concern when a foreign arbitration award is sought to be enforced in Sudan is that any interest ruled as part of the award would be considered illegal and unenforceable in Sudan, because Section 110 of the Civil Procedures Act 1983 provides that a court in Sudan shall under no circumstance whatsoever make a decree ordering payment of interest on a principal sum adjudged, and also because the dominant view in Islamic law literature is that interest would be considered as usury (*riba*) disallowed under Shari'a rules, which Sudanese courts are directed to follow. Invalidity would be limited to the interest only and would not extend to the principal debt.

However, under the recent legislation referred to above, which is designed to make conventional banking permissible side-by-side with Islamic banking, Section 110 has been amended to exclude "financial and banking business in accordance with the conventional system" from the application of this Section. It could be argued that this exclusion should extend to cases of enforcement of arbitration (or at least international arbitration) awards in Sudan, so as to make it permissible to enforce arbitration awards including interest. However, one would expect counter-arguments on the basis that allowing interest would constitute a violation of Islamic law, which is considered a primary source of law in the country, and that it was not a wise step by the transitional government to open the door for exclusions in the first place.

Potential trends of international arbitration

If the political crisis and the current ongoing war are resolved in a positive manner, and any future government succeeds in terms of economic reform, regulatory reform and political stabilisation of the country, the expectation is that the country will witness a gradual flow of international investors. Sudan is rich in natural resources, and the potential is high for foreign investments in certain areas such as agriculture, livestock, tourism, mining, and oil and gas. Also, the country was in dire need of developing its poor infrastructure even before the current war; add to that the huge damage caused to infrastructure by the war, the country's banking and financial service sector and other areas of economic activities, all of which could be targets for foreign investments. The above laws are mainly designed to encourage the flow of foreign investments into these and other industries.

Typically, contracts with foreign investors provide for dispute resolution through international arbitration. The Investment Act provides for the settlement of disputes involving foreign investors under one of a host of international and regional treaties to which Sudan is a signatory. The Act provides that in case of a dispute regarding an investment, such dispute shall be referred to a specialised court unless the parties agree to refer it to arbitration or reconciliation, except disputes governed by one of the following treaties to which Sudan is a signatory:

- the Unified Agreement for the Investment of Arab Capital in Arab States 1980;
- the Agreement for Settlement of Investment Disputes among Arab States 1974;
- the Agreement for Settlement of Investment Disputes between States and Nationals of Other States 1965;
- the General Agreement for Economic, Technical and Commercial Co-operation among Member States of the Islamic Conference 1977; and
- any other agreement to which Sudan is party.

Recently Sudan acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards 1958 and thus became the 159th Contracting State to this Convention. Also, Sudan is a Contracting Party to the Riyadh Arab Agreement for Judicial Cooperation 1983, which regulates recognition and enforcement of arbitration awards and court judgments among Contracting Parties. This Convention is signed by 18 Arab countries.

Local law: a case for reform?

The fact that Sudan is party to these international and regional agreements, all of which adopt international arbitration as the main mechanism for resolution of disputes involving foreign investors, whether with regards to arbitration proceedings or enforcement of international arbitral awards, is a welcome development. However, a question that may be asked is: are the rules of the Sudanese domestic arbitration law sufficient to give the foreign investors the comfort they are seeking when planning to invest in Sudan?

It can be argued that there are certain areas where the Sudanese domestic arbitration law is less favourable to foreign investors compared with the UNCITRAL Model Law on International Arbitration, such as the limited scope and the uncertainty regarding preliminary measures before Sudanese courts in arbitrations conducted outside Sudan, the wider scope of intervention by local courts in the arbitration proceedings under the domestic law, and the local law's requirement to suspend proceedings pending resolving the resolution of a challenge to an arbitrator, and/or to decide on a case of challenge of jurisdiction as a preliminary question. These and other points are in addition to the points already discussed regarding compromising the finality of arbitral awards in the case of several-stage appeals in an annulment case, and the non-enforceability of interest if made as part of an arbitration award.

Based on the above points, it can be argued that the Sudanese arbitration law should be reformed so as to remove these contradictions with the Model Law. On the other hand, the author has seen an argument that it is advisable not to, in all cases, just follow the Model Law and similar model laws recommended by international agencies, because these model laws are designed primarily in a manner favourable to the protection of the interests of multinational corporations, and ignoring the interests of developing countries, such as Sudan.

In order to decide which argument to follow, policy-makers in Sudan need to strike a balance between either encouraging foreign investors to invest in the country even at the expense of scarifying certain elements of national interest (supposing the counter-argument is correct) or sticking and safeguarding the country's interest at the expense of discouraging foreign investors from coming to the country.

Regarding multiplicity of appeals, there is a good ground to argue in favour of going back to the rule under the old law, which allowed for a one-stage application for annulment cases. Again, here a balance needs to be made between the desire of the parties to arbitration for speedy resolution of their disputes and ensuring justice by allowing several levels of appeal in cases seeking the setting aside of arbitration awards.

With respect to making interest enforceable, on the basis that the current government has taken a liberal approach by excluding banking and financial services from the prohibition of interest, it can be argued that such exclusion should be extended to foreign arbitration awards sought to be enforced in Sudan. Here the balance to be struck is between the favourable treatment of foreign investors, who would expect to be allowed a mechanism for calculating compensation for breach of contract or delay in performance or payment through interest and sticking to the rules on the basis of being in line with Islamic law teachings.

Concerning arbitrators' fees fixed in a schedule attached to the Arbitration Act, the schedule can simply be deleted, with the fees left to the agreement between the arbitrators and the parties to the arbitration.

SWEDEN

Law and Practice

Contributed by:
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Advokatfirman Vinge KB (Vinge) is one of the largest commercial law firms in Sweden, operating as a full-service firm with over 500 employees in Stockholm, Gothenburg, Malmö, Helsingborg and Brussels. Vinge has one of the largest dispute resolution practices in the Nordic region, with over 50 lawyers handling both international arbitration and litigation at all levels of the Swedish court system. A number of the firm's lawyers also sit regularly as arbitrators.

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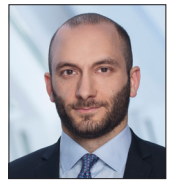

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VINGE

1. General

1.1 Prevalence of Arbitration

In the absence of a commercial court in Sweden, arbitration is generally the preferred means of resolving commercial disputes and arbitration clauses are regularly found in commercial contracts. Both domestic and international arbitrations are commonly held in Sweden. Sweden has long been a preferred seat of arbitration for international cases, largely as a result of the success of the SCC Arbitration Institute (formerly the Arbitration Institute of the Stockholm Chamber of Commerce).

1.2 Key Industries

Since arbitrations are private, it is difficult to give a fuller comment other than to observe from the latest statistics of the SCC Arbitration Institute for 2023 that disputes brought to the SCC in that year most frequently concerned service agreements, business acquisitions, delivery agreements, loan agreements, M&A, construction agreements, and co-operation agreements.

1.3 Arbitration Institutions

The most used arbitration institution for international arbitration in Sweden is the SCC Arbitration Institute. The institute was founded in 1917 in Sweden and is one of the world's leading dispute resolution institutions. No new arbitration institutions have been established in Sweden in the past few years.

1.4 National Courts

Within the court system in Sweden, there are three categorises of courts: general courts, general administrative courts and special courts.

The general courts are designated to hear civil cases between individuals, corporations and other entities. The general courts consist of district courts, courts of appeal and the Supreme Court.

According to the Swedish Arbitration Act (1999:116), an action to set aside an award and/or to declare an award invalid should be brought directly before the Court of Appeal in Sweden where the arbitration had its seat. Where the seat was Stockholm, the Svea Court of Appeal in Stockholm has jurisdiction.

2. Governing Legislation

2.1 Governing Law

International arbitrations and domestic arbitrations are governed by the Swedish Arbitration Act. The extent to which the Swedish Arbitration Act should be based on the UNCITRAL Model Law was discussed in the preparatory works. The conclusion was that the UNCITRAL Model Law should not be used as a direct basis for the Swedish Arbitration Act, either in terms of structure or content. However, it was considered important to take the provisions of the UNCITRAL Model Law into account, and frequent references are made to the UNCITRAL Model Law in the preparatory works.

2.2 Changes to National Law

There have been no changes to the Swedish Arbitration Act in the past year nor is there any pending legislation that may change the arbitration landscape.

3. The Arbitration Agreement

3.1 Enforceability

In order for an arbitration agreement to be valid and enforceable under Swedish law, the following general remarks can be made. As a starting

point, ordinary rules on contract law apply when the validity and scope of an arbitration agreement are determined. As a result, no particular form is required to constitute an arbitration agreement. In theory, such an agreement may be oral, or it may even be formed by the parties' conduct. However, for example for reasons of evidence, arbitration agreements are in practice concluded in written form.

Since an arbitration agreement is a waiver of the right to court proceedings, it must also be clear that the parties have agreed on arbitration and not on any other form of dispute settlement mechanism.

Section 1 of the Swedish Arbitration Act stipulates that the subject matter of the dispute must also be arbitrable (see further **3.2 Arbitrability**).

With respect to arbitration agreements which relate to future disputes, Section 1 of the Swedish Arbitration Act also stipulates that the arbitration agreement must refer to a specific legal relationship, normally the contract in which the arbitration agreement or clause is contained.

3.2 Arbitrability

Sweden has specific rules regarding arbitrability. According to the Swedish Arbitration Act, an issue is generally arbitrable if the parties would be able to reach a settlement on the issue. Other issues which cannot be determined by the parties, such as matters of public law, are generally not arbitrable.

For example, disputes related to the registration of patents and trade marks are generally considered to be non-arbitrable. Sanctions for criminal liability (apart from damages) and, to a large extent, family law are also considered to be non-arbitrable.

With regard to competition law, Section 1 of the Swedish Arbitration Act provides that issues concerning the "civil law effects of competition law as between the parties" are arbitrable.

As a general rule, the time to assess whether a matter is arbitrable is when the arbitration agreement is concluded.

3.3 National Courts' Approach

With respect to determining the governing law of the arbitration agreement, the national courts invariably follow Section 48 of the Swedish Arbitration Act, which in summary provides that the arbitration agreement is governed by Swedish law unless the arbitration agreement itself specifies otherwise. Swedish courts generally seek to give effect to valid arbitration agreements.

3.4 Validity

The Swedish Arbitration Act provides that, if the validity of an arbitration agreement which constitutes part of another agreement must be determined in conjunction with a determination of the jurisdiction of the arbitrators, the arbitration agreement will be deemed to constitute a separate agreement. This is an embodiment of the doctrine of separability. Accordingly, if the main agreement is alleged to be invalid, this does not automatically result in the invalidity of the arbitration clause.

4. The Arbitral Tribunal

4.1 Limits on Selection

As a starting point, the Swedish Arbitration Act provides that the parties may determine the number of arbitrators and the manner in which they will be appointed.

Any person who possesses full legal capacity and is not bankrupt may act as an arbitrator. It follows that only a natural person can be appointed as an arbitrator. According to Swedish law, a person of sound mind obtains full legal capacity at the age of 18. It is not a requirement that the person is a Swedish citizen or resident in Sweden.

The Swedish Arbitration Act further stipulates that an arbitrator must be impartial and independent, and the Act includes provisions for the removal of an arbitrator where circumstances exist that may diminish confidence in the arbitrator's impartiality or independence.

4.2 Default Procedures

Two-Party Arbitrations

Unless the parties have agreed otherwise, the Swedish Arbitration Act stipulates that the following default procedure will apply when selecting arbitrators. There will be three arbitrators. Each party appoints one arbitrator, and the arbitrators so appointed appoint the third.

If each party is required to appoint an arbitrator and one party has notified the opposing party of its choice of arbitrator in a request for arbitration, the opposing party must, within 30 days of receipt of the notice, notify the first party in writing of its choice of arbitrator. A party that has notified the opposing party of its choice of arbitrator in this manner may not revoke the choice without the consent of the opposing party. If the opposing party fails to appoint an arbitrator within the specified time, the district court will appoint an arbitrator upon the request of the first party.

If an arbitrator is to be appointed by other arbitrators, but they fail to do so within 30 days from the date on which the last arbitrator was appointed, the district court will appoint the arbitrator upon the request of a party. Unless the parties or the arbitrators have decided otherwise, the chairperson will be the arbitrator appointed by the other arbitrators or by the district court.

Multi-Party Arbitrations

Where an arbitration is commenced against several respondents, Section 14(3) of the Swedish Arbitration Act provides that, unless the respondents can agree upon a choice of arbitrator, the district court will appoint all the arbitrators and any arbitrator already appointed will be dismissed. Alternatively, such situations can be dealt with as separate arbitrations against each respondent.

4.3 Court Intervention

As a starting point, and unless the parties have agreed otherwise, the right to appoint arbitrators is given to the parties and the party-appointed arbitrators.

However, in certain specific situations and upon the request of a party, the Swedish Arbitration Act provides that the district court will appoint and remove an arbitrator. If the parties have so agreed, and any of the parties so requests, the district court can also appoint arbitrators in situations other than those specified in the Swedish Arbitration Act.

4.4 Challenge and Removal of Arbitrators

The Swedish Arbitration Act contains particular provisions concerning the challenge or removal of arbitrators.

Impartiality and Independence

If a party so requests, an arbitrator will be released from appointment if any circumstance exists that could diminish confidence in the arbitrator's impartiality or independence. A challenge

to an arbitrator must be presented within 15 days from the date on which the party became aware both of the appointment of the arbitrator and of the existence of the circumstance. The challenge is adjudicated upon by the arbitrators, unless otherwise decided by the parties (eg, by choosing a different challenge mechanism as mandated in arbitration rules).

If the challenge is successful, the decision is not subject to appeal.

If the challenge is unsuccessful, a party who is dissatisfied with a decision denying a challenge, or a decision dismissing a challenge as untimely, may file an application with the district court that the arbitrator be released from the appointment. The application must be submitted within 30 days from the date on which the party was notified of the decision. The arbitrators may continue the arbitration proceedings pending the determination of the district court.

The parties may, alternatively, agree that a challenge to an arbitrator will be conclusively determined by an arbitration institution.

Delay to the Proceedings

If an arbitrator has delayed the proceedings, the district court is entitled, upon the request of a party, to release the arbitrator and appoint another arbitrator. The parties may decide that such a request will, alternatively, be conclusively determined by an arbitration institution.

4.5 Arbitrator Requirements

The following requirements apply in relation to arbitrator independence, impartiality and/or disclosure of potential conflicts of interest.

Requirements Pursuant to the Swedish Arbitration Act

An arbitrator must be impartial and independent. An arbitrator will be released from appointment if any circumstance exists that may diminish confidence in the arbitrator's impartiality or independence. Such a circumstance will always be deemed to exist:

- if the arbitrator or a person closely associated with the arbitrator is a party, or otherwise may expect to receive a significant benefit or detriment as a result of the outcome of the dispute;
- if the arbitrator or a person closely associated with the arbitrator is the director of a company or any other association which is a party, or otherwise represents a party or any other person who may expect to receive a significant benefit or detriment as a result of the outcome of the dispute;
- if the arbitrator, in the capacity of expert or otherwise, has taken a position in the dispute, or has assisted a party in the preparation or conduct of its case in the dispute; or
- if the arbitrator has received or demanded compensation pursuant to an agreement that is not entered into jointly by the parties (with one exception, with respect to security provided by one of the parties).

A person who is asked to accept appointment as an arbitrator must immediately disclose all circumstances which might be considered as factors preventing the person from serving as an arbitrator. An arbitrator must inform the parties and the other arbitrators of such circumstances as soon as all the arbitrators have been appointed, and thereafter in the course of the arbitration proceedings, as soon as the arbitrator learns of any such circumstance.

Requirements Pursuant to the SCC Arbitration Rules

Every arbitrator must be impartial and independent. Before being appointed, a prospective arbitrator must disclose any circumstances that may give rise to justifiable doubts as to the prospective arbitrator's impartiality or independence.

Once appointed, an arbitrator must submit to the SCC Secretariat a signed statement of acceptance, impartiality and independence, disclosing any circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence. The Secretariat will send a copy of the statement of acceptance, impartiality and independence to the parties and the other arbitrators.

An arbitrator must immediately inform the parties and the other arbitrators, in writing, if any circumstances arise during the course of the arbitration that could result in justifiable doubts as to the arbitrator's impartiality or independence.

A party may challenge any arbitrator if circumstances exist that give rise to justifiable doubts as to, among other things, the arbitrator's impartiality or independence.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

According to the Swedish Arbitration Act, an issue must be arbitrable in order to be referred to arbitration; that is, in general, the parties must be able to reach a settlement on the issue in dispute. It follows that non-arbitrable matters may not be subject to arbitration. For example, disputes related to the registration of patents and trade marks are generally considered to be non-arbitrable. Sanctions for criminal liability (other than damages) and, to a large extent, family law are also considered to be non-arbitrable.

5.2 Challenges to Jurisdiction

According to the Swedish Arbitration Act, the arbitrators may rule on their own jurisdiction to decide the dispute.

5.3 Circumstances for Court Intervention

If the Arbitrators Find That They Have Jurisdiction

The arbitrators may rule on their own jurisdiction to decide the dispute. If the arbitrators have rendered a decision in which they find that they have jurisdiction to adjudicate the dispute, any party that disagrees with the decision may request the Court of Appeal to review the decision. The arbitrators may continue the arbitration pending the court's determination.

The parties may also challenge an award on grounds of lack of jurisdiction to decide the dispute.

If the Arbitrators Find That They Do Not Have Jurisdiction

If the arbitrators render a negative ruling on jurisdiction, and thus conclude the proceedings without ruling on the issues submitted to them for resolution, such an award may be amended, in whole or in part, by the Court of Appeal upon the application of a party. An action must be brought within two months from the date upon which the party received the award.

5.4 Timing of Challenge

The parties' right to go to court to challenge the jurisdiction of the arbitral tribunal depends on the circumstances, as set out below. The Swedish Arbitration Act stipulates that the arbitrators may rule on their own jurisdiction to decide the dispute. If a party challenges the jurisdiction of

the arbitral tribunal, it is up to the arbitrators to decide whether the issue should be addressed immediately or whether it should be deferred until the arbitral tribunal renders its award on the merits. However, if the proceedings are expected to last for a long period of time, it may be appropriate to decide the issue immediately.

If the Arbitrators Find That They Have Jurisdiction

If the arbitrators have rendered a decision finding that they have jurisdiction to adjudicate the dispute, any party that disagrees with the decision may request the Court of Appeal to review the decision. Such a request must be brought within 30 days from when the party was notified of the decision. The arbitrators may continue the arbitration pending the court's determination.

The arbitral tribunal's decision is, however, not binding. As a result, a party dissatisfied with the decision does not need to challenge the decision in order to retain its right to challenge the award.

If a party would like to challenge the award (set-aside action), it should, however, be noted that a party is not entitled to rely upon a circumstance which, through participation in the proceedings without objection, or in any other manner, the party may be deemed to have waived. Thus, if a party challenges the jurisdiction of the arbitral tribunal and if a decision is rendered, it is important that the party objects to the arbitral tribunal's decision in order to preserve its right to later invoke such circumstances.

According to the Swedish Arbitration Act, a set-aside action must be brought within two months from the date upon which the party received the award.

If the Arbitrators Find That They Do Not Have Jurisdiction

If the arbitrators render a negative ruling on jurisdiction, and thus conclude the proceedings without ruling on the issues submitted to them for resolution, such an award may be amended, in whole or in part, by the Court of Appeal upon the application of a party. An action must be brought within two months from the date upon which the party received the award.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The standard or method of judicial review for questions of admissibility and jurisdiction is not an entirely clear issue under Swedish law.

In a precedent from 2019 (the so-called "Belgor decision"), the Swedish Supreme Court stated that the starting point for the court's review should be that the arbitral tribunal's interpretation and evaluation of the evidence was correct. However, and notwithstanding this precedent, leading legal scholars have suggested that the Court of Appeal may make a de novo review of the arbitrators' jurisdiction.

5.6 Breach of Arbitration Agreement

A court may not, over an objection of a party, rule on an issue which, pursuant to an arbitration agreement, will be decided by arbitrators. A party must invoke an arbitration agreement on the first occasion the party pleads its case on the merits in court.

During the pendency of a dispute before arbitrators or prior thereto, a court may, irrespective of the arbitration agreement, issue such decisions in respect of security measures as the court has jurisdiction to issue.

5.7 Jurisdiction Over Third Parties

In general, arbitrators sitting in Sweden may not assume jurisdiction over third parties that are neither party to an arbitration agreement nor signatories to the contract containing the arbitration agreement. Note, however, that under the Swedish law doctrine of assertion, an arbitral tribunal should generally assume jurisdiction over an individual or an entity that the claimant asserts is a party to an arbitration agreement, provided that the claim is not manifestly unfounded.

6. Preliminary and Interim Relief

6.1 Types of Relief

According to the Swedish Arbitration Act, and unless the parties have agreed otherwise, the arbitrators may, at the request of a party, decide that, during the proceedings, the opposing party must undertake a certain interim measure to secure the claim which is to be adjudicated by the arbitrators. The arbitrators may prescribe that the party requesting the interim measure must provide reasonable security for the damage which may be incurred by the opposing party as a result of the interim measure.

An interim measure rendered by an arbitral tribunal is not, strictly speaking, enforceable under Swedish law, since (not being a final order) it does not constitute an order that must be taken into account by the Swedish Enforcement Authority. However, a party's failure to comply with an interim order may be taken into account when the arbitral tribunal decides the case on the merits.

The types of relief that can be awarded vary. The Swedish Arbitration Act limits the arbitral tribunal only to the extent that an interim measure must be aimed at securing the claim which is to be adjudicated by the arbitrators. However, it is important that an interim measure does not pre-empt the merits of the dispute. For example, the arbitral tribunal may order the respondent to pay a certain amount into an escrow account or order a party to preserve certain evidential material.

6.2 Role of Courts

During the pendency of a dispute before arbitrators or prior thereto, a court may, irrespective of the arbitration agreement, issue such decisions in respect of security measures as the court has jurisdiction to issue. If a court grants such an interim or security measure before the arbitral proceeding has begun, the applicant must, within a month of the order, either institute a court action on the matter at issue or, if the claim is to be resolved out of court (eg, through arbitration), initiate the appropriate proceeding. An interim measure rendered by a court is formally enforceable under Swedish law.

The general requirement for Swedish courts to have jurisdiction to grant interim relief is that the Swedish legal system has an interest in resolving the issue under dispute. Such interest exists if the connection between the dispute or the parties and Sweden is sufficiently strong. For example, if a party resides in Sweden or if a party does not reside in Sweden but has assets in Sweden, the courts are generally deemed to have jurisdiction. Hence, it follows that the seat of the arbitration is not the decisive factor when determining whether jurisdiction exists.

For example, if a party has a monetary claim against an opponent, the court may order the provisional attachment of so much of the opponent's property that the claim may be assumed to be secured on execution. Further, if a party has a superior right to certain property, the

court may order provisional attachment of that property. The courts may also make an order for measures to secure the applicant's right.

The Swedish Arbitration Act does not contain provisions concerning emergency arbitration.

6.3 Security for Costs

Court Proceedings

As a general rule, a party may not request a Swedish court to order the other party to provide security for the first-mentioned party's own costs. However, if a foreign legal entity (or a non-resident foreign national) initiates court proceedings in Sweden against a Swedish legal entity (or a Swedish national or a person domiciled in Sweden), the former shall, at the request of the latter, provide security for the costs which the foreign legal entity may be deemed to pay as a result of the final judgment in the case. In this regard, a national or a resident of a country in the European Economic Area and legal entities established under the law of such a country, must be treated in the same way as Swedish nationals and Swedish legal entities.

Arbitration Proceedings

The Swedish Arbitration Act does not provide for the possibility for a party to ask the arbitral tribunal to order the other party to provide security for the first-mentioned party's costs. On the other hand, the arbitrators may, however, request security for their own compensation.

It should be added that the SCC Arbitration Rules do have a specific provision that entitles a party to seek security for its own costs, but this provision states that such security for costs should only be granted in exceptional circumstances.

7. Procedure

7.1 Governing Rules

The Swedish Arbitration Act governs arbitration proceedings seated in Sweden. Although several of its provisions are not mandatory, parties may not opt out of the Arbitration Act. Despite the foregoing, the Arbitration Act is based on the principle of party autonomy and parties are given ample room to deviate from the default rules set out in the Arbitration Act. In other words, although parties are not able to agree that an arbitration in Sweden should be governed by a foreign procedural law, the parties are not precluded from agreeing on other rules of procedure where the Arbitration Act is not mandatory.

There are only a few provisions of the Arbitration Act which govern the actual conduct of the arbitration proceedings. Consequently, the parties may agree on supplementary rules, institutional or otherwise. In addition, most of the provisions in the Arbitration Act are non-mandatory.

However, there are some mandatory procedural rules which the parties may not deviate from: for example, the provisions regarding the invalidity of an award; the provisions regarding the arbitrability of a dispute; and the requirement that an award must be written and signed by the arbitrators.

It should also be noted that, although the Swedish Code of Judicial Procedure is not formally applicable, Swedish lawyers and scholars sometimes refer to the local judicial code by analogy in relation to domestic arbitration seated in Sweden. This is less common in respect of international arbitration seated in Sweden, although even in international arbitration, reference is sometimes made to certain underlying principles as set out in the local judicial code. In particular,

this is the case when arbitral awards are subject to judicial review by the courts.

7.2 Procedural Steps

In arbitration proceedings conducted in Sweden, there are no specific mandatory procedural steps that are required by law. However, the Swedish Arbitration Act contains a number of procedural provisions that apply unless the parties have agreed otherwise.

7.3 Powers and Duties of Arbitrators

In general, the powers of the arbitrators commence when the tribunal is constituted and last until the arbitration agreement is terminated, usually when the arbitrators have delivered a final award. This is true with respect to each arbitrator, unless any of the arbitrators resigns or otherwise ceases to be a member of the tribunal during the proceedings.

The arbitrators do, however, retain some residual powers even after the award has been delivered. Those powers include, among other things, the power to correct or supplement the award due to obvious inaccuracies or errors, as well as the power to interpret the operative part of the award.

As regards the arbitrators' duties, in a general sense, the overarching duty of the arbitrators is to decide the dispute submitted to them. While doing so, the arbitrators must observe the fundamental principles and rules laid out in the Swedish Arbitration Act. Such duties include, among other things, the requirement that the arbitrators must handle the dispute in an impartial, practical and speedy manner. The arbitrators must further act in accordance with the parties' instructions, unless they are impeded from doing so; for example, if the parties' instructions violate any of the mandatory provisions in the Arbitration Act or law more generally. The arbitrators must also afford the parties an opportunity to present their respective cases, to the extent necessary, and the award must further be made in writing.

With regard to the arbitrators' powers, should the parties not have agreed thereon, the arbitrators have the power to determine the place of arbitration and to hold hearings and other meetings elsewhere in Sweden or abroad, unless otherwise agreed by the parties. Powers with respect to the conduct of the arbitration proceedings are likely to include the production of documents, to appoint experts, to hold hearings, to require the presence of witnesses, to receive evidence, etc.

7.4 Legal Representatives

Court Proceedings

As far as court proceedings in Sweden are concerned, a legal representative must be resident in Sweden or another state within the EEA. However, other persons may serve as representatives if the court considers it appropriate with regard to the circumstances in the particular case. Only a person deemed suitable by the court, by reason of that person's honesty, knowledge, and earlier activities, may appear as a legal representative. Additionally, that person must also master the Swedish language.

Except as set out above, there are no prescribed qualifications or other requirements for legal practice. In principle, as long as the requirements set out above are fulfilled, anyone can act as a legal representative before a Swedish court, since the members of the Swedish Bar Association do not have a monopoly in respect of their professional activities. In practice, however, most private practitioners who carry out commercial law are members of the Swedish Bar Association.

Arbitration Proceedings

In contrast to the restrictions set out above regarding court proceedings, there are no such requirements pertaining to legal representatives in arbitration proceedings. Thus, there are no rights of audience or other requirements with respect to legal representatives acting in arbitration proceedings.

8. Evidence

8.1 Collection and Submission of Evidence

Introduction

An important starting point under Swedish arbitration law is that the parties are generally required to supply the evidence. In other words, the initiative in respect of evidence is exclusively in the hands of the parties, not the arbitral tribunal.

Consequently, it is up to the parties to decide how the evidence is to be presented – and each party has a right to present its case largely as it sees fit. This is in line with the overarching principle of party autonomy under Swedish arbitration law.

Generally, the following methods of presenting evidence are available:

- production of documents;
- hearing of witnesses;
- hearing of experts; and
- inspection of the subject matter of the dispute.

Unless the parties agree otherwise, the IBA Rules on the Taking of Evidence in International Commercial Arbitration (the "IBA Rules") are not formally applicable. However, they are very often used as important guidelines in international arbitrations seated in Sweden.

Documentary Evidence

In general, there are no restrictions as regards the use of documentary evidence. The parties are therefore allowed to rely on virtually all kinds of documents to prove their respective cases.

Production of Documents

There are no provisions concerning production of documents in the Swedish Arbitration Act. However, the common view is that arbitrators may order a party to produce documents in its possession at the request of another party. Documents which are in the possession of third parties, however, fall outside the scope of the arbitrators' powers.

An order by the tribunal according to which a party is ordered to produce certain documents is not formally enforceable. However, this is remedied by the possibility for a party to turn to the competent Swedish district court with a request for such documents to be produced to the court, subject to the arbitral tribunal's approval. Certain issues regarding jurisdiction may arise, however, in this context – for example, a request for a foreign party to produce documents before the Swedish court may not be formally enforceable against the foreign party.

The arbitrators may also attach evidentiary weight to the fact that a party refuses to abide by an order to produce certain evidence.

There is no equivalent under Swedish arbitration law to common-law discovery. Unless the parties have agreed on specific rules to be applied, Swedish arbitrators will normally follow the rules and principles contained in the Swedish Code of Judicial Procedure and/or the IBA Rules, as

appropriate. Consequently, so-called "fishing expeditions" are not allowed under Swedish law, unless of course the parties have agreed otherwise.

Documents falling under the scope of attorney-client privilege may not generally be produced either to a court or to an arbitral tribunal, unless the party in question agrees otherwise.

Hearing of Witnesses

There are no provisions in the Swedish Arbitration Act governing how the examination of witnesses and experts should be conducted. Nevertheless, the examination of witnesses and experts usually proceeds in the following three stages:

- direct examination;
- cross-examination; and
- re-direct examination.

In cases where the parties have agreed to use witness statements, the witness statements will usually be used in place of direct examination.

The examination of witnesses is generally carried out by counsel, unless the parties have agreed otherwise. The arbitrators generally wait until counsel have finished their examination before asking any follow-up questions, which generally tend to be limited. Swedish arbitrators tend to take a rather careful approach when putting questions to witnesses, so as to avoid raising any doubts concerning their impartiality.

In line with what is stated in the IBA Rules, it is in general acceptable that witnesses may be interviewed and prepared before they testify orally.

Witness Statements

Unlike in court litigation in Sweden, the use of written statements is common practice in international arbitration proceedings. The arbitrators will normally try to reach an agreement with the parties in this regard. If the parties agree on using witness statements, it is common practice that the witness who has submitted a witness statement also appears at the hearing to be cross-examined by opposing counsel, if so requested.

The Main Hearing

If a party so requests, a main hearing shall be held. Since parties almost always exercise this right, a main hearing is held in almost all cases, unless the case is settled before the hearing.

8.2 Rules of Evidence

Since the principle of the free evaluation of evidence applies, there are almost no formal rules of evidence that apply to Swedish arbitration. In general, a party can rely on almost any document, provided that the party can explain why the document in question is important as evidence.

Free Evaluation of Evidence

Under Swedish arbitration law, unlike in common-law countries, the arbitrators may freely evaluate the evidence presented to them during the proceedings. Instead of formal evidential rules, the arbitrators are free to weigh the evidence as they see fit.

Generally, if a witness's testimony is corroborated by documentary evidence, the arbitrators are often likely to attach more evidentiary weight to that testimony. Also, an independent witness, with no interest in the outcome of the dispute, may often be given more weight than, for example, a party representative.

Burden of Proof

There are no rules in the Swedish Arbitration Act concerning burden of proof. However, the parties may agree on rules governing the burden of proof, for example, by referring to the UNCITRAL Arbitration Rules. According to these rules, each party has the burden of proving the facts relied on to support its claim or defence. As a starting point, this is in line with what often applies in Swedish judicial practice.

On the other hand, in Swedish courts the burden of proof is sometimes placed on the party that has the best possibility of securing certain written or technical evidence, and such principles are sometimes relied upon in Swedish arbitration. It is also sometimes the case that a party that seeks to argue for a deviation from a customary practice has the burden of proving the benefits of such a deviation.

The burden of proof may also shift, for example, depending on the issue under dispute and the applicable law.

Rejection of Evidence

The arbitrators have the power to reject evidence if it is presented too late in the arbitration process or if it is manifestly irrelevant. However, this is relatively uncommon as a rejection may be relied on as a ground to challenge the award (since the parties must be given the opportunity to present their respective cases). In practice, the IBA Rules are also often used as guidelines in this regard.

Although there are no time limits for the presentation of evidence, the arbitrators may reject new evidence if one of the parties tries to introduce the evidence immediately prior to or during the final hearing.

8.3 Powers of Compulsion

Under Swedish arbitration law, arbitrators have no subpoena powers and therefore they cannot compel parties or witnesses to appear. Nor may they impose conditional fines or otherwise use compulsory measures in order to obtain requested evidence. Arbitrators also cannot administer oaths. However, subject to the consent of the arbitral tribunal, it is possible to hear witnesses under oath before the competent district court.

As regards the production of documents, the common view is that arbitrators may order one of the parties to produce the documents in its possession at the request of another party. Documents which are in the possession of third parties, however, fall outside the scope of the arbitrators' powers. An order by the tribunal to produce certain documents is, however, not formally enforceable. This is remedied by the possibility for a party to turn to the competent national court with such a request, subject to the arbitral tribunal's approval.

Although rarely done in practice, the arbitrators may appoint their own expert, unless both parties object thereto.

9. Confidentiality

9.1 Extent of Confidentiality

The Swedish Arbitration Act does not contain any express provisions regarding confidentiality. Although arbitration proceedings are private, the parties to an arbitration are not bound by confidentiality, unless the parties have explicitly agreed thereto. Parties should therefore consider incorporating a confidentiality clause into their arbitration agreement if they want to keep the arbitration proceedings confidential.

Counsel, arbitrators and the relevant arbitration institute (if applicable) are bound by confidentiality, the extent of which depends on their respective role in the proceedings, ethical obligations, institutional rules, etc. For example, the arbitrators are deemed to be under a duty of confidentiality which can only be lifted through the consent of both parties.

10. The Award

10.1 Legal Requirements

In general, there are few legal requirements for an arbitral award according to the Swedish Arbitration Act. The award must be in writing and signed by the arbitrators. If all the arbitrators cannot sign the award, it is sufficient if the majority of the arbitrators sign the award. The reason why all the arbitrators have not signed the award must then be noted in the award.

Furthermore, the award should include details of the seat of the arbitration and the date when the award was rendered. If one of the arbitrators has a dissenting opinion, this opinion is usually included in the award, although this is not a formal requirement. The Arbitration Act does not require that the award is reasoned, but in practice, reasoned awards are usually provided in almost all cases (and the institutional rules usually require awards to be reasoned).

Unless the parties have agreed otherwise, there are no time limits with respect to the rendering of an award (however, institutional rules usually do impose time limits).

10.2 Types of Remedies

An arbitral tribunal may generally grant the same types of remedies and relief that are available to a court. There are, however, some restrictions. For example, an arbitral tribunal cannot order a party to undertake an action that is prohibited by law.

As regards punitive damages, it is in practice most unlikely that an arbitral tribunal sitting in Sweden would award punitive damages. It is often assumed that an award of punitive damages would be contrary to public policy, although the question of whether such an award would be enforceable is not entirely settled.

10.3 Recovering Interest and Legal Costs

At the request of a party, the arbitral tribunal may at its discretion determine the allocation of costs between the parties. Such costs include a party's costs incurred with respect to the arbitration proceedings, including reasonable legal fees, compensation to the arbitrators and the institution (if applicable), costs for the party's own work and costs relating to evidence. As a general rule, costs follow the event, that is, the loser pays the winner's fees. However, an allocation of costs which is proportional to the claimant's success is also common.

Under Swedish law, parties may claim interest on their principal claim and costs, unless otherwise agreed between the parties. As a main rule, the interest rate is equivalent to the base rate as determined by the Riksbank (Sweden's central bank), plus eight percentage points. However, the parties are free to agree on another rate.

11. Review of an Award

11.1 Grounds for Appeal

Unless otherwise agreed by the parties, an arbitral award cannot be appealed on the merits. Note, however, that there is a limited exception

with respect to (i) the award of compensation to the arbitrators; and (ii) a decision by the arbitral tribunal to deny jurisdiction. Both such decisions can be appealed to the courts as set out in the Swedish Arbitration Act.

Grounds for Setting Aside

In other respects, as set out below, an award may be challenged on the grounds set out in the Swedish Arbitration Act. According to the Arbitration Act, upon challenge of a party, an award will be set aside wholly or partially if:

- the award is not covered by a valid arbitration agreement between the parties;
- the arbitrators have made the award after the expiration of the time limit set by the parties;
- the arbitrators have exceeded their mandate, in a manner that probably influenced the outcome;
- the arbitration should not have taken place in Sweden;
- an arbitrator was appointed in a manner that violated the parties' agreement or the Arbitration Act;
- an arbitrator was unauthorised to adjudicate the dispute due to lack of full legal capacity or was not impartial or independent; or
- there otherwise occurred an irregularity in the course of the proceedings without fault of the party, which probably influenced the outcome of the case.

Grounds for Declaring Invalid

According to the Arbitration Act, an award may also be declared invalid if:

- the subject matter of the dispute was not arbitrable;
- the award, or the manner in which the award arose, is clearly incompatible with the basic principles of the Swedish legal system (ordre public); or
- the award does not fulfil the requirements with regard to the written form and signature in accordance with the Arbitration Act.

Time Limits

If any of the grounds for invalidity are fulfilled, the award is invalid ipso jure. This means that no further action is needed; the award is invalid by law. However, in practice, a party may well wish to have the award formally declared invalid by the competent appellate court. Invalidity may be invoked without any time limit, and the court must take account of the rules governing invalidity even without a request by a party.

An action to have an award set aside in challenge proceedings must be brought within two months from the date when the challenging party received the award (or a correction, supplementation or interpretation of the award). Following the expiration of the two-month period, a party may not invoke a new ground in support of its challenge of the award. In contrast to challenge proceedings, an action to have an award declared invalid is not limited in time.

Role of the Court of Appeal

An action against an arbitral award must be initiated before the competent appellate court, ie, within the jurisdiction of which the arbitration proceedings had its seat. If the seat of arbitration is not determined, or not stated in the award, the action against the arbitral award may be brought before the Svea Court of Appeal in Stockholm.

The appellate court's judgment may not be appealed, unless leave to appeal is granted by the court, as well as the Swedish Supreme Court. A leave of appeal may be granted if it is of importance as a matter of precedent that the

appeal is considered by the Swedish Supreme Court.

11.2 Excluding/Expanding the Scope of Appeal

If none of the parties is domiciled or has its place of business in Sweden, then the parties may agree to waive the right to invoke any or all grounds for challenging the arbitral award. Such an agreement must, however, be made in writing and must explicitly state the parties' intent; a mere reference to, for example, institutional rules under which this possibility exists is not enough. The parties' relationship must also be commercial in nature.

It is important to note, however, that the right to have an award declared invalid cannot be waived.

As far as expanding the scope of grounds for challenge is concerned, the parties are free to do so.

11.3 Standard of Judicial Review

Arbitral awards are final and binding on the merits, unless the parties have agreed otherwise. Findings by the arbitrators concerning substantive law or evaluation of evidence therefore fall outside the review of the courts.

12. Enforcement of an Award

12.1 New York Convention

Sweden has, without any reservations, signed the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). The provisions in the New York Convention have subsequently been incorporated into the Swedish Arbitration Act.

Sweden has also signed and ratified several other treaties dealing with enforcement of foreign arbitral awards, such as the Washington Convention on the Settlement of Investment Disputes of 1965 (the "ICSID Convention") and the 1927 Convention on the Execution of Foreign Arbitral Awards (the predecessor to the New York Convention).

12.2 Enforcement Procedure

Domestic or Foreign?

The Swedish Arbitration Act differentiates between domestic and foreign arbitral awards. An arbitral award is domestic if it has been rendered by an arbitral tribunal sitting in Sweden. In other instances, the arbitral award is foreign.

Enforcement of Domestic Arbitral Awards

According to the Swedish Enforcement Act, a domestic arbitral award is principally enforceable in the same manner as a final and binding domestic court judgment. Hence, there is no need for exequatur proceedings. Consequently, a party may turn directly to the Swedish Enforcement Authority with an application to enforce the award.

Enforcement of Foreign Arbitral Awards

In principle, foreign arbitral awards are recognised and enforced in Sweden provided that an arbitration agreement exists. However, a foreign arbitral award cannot be enforced until it has undergone exequatur proceedings. Accordingly, an application for enforcement must be submitted to the Svea Court of Appeal in Stockholm. However, the application cannot be granted unless the opposing party has been afforded an opportunity to present its case. Consequently, the opposing party may resist the enforcement of the arbitral award based on the grounds set out in the Swedish Arbitration Act (which princi-

pally correspond to those set out in Article V in the New York Convention).

If the court grants the enforcement application, the foreign arbitral award will become enforceable in Sweden in the same way as judgments and orders of national courts. The award can then be enforced upon application to the Swedish Enforcement Authority.

Where a Domestic Arbitral Award Has Been Set Aside

If an arbitral award has been set aside or declared invalid in a final and binding judgment, then there is nothing more to enforce. Should enforcement measures already be under way, then they must cease immediately (unless otherwise ordered), and as far as possible, be reversed.

Where a Foreign Arbitral Award Has Been Set Aside

If a foreign award has been set aside by the competent foreign authority in which the award was rendered, the arbitral award will not be recognised and enforced in Sweden.

Where a Domestic Arbitral Award is Subject to Ongoing Set-Aside Proceedings

Ongoing set-aside proceedings do not automatically entail that an arbitral award cannot be enforced. The party seeking to have the arbitral award set aside must request that the court orders a stay of enforcement. While doing so, the requesting party must present evidence to convince the court that the challenge is likely to be successful and that the enforcement therefore should be suspended until further notice.

The court will then weigh up the likelihood of the success of the challenge and the extent of the prejudice that may be caused to the respective parties if enforcement is allowed to continue or is suspended.

Where a Foreign Arbitral Award is Subject to Ongoing Set-Aside Proceedings

If a foreign award is subject to ongoing set-aside proceedings at the seat, the court may postpone its decision upon objection from the party resisting enforcement. In reaching a decision, the court must balance the interests of the parties and the court's assessment must be based on all relevant circumstances.

As a starting point, the resisting party must present convincing reasons for a stay to be granted. However, the approach taken by the courts will be restrictive. The Swedish Supreme Court has attributed decisive importance to the public interest in facilitating enforcement of foreign arbitral awards.

In one of the more recent cases decided by the Swedish Supreme Court, the court emphasised that there was uncertainty as to whether the set-aside proceedings would be successful, and that it could take a long time until a final decision was reached. In light of "the general interest in facilitating the enforcement of foreign arbitral awards", the court held that there were not sufficient reasons to grant a stay.

Finally, upon request of the enforcing party, the court may order the resisting party to provide reasonable security, in default of which, enforcement might otherwise be ordered.

State Immunity as a Means to Resist Enforcement

There are no provisions in Swedish legislation regarding immunity for a foreign state from enforcement in Sweden. However, Swedish courts observe and adhere to principles on state

immunity established in customary international law.

Sweden has ratified the United Nations Convention on Jurisdictional Immunities of States and Their Property (the "Convention") and incorporated the Convention into law. Although neither the Convention nor the Swedish Act incorporating the Convention have entered into force (at the time of writing, August 2024), the restrictive approach on state immunity expressed in the Convention is adopted in Sweden.

Generally, the approach taken by the courts with respect to immunity from suit, is that immunity only extends to sovereign acts, not commercial. However, enforcement measures are considered more intrusive than subjecting a state to the jurisdiction of a foreign court. Accordingly, a foreign state enjoys broader immunity from enforcement.

However, the foreign state's immunity from enforcement is not absolute. There is case law from the Swedish Supreme Court – in line with the principle that enforcement can be carried out in property used for purposes other than governmental or non-commercial – in which the foreign states failed to successfully plead immunity from enforcement.

12.3 Approach of the Courts

As a consequence of the general pro-enforcement attitude of the Swedish courts and the limited grounds for refusal set out in the Swedish Arbitration Act, there are very few Swedish cases where enforcement has been refused. Under Swedish arbitration law, recognition and enforcement of a foreign arbitral award will be refused if the court finds that it would be clearly incompatible with the basic principles of the Swedish legal system to recognise and enforce the award. Consequently, the starting point is that the public policy exception refers to what is considered to fall thereunder from a Swedish public policy perspective.

Under Swedish arbitration law, public policy only concerns extremely offensive cases in respect of arbitral awards where there has been a failure to comply with fundamental legal principles. As examples of such arbitral awards, reference is made, in the preparatory works of the Swedish Arbitration Act, to claims that are based on gaming or on criminal acts, such as, obligations to pay a contractually agreed bribe.

In light of the above, the possibilities to refuse enforcement of an arbitral award on public policy grounds are very limited and, since the relevant provision in the Arbitration Act should be given a restrictive interpretation, it is extremely seldom that this is applicable.

It should be noted that particular rules apply concerning competition law, particularly in the context of EU competition law.

13. Miscellaneous

13.1 Class Action or Group Arbitration

With respect to court proceedings, Swedish law allows for class actions and group proceedings. Class action arbitration and group arbitration are, however, not subject to specific regulation in Sweden.

13.2 Ethical Codes

The Swedish Arbitration Act provides that an arbitrator must be impartial and independent.

With respect to court proceedings, the Swedish Code of Judicial Procedure stipulates that only a

person deemed suitable by the court, by reason of that person's honesty, knowledge and earlier activities, may act as counsel. An additional requirement is that the counsel must master the Swedish language.

Furthermore, if a counsel or an arbitrator is a member of the Swedish Bar Association, and thus holds the title "*Advokat*", they will always be required to follow the Bar Association's code of conduct (whether in court proceedings or arbitration proceedings).

13.3 Third-Party Funding

Third-party funding is not subject to specific regulation in Sweden. However, this does not mean that there are no laws or regulations that may be relevant in the context of third-party funding of, for example, rules regarding legal costs, conflict of interest, confidentiality and production of documents, all of which could potentially be relevant.

13.4 Consolidation

The Swedish Arbitration Act provides that an arbitration may be consolidated with another arbitration, if the parties agree to such consolidation, if it benefits the administration of the arbitration, and if the same arbitrators have been appointed in both cases. The decision to consolidate separate arbitration proceedings is made by the arbitral tribunal (not by the court).

Note that institutional rules, such as the SCC Arbitration Rules, generally have specific rules governing consolidation.

13.5 Binding of Third Parties

In principle, under Swedish law, a contract, and thus an arbitration agreement or clause, is only binding between the parties entering the contract. In certain situations, however, a third party may, depending on the circumstances, be bound by an arbitration agreement – for example, in the following instances:

- universal succession – all rights and obligations of a legal subject pass on to another subject (eg, following a merger between two companies);
- bankruptcy – a company that has been declared bankrupt is no longer authorised to enter into contracts or to plead in court or arbitration proceedings; instead, the right to represent the company lies with the receiver;
- singular succession; and
- guarantee agreement.

The main principle provides that an arbitral award, as well as a court judgment, has res judicata effect between the parties. However, in some cases an arbitral award (and a court judgment) may have a res judicata effect against a third party (eg, in cases of succession).

Trends and Developments

Contributed by:
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Advokatfirman Vinge KB (Vinge) is one of the largest commercial law firms in Sweden, operating as a full-service firm with over 500 employees in Stockholm, Gothenburg, Malmö, Helsingborg and Brussels. Vinge has one of the largest dispute resolution practices in the Nordic region, with over 50 lawyers handling both international arbitration and litigation at all levels of the Swedish court system. A number of the firm's lawyers also sit regularly as arbitrators.

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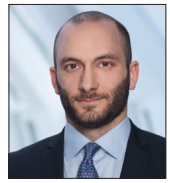

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Introduction

In respect of trends and developments in international arbitration in Sweden over the last couple of years, two matters in particular are worthy of mention, as in the following discussion.

Statistics From the SCC Arbitration Institute

The SCC Arbitration Institute (SCC) – formerly the Arbitration Institute of the Stockholm Chamber of Commerce – is based in Stockholm, Sweden. Having been in existence for over 100 years, the SCC forms the hub of arbitration activity in Sweden, and it follows that its statistics provide a useful insight into arbitration activities in the country.

It should be noted that parties choosing arbitration in Sweden generally choose institutional arbitration rather than ad hoc arbitration. The SCC is by far the most popular choice of institution, followed by the International Chamber of Commerce (ICC). (There is, of course, also ad hoc arbitration, but it is difficult to know how many ad hoc arbitrations take place in Sweden every year.)

The SCC's statistics for 2023 reveal an arbitration market that has been affected both by the COVID-19 pandemic and by the war in Ukraine. Thus, the total number of cases (175) is down from the high of 213 cases in 2020. On the other hand, the total value of the cases is comparatively high, at EUR3.05 billion.

With respect to cases where the seat was specified, one interesting development is that 18% of the cases filed before the SCC in 2023 had their seat of arbitration outside Sweden. This is perhaps surprising, since the SCC is generally associated with arbitrations taking place in Sweden. Of the foreign-seated arbitrations, the most popular foreign seat was London, followed by a range of other seats including Helsinki, Copenhagen and Frankfurt. This development may reflect the fact that SCC arbitration has certain particular features that are popular internationally, including expedited arbitration and the SCC's emergency arbitration which is considerably faster than emergency arbitration at other institutions.

Although the majority of parties who use SCC arbitration are Swedish, the 2023 statistics reveal that 43% of the parties were of other nationalities – 41 other nationalities in total.

Regarding the language of the arbitrations filed before the SCC in 2023, 54% were in English and 43% were in Swedish, with 3% in French, Russian and Polish.

Regarding the time taken from referral of the case to the tribunal until the final award, 65% of arbitrations under the general SCC rules were concluded within 12 months, and 100% of arbitrations under the expedited SCC rules were concluded within six months. This is impressively efficient, although of course, some other cases were not as efficient.

With respect to the applicable law (specified by the parties), while 82% of the arbitrations listed were under Swedish substantive law, 13 other substantive laws were chosen – the most common substantive law, after Swedish law, being English law. In four cases, the applicable law had not been specified by the parties.

The statistics reveal that 67% of the arbitrations had three arbitrators, and 32% of the arbitrations had one arbitrator. (The statistics do not reveal what happened in the other 1% of cases – the explanation being perhaps that the position was unclear at the commencement of these arbitrations.)

The SCC has remarked in its statistics that the arbitrators appointed in 2023 were from five continents, in total, 27 different nationalities.

In this context, it is good to see that there were very few challenges – only six challenges in total in 2023, of which only one challenge was sustained.

The SCC appointed 37% of the arbitrators. Of the total number of arbitrators appointed, 39% were women; but where the SCC appointed the arbitrators, 55% were women. This highlights the SCC's continued impressive record in promoting diversity in arbitral appointments.

Finally, the SCC's statistics show that only four emergency arbitrations were commenced in 2023, of which two were dismissed and two were partly sustained.

To summarise the picture given by these statistics, although the SCC's caseload is somewhat small by comparison with some of its competitors, the caseload remains healthy with an even spread of domestic and international cases. The SCC also continues to lead the way in diversity and efficiency.

Recent Case Law in the Field of Arbitration

Sweden is well known as an arbitration-friendly jurisdiction, and it is therefore not surprising that it is very rare for arbitral awards to be successfully challenged.

However, challenges are sometimes successful and recent case law reveals a high number of successful cases before the Svea Court of Appeal in the first half of 2024.

Some successful challenges in early 2024

- Svea Court of Appeal Case No T 4236-19, 27 May 2024;
- Svea Court of Appeal Case No T 3229-19, 17 June 2024; and
- Svea Court of Appeal Case No T 1626-19, 28 June 2024.

The above three cases concern the relationship between the Energy Charter Treaty (ECT) and EU legislation. In particular, the cases concern the applicability and validity of Article 26 ECT in intra-EU disputes, that is, disputes between a member state and an investor from another member state.

With reference to, among other things, the CJEU's rulings in Achmea (C-284/16); Komstroy

(C-741/19); and PL Holdings (C-109/20), the Svea Court of Appeal concluded that upholding the arbitral awards would be manifestly incompatible with the public policy of the Swedish legal system. On this basis, the Svea Court of Appeal accordingly found that the underlying arbitral awards were invalid.

Svea Court of Appeal Case No T 9629-23, 19 June 2024, was a domestic arbitration in which the court found that the arbitral tribunal had exceeded its mandate. The court found that the relief awarded by the arbitral tribunal did not correspond to the circumstances actually invoked, and on that basis, the award was (partly) set aside.

Summary

It is interesting to see the judiciary ruling on such important issues, since it is somewhat rare for arbitration issues to be decided in court.

SWITZERLAND

Law and Practice

Contributed by:
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GABRIEL Arbitration

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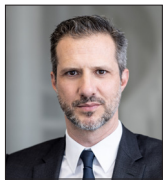

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GABRIEL ARBITRATION DISPUTE RESOLUTION

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1. General

1.1 Prevalence of Arbitration

Switzerland is one of the leading places of arbitration worldwide. The local hubs are Geneva (in the French-speaking part of Switzerland) and Zurich (in the German-speaking part). There is also some international arbitration activity in Lausanne (the seat of the Court of Arbitration for Sport, CAS), Lugano (in the Italian-speaking part), and Basel (a pharmaceutical hub in the German-speaking part of Switzerland).

The importance of Switzerland as a place of arbitration stems from Switzerland's traditional neutrality, its cultural diversity as reflected by the four official languages of the country and, most importantly, the quality and integrity of the legal profession.

Switzerland as a place of arbitration is often chosen together with Swiss substantive law because the latter has influenced the making of the laws of some countries in South-Eastern Europe and beyond, the most prominent among them being Türkiye. Swiss substantive law is, therefore, in many cases both neutral and familiar to both parties in a dispute – this being an advantage that few substantive laws have. Other advantages of Swiss substantive law are its flexibility and the high priority of parties' agreements.

Furthermore, Switzerland also has a tradition of efficiently administering small and mid-size disputes, with the Swiss Rules of International Arbitration stipulating that disputes up to a value of CHF1 million are dealt with in expedited proceedings within six months. The expedited proceedings are additionally chosen by parties for larger disputes when time is of the essence.

Moreover, Switzerland promotes efficient international arbitration because an arbitral award that was rendered by a tribunal with its seat in Switzerland can only be set aside for very limited reasons, and only the Swiss Federal Tribunal (the highest Swiss judicial authority) is competent to hear such a case. There is even the possibility to exclude any challenge proceedings (see **1.2 Excluding/Expanding the Scope of Appeal**).

Finally, the enacted "revision light" of the Swiss lex arbitri contained in the 12th Chapter of the Private International Law Act (PILA), which entered into force on 1 January 2021, confirmed the distinctively liberal and arbitration-friendly tradition of Switzerland. On the institutional side, the conversion of the former Swiss Chambers' Arbitration Institution (SCAI) into the Swiss Arbitration Centre and the revision of the Swiss Rules of International Arbitration (the "Swiss Rules"), which entered into force on 1 June 2021, helped to maintain and strengthen Switzerland's standing as a major arbitration venue (see **1.3 Arbitral Institutions**).

1.2 Key Industries

Key industries that usually appreciate arbitration as a dispute resolution method are the pharmaceutical industry, the construction industry and commodity traders, as well as exporters and importers of technical equipment.

In all these industries, the caseload is steady, in particular as a result of the ongoing disruption of supply chains caused by the termination of trade relationships by the war in Ukraine and the Red Sea shipping crisis.

The broad use of sanctions as a geopolitical tool affects a growing number of contractual relationships, and the number of related cases is likely to further increase. The legal consequences of

sanctions remain a contentious issue, frequently debated in many arbitrations, both on a procedural level and as a matter of substantive law. The fundamental right of access to justice raises new and delicate issues for arbitration as a dispute resolution mechanism, which are yet to be fully resolved.

The financial industry in Switzerland has traditionally not been a frequent user of arbitration. However, a rise in fintech cases involving companies from Switzerland's crypto valley, a world-leading blockchain hub, can be observed since the early 2020s.

1.3 Arbitration Institutions

The leading arbitration institutions are the International Chamber of Commerce (the issuer of the "ICC Rules") and the Swiss Arbitration Centre (the issuer of the "Swiss Rules").

In May 2021, the Swiss Arbitration Centre was established by the Swiss Arbitration Association (ASA) and the cantonal chambers of commerce that formerly constituted SCAI. As a one-stop shop, the Swiss Arbitration Centre aims to make Swiss arbitration more accessible for international users, who sometimes found the previous dualism confusing.

In June 2021, the revised Swiss Rules entered into force (replacing the version of 2012). Being based on the UNCITRAL Arbitration Rules, the Swiss Rules provide for an arbitration procedure that combines international best practices with useful innovations and a comparatively light institutional framework. Only a few substantial amendments were made and the key features of the Swiss Rules remained the same ("light touch administration", multiparty proceedings, expedited proceedings and emergency arbitration).

Moreover, users benefit from a single internet portal providing services, information and links. The platform includes information from the Swiss Arbitration Academy and the Swiss Arbitration Hub. These four organisations have joined under a new brand, "Swiss Arbitration", to emphasise their close co-operation for the benefit of arbitration users worldwide. The Swiss Arbitration Academy provides training for arbitration practitioners and the Swiss Arbitration Hub provides services and information for the organisation of hearings in Switzerland.

1.4 National Courts

The Swiss Federal Tribunal is the only state court in Switzerland competent to hear challenges of international arbitral awards rendered in Switzerland (see **11. Review of an Award**). On the cantonal level, state courts may intervene in the composition of the arbitral tribunal under limited circumstances (see **4.3 Court Intervention**) and grant interim relief upon request (see **6.2 Role of Courts**), both in supportive function to international arbitration proceedings.

That said, there are no commercial courts (neither on a federal nor on a cantonal level) specifically designated to exclusively deal with international commercial disputes (or arbitrations) in Switzerland. In this context, however, the Swiss legislature has during the past few years implemented a minor revision of the Swiss Civil Procedure Code (CPC). Pursuant to the revised law, the Swiss cantons will be entitled to designate their commercial courts as competent to specifically decide international commercial disputes provided certain conditions are met, including obtaining the necessary consent from the parties. In March 2023, the Swiss Parliament approved the respective amendments, and the revised CPC will come into force on 1 January 2025. Upon its enactment, it will have to be seen

in practice whether the same types of disputes that are currently resolved by means of international arbitration will increasingly be heard before Swiss cantonal commercial courts.

2. Governing Legislation

2.1 Governing Law

International arbitration proceedings in Switzerland are governed by the 12th Chapter of the PILA, which, since the revision, comprises 24 articles (Article 176 to Article 194 of the PILA, the so-called Swiss lex arbitri).

The PILA is not directly based on the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), although it is evident that the drafters of the PILA were aware of the ideas and concepts of the Model Law, and some Swiss scholars even state that the spirit of the Model Law can be recognised in many provisions of the PILA.

At the same time, the parties are free to exclude the application of the 12th Chapter of the PILA and instead agree that the provisions of the third part of the CPC is applicable (Article 176.2 of the PILA).

2.2 Changes to National Law

On 1 January 2021, a minor revision of the Swiss international arbitration law (ie, the 12th Chapter of the PILA) (see **1.1 Prevalence of Arbitration**) came into force.

Since then, no legal changes were made to the Swiss international arbitration law.

3. The Arbitration Agreement

3.1 Enforceability

From a formal point of view, the arbitration agreement is required to be evidenced by text (so-called text form, Article 178.1 of the PILA); therefore, arbitration agreements in emails, instant messaging apps, or telefax communications are formally valid in Switzerland.

In a landmark decision (decision of the Swiss Federal Tribunal No 145 III 199), the Swiss Federal Tribunal confirmed that the text form requirements are congruent with those of Article II.2 of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958 (the "New York Convention"). It further held that, in line with Article II.2 of the New York Convention, an arbitration agreement can bind non-signatories; eg, in a scenario where a non-signatory is involved in the performance of an agreement and implicitly declares, by its conduct, that it intends to be party to the arbitration agreement. Similarly, the Swiss Federal Tribunal confirmed that an arbitration agreement can be implicitly extended and bind a non-signatory without the extension being evidenced by text.

From a substantive point of view, the minimal requirements for an arbitration agreement are as follows:

- it provides for an agreed exclusion of the state court jurisdiction in favour of arbitral jurisdiction;
- it relates to a defined dispute (eg, "all disputes arising out of or in connection with" a certain contract); and
- it details a definable arbitral tribunal.

Furthermore, it should be noted from a substantive point of view that an arbitration agreement is also considered valid in Switzerland if it meets the substantive legal requirements of either the law chosen by the parties or the law that applies to the merits of the case or Swiss law (Article 178.2 of the PILA; principle of favor validitatis).

Finally, Article 178.4 of the PILA clarifies that the rules of the Swiss lex arbitri also apply, by analogy, to arbitration agreements in unilateral legal instruments (such as last wills) or in articles of association.

3.2 Arbitrability

Article 177.1 of the PILA provides that every claim "of financial interest" (*vermögensrechtlich*) may be referred to international arbitration. Claims that concern family status issues (eg, separation, divorce or children-related claims) are thus not arbitrable in Switzerland, and neither are insolvency matters arbitrable that have the aim of dissolving a company for lack of assets. At the same time, a company in insolvency proceedings is still bound by pre-existing arbitration agreements (unless the insolvency negatively affects the general legal capacity of an entity according to the decisions of the Swiss Federal Tribunal Nos 4A_118/2014, 138 III 714, and 4A_428/2008 – the so-called Vivendi decision).

One important point for proceedings with state involvement is that Article 177.2 of the PILA provides that a state or state-owned entity is not entitled to rely on its own law in order to argue that certain issues in dispute are not arbitrable or that it is not capable of being a party in arbitration proceedings. This provision of the PILA can be very useful for any party that contracts with state-owned entities.

3.3 National Courts' Approach

The Swiss Federal Tribunal considers that (at least) the core of the arbitration agreement (ie, the exclusion of the state courts in favour of arbitration) is of a procedural nature.

If a party starts legal proceedings before state courts in a dispute that is subject to an arbitration agreement, the state court will – first of all – wait and see whether the counterparty objects to state court jurisdiction based on the arbitration agreement. If there is an objection, it will decline its jurisdiction and the claimant will need to start arbitration proceedings. However, the state court will consider the absence of any objection as tacit agreement to proceed before state courts (Article 7 of the PILA).

In respect of the law applicable to the arbitration agreement, the state court will apply the principle of favor validitatis in international arbitration proceedings seated in Switzerland (see **3.1 Enforceability**).

On the other hand, the state court is obliged to apply Article II.3 of the New York Convention, of which Switzerland is a contracting state, if the arbitration agreement at issue would (hypothetically) lead to the formation of an arbitral tribunal seated outside Switzerland. In this regard, the prevailing view suggests that the state court should apply the conflict of laws rule of Article V.1.a of the New York Convention by analogy. Accordingly, the law applicable to the substantive validity of an arbitration agreement is primarily the law chosen by the parties to govern their agreement (lex causae), or subsidiarily, the law of the foreign seat of the arbitral tribunal (foreign lex arbitri).

In a recent decision, the Swiss Federal Tribunal found in this regard that an arbitration clause,

providing for a (Russian) arbitration institution that no longer existed, was to be interpreted exclusively on the basis of the applicable foreign law, in this case Russian law (decision of the Swiss Federal Tribunal No 4A_19/2023, paragraph 2.3; see Schregenberger/Carè, Pathological Arbitration Clauses: Role of the Law Applicable to the Substantive Validity of the Arbitration Agreement under Article II.3 NYC, ASA Bull. 1/2024, p 23 et seqq for further information on this case).

Against this background, the (procedural) Swiss approach is slightly different from the (substantive) US approach, where courts positively order parties to attend arbitration proceedings, but the result remains the same: if a valid arbitration agreement exists and one of the parties insists on arbitration, Swiss courts will respect the arbitration agreement by declining their jurisdiction and the parties must proceed with arbitration in order to obtain a decision on the merits. This approach is in line with Article II.3 of the New York Convention.

3.4 Validity

Article 178.3 of the PILA expressly provides that an arbitration agreement may be considered valid even if the remainder of the contract is invalid (the so-called doctrine of separability).

At the same time, there may be situations in which a defect of the main contract also affects the arbitration agreement. This can be the case, for example, if an unauthorised person signed a contract that includes an arbitration agreement. However, in such a situation it would be for the arbitral tribunal (and not a state court) to assess whether the arbitration agreement is valid, since the arbitral tribunal is competent to rule on its own competence (Article 186.1 of the PILA).

In a recent decision (decision of the Swiss Federal Tribunal No 4A_148/2023), the Swiss Federal Tribunal confirmed that the arbitral tribunal has to individually check whether a defect exclusively affects the validity of the arbitration agreement, the main contract or both of them. In this regard, the Swiss Federal Tribunal emphasised that if this question is examined under Swiss law, the capacity to act is a relative concept that must be assessed individually in relation to a specific act at a specific point in time (see Frenkel, Autonomy of Arbitration Agreements and Capacity of Judgment, ASA Bull. 1/2024, p 45 et seqq for further information on this case).

In exceptional cases, an arbitration agreement in a draft contract can even be valid and binding before the main contract is signed. This is the case if an intention to be bound by the arbitration agreement can be established independently of the conclusion of the main contract (see Gabriel/Wicki, Vorvertragliche Schiedszuständigkeit – Pre-contractual Jurisdiction of Arbitral Tribunals, ASA Bull. 2/2009, p 236 et seq for further information on this issue).

4. The Arbitral Tribunal

4.1 Limits on Selection

The parties are free to nominate and replace any arbitrator in line with the arbitration agreement. If the parties have not agreed otherwise, the tribunal shall consist of three members, whereby each party nominates one member and these members nominated by the parties unanimously nominate the president of the tribunal (Article 179.1 of the PILA).

However, if an arbitrator nominated by a party is not sufficiently independent and/or impartial, they may be challenged by the other party, and

may be subject to removal (see **4.4 Challenge and Removal of Arbitrators**).

Against this background, a prospective arbitrator must disclose any grounds that may raise doubts as to their independence and impartiality, and this for the course of the entire proceedings (Article 179.6 of the PILA). In this regard, an arbitrator whose law firm maintains a client relationship with one of the parties may have a duty to disclose such relationship irrespective of whether such other mandate(s) bears any direct relevance to the case in question (decision of the Swiss Federal Tribunal No 4A_462/2021, paragraph 4.2).

4.2 Default Procedures

If the parties' chosen method for selecting arbitrators fails, they may approach the state court judge at the place of arbitration (*juge d'appui*) and request that it designates an arbitral tribunal. If the parties have not determined the seat, or determined that the seat should be in Switzerland (without any further specification), the state court that was first seized by a party shall have jurisdiction (Article 179.2 of the PILA).

In this context, Article 179.3 of the PILA specifies that if a state court is entrusted with the appointment or replacement of a member of the tribunal, it must grant that request, unless a summary examination shows that there exists no arbitration agreement between the parties. The state court must thereby take the required measures for the constitution of the tribunal at the request of a party if the parties or the (party-nominated) members of the tribunal do not comply with their duties within 30 days (Article 179.4 of the PILA). Also, the *juge d'appui* may nominate the entire arbitral tribunal in multiparty cases (Article 179.5 of the PILA).

4.3 Court Intervention

A state court cannot intervene in the selection of arbitrators unless an arbitrator is rightly challenged and thus removed for lack of independence and/or impartiality. Even in this case, the state court does not have the authority to name the new arbitrator. Instead, the arbitration agreement's provisions will dictate the selection of the replacement.

4.4 Challenge and Removal of Arbitrators

Article 180 of the PILA governs the challenge and potential removal of arbitrators. Reasons for challenging an arbitrator include:

- reasonable doubts with respect to impartiality and/or independence;
- a failure to meet characteristics provided for in the arbitration agreement; and
- any further reasons provided for in the arbitration agreement.

If the parties have not agreed otherwise and the proceedings are still pending, a time limit of 30 days for the submission of the challenge applies, running from the point in time when a party has, or could have in exercising due diligence, learned about the respective reasons (Article 180a.1 of the PILA). Once the challenge has been submitted to the arbitrator(s), there is a further 30-day period for bringing the challenge to the state court, which will render the final decision (Article 180a.2 of the PILA). The tribunal may proceed without excluding the challenged arbitrator until there is a decision in the challenge proceedings, unless the parties have agreed otherwise (Article 180a.3 of the PILA). Also, Article 180b of the PILA provides additional rules for the removal of arbitrators upon joint agreement of the parties or unilaterally – that is, by a single party – specifically in cases where an arbitrator is deemed unfit for duty.

4.5 Arbitrator Requirements

According to Article 180 of the PILA and pertinent jurisprudence of the Swiss Federal Tribunal, arbitrators must be independent and impartial, comparable to state court judges (see, for example, the decision of the Swiss Federal Tribunal No 4A_620/2012, paragraph 3.1). The Swiss Federal Tribunal takes note of the IBA Guidelines on Conflict of Interest in International Arbitration on a case-by-case basis, but does not consider itself to be bound by any standards noted therein.

If an arbitrator does not meet the required (high) standard of independence and impartiality, any award that was rendered with their participation risks being set aside.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

Any disputes of financial interest (ie, monetary value) may be referred to arbitration pursuant to the Swiss lex arbitri (for the Swiss lex arbitri, see **2.1 Governing Law** and for arbitrable disputes, see **3.2 Arbitrability**), as long as they are covered by a valid arbitration agreement.

5.2 Challenges to Jurisdiction

The arbitral tribunal can assess whether it is competent to make a decision on the merits of a dispute (Article 186.1 of the PILA: so-called competence-competence). When making use of its competence-competence, the arbitral tribunal may render a decision on its jurisdiction even in lis pendens situations (ie, where the same matter is already pending before a state court or a different arbitral tribunal). In such lis pendens situations, the arbitral tribunal is not required to stay its proceedings, unless justified by notable circumstances (Article 186.1bis of the PILA).

5.3 Circumstances for Court Intervention

The Swiss Federal Tribunal is the only judicial instance that has the power to review any decision on jurisdiction (whether positive or negative) in potential challenge proceedings, if a respective objection is brought forward by a party (Article 191 of the PILA). If not challenged, a negative ruling on jurisdiction by the arbitral tribunal becomes final, with the effect that the same matter cannot validly be submitted (again) to arbitration.

The Swiss Federal Tribunal freely assesses the accurate application of the law in this respect. At the same time, it is not in a position to review the findings of an arbitral tribunal with respect to the facts underlying the award on jurisdiction.

5.4 Timing of Challenge

Only arbitral awards are subject to challenge proceedings and thus also to challenges with respect to the jurisdiction of an arbitral tribunal. At the same time, the parties are required to object to arbitral jurisdiction in their first submission on the merits. Otherwise, the jurisdictional challenge will be barred due to an assumed tacit agreement to arbitral jurisdiction (*materielle Einlassung* see also **3.3 National Courts' Approach** for the same requirement before state courts).

If arbitral jurisdiction is disputed in arbitral proceedings, the tribunal is generally required to decide on its jurisdiction in a preliminary award, in order to enable an early challenge in this respect (Article 186.3 of the PILA).

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The Swiss Federal Tribunal has the authority to conduct a comprehensive examination of jurisdictional matters, specifically concerning the correct application of the law. However, it has no

authority to review the arbitral tribunal's findings on the facts of the case (see also **5.3 Circumstances for Court Intervention**).

According to statistics in 2021, only 12.3% of all jurisdictional challenges have been successful since the PILA was introduced in 1989 (see Dasser/Wojtowicz, Swiss International Arbitral Awards Before the Federal Supreme Court – Statistical Data 1989-2019, ASA Bull. 1/2021, p 19), so it appears fair to conclude that the Swiss Federal Tribunal has remained deferent to reasonable jurisdictional decisions of arbitral tribunals.

5.6 Breach of Arbitration Agreement

Swiss courts will deny state court jurisdiction and the party that commenced state court proceedings in breach of an arbitration agreement will have to restart the proceedings before an arbitral tribunal (see also **3.3 National Courts' Approach**).

5.7 Jurisdiction Over Third Parties

In general, the Swiss Federal Tribunal has accepted extensions of arbitration agreements to non-signatories in the following situations:

- if an assignment of a claim, an assumption of a debt or a transfer of a contract takes place;
- if a third party intentionally interferes with the performance of a contract in full knowledge of the fact that this contract contains an arbitration agreement; or
- if a contract for the benefit of a third party is concluded; the third party then also needs to respect an arbitration agreement (unless otherwise stated in that arbitration agreement).

A summary of this jurisprudence can be found in the decision of the Swiss Federal Tribunal No 4A_627/2011, paragraph 3.2 (with further references; see also **3.1 Enforceability**).

Moreover, the Swiss Federal Tribunal has in the past also accepted an extension of an arbitration agreement to non-signatories based on the group of companies doctrine. In the decision of the Swiss Federal Tribunal No 4A_450/2013, para. 3.2 and 3.5.5.1.1, the court found that the companies of a group had created an appearance of adhering to the contracts by not making it clear that they did not want to be bound by such contracts and by behaving as if they were. On such basis, the parent company had created the appearance that it was a party to the contracts and thus the arbitration agreement.

In the context of situations with intentional interference by a third party, the Swiss Federal Tribunal has (partly) quashed an award in which an arbitral tribunal had extended the arbitration agreement of a main contractor to a subcontractor (decision of the Swiss Federal Tribunal No 4A_124/2020, paragraph 3.3.2). The key holding of the decision is that a party's officially communicated position as a subcontractor outweighs actions by that party that might otherwise be deemed sufficient to extend the arbitration agreement. This clarification is welcome and likely to be relevant in practice regarding projects or supply chains with main contractors and subcontractors.

6. Preliminary and Interim Relief

6.1 Types of Relief

Article 183 of the PILA expressly authorises arbitral tribunals to order interim measures, unless the parties agreed otherwise in the arbitration agreement.

Interim measures in the sense of the PILA would be measures of a temporary nature that aim to maintain the status quo between the parties

while a dispute is pending, safeguard the arbitral process (eg, by preserving evidence), or preserve assets in order to satisfy a subsequent award (eg, security for costs).

Even though it is not expressly excluded according to the terms of the PILA, Swiss arbitral tribunals would be very reluctant to order anti-suit injunctions as there is no legal tradition of applying this measure in Switzerland.

The arbitral tribunal may require a security from the party requesting interim measures in order to secure potential damages from the party against which the order is directed (Article 183.3 of the PILA).

Emergency arbitration proceedings in Switzerland are mostly conducted under the ICC Rules or the Swiss Rules. In this respect, it should be noted that under the Swiss Rules, ex parte applications are also admissible before emergency arbitrators.

6.2 Role of Courts

If a party does not voluntarily comply with an interim measures order from an arbitral tribunal, the state courts may assist in the enforcement of the order upon request of the arbitral tribunal or a party (Article 183.2 of the PILA). The state courts also support arbitral tribunals of, and parties to, arbitration proceedings with a place of arbitration outside Switzerland (i) to implement preliminary or securing measures (Article 185a.1 of the PILA), or (ii) in the taking of evidence (in the case of a party, only upon approval by the tribunal) (Article 185a.2 of the PILA).

6.3 Security for Costs

According to a large majority of legal commentators, arbitral tribunals are in a position to order security for costs in the sense that (typically) the impecunious claimant would have to provide security for the potential procedural costs of the respondent.

While the specific requirements remain a topic of debate among legal scholars, the majority of them contend that for security for costs to be ordered, there must have been a deterioration in the financial position of the party against whom the request is directed (usually the claimant) since the time the arbitration agreement was executed. This means that any party that chooses to contract with an impecunious counterparty (eg, a shell company or special-purpose vehicle) risks that eventually no security for costs will be granted.

7. Procedure

7.1 Governing Rules

Articles 182 to 185a of the PILA provide a few general rules on arbitral procedure.

As a matter of mandatory procedural law, Article 182.3 of the PILA provides that, in any event, arbitral tribunals need to safeguard the parties' equal treatment as well as their right to be heard in contradictory proceedings.

In this context, Article 182.4 of the PILA expressly stipulates that a party that continues the proceedings without objecting to an infringement against the procedural rules immediately after it took, or could have taken, notice thereof will later be precluded from invoking that infringement.

7.2 Procedural Steps

As long as the parties are treated equally and their right to be heard in contradictory proceedings is safeguarded, Swiss law does not prescribe any particular procedural steps.

At the same time, it should be noted that the right to be heard in contradictory proceedings guarantees the following minimum standard of participation in arbitration proceedings:

- the opportunity to submit arguments on the merits of the case in accordance with the procedural rules;
- participation in oral hearings, if any;
- access to records; and
- the opportunity to comment on the arguments of the other party.

7.3 Powers and Duties of Arbitrators

The arbitral tribunal has the power to order the individual procedural steps in the event that the parties have not reached any agreements regarding the procedure. In this respect, and as previously mentioned, the arbitral tribunal is required to treat the parties equally and grant them the right to be heard in contradictory proceedings (see also **7.1 Governing Rules** and **7.2 Procedural Steps**).

At the same time, the arbitrators have a duty to conduct a reasonably expedited procedure and issue the necessary orders in good time. They also have a duty to deliberate on the merits of the case and make an award on the basis of the applicable substantive law (which is applied ex officio in Swiss arbitration proceedings pursuant to the principle of iura novit arbiter). An exception applies if the parties agreed that the arbitral tribunal shall decide ex aequo et bono (Article 187.2 of the PILA).

On the other hand, the right to be heard does not, pursuant to consistent jurisprudence by the Swiss Federal Tribunal, entitle the parties to a reasoning of the award. In this regard, the Swiss Federal Tribunal specified in a recent decision (decision of the Swiss Federal Tribunal No 4A_41/2023) that a scrutiny of the award by the Swiss Federal Tribunal was "inaccessible" where the release of an unreasoned award was in line with the procedural rules agreed by the parties (see Buhr, No setting aside without reasoning, in: dRSK, published on 10 July 2023).

Finally, the application of the law by the arbitral tribunal must not be surprising. However, a surprise has been acknowledged by the Swiss Federal Tribunal only in very exceptional cases, where an arbitral tribunal applied a legal act to which no party had made reference in the arbitral proceedings and the application of which could not have been foreseen by the parties (decision of the Swiss Federal Tribunal No 4A_424/2018, paragraph 5.2.3).

7.4 Legal Representatives

There are no legal requirements for legal representatives in arbitration proceedings in Switzerland, but it is highly recommended to choose a legal representative who is not only educated in Swiss law but also experienced in international arbitration. Candidates should specifically be asked about their experience in international arbitration before being instructed in an arbitration case.

For legal representation of parties before any Swiss state courts (also in challenge proceedings against an arbitral award before the Swiss Federal Tribunal), a Swiss Bar exam or an international accreditation as a lawyer in Switzerland is required.

8. Evidence

8.1 Collection and Submission of Evidence

Typically, Swiss arbitrators use the IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules"; 2020 version) as a source of inspiration for the taking of evidence. This means:

- there are usually no US-style discovery proceedings, but requests for the production of specific documents that may be relevant to the outcome of the case are generally considered to be admissible (typically in the format of a so-called Redfern Schedule);
- correspondence between clients and legal counsel is usually considered to be legally privileged and is thus excluded from any production orders;
- documentary evidence is to be submitted together with the written submissions;
- written witness statements are fairly common in Swiss international arbitration proceedings;
- in the oral witness hearings, there is typically a brief direct examination (to "warm up" the witness) and then cross-examination on all relevant issues – in many cases, Swiss arbitral tribunals admit re-direct examination limited to issues covered in cross-examination and re-cross-examination limited to issues covered in re-direct examination; and
- the tribunal often takes the prerogative to ask questions of witnesses at any time during the examinations, but experienced arbitrators will rarely interfere with the examinations of versed counsel, unless there are specific reasons to do so.

8.2 Rules of Evidence

Article 184.1 of the PILA (merely) provides that it is for the arbitral tribunal to administer the taking of evidence, and Article 184.2 of the PILA provides that the arbitral tribunal or a party (upon approval by the tribunal) may seek the assistance of the state courts with respect to the taking of evidence. The state courts apply their own (domestic) law or, since the revision, may apply or consider different procedural rules as their own on request, which may, in particular, be helpful for the examination of witnesses (Article 184.3 of the PILA).

Against the background of the right to be heard, the tribunal is required to consider evidence that was offered in accordance with the procedural rules.

8.3 Powers of Compulsion

As previously mentioned, the arbitral tribunal may seek the assistance of the state courts with respect to the taking of evidence (see **8.2 Rules of Evidence**). If relevant evidence is not under the control of either party, there may be no other option than to seek assistance from a state court, even though it is rarely seen in practice. Since the revision (see **2.2 Changes to National Law**), the Swiss state courts will also assist arbitral tribunals and parties (upon approval by the tribunal) to arbitration proceedings with a place of arbitration outside Switzerland with the taking of evidence (Article 185a of the PILA).

However, if relevant evidence is under the control of a party, tribunals may anticipate a so-called adverse inference if the evidence is not produced, rather than seeking the assistance of the state courts.

9. Confidentiality

9.1 Extent of Confidentiality

Swiss arbitration proceedings are confidential in the sense that they are not open to the public (expressly confirmed by the Swiss Federal Tribunal in connection with the "Causa Pechstein" in decision No 4A_612/2009, paragraph 4.1).

Furthermore, it is widely acknowledged that, based on the arbitrators' agreement with the parties (receptum arbitri), arbitrators have a duty to keep any information from the arbitral proceedings confidential.

At the same time, legal scholars have controversially discussed whether, and to what extent, the parties themselves have any confidentiality duties arising out of the arbitration agreement. If the arbitration agreement (including arbitration rules potentially referred to) does not address the issue of confidentiality, it is difficult to find a legal basis for a respective duty between the parties, as the Swiss lex arbitri is silent on this issue. Nevertheless, some Swiss commentators suggest that any arbitration agreement should be interpreted to the effect that the mere existence of arbitration proceedings is not confidential, while any materials submitted in the proceedings as well as the award should be considered confidential.

The Swiss Rules, for example, provide for a general confidentiality provision in Article 44, whereas the ICC Rules do not.

10. The Award

10.1 Legal Requirements

Article 189.1 of the PILA provides that the arbitral award shall be made in the form, and according to the procedure, agreed upon by the parties.

Article 189.2 of the PILA provides that, in the absence of any agreement between the parties, the following requirements apply:

- the award shall be made by majority vote or, in the absence of any majority, by the president of the tribunal;
- the award shall be in written form (the signature of the president is sufficient) and show the date on which it is rendered; and
- the award shall be reasoned (at least with respect to the most relevant arguments of the parties).

10.2 Types of Remedies

As a general rule, the arbitral tribunal may, and shall, award what is owed pursuant to the applicable substantive law. At the same time, there are some limits that must be considered.

First, any arbitral award rendered in Switzerland must remain within the boundaries of Swiss public policy (the so-called ordre public). Any legal consequences that are not in line with Swiss public policy must not be awarded, and such an award would be at risk of being set aside by the Swiss Federal Tribunal. There are indications that punitive damages might be considered as an infringement of Swiss public policy by the Swiss Federal Tribunal (see, for example, the decision of the Swiss Federal Tribunal No 122 III 463, paragraph 5.c.cc).

Second, as previously mentioned (see **3.2 Arbitrability**), only claims "of financial interest" are

arbitrable in Switzerland, so an arbitral tribunal must not award remedies for claims that fall outside the definition of arbitrability.

10.3 Recovering Interest and Legal Costs

The issue of the recovery of legal costs is a matter of procedural law and is thus governed by the arbitration agreement (including reference to any institutional rules). If the arbitration agreement is silent on the allocation of legal costs but both parties request to be compensated for their legal costs, it appears reasonable to accept an implied agreement that legal costs should be allocated. If the parties do not request compensation for legal costs, the issue of the allocation becomes moot, as the tribunal must not award any position that was not requested by either of the parties.

Generally, Swiss tribunals allocate legal costs in proportion to the success of the parties on the merits of the case. Further circumstances (such as the procedural behaviour of the parties) are sometimes considered as well.

The so-called American Rule, where each party bears its own costs, is only applied if agreed upon by the parties or if the proportion of the success on the merits is close to 50/50.

11. Review of an Award

11.1 Grounds for Appeal

In Switzerland, an arbitral award may be challenged before the Swiss Federal Tribunal. The available grounds are expressly noted in Article 190.2 of the PILA and can be summarised as follows:

- incorrect designation and/or composition of the arbitral tribunal;
- inaccurate decision on arbitral jurisdiction;
- the decision either does not cover all of the parties' requests for relief (infra petita) or goes beyond the requests for relief of the parties (ultra petita or extra petita);
- infringement of the principles of the right to be heard and/or equal treatment; and
- infringement of Swiss public policy.

The challenge application must be submitted to the Swiss Federal Tribunal within 30 days of the date of receipt of the award (Article 190.4 of the PILA), and must specifically demonstrate that at least one of the above reasons for challenge applies to the award at issue. Since the revision, the briefs in appeal proceedings can be submitted in the English language (Article 77.2bis of the Federal Tribunal Act) (see **2.2 Changes to National Law**). The Swiss Federal Tribunal invites the counterparty and the arbitral tribunal to submit comments (unless a challenge is considered as evidently inadmissible or unfounded by the Swiss Federal Tribunal), and typically decides within a timeframe of four to six months in total.

Grounds for Revision

Since the revision (see **2.2 Changes to National Law**), the Swiss lex arbitri formally includes the exceptional legal remedy of the so-called revision against binding awards based on earlier jurisprudence of the Swiss Federal Tribunal (see decisions of the Swiss Federal Tribunal Nos 122 III 492 and 134 III 286), which is generally only available on limited grounds that are discovered after an award was rendered. Such limited grounds include (i) discovery of new material facts, (ii) criminal behaviour that affected the award, and (iii) discovery of new circumstances that give rise to doubts as to an arbitrator's inde-

pendence or impartiality (Article 190a.1 of the PILA).

A request for revision must be submitted within 90 days of the discovery of such new facts, whereby such request has, in any event, to be submitted within ten years of the award coming into legal force, with the exception of criminal behaviour that affected the award (Article 190a.2 of the PILA). As with appeal proceedings, the briefs can be submitted in the English language (Article 77.2bis of the Swiss Federal Tribunal Act).

In its first decision on a request for revision pursuant to Article 190a of the PILA, the Swiss Federal Tribunal rejected the respective application as manifestly inadmissible. Specifically, the Swiss Federal Tribunal named the following five individual conditions that must be fulfilled under the pertinent ground for revision (decision of the Swiss Federal Tribunal No 4A_422/2021, paragraph 4.4.1).

- Allegation of one or more facts.
- The alleged facts must be material to the outcome of the case. This is the case if they modify the factual basis of the award in the sense that the correct application of the law on the (modified) facts leads to a different legal solution and thus to a different award.
- The relevant facts already existed at the time when the award was rendered.
- The relevant facts were only discovered at a later point in time.
- The applicant was not in a position – in spite of all its diligence – to rely on these facts during the arbitration proceedings.

In several recent decisions, the Swiss Federal Tribunal applied Article 190a PILA to requests for the revision of arbitral awards which were released before 1 January 2021, when the revised law entered into force (see decisions of the Swiss Federal Tribunal No 4A_184/2022, paragraph 2.2; 148 III 436, paragraph 3; and 4A_100/2022, paragraph 2.3).

In conclusion, the revision is not merely a theoretical concept; it is a legal remedy with very specific requirements, offering a mechanism to review awards alongside the ordinary setting aside application under Article 190.2 of the PILA.

Correction of Awards

Finally, Article 189a.1 of the PILA provides for the right of a party to request from the arbitral tribunal the correction of typos, the explanation of unclear or ambiguous considerations and the rendering of an additional award on any claims not dealt with.

In the respective proceedings (ie, after the award was issued), the arbitral tribunal is bound by the fundamental procedural guarantees, and in particular the parties' right to be heard, like it is in the main proceedings (see **7.1 Governing Rules**). Accordingly, the arbitral tribunal must as a rule notify the other party of the correction request before the correction of the award. In a recent decision, the Swiss Federal Tribunal set aside an interpretation of an award because the arbitral tribunal had omitted to notify the other party of the respective request before it issued its interpretation (decision of the Swiss Federal Tribunal No 4A_603/2023, paragraph 4.4).

11.2 Excluding/Expanding the Scope of Appeal

If no party is domiciled in Switzerland, the parties may exclude (fully or partially) any challenge or revision proceedings (Article 192 of the PILA). As is the case with the arbitration agreement, such exclusion must be evidenced by text (so-

called text form, Article 178.1 of the PILA) (see **3.1 Enforceability**). However, the parties may not exclude a revision on the ground of criminal behaviour that affected the award (Article 192.1 of the PILA) (see the decision of the Swiss Federal Tribunal 148 III 436, paragraph 4.3.3, and 11.1 Grounds for Appeal).

If the parties wish to expand the scope of review of a higher instance, they have the possibility to agree on an appeal mechanism before a second arbitral tribunal, but the Swiss Federal Tribunal will review challenges only as defined in Article 190.2 of the PILA.

11.3 Standard of Judicial Review

The Swiss Federal Tribunal does not review the merits of the case, unless it is indispensable in order to review issues of (i) arbitral jurisdiction or (ii) substantive public policy.

12. Enforcement of an Award

12.1 New York Convention

Switzerland has signed and ratified the New York Convention (without reservations; see also **3.1 Enforceability**).

12.2 Enforcement Procedure

Enforcement of an arbitral award does not require a separate recognition procedure in Switzerland. Rather, the competent court will examine as a preliminary question within the specific enforcement procedure whether the requirements of the New York Convention are fulfilled.

The applicable state court jurisdiction and the details of the enforcement procedure are provided for in Articles 335 et seq of the CPC and the Swiss Debt Enforcement and Insolvency Act.

12.3 Approach of the Courts

Swiss courts are rightly considered to be arbitration-friendly and there are rarely any public policy concerns that would impede enforcement of an arbitral award.

In particular, neither the mere possibility to challenge a foreign award nor the mere filing of an appeal at the foreign seat constitutes a ground for refusal under Article V.1.e of the New York Convention (see decision of the Swiss Federal Tribunal No 135 III 136, paragraph 2.2). Rather, it is, in line with Article IV of the New York Convention, up to the discretion of the competent state court to decide whether the enforcement proceedings should be stayed until ongoing set-aside proceedings at the foreign seat are resolved.

13. Miscellaneous

13.1 Class Action or Group Arbitration

Collective arbitration procedures do not exist and requests for representative relief cannot be submitted to arbitration in Switzerland.

Subject to a very limited number of exceptions, claimants are not entitled to submit any claims but their own to arbitration. Likewise, Swiss awards strictly entitle and bind the parties to the arbitration only.

13.2 Ethical Codes

All qualified Swiss lawyers who are registered to represent parties in state courts must comply with Switzerland's professional rules, including its ethical provisions. The entirety of their contentious and non-contentious legal work (whether in or out of court) must comply with these professional rules. This includes, as a general rule, any work as an arbitrator or counsel in arbi-

tration proceedings, including cases with a place of arbitration outside Switzerland.

International soft law (such as the IBA International Principles on Conduct for the Legal Profession or the IBA Guidelines on Party Representation in International Arbitration) is often viewed with scepticism (with the exception of the IBA Guidelines on Conflicts of Interest in International Arbitration, which are also used by the Swiss Federal Tribunal as guidelines, as mentioned above; see **4.5 Arbitrator Requirements**).

13.3 Third-Party Funding

Third-party funding is not specifically addressed by Swiss statutory laws or Swiss arbitration law. However, the possibility of third-party funding and its limitations have been confirmed and analysed by the Swiss Federal Tribunal numerous times (decisions of the Swiss Federal Tribunal Nos 131 I 223 and 2C_814/2014).

Third-party funding must not prevent Swiss lawyers from acting in line with the professional rules. As in all other cases, Swiss lawyers must act independently, keep client-related information confidential, and avoid conflicts of interest. In addition, Swiss lawyers must comply with the following limitations for success fee arrangements, which have been highlighted by the Swiss Federal Tribunal in the past (decision of the Swiss Federal Tribunal No 4A_125/2018):

- the fees that are not performance-related must cover the lawyer's costs and include a reasonable profit margin;
- the performance-related fees must not be higher than the fees that are not performance-related; and
- the success fee arrangement must be made either at the beginning or after the completion of the case. During the proceedings, lawyers must not enter into success fee arrangements with their clients.

13.4 Consolidation

Consolidation is not specifically addressed by Swiss arbitration law. Consolidation of compatible proceedings is possible, and usually governed by institutional rules (eg, by Article 7 of the Swiss Rules).

13.5 Binding of Third Parties

Arbitration agreements can extend to non-signatories only in the limited number of situations described in **5.7 Third Parties**.

As a general rule, awards cannot be enforced against any party but the award debtor. Piercing of the corporate veil at the enforcement level is only possible in very exceptional cases that must typically include an abuse of corporate structures.

Trends and Developments

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5Gambit Disputes is an international arbitration and litigation boutique law firm with a unique footprint in the Zurich legal market. 5Gambit Disputes pairs many years of elite law firm experience with a bold, tenacious and conflict-free approach in contentious and regulatory matters. The team comprises prominent lawyers qualified in various jurisdictions and working in English, German, French, Spanish, Italian, Russian and Hebrew. The firm's lawyers act as counsel in complex and high-profile commercial arbitrations across a wide range of industries and conducted under many of the major institutional rules or ad hoc. The team has particularly deep experience in financial, commodities, construction (FIDIC), engineering, mining, and post-M&A/shareholders arbitration. 5 Gambit Disputes' lawyers are regularly instructed in commercial arbitrations in the sports industry in disputes spanning from the organisation of large sports events to sponsorship and media rights-related disputes.

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Switzerland as a Consolidated Arbitration Venue: Key Factors

Switzerland is among the most favoured venues in the world for international arbitration. In 2023, the International Chamber of Commerce (ICC) reported that Geneva and Zurich once again ranked among the top five preferred arbitration seats globally, a recognition that only underscores Switzerland's established and reliable reputation in the field of international arbitration.

In addition, Switzerland is home to the Court of Arbitration for Sport (CAS) in Lausanne, which serves as the highest authority for resolving sports-related disputes globally. Switzerland also hosts the WIPO Center for Arbitration and Mediation.

Several factors account for Switzerland's success, including its political neutrality and stability, the quality of its infrastructure, professional and academic expertise in the field of arbitration and a predictable and reliable legal framework. Not surprisingly, Swiss law consistently ranks as one of the most frequently chosen laws to govern international commercial contracts (second according to the aforementioned ICC 2023 Report).

Switzerland's success as a premier forum for international arbitration is significantly bolstered by its arbitration law. Swiss law distinguishes between domestic and international arbitration through separate statutes. Chapter 12 of the Swiss Private International Law Act (PILA), effective from 1 January 1989, governs international arbitrations seated in Switzerland and is applicable if at least one party to the arbitration agreement had its domicile or habitual residence outside Switzerland at the time of the conclusion of the arbitration agreement. In the sense of a negative distinction, the arbitration is otherwise considered to be domestic and governed by the Third Titel of the Swiss Code of Civil Procedure (CCP), effective from 1 January 2011.

The PILA offers several key advantages, further enhanced by its 2021 reform. This reform, that codified decades of Swiss arbitration case law, clarified and streamlined arbitration procedures, enhancing user-friendliness and efficiency. Key improvements include the express recognition of electronic arbitration agreements and the possibility of submitting briefs in appeal proceedings before the Swiss Federal Tribunal in English, making the process more accessible to international parties. The PILA continues to provide strong enforcement mechanisms for arbitral awards and guarantees confidentiality, protecting the interests of the parties involved.

Another cornerstone of Switzerland's success in international arbitration is the high quality and consistency of the Swiss Federal Tribunal's case law. The Swiss Federal Tribunal, which is the sole appeals instance for arbitral awards, adopts a pro-arbitration stance.

The Swiss Federal Tribunal Case Law Further Strengthens Switzerland's Position as a Leading Arbitration Venue

The decisions of the Swiss Federal Tribunal over the past year have confirmed Switzerland's position as a leading seat for non-ICSID investment arbitration, while at the same time confirming and clarifying its well-established commercial arbitration case law.

Switzerland is a pro-investor seat

Switzerland generally takes a liberal, pro-investment approach to international investment agreements. Several factors account for this stance, including the fact that it is a capital-exporting country (the ninth-largest foreign

investor in the world) and it is heavily dependent on foreign trade.

As a result, in 1986, Switzerland ratified the Washington Convention for the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and the Energy Charter Treaty in 1996 (in force as from 1998) (ECT). Furthermore, Switzerland is party to a significant number of bilateral treaties, ranking just behind China and Germany.

Not surprisingly, Switzerland is frequently chosen as seat for investor-state arbitrations outside of the arbitration proceedings administered under the ICSID Convention and this popularity has increased as evidenced by the number of challenges brought before the Swiss Federal Tribunal over the last few years.

In a landmark decision, published on 2 May 2024 (case number 4A_244/2023 dated 3 April 2024), the Swiss Federal Tribunal took a further step towards consolidating Switzerland as a favourable jurisdiction for investor-state disputes.

The case at hand concerned the acquisition and development of 12 photovoltaic plants in Spain by a French investor. The regulation governing such installations (and providing an attractive feed-in tariff) was replaced by less favourable legislation in terms of remuneration (the fixed feed-in-tariff was ultimately replaced by a "reasonable remuneration regime"). The French investor initiated an arbitration against the Kingdom of Spain on the basis of Article 26 of the Energy Charter Treaty. The dispute was heard by an ad hoc arbitral tribunal in Geneva.

In the context of the proceedings, the Kingdom of Spain raised a jurisdictional objection, mainly based on the case law of the Court of Justice of the European Union (Achmea and Komstroy cases), according to which Article 26 ECT had to be considered incompatible with EU law due to the intra-EU nature of the dispute. The Arbitral Tribunal rejected the jurisdictional objection and the award was ultimately challenged by the Kingdom of Spain before the Swiss Federal Tribunal on the basis of Article 190 (2)(b) of the PILA.

The Swiss Federal Tribunal found that, by signing the ECT, Spain had given its "unilateral consent" to submit disputes with an investor of another Contracting State to international arbitration in accordance with Article 26 ECT.

The Swiss Federal Tribunal held that non-EU States are not bound by EU law and thus, by the findings in the Achmea case (where it was held that EU law was incompatible with an arbitration clause contained in an intra-EU BIT) or in the Komstroy case (where it was held that EU law was incompatible with intra-EU investments arbitrations under the ECT). Hence, in deciding an appeal against an arbitral award issued by a Swiss seated arbitral tribunal, the findings of Achmea and Komstroy are not binding.

The Swiss Federal Tribunal then applied the principles of interpretation set forth in Article 31 of the 1969 Vienna Convention on the Law of Treaties (VCLT) (disregarding the supplementary means of interpretation laid down in Article 32 of the VCLT as requested by Spain) and concluded that the history of the negotiation of the ECT by the EU confirmed the possibility of submitting intra-European disputes to arbitration under Article 26(3)(a) ECT.

Moreover, in applying the rules on the conflict of international treaties set out in Article 30 of the VCLT, the Swiss Federal Tribunal denied that the

European law, and more specifically, the Treaty on the Functioning of the European Union (TFEU) should take precedence over those of the ECT.

In a nutshell, the Swiss Federal Tribunal confirmed that arbitral tribunals seated in Switzerland have jurisdiction over intra-EU disputes based on the ECT, notwithstanding the case law of the Court of Justice of the European Union. This ruling echoes the UK High Court's January 2023 ruling in Infraestructure Services Luxembourg v Spain, [2023] EWHC 1226, which rejected a similar intra-EU objection raised by Spain.

The Swiss Federal Tribunal has underlined that for investors considering intra-EU investments, the choice of dispute resolution before Swiss-based arbitral tribunals remains a safe one, thus reinforcing Switzerland's reputation as an arbitration-friendly jurisdiction.

The Swiss Federal Tribunal continues to strengthen and to clarify its well-established case law

During the past year, the Swiss Federal Tribunal's case law shed some light and the Tribunal further clarified its case law on important issues such as the requirements for the extension of an arbitration clause to third parties, the extent of the principle of separability of the arbitration agreement and the principle of res judicata.

Clarification on the extension of an arbitration clause to third parties

Chapter 12 of the PILA does not address the question of the extension of an arbitration agreement to third parties. Swiss law upholds the principle of privity of contract, which means that arbitration clauses bind only the original parties to the arbitration agreement. However, there are cases where third parties may be bound by an arbitration agreement, such as in cases of succession, assignment of claims, assumption of debts or assignment of contracts. Moreover, an arbitration agreement may be extended to a third party if its participation in the conclusion and/or performance of the underlying contract was such that its consent to be bound by the arbitration agreement is implied. Furthermore, an arbitration agreement entered into by a Swiss general partnership (Articles 552-593 Swiss Code of Obligations ["CO"]) or by a Swiss limited partnership (Articles 594-619 CO) also binds the general partners, who are legally liable for the partnership's obligations in a subsidiary capacity.

In two recent decisions (cases numbers 4A_144/2023 and 4A_146/2023 dated 4 September 2023), the Swiss Federal Tribunal seized the opportunity to clarify and develop its case law in relation to the possible extension of an arbitration agreement to a third party.

Both decisions related to a dispute between a father, his four sons and a group of companies belonging to the father. Several loan agreements and a debt assumption agreement were executed within the group, none of which were drafted, negotiated, or signed by the father or his sons. Nevertheless, both the father and his sons were involved in the conception and execution of the debt assumption agreements, benefited from the funds related to these loan agreements and debt assumptions agreements and intervened at the time of the loan repayment (and in the debt allowance decision).

The Swiss Federal Tribunal found that the question of the actual intention of the parties was a matter of fact, and that it was therefore bound by the findings of the arbitral tribunal that decided on the dispute. Nevertheless, the Swiss Federal Tribunal also held that the facts as described in the challenged award could be interpreted as

an expression of the will of the father and his sons to be bound by the arbitration agreements contained in the debt assumption agreements and the loan agreements.

Clarification on the extent of the separability of the arbitration agreement (in the context of civil incapacity)

Under Swiss law, the autonomy of the arbitration agreement is a well-established principle, expressly recognised in Article 178 (3) PILA, which provides that the validity of an arbitration agreement cannot be challenged on the grounds that the main contract is invalid.

In its decision 4A_148/2023 (on the same facts as the above-mentioned cases 4A_144/2023 and 4A_146/2023), the Swiss Federal Tribunal once again confirmed the separability of the arbitration agreement even in cases where the potential incapacity of the signatory would in principle affect the validity of both the arbitration clause and the main contract.

In this case, the Swiss Federal Tribunal, which examined the father's possible lack of capacity, stated that the capacity to act is a relative concept that requires an individual assessment in relation to a particular act at a specific moment in time. Therefore, it is possible for a party to understand the meaning and scope of a main contract but not an arbitration agreement, and vice versa. The Swiss Federal Tribunal concluded that the arbitral tribunal acted correctly in assessing its jurisdiction by examining the father's capacity to understand only the arbitration clause.

Restrictive approach to the Res Iudicata defence

Despite the absence of a statutory provision on the matter, the Swiss Federal Tribunal held that an award issued by an international arbitral tribunal seated in Switzerland that disregards the preclusive effect of an earlier state court judgment or arbitral award would violate the principle of res judicata and thus the principle of procedural public policy set forth in Article 190(2)(e) PILA (case number 4A_508/2013 of 27 May 2014).

The Swiss Federal Tribunal has traditionally adopted a restrictive approach to the application of the principle of res judicata and the violation of procedural public policy, in relation to the application of the aforementioned principle.

In a recent decision (case number 4A_256/2023 of 6 November 2023), the Swiss Federal Tribunal denied that an arbitral award violated the principle of res judicata by failing to take into account judicial decisions of Ecuadorian courts confirming the authenticity of information concerning a football player in the Ecuadorian civil registry. The Swiss Federal Tribunal reasoned that the subject matter of the proceedings before the Ecuadorian authorities (authenticity of the information in the Ecuadorian registry) was different from the subject matter of the proceedings before the Court of Arbitration for Sport (CAS) (disciplinary proceedings) and involved different parties (the player in the Ecuadorian proceedings and the plaintiff in the CAS arbitration). Therefore, the Swiss Federal Tribunal concluded that the CAS award did not violate the principle of res judicata and thus did not violate procedural public policy under Article 190(2)(e) of the PILA.

New Swiss Law and Rules for Arbitration of Corporate Disputes in Force

Following the 2021 overhaul and modernisation of its arbitration law, Switzerland has not rested on its laurels, but advanced further reforms to

resolve outstanding issues, such as corporate arbitration.

Despite Switzerland's pre-eminent position as a venue for international arbitration, arbitration has rarely been used as a method of resolving corporate disputes in Switzerland.

This limited recourse to arbitration stems, at least in part, from the legal uncertainty surrounding the validity and effect of arbitration clauses in the Articles of Associations (AoA) of Swiss companies. Indeed, it was unclear whether all shareholders of a company had to approve the arbitration clause contained in the AoA and whether minority shareholders were entitled to any special protection. The question of whether shareholders who acquired their shares after an AoA had been approved by the general meeting were bound by such an arbitration clause was also a major concern.

A reform of company law has now resolved this issue with the adoption of a new Article 697n of the CO, which entered into force on 1 January 2023. This provision expressly permits the inclusion of statutory arbitration clauses in the AoA of Swiss corporations, limited partnerships and limited liability companies and, unless the AoA provide otherwise, the company, its corporate bodies, the members of the corporate bodies and the shareholders are bound by such arbitration clauses.

This new article has been complemented by the publication by the Swiss Arbitration Centre of new Supplementary Swiss Rules for Corporate Law Disputes, which contain a model arbitration clause and procedural rules specifically designed to comply with the procedural requirements set forth in Article 697n (the "Supplementary Rules").

The new Article 697n CO contains mandatory requirements that guarantee the validity and effect of arbitration clauses in AoAs and specifically addresses the above-mentioned concerns, namely:

- an arbitration clause included in a company's AoA can only refer disputes to an arbitral tribunal with its seat in Switzerland. This guarantees that the Swiss Federal Tribunal will hear any award based on an arbitration clause featured in a company's AoA;
- any arbitration based on an arbitration clause contained in a company's AoA should be conducted in accordance with Part 3 of the CPC and not Chapter 12 of the PILA. Consequently, the arbitrariness of the award (Article 393e) CPC) could then be reviewed (which is not possible under Chapter 12 of the PILA). Moreover, the parties would not be able to waive their right to challenge the arbitral award;
- in any arbitration proceeding based on an arbitration agreement contained in a company's AoA, the persons who may be directly affected by the legal consequences of the arbitral award should not only be notified of the commencement and conclusion of the proceedings, but should also be able to participate in the appointment of the arbitral tribunal and in the proceedings as intervening parties. It is expected that the company will refer to a specific set of rules (such as the Supplementary Rules) to regulate the specific procedure; and
- pursuant to Article 704(1)(14) CO, the introduction of an arbitration clause in the AoAs requires the approval of at least two-thirds of the votes represented and the majority of the nominal value of shares represented (so-called qualified majority).

Conclusion

Switzerland continues on its roadmap to further modernise and improve its already highly favourable arbitration rules and jurisprudence. Following the ambitious reform of its arbitration law in 2021, Switzerland has addressed further outstanding issues such as corporate arbitration. These efforts are supported by the Swiss Federal Tribunal, which is presenting itself as a safe haven for non-ICSID investment arbitrations, while clarifying and strengthening its well-established and favourable jurisprudence. This should enable Switzerland to continue to compete with emerging jurisdictions that are gaining prominence in arbitration.

TAIWAN

Law and Practice

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Formosa Transnational Attorneys At Law (FT) is one of the largest and most respected law firms in Taiwan and has long been known for its expertise in litigation and arbitration. Three of the founding partners previously served as judges and one served as a prosecutor prior to the establishment of FT in 1974. With an elite team of more than 20 attorneys, FT has been actively handling arbitration cases in connection with disputes involving construction, trade, maritime, energy and offshore wind farms at various reputable arbitration institutions, as well as assisting international and domestic companies regarding the enforcement of foreign and domestic arbitral awards in Taiwan. Recent cases include representing a major power company in an ICC arbitration involving an alleged breach of contract, acting as Taiwanese law expert for a multinational glass manufacturer in an ICC arbitration seated in New York in relation to a stay of a Taiwanese litigation proceeding, and representing an offshore wind farm company to resolve a JV agreement dispute by arbitration at SIAC seated in Singapore.

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1. General

1.1 Prevalence of Arbitration

International arbitration is a widely used form of dispute resolution in Taiwan. In light of the impartiality, efficiency, flexibility and confidentiality of arbitration, an increasing number of parties are choosing arbitration to settle their disputes. This is particularly the case in matters that involve cross-border transactions, large amounts or specialised industries (eg, construction, energy, finance, shipping and maritime, pharmacy, government procurement and labour). In contrast, most domestic and traditional civil disputes tend to be settled by litigation.

Parties that choose arbitration as their dispute resolution mechanism typically include an arbitration clause in their agreement. This arbitration clause may include choices about which arbitration rules to use, the seat of the arbitration, the composition of the arbitral tribunal, the language of the proceedings, and the effect of any arbitral award. In practice, most parties agree in the arbitration clause that the arbitration shall be referred to the Chinese Arbitration Association (CAA) and that the CAA's rules shall be used. Taiwan is usually chosen as the seat.

1.2 Key Industries

Historically, arbitration has been most frequently used by parties in the construction, energy and finance industries. Arbitration is also often used for government procurement cases and international transactions. The common threads running through these disputes are high levels of technical complexity and large sums at stake. Over the past 15 years, an average of 170 cases were arbitrated under the auspices of the CAA each year.

1.3 Arbitration Institutions

There are several arbitral institutions in Taiwan. Some arbitral institutions provide a comprehensive arbitration service across multiple industries (eg, the CAA and the Taiwan Arbitration Association), and others specialise in specific industries (eg, the Chinese Construction Industry Arbitration Association (CCIAA) for construction, the Chinese Real Estate Arbitration Association for real estate, and the Taiwan Assessment and Evaluation Association for sports).

Among these arbitral institutions, the CAA is the most frequently used for international arbitration in Taiwan. Established in 1955, the CAA was the first arbitral institution to have a quasi-judicial function in Taiwan. Known for its professionalism and integrity, the CAA is one of the most reliable arbitral institutions in Taiwan.

In 2018, the CAA opened its first offshore branch in Hong Kong. This was in part a response to the fact that Taiwan is not a contracting state to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (please refer to **12.1 New York Convention**) and also in part an effort to serve the increasing need for international arbitration. The branch's official name is the CAA International Arbitration Centre (CAAI). Through the dual-track system of the CAA and CAAI, parties can choose the CAA as the arbitral institution if the arbitration is seated in Taiwan; if the arbitration is seated outside of Taiwan, they can choose the CAAI as the arbitral institution.

No new arbitral institutions were established in Taiwan during 2022-2023.

1.4 National Courts

While Taiwan has a special court with jurisdiction over intellectual property and significant com-

mercial disputes, no specific courts are designated to hear disputes relating to international or domestic arbitrations. Any such disputes are heard by courts of general jurisdiction.

2. Governing Legislation

2.1 Governing Law

Taiwan Arbitration Act

Taiwan's Arbitration Act is the national legislation that governs arbitration in Taiwan. Based on the UNCITRAL Model Law of 1985 and the Regulation Governing Organization, Mediation Procedures and Fees of Arbitration Institution of 1999, the Arbitration Act regulates arbitration agreements, the composition of arbitral tribunals, arbitration proceedings, the enforcement of arbitral awards, the revocation of arbitral awards, settlement and mediation, and foreign arbitral awards. The Arbitration Act governs international and domestic arbitrations as a unitary system rather than creating separate regimes distinguishing between them.

Divergence From the UNCITRAL Model Law of 2006

Since the Arbitration Act was enacted based on the UNCITRAL Model Law of 1985, and the UNCITRAL Model Law was materially amended in 2006, the Arbitration Act diverges from the UNCITRAL Model Law of 2006 in the following respects:

- Arbitration Procedure: If the parties do not expressly agree on the rules for the arbitration procedure, Article 19 of the Arbitration Act specifies that the arbitral tribunal shall apply the Arbitration Act, and where that Act is silent, the tribunal shall adopt the rules of the Taiwan Code of Civil Procedure mutatis mutandis, or other rules of procedure that the tribunal deems proper. Article 52 of the Arbitration Act provides that a court hearing an arbitration dispute shall apply the Taiwan Non-contentious Matters Law in addition to the Arbitration Act. If the Taiwan court does not find any relevant provisions in either of these two laws, it is required to apply the Code of Civil Procedure mutatis mutandis. The UNCITRAL Model Law of 2006 has no similar provisions regarding applicable arbitration procedures.
- Time Constraints on Notice and Arbitral Decision: Article 21 Paragraph 1 of the Arbitration Act requires the arbitral tribunal to decide the venue and date of hearing and to notify the parties within ten days of receipt of notice of the appointment. This Article further provides that the arbitral tribunal should render an award within six months of the commencement of such arbitration, although one three-month extension is permitted when necessary. The UNCITRAL Model Law of 2006 has no similar provisions controlling the time of notification and arbitral decision.
- Interim Measures: Article 39 Paragraph 1 of the Arbitration Act merely permits the parties to apply to the court for provisional remedies pursuant to the Code of Civil Procedure, but the Arbitration Act does not grant the arbitral tribunal the power to provide interim relief directly to the parties. Nonetheless, Article 28 Paragraph 1 of the Arbitration Act provides that the arbitral tribunal can request necessary assistance from a court or other agencies when it conducts arbitration. In contrast, Article 9 of the UNCITRAL Model Law of 2006 provides that an arbitral tribunal can grant interim measures or a preliminary order to the parties.

2.2 Changes to National Law

The Arbitration Act has not been amended since 2015. Concerned that the Arbitration Act has not been updated to reflect the changes to the UNCITRAL Model Law in 2006, in 2022, the CAA and some legislators proposed a bill to amend the Arbitration Act that would align Taiwan's arbitration regime with international norms. The draft amendments mostly focus on arbitrability, confidentiality of arbitration, party autonomy (eg, composition of arbitral tribunal, applicable law, arbitration procedure and language), withdrawal of arbitrators, the competence-competence principle, the powers of the arbitral tribunal, and reasons for setting aside arbitral awards. The bill is pending a second reading (committee stage) in the Legislative Yuan but it cannot presently be foreseen when it might be debated or passed.

3. The Arbitration Agreement

3.1 Enforceability

Pursuant to Article 1 Paragraphs 3 and 4 of the Arbitration Act, an arbitration agreement must be in writing to be enforceable. The writing requirement can be met by any written document, documentary instrument, correspondence, facsimile, telegram or other similar type of communication between the parties that is sufficient to show the existence of a prima facie arbitration agreement.

3.2 Arbitrability

Pursuant to Article 1 Paragraphs 1 and 2 of the Arbitration Act, the subject matter of arbitration is limited to justiciable matters. For matters that are expressly excluded from arbitration, please refer to **5.1 Matters Excluded From Arbitration**.

3.3 National Courts' Approach

Taiwan's courts respect agreements between parties, whether express or implicit, regarding the applicable law of the arbitration. This is consistent with Taiwan's courts' commitment to the principle of party autonomy. For the enforcement of an arbitration agreement, pursuant to Article 1 Paragraphs 3 and 4 of the Arbitration Act, the court may check first whether the arbitration agreement meets the requirement of being in writing. In the event that a party breaches the arbitration agreement or clause and files litigation to the court, pursuant to Article 4 Paragraph 1 of the Arbitration Act, the court shall, upon application by the adverse party, suspend the litigation and order the plaintiff to submit to arbitration within a specified time, unless the defendant proceeds to respond to the legal action. Pursuant to Paragraph 2 of the same Article, if the plaintiff does not submit to arbitration within the designated period, the court shall dismiss such litigation. Pursuant to Paragraph 3 of the same Article, if the arbitral award is rendered after the suspension of the litigation, such litigation shall be regarded as withdrawn when the arbitral award is rendered. In addition, if a party applies to the court for an interim measure but has not submitted to arbitration, pursuant to Article 39 Paragraph 1 of the Arbitration Act, the court shall, upon the adverse party's request, order such party to submit to arbitration within a designated period. If the party fails to do so, the court may, upon the adverse party's request, set aside such interim measure.

3.4 Validity

Article 3 of the Arbitration Act provides for the severability of an arbitration clause from a principal agreement. The validity of an arbitration clause that forms part of a principal agreement is determined separately from the rest of the principal agreement. The validity of the arbitra-

tion clause is not affected by the nullity, invalidity, revocation, rescission or termination of other parts of the principal agreement.

4. The Arbitral Tribunal

4.1 Limits on Selection

The Arbitration Act sets forth the qualifications of arbitrators (see below), but it does not further restrict the parties' autonomy to select arbitrators. Parties can agree on the appointment of arbitrators, the method of appointment, and any special qualifications for the arbitrators. Pursuant to Article 16 Paragraph 1 of the Arbitration Act, any party may apply for recusal of an arbitrator if the arbitrator lacks any of the qualifications agreed upon by the parties or if one of the circumstances listed in Article 15 Paragraph 2 of the Arbitration Act (eg, lack of impartiality) applies to the arbitrator.

Qualifications of Arbitrators

The Arbitration Act sets forth the qualifications of arbitrators in Articles 5 to 8. Arbitrators must be individuals. Pursuant to Article 6 of the Arbitration Act, professionals who have legal and other knowledge or experience, a reputation for integrity and impartiality, and have one of the following qualifications can serve as arbitrators:

- having served as a judge or public prosecutor;
- having practised for more than five years as a lawyer, accountant, architect or engineer or in any other commerce-related profession;
- having acted as an arbitrator of a domestic or foreign arbitration institution;
- having taught as an assistant professor or higher in a domestic or foreign university or college accredited by the Ministry of Education; or
- being a specialist in a particular field or profession and having practised for more than five years.

Registration for Arbitrators in Arbitration Institutions

In addition to the aforementioned qualifications, Article 8 of the Arbitration Act requires professionals to receive training and obtain a certificate before applying to an arbitration institution for registration as an arbitrator unless they have one of the following qualifications:

- having served as a sitting judge or prosecutor;
- having practised as a lawyer for more than three years;
- having taught at the law school of a domestic or foreign university or college accredited by the Ministry of Education as a professor for two years, or as an associate professor for three years, as well as having taught major legal courses for not less than three years; or
- having been registered as an arbitrator in any arbitration institution prior to the effectiveness of the 2002 amendment of the Arbitration Act, and acted in practice as an arbitrator in a dispute.

The aforementioned requirements are not applied in ad hoc arbitrations.

Disqualification of Arbitrators

Article 7 of the Arbitration Act prescribes the conditions for disqualification of an arbitrator. A person cannot act as an arbitrator:

- where the person has been convicted of a criminal offence for corruption or malfeasance;
- where the person has been convicted of any offence other than those in the preceding cat-

egory and sentenced to serve a prison term of one year or more;
- where the person has been deprived of public rights, and the period of deprivation has not expired;
- where the person has been announced bankrupt and has not recovered his or her property rights;
- where the person has become subject to a guardianship order and the order has not been cancelled; or
- where the person is a minor (ie, under the age of 18).

4.2 Default Procedures

Articles 9 to 12 of the Arbitration Act prescribe the appointment of arbitrators and composition of the arbitral tribunal.

Silence on Appointment of Arbitrators

Pursuant to Article 9 Paragraph 1 of the Arbitration Act, if the parties do not agree on the appointment of an arbitrator or the method of such appointment in an arbitration agreement, each party shall appoint an arbitrator for itself. Then, the appointed arbitrators shall jointly designate a third arbitrator to be the presiding arbitrator of the arbitral tribunal, and the arbitral tribunal shall notify the parties of the final appointment in writing. Pursuant to Paragraph 2 of the same Article, if the presiding arbitrator cannot be decided after 30 days of appointment of arbitrators by the parties, the parties may apply to the court to appoint the presiding arbitrator.

Arbitration by Sole Arbitrator

In the event that the parties agree to arbitration by a sole arbitrator, one party may send a written request for the appointment of the arbitrator to the other party. Pursuant to Article 9 Paragraphs 3 and 4 of the Arbitration Act, if both parties cannot reach agreement regarding such appointment within 30 days from receipt of such request, one of the parties can apply to the court to appoint an arbitrator. Under the aforementioned circumstance, if both parties have agreed that the arbitration will be conducted by an arbitration institution, the chosen arbitration institution appoints the arbitrator.

Arbitration by an Arbitral Tribunal (Multiple Arbitrators)

In the event that the parties agree to arbitration by an arbitral tribunal (composed of multiple arbitrators), each party shall appoint an arbitrator. Then, the appointed arbitrators shall jointly designate a third arbitrator to be the presiding arbitrator of the arbitral tribunal, and the arbitral tribunal shall notify the parties of the final appointment in writing. Pursuant to Articles 11 and 12 of the Arbitration Act, if one party has already appointed an arbitrator, such party can notify the other party in writing to appoint its arbitrator within 14 days of receipt of such notification. If the receiving party fails to do so, the notifying party may apply to the court or the chosen arbitration institution to appoint the arbitrator.

Arbitration by Multi-Parties

Pursuant to Article 9 Paragraph 5 of the Arbitration Act, if there are numerous individuals in either party, and that party is unable to agree on the appointment of an arbitrator, the appointment shall be made by a majority vote. In the event of a tie, the appointment shall be made by drawing lots. For the arbitration of more than two parties, the Arbitration Act does not prescribe special regulations on the appointment of the arbitrator and the composition of the arbitral tribunal.

4.3 Court Intervention

Generally speaking, the courts respect party autonomy and will not intervene in the selection of arbitrator(s). However, the court may appoint arbitrator(s) upon a party's request in the following situations:

Inaction or Delay of the Parties or the Arbitration Institution

Pursuant to Article 12 of the Arbitration Act, if one party or the chosen arbitration institution does not appoint an arbitrator within the designated period, the other party can apply to the court to appoint the arbitrator.

Inability of Arbitrators to Duly Perform Arbitration

Pursuant to Article 13 of the Arbitration Act, in the event that the arbitrator agreed to by the parties cannot perform the arbitration as a result of death or any other cause, or because the arbitrator refuses to conduct the arbitration or unreasonably delays the arbitration, the parties may agree to replace the arbitrator. If the parties cannot reach an agreement on a replacement, the court may, upon a party's request, appoint a new arbitrator. If the arbitrator appointed by one party cannot duly perform the arbitration for one of the aforementioned reasons, the other party may request such party to appoint another arbitrator within 14 days of receipt of such request. If the obliged party fails to do so, the requesting party may apply to the court to appoint a new arbitrator.

Court May Appoint the Arbitrator Upon the Parties' Request or of Its Own Volition

If the arbitrator appointed by the arbitration institution or the presiding arbitrator cannot hear the arbitration pursuant to Article 13 Paragraph 1 of the Arbitration Act (death, refusal or undue delay), the court may, upon the parties' request or of its own volition, appoint a new arbitrator or a new presiding arbitrator.

4.4 Challenge and Removal of Arbitrators

Pursuant to Articles 16 and 17 of the Arbitration Act, if an arbitrator does not possess the qualifications agreed by the parties, or if one of the statutory circumstances prescribed in Article 15 Paragraph 2 applies to the arbitrator (ie, a conflict of interest), the parties may file a request in writing to the arbitral tribunal for withdrawal of such arbitrator within 14 days of their knowledge of the basis for such withdrawal. The arbitral tribunal shall decide on the withdrawal within ten days. For the statutory circumstances prescribed in Article 15 Paragraph 2 of the Arbitration Act, please refer to **4.5 Arbitrator Requirements**.

4.5 Arbitrator Requirements

Article 15 Paragraph 1 of the Arbitration Act prescribes that arbitrators have obligations of independence, impartiality and confidentiality. Moreover, Paragraph 2 of the same article lists the circumstances in which an arbitrator is required to immediately disclose the details thereof to the parties:

- the existence of any of the causes that, mutatis mutandis, would require a judge to withdraw from a judicial proceeding in accordance with Article 32 of the Code of Civil Procedure;
- the existence or history of an employment or agency relationship between the arbitrator and a party;
- 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; or
- the existence of any other circumstances which raise any justifiable doubts as to the impartiality or independence of the arbitrator.

These circumstances may create conflicts of interest or potential conflicts of interest between the arbitrator and the parties, or they may raise justifiable doubts as to the impartiality or independence of the arbitrator. Pursuant to Articles 16 and 17 of the Arbitration Act, if one of these situations applies to an arbitrator, the parties can request the arbitral tribunal to remove the arbitrator. Please refer to **4.4 Challenge and Removal of Arbitrators**.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

A matter may not be referred to arbitration if it relates to an exclusive power of the state, the public interest, or public policy such that it is not justiciable. To be more specific, criminal cases, family cases regarding marriage, family relations and inheritance, and disputes over the validity of patents and trademarks lack arbitrability.

5.2 Challenges to Jurisdiction

Taiwan recognises the principle of competence-competence. Article 22 of the Arbitration Act prescribes that the arbitral tribunal shall decide an objection raised by a party as to the scope of such arbitral tribunal's authority. That is to say, the arbitral tribunal can rule on the existence of the arbitration agreement, the validity of arbitration agreement, and whether the dispute is within the scope of the arbitration agreement. By deciding these issues, the arbitral tribunal decides competence issues itself.

In practice, the Supreme Court and the Taiwan High Court have mentioned this issue in the rationale of judgments on actions to set aside arbitral awards. It can be inferred from the rationale of these judgments that the courts recognise that the arbitral tribunal can determine itself whether it has competence with respect to the dispute.

Please note that Article 22 provides that a party may not object to the arbitral tribunal's jurisdiction if it has submitted its statement of defence regarding the subject matter of the dispute. This is to protect the integrity of the proceedings and arises from parties' duty to raise objections in a timely manner.

5.3 Circumstances for Court Intervention

The courts may address the issue of jurisdiction of the arbitral tribunal when the parties file litigation to set aside an arbitral award. Pursuant to Article 40 Paragraph 1 Subparagraphs 2 and 4 of the Arbitration Act, one party may file litigation to set aside an arbitral award in the following circumstances: (i) the arbitration agreement is null, invalid or has yet to come into effect or has become invalid prior to the conclusion of the arbitral proceedings; or (ii) the composition of the arbitral tribunal or the arbitral proceedings is contrary to the arbitration agreement or the law. In these cases, the courts examine whether the arbitral tribunal had competence for the arbitration and whether the rulings on jurisdiction by the arbitral tribunal were correct.

If the arbitral tribunal decides that it does not have competence for such arbitration and rejects the request for arbitration, the court can rule on whether the arbitral tribunal had competence or not. If the court decides that the arbitral tribunal is in fact competent but the arbitration is contrary to the arbitration agreement, the court can set aside the arbitral award based on Article 40 Paragraph 1 Subparagraph 4 of the Arbitration Act.

In the absence of the aforementioned circumstances, the courts tend not to intervene.

5.4 Timing of Challenge

The parties to an arbitration can challenge the jurisdiction of the arbitral tribunal in the courts only by filing litigation to set aside the arbitral award. Please refer to **5.3 Circumstances for Court Intervention**.

The subject matter of the litigation to set aside an arbitral award must be a final arbitral award. No action to set aside an interlocutory arbitral award will be heard. In practice, the Taiwan High Court has rendered a judgment holding that the parties can file litigation to set aside a final arbitral award but not an interlocutory arbitral award. Even if the arbitral tribunal renders an interlocutory arbitral award on the issue of jurisdiction, the parties cannot file litigation to set it aside. Thus, the time for the parties to challenge the jurisdiction of the arbitral tribunal through the court comes only after the final arbitral award has been rendered.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The courts can independently examine the existence, validity and scope of the arbitration agreement and the arbitrability of the subject matter de novo to address the admissibility and jurisdiction of arbitration regardless of the rulings of the arbitral tribunal on these matters.

5.6 Breach of Arbitration Agreement

Pursuant to Article 4 Paragraph 1 of the Arbitration Act, if a party breaches the arbitration agreement or clause and directly files litigation to the court, the court shall, upon application by the adverse party, suspend the litigation and order the plaintiff to submit to arbitration within a specified time, unless the defendant proceeds to respond to the legal action. Pursuant to Paragraph 2 of the same Article, if the plaintiff does not submit to arbitration within the designated period, the court shall dismiss such litigation. Pursuant to Paragraph 3 of the same Article, if the arbitral award is rendered after the suspension of the litigation, such litigation shall be regarded as withdrawn as of the date on which the arbitral award was rendered.

5.7 Jurisdiction Over Third Parties

It is not stipulated in the Arbitration Act that the arbitral tribunal can assume jurisdiction over a party other than the contracting parties of the arbitration agreement. The jurisdiction of arbitration in principle only covers the contracting parties to the arbitration agreement. However, there are exceptions that may extend the jurisdiction of arbitration and the effect of the arbitral award to a third party in practice.

A Third Party Succeeds to the Arbitration Agreement

Firstly, if a third party succeeds to the rights and obligations of the arbitration agreement (whether in the form of an arbitration clause within a principal agreement or a separate arbitration agreement) by assignment, inheritance, insolvency administration, subrogation or any other statutory means, the succeeding party shall bear the rights and obligations of such arbitration so that the jurisdiction of such arbitration and the effect of the arbitral awards may be extended to the succeeding party. Please note that, under this circumstance, the key issues in the jurisdiction of arbitration are whether the third party has succeeded to the arbitration agreement and whether the succeeded arbitration agreement covers the subject matter at issue.

Third-Party Intervention

Secondly, a third party may intervene in arbitration proceedings. Pursuant to Article 19 of the Arbitration Act, if the Arbitration Act is silent on a matter, the arbitral tribunal may apply the

Code of Civil Procedure mutatis mutandis or other rules of procedure that it deems proper. The legal practice in Taiwan based on this provision is to adopt the rules for third-party intervention prescribed in Articles 58 to 67-1 of the Code of Civil Procedure mutatis mutandis to the arbitration. To be more specific, if the third party has a legal interest in the subject matter of the arbitration, it may request the arbitral tribunal to permit it to intervene in the arbitration as an intervener. If approved to intervene, the third party shall intervene in the procedure of the arbitration accordingly and shall be bound by the arbitral award. This practice has been recognised in actual cases by the Supreme Court.

Other Doctrines Are Not Applied in Taiwan

To respond to modern disputes of high complexity and with multiple parties, international arbitration has developed a number of doctrines and theories to deal with the legal standing of third parties in arbitration (eg, the "group of companies doctrine" developed from the doctrine of "piercing the corporate veil"). Nonetheless, the Arbitration Act has not incorporated these doctrines and theories so far, and Taiwan's courts and arbitrators have thus far not formed stable views on these issues.

6. Preliminary and Interim Relief

6.1 Types of Relief

The Arbitration Act does not expressly provide that an arbitral tribunal in Taiwan can grant interim or preliminary relief, but there are corresponding or similar provisions in the Arbitration Rules of the CAA, the CAAI and the CCIAA.

Arbitration Rules of the CAA and CCIAA

The Arbitration Rules of the CAA and CCIAA adopt a concise regime for this issue. Pursuant to Article 36 Paragraph 1 of the CAA Arbitration Rules and Article 43 of the CCIAA Arbitration Rules, the arbitral tribunal may, at the request of either party, take any interim measures as agreed by the parties in respect to the subject matter of the dispute for purposes of preserving perishable goods or providing immediate protection, such as ordering their sale, custody by a third party, or other interim measures deemed necessary. Paragraph 2 of Article 36 of the CAA Arbitration Rules further prescribes that, in the aforementioned circumstances, the arbitral tribunal may record the terms of settlement pursuant to Article 44 of the Arbitration Act and order the claimant to make advance payment for carrying out the measures.

Arbitration Rules of the CAAI

Harmonised with the UNCITRAL Model Law of 2006, the Arbitration Rules of the CAAI regulate this issue with more comprehensive norms. Pursuant to Article 26 of the CAAI Arbitration Rules:

- The parties may apply to an emergency arbitrator for emergency measures before the arbitral tribunal's constitution.
- The parties may apply to the arbitral tribunal for interim measures for the conduct prescribed in Paragraph 3 of the same Article (such as maintaining or restoring the status quo, taking action to prevent or refraining from taking action likely to cause harm or prejudice to the arbitral process, and so on) and the arbitral tribunal may grant interim measures in any form before the final arbitral award is rendered.
- The arbitral tribunal may require the requesting party to provide appropriate security in connection with the measures.
- The arbitral tribunal may modify, suspend or terminate any measure it has granted upon any party's request, or on the arbitral tribu-

nal's own initiative with advance notice to the parties in exceptional circumstances.

6.2 Role of Courts

Interim and Preliminary Measures by the Courts

Regarding the role of the courts for interim and preliminary measures in the arbitration, Article 39 Paragraph 1 of the Arbitration Act approves party applications to the court for interim relief pursuant to the Code of Civil Procedure. Moreover, Article 28 Paragraph 1 of the Arbitration Act prescribes that the arbitral tribunal can request necessary assistance from a court or other agencies in the course of arbitration. If the applicable arbitration rule does not regulate the preservation of evidence, the party may use Article 19 of the Arbitration Act and Article 368 of the Code of Civil Procedure to apply to the courts to grant interim and preliminary measures. Please refer to **2.1 Governing Law**.

Emergency Arbitrators

The Arbitration Act and other national legislation do not set forth provisions for emergency arbitrators. However, the CAAI Arbitration Rules prescribe relevant provisions in Article 26 and Schedule 1 thereto.

6.3 Security for Costs

Neither the Arbitration Act nor the Regulation Governing Organization, Mediation Procedures and Fees of Arbitration Institution ("Regulation") sets forth rules on security for the cost of arbitration. Chapter 4 of the Regulation prescribes the costs of arbitration. Pursuant to Article 25 Paragraph 4 of the Regulation, in case an applicant fails to pay the arbitration cost prescribed in Paragraph 1 of the same Article, the arbitration institution shall order the applicant to make such payment within a specified time period. If the applicant fails to pay it in accordance with the order, the arbitration institution may dismiss the application.

7. Procedure

7.1 Governing Rules

The Arbitration Act provides for the fundamental procedural rules of arbitration seated in Taiwan. For example, Article 18 sets out the required steps to initiate arbitration. Article 19 permits party autonomy by allowing the parties to agree on which rules of procedure shall apply to the arbitration of their dispute. In cases without a mutual agreement on procedure, the Arbitration Act empowers the tribunal to proceed with the arbitration in accordance with the Code of Civil Procedure or any other procedures that the tribunal deems appropriate.

7.2 Procedural Steps

Chapter III of the Arbitration Act prescribes the basic procedural steps for arbitration in Taiwan, including initiation of the arbitration by written notice (Paragraph 1 Article 18), objections to jurisdiction (Article 22) and appointment of counsel (Article 24).

In addition, the CAA Arbitration Rules set out further details of the procedural steps for arbitration. In our experience, the CAA Arbitration Rules are widely acknowledged as the prevailing set of rules utilised for arbitrations conducted in Taiwan.

A party wishing to request arbitration administered by the CAA shall make an advance payment and submit the following documents:

- the Request for Arbitration and copies thereof for each of the arbitrators and the other parties;

- copies of the arbitration agreement or the contract containing an arbitration clause;
- the Power of Attorney, if a representative is appointed; and
- Arbitrator Statement by any appointed arbitrator, including their name and their domicile or residence and any circumstances to be disclosed by the appointed arbitrator.

7.3 Powers and Duties of Arbitrators

The duties of arbitrators are defined in the Arbitration Act. Article 15 provides that the arbitrators have:

- the duty to act independently and impartially;
- the duty to uphold the principle of confidentiality; and
- the duty to disclose any matter relating to conflicts of interest and other matters.

Please refer to **4.1 Limits on Selection** and **4.5 Arbitrator Requirements**.

With respect to the powers of arbitrators, the Arbitration Act grants the arbitral tribunal the power to rule on its own jurisdiction (Article 22), summon witnesses or expert witnesses (Article 26), request assistance from the court (Article 28) and render an arbitral award (Article 33).

7.4 Legal Representatives

The Arbitration Act does not establish any requirements or restrictions for the parties' legal representatives. The parties have the discretion to appoint foreign law firms or law practitioners to act as their legal representatives in an international arbitration seated in Taiwan. Nonetheless, Taiwan's Attorney Act requires individuals to be licensed in Taiwan to act in domestic legal matters. Thus, a Taiwan-qualified lawyer may be required if the arbitration is wholly focused on domestic matters without the involvement of foreign parties.

8. Evidence

8.1 Collection and Submission of Evidence

As aforementioned, the parties to an arbitration have the discretion to agree upon procedural rules, including the rules for the collection and submission of evidence. In the absence of agreed rules of evidence, the tribunal will generally follow the rules of evidence stipulated in the Code of Civil Procedure. Under the Code of Civil Procedure, each party is generally responsible for collecting and submitting its evidence to the court/tribunal before the final oral hearing.

Due to Taiwan's status as a civil law jurisdiction, its Code of Civil Procedure does not contain rules of discovery. Consequently, discovery procedures are rare in Taiwan arbitration proceedings administered by the CAA, particularly when the arbitral tribunal is made up of arbitrators with civil law backgrounds, as is typically the case.

8.2 Rules of Evidence

As aforementioned, the Arbitration Act permits the parties to decide on their preferred arbitration procedures. Their agreement on procedure may govern what rules of evidence apply. In practice, the CAA Arbitration Rules are most commonly adopted. Article 24 of the CAA Arbitration Rules states that the parties shall make submissions on facts and laws, and present relevant evidence to the tribunal. The parties are also required to respond and answer submissions and evidence presented by the other party. Pursuant to Article 27, a party can submit an application to allow witnesses or expert witnesses to testify at the hearings. It is also common in some of the arbi-

tration proceedings to adopt the IBA Rules on the Taking of the Evidence in International Arbitration.

8.3 Powers of Compulsion

The Arbitration Act provides that an arbitral tribunal has the power to summon witnesses or expert witnesses to appear for questioning. However, the tribunal does not have the power to compel a witness to appear or a party to produce evidence. Nonetheless, the tribunal may apply for a court order to compel a witness to appear and petition the court to authorise the tribunal to exercise the power of investigation under Article 28 of the Arbitration Act.

9. Confidentiality

9.1 Extent of Confidentiality

Pursuant to Article 23 of the Arbitration Act, arbitral proceedings are confidential. Each arbitrator has a duty to maintain confidentiality. The arbitral proceedings shall not be made public, unless the parties have agreed otherwise.

10. The Award

10.1 Legal Requirements

The requirements for an arbitral award are stipulated in Article 33 Paragraphs 2 and 3 of the Arbitration Act.

These requirements include:

- identifying the parties;
- identifying any interpreters involved;
- setting out the main text of the award along with relevant facts and reasons unless the parties have agreed otherwise;
- noting the date and place of the rendering of the award; and
- having the original copy of the award signed by the arbitrator(s) who heard the dispute.

Pursuant to Article 33 Paragraph 1 of the Arbitration Act, an arbitral tribunal is required to issue an arbitral award within ten days after the conclusion of the hearings. This award should address the claims raised by the parties and the issues brought forward.

10.2 Types of Remedies

There are no limitations on the types of remedies that an arbitral tribunal may award. Nonetheless, the tribunal will take into account the governing law of the arbitration agreement and the laws of the jurisdiction where the recognition and enforcement of the award might take place ("Enforcement Laws") to decide what kinds of remedies should be awarded. In particular, if the Enforcement Laws prohibit enforcing a certain remedy in the context of arbitration, the tribunal will generally not award such remedy.

10.3 Recovering Interest and Legal Costs

Interest

Parties are entitled to recover interest in Taiwan. In general, the tribunal will apply the interest rate agreed to by the parties to the arbitration so long as the interest rate is not contradictory to the governing law of the arbitration agreement and the Enforcement Laws. If the governing law is Taiwanese law, the default interest rate is 5% per annum pursuant to Article 207 of the Civil Code.

Legal Costs

While the parties are free to agree on the rules governing the allocation of legal costs, in the absence of such rules, the arbitration fees are borne by the losing party (Article 78 of the Code

of Civil Procedure). For attorney fees, Taiwan follows the US rule whereby each party pays its own attorney fees incurred for litigation unless stipulated otherwise in the contract between the parties.

11. Review of an Award

11.1 Grounds for Appeal

Parties are not allowed to appeal an award seated in Taiwan since the award is final and binding upon the parties to the arbitration proceedings. Nonetheless, an arbitral award may be set aside pursuant to Article 40 Paragraph 1 of the Arbitration Act. The grounds for setting aside an award are as follows:

- The arbitral award concerns a dispute not contemplated by the terms of the arbitration agreement, or exceeds the scope of the arbitration agreement, unless the offending portion of the award may be severed and the severance will not affect the remainder of the award.
- The reasons for the arbitral award were not stated, as required, unless the omission has been corrected by the arbitral tribunal.
- The arbitral award directs a party to act contrary to the law.
- The arbitration agreement is null, invalid, or has yet to come into effect or became invalid prior to the conclusion of the arbitral proceedings.
- The arbitral tribunal fails to give any party an opportunity to present its case prior to the conclusion of the arbitral proceedings, or any party is not lawfully represented in the arbitral proceedings.
- The composition of the arbitral tribunal or the arbitral proceedings is contrary to the arbitration agreement or the law.
- An arbitrator fails to fulfil the duty of disclosure prescribed in Article 15 Paragraph 2 of the Arbitration Act 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.
- An arbitrator violates any duty in the entrusted arbitration and such violation carries criminal liability.
- A party or any representative has committed a criminal offence in relation to the arbitration.
- Any evidence or the content of any translation upon which the arbitration award relies has been forged or fraudulently altered or contains any other misrepresentations.
- A judgment of a criminal or civil matter, or an administrative ruling upon which the arbitration award relies, has been reversed or materially altered by a subsequent judgment or administrative ruling.

Please note that the set-aside procedure is subject to appeal and therefore may go up to the court of the third instance. Nonetheless, the Taiwan courts tend to review the grounds for setting aside quite narrowly.

11.2 Excluding/Expanding the Scope of Appeal

The Arbitration Act neither permits nor prohibits the parties from agreeing to exclude or expand the scope of appeal or challenge. There are no Taiwan judgments on this point though.

11.3 Standard of Judicial Review

The Taiwan court does not review the merits or any other substantive elements of the award. It will only review the procedural matters stated in Article 40 of the Arbitration Act as grounds for setting aside an arbitral award.

12. Enforcement of an Award

12.1 New York Convention

Taiwan is currently not a contracting state to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"). Nevertheless, its Arbitration Act is designed to align with the Convention. This is to ensure that Taiwan has an arbitration system that meets international standards and produces arbitral awards that can be enforced domestically and internationally.

12.2 Enforcement Procedure

Order of Enforcement

Pursuant to Article 37 Paragraph 1 of the Arbitration Act, an arbitral award shall have the same effect as a final and irrevocable court judgment on the parties. In other words, an arbitral award can be compulsorily enforced by the court under the Arbitration Act.

To enforce an arbitral award, the winning party must apply for and obtain a court order for the award to be enforced under Article 37 Paragraph 2 of the Arbitration Act.

Enforcement of Foreign Arbitral Awards

For an award made or seated outside Taiwan, or issued pursuant to foreign laws within the territory of Taiwan ("Foreign Arbitral Award"), the winning party must file an application to the court for the recognition of such award pursuant to Article 47 Paragraph 2 of the Arbitration Act. After recognition by the court, the Foreign Arbitral Award shall have the same effect as a domestic arbitral award per Article 37 Paragraph 1 of the Arbitration Act mentioned previously and is subject to compulsory enforcement.

Please note that to apply for recognition of the Foreign Arbitral Award, the party must furnish the following documents:

- the original arbitral award or an authenticated copy thereof;
- the original arbitration agreement or an authenticated copy thereof; and
- the full text of the foreign arbitration law and regulation, the rules of the foreign arbitration institution or the rules of the international arbitration institution which applied to the Foreign Arbitral Award.

Grounds for Non-enforcement and Grounds for Non-recognition of Foreign Arbitral Awards

The losing party may challenge enforcement of an award based on the following grounds (Article 38 of the Arbitration Act):

- The arbitral award concerns a dispute not contemplated by the terms of the arbitration agreement, or exceeds the scope of the arbitration agreement, unless the offending portion of the award may be severed and the severance will not affect the remainder of the award.
- The reasons for the arbitral award were not stated, as required, unless the omission was corrected by the arbitral tribunal.
- The arbitral award directs a party to act contrary to the law.

The losing party may challenge recognition of a Foreign Arbitral Award based on the following grounds (Articles 49 and 50 of the Arbitration Act):

- The recognition or enforcement of the arbitral award would be contrary to the public order or good morals of Taiwan.

- The dispute is not arbitrable under the laws of Taiwan.
- The arbitration agreement is invalid as a result of the incapacity of a party according to the law chosen by the parties to govern the arbitration agreement.
- The arbitration agreement is null and void according to the law chosen to govern said agreement or, in the absence of choice of law, the law of the country where the arbitral award was made.
- A party was not given proper notice, whether of the appointment of an arbitrator, or of any other matter required in the arbitral proceedings, or any other situations which give rise to lack of due process.
- The arbitral award is not relevant to the subject matter of the dispute covered by the arbitral agreement or exceeds the scope of the arbitration agreement, unless the offending portion can be severed from and not affect the remainder of the arbitral award.
- The composition of the arbitral tribunal or the arbitration procedure contravened the arbitration agreement or, in the absence of an arbitration agreement, the law of the place of the arbitration.
- The arbitral award is not yet binding upon the parties or has been suspended or revoked by a competent court.
- The seat of the award does not recognise arbitral awards seated in Taiwan.

Please note that grounds for non-enforcement and grounds for non-recognition of Foreign Arbitral Awards are interpreted and reviewed quite narrowly by the court. In other words, the Taiwan court will generally recognise and enforce an award.

It is worth noting that a recent decision by the Taiwan Supreme Court has interpreted Article 47 Paragraph 1 of the Arbitration Act, stating that "foreign law" includes foreign arbitration regulations, the arbitration rules of foreign arbitration institutions, and the arbitration rules of international organisations. The decision also concluded that the lawsuit for setting aside an arbitration award is limited to "domestic arbitration awards" and does not include foreign arbitration awards. Under this interpretation, the Taiwan court may refuse to set aside arbitration awards made according to the rules of foreign arbitration institutions in Taiwan.

The Arbitration Act does not provide any stipulation with respect to state immunity as a ground for refusing recognition or enforcement of an arbitral award. There are also no cases shown in the publicly available record in which a party successfully challenged the recognition or enforcement of an award based on state immunity.

Nonetheless, pursuant to Article 5 Paragraph 4 of the Act Governing the Privileges and Immunities for Foreign Institutions and Their Staff Stationed in Taiwan, any official foreign institutions and their personnel approved to be stationed in Taiwan are generally immune from any civil, criminal and administrative proceedings, except when the subject matter of the dispute is commercial in nature. Hence, it is unlikely that any official foreign institutions or their personnel could successfully challenge the recognition or enforcement of an award based on state immunity in the case of international commercial arbitration.

12.3 Approach of the Courts

Unless the Taiwan court has substantial concerns about the arbitral award as specified in Article 38 of the Arbitration Act, the Taiwan court would tend to recognise and enforce a domestically rendered award. In regard to Foreign Arbi-

tral Awards, as stated in Article 49, the Taiwan court may refuse to recognise a Foreign Arbitral Award that is rendered in a country that does not recognise arbitral awards rendered in Taiwan or is contrary to the public order or good morals of Taiwan.

13. Miscellaneous

13.1 Class Action or Group Arbitration

The Arbitration Act does not contain provisions that govern class-action arbitration or group arbitration. As at the time of writing, no class-action or group arbitration has been initiated at the CAA. This does not imply that class-action arbitration or group arbitration is prohibited.

Class-action arbitration is permitted for an arbitration initiated by investors against a company to protect those investors from financial distress per the Rules Governing Class-Action Litigation or Arbitration Handled by the Securities and Futures Investors Protection Center.

13.2 Ethical Codes

The Arbitration Act provides basic requirements for arbitrator qualification addressing their character, finances, criminal records, conflicts of interest, and age. If the arbitrating parties adopt the CAA Arbitration Rules for their arbitration, party counsel and arbitrators are bound by the CAA Code of Ethics for Arbitrators.

13.3 Third-Party Funding

Currently, there are no relevant provisions with respect to third-party funding in the Arbitration Act. However, the Taiwanese legislature and academics are aware of the widespread global acceptance of third-party funding, especially in commercial and investment treaty arbitration.

13.4 Consolidation

The Arbitration Act is silent on the consolidation of arbitration and there is no public record of Taiwan court granting consolidation of arbitration. However, the international branch of the CAA, the CAAI, has provided relevant rules. Those rules state that a tribunal can approve a proposed consolidation if it assesses that:

- the parties have agreed to the consolidation;
- the claims in the arbitrations are made under the same arbitration agreement; or
- the claims in the arbitrations are made under multiple but compatible arbitration agreements between the same or related parties, which involve common questions of law or fact, and the remedy or relief claimed arises out of the same transaction or series of transactions.

13.5 Binding of Third Parties

To assess whether a third party can be bound by an arbitration agreement or award, please refer to **5.7 Jurisdiction Over Third Parties**.

Trends and Developments

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Formosa Transnational Attorneys At Law (FT) is one of the largest and most respected law firms in Taiwan and has long been known for its expertise in litigation and arbitration. Three of the founding partners previously served as judges and one served as a prosecutor prior to the establishment of FT in 1974. With an elite team of more than 20 attorneys, FT has been actively handling arbitration cases in connection with disputes involving construction, trade, maritime, energy and offshore wind farms at various reputable arbitration institutions, as well as assisting international and domestic companies regarding the enforcement of foreign and domestic arbitral awards in Taiwan. Recent cases include representing a major power company in an ICC arbitration involving an alleged breach of contract, acting as Taiwanese law expert for a multinational glass manufacturer in an ICC arbitration seated in New York in relation to a stay of a Taiwanese litigation proceeding, and representing an offshore wind farm company to resolve a JV agreement dispute by arbitration at SIAC seated in Singapore.

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The Chinese Arbitration Association (CAA) is Taiwan's foremost and most influential institution in resolving international arbitration disputes. Established to promote the fair and efficient resolution of cross-border conflicts, the CAA plays a pivotal role in shaping Taiwan's arbitration landscape.

In 2019, the CAA introduced the CAA Case Management Conference Guidelines, marking a significant regulatory update to enhance procedural clarity and efficiency in arbitration proceedings across Taiwan. These guidelines, incorporated into Article 4 of the CAA Arbitration Rules, provide essential procedural recommendations to arbitrators. Despite being institution-level rules, their adoption carries substantial weight due to the CAA's prominence and popularity within Taiwan's arbitration community. Although published in 2019, the adoption of these guidelines has been increasingly observed in recent years. Although the CAA personnel do not have the exact percentage of cases that adopt the guidelines, they have observed a trend: cases with foreign arbitrators are more likely to use such guidelines.

Furthermore, the CAA notes that calculating the adoption rate is challenging because some cases adopt the guidelines in their entirety, while others only partially adopt them. For instance, some cases may arrange a case management conference but do not use the terms of reference. It is anticipated to influence the route of arbitration practices in Taiwan, potentially setting new trends in procedural standards.

The Case Management Conference Guidelines offer a structured framework for managing arbitration proceedings, fostering mutual understanding, and ensuring the commitment of arbitration parties and tribunals. Through collaborative dialogue, tribunal members and disputing parties deliberate and finalise crucial elements to be incorporated into the terms of reference. This contractual instrument, signed by the parties and the arbitrators after the arbitral tribunal is constituted, defines the dispute clearly and evidences the parties' agreement on procedural matters. Formalising these agreements through signatures reinforces collective adherence to procedural guidelines and builds confidence in arbitration.

This trend underscores the growing recognition of the CAA's efforts to align with international standards and enhance the arbitration process in Taiwan. By providing clear and comprehensive procedural recommendations, the CAA Case Management Conference Guidelines aim to contribute significantly to the integrity and effectiveness of arbitration, ensuring that disputes are resolved fairly and efficiently.

Traditional Arbitration Process in Taiwan

Historically, domestic arbitration tribunals in Taiwan have adhered to a procedural format akin to court proceedings, characterised by sequential hearings spanning several months. This conventional approach, while familiar, has posed challenges. It often leads to gaps in arbitrators' recollection of preceding hearings and document exchanges, thereby impeding focused deliberations on substantive issues. Consequently, the efficacy of dispute resolution in complex cases has been compromised.

Background of the Guidelines

Recognising the need for streamlined and effective arbitration practices, the CAA has drawn inspiration from leading international arbitration institutions. The objective is to establish a clear distinction between procedural preparations and substantive hearings, aligning Taiwan's practic-

es with global standards. Central to this initiative is the emphasis on meticulous pre-hearing preparation, designed to optimise the arbitration process and ensure a thorough examination of contentious issues.

Case Management Conference

At the heart of the CAA's Case Management Conference Guidelines is the "case management conference", a pivotal pre-hearing gathering involving arbitration tribunals and disputing parties. This forum serves as a strategic platform to:

- facilitate comprehensive discussions to delineate the precise scope of the tribunal's jurisdiction and the procedural framework governing the arbitration process; and
- set definitive timelines and deadlines for crucial stages of arbitration, including document submission, expert testimonies, and final hearings.

These deliberations culminate in formulating a "terms of reference" and a detailed "procedural timetable", which collectively serve as a roadmap guiding the tribunal and parties through the arbitration proceedings.

The case management conference serves as a catalyst for enhanced communication and cooperation among arbitration tribunals and parties. Through early consensus-building on the terms of reference, parties comprehensively understand procedural expectations and milestones. This preemptive clarity diminishes the likelihood of procedural disputes and fosters a collaborative atmosphere conducive to constructive engagement throughout the arbitration process.

Structured and Predictable Schedule

Unlike the conventional approach reliant on sporadic document exchanges, the case management conference introduces a structured and predictive schedule. The guidelines foster a more cohesive and time-efficient arbitration process by consolidating all hearing dates and procedural milestones at the outset. This departure from prolonged exchanges minimises procedural delays and optimises resource allocation, expediting dispute resolution.

The guidelines mitigate the inherent inefficiencies associated with prolonged arbitration proceedings by establishing a structured procedural framework from the outset. The consolidated scheduling of hearings and deadlines minimises procedural gaps, curtailing time and resource expenditures for all involved parties. This proactive approach expedites dispute resolution and enhances cost-effectiveness, making arbitration a more viable alternative to protracted litigation.

Terms of Reference

Another aspect central to the efficacy of the case management conference is the cultivation of mutual understanding and commitment among the parties and tribunal. This collaborative dialogue between tribunal members and disputing parties ensures that all critical elements are meticulously deliberated and finalised for inclusion in the terms of reference.

The terms of reference serve as a contractual instrument signed by both parties and the arbitrators after the constitution of the arbitral tribunal. Their primary objective is to define the dispute with clarity and precision, providing a comprehensive framework that outlines the parties' agreement on procedural matters. This document delineates the scope of the arbitration,

detailing the claims, counterclaims, and issues to be resolved.

Moreover, the terms of reference establish the procedural guidelines governing the arbitration process, including timelines, the rules of evidence, and the conduct of hearings. By formalising these agreements through signatures, the parties and the tribunal affirm their collective adherence to the established procedures, reinforcing confidence in the arbitration process.

This commitment to a well-structured and transparent arbitration procedure underscores the importance of the terms of reference in fostering an environment of trust and co-operation, ensuring that the arbitration is conducted efficiently and effectively.

Use of Expert Witnesses

While the core CAA rules traditionally do not stipulate the involvement of expert witnesses, the Case Management Conference Guidelines introduce their utilisation, representing a significant procedural enhancement. This inclusion necessitates thorough preparation and careful co-ordination among legal counsel and arbitration participants. The involvement of expert witnesses enriches the evidentiary base and facilitates nuanced discussions on complex technical matters, thereby bolstering the arbitration tribunal's capacity to render informed decisions.

A significant impact of adopting the guidelines is the effect of "hot-tubbing", or concurrent expert evidence. This approach allows experts from opposing sides to testify jointly, fostering exchanges and comprehensive scrutiny of technical evidence. Having experts discuss their opinions and evidence in real time promotes rigorous evidentiary examination and enables the tribunal to address discrepancies more effectively. This method enhances the tribunal's ability to render well-informed and equitable decisions, underscoring the guidelines' commitment to improving the arbitration process. Hot-tubbing not only streamlines the presentation of expert testimony but also encourages a collaborative and transparent approach, ultimately contributing to a more robust and reliable arbitration outcome.

Flexibility and Adaptability

The guidelines' adaptive framework is a hallmark that accommodates evolving dynamics within arbitration proceedings. The flexibility to incorporate new claims must meet Article 14 of the CAA Rule, subject to tribunal approval under specified conditions, and ensure responsiveness to emergent issues and evolving case complexities. This adaptive stance not only safeguards procedural fairness but also fortifies the tribunal's capacity to deliver equitable outcomes tailored to the unique circumstances of each dispute.

Conclusion

Adopting the CAA Case Management Conference Guidelines marks a transformative milestone in Taiwan's arbitration landscape, promoting efficiency, transparency, and procedural rigour. By modernising arbitration practices to align with international standards, these guidelines may enhance Taiwan's attractiveness as a jurisdiction for international arbitration. They also provide a structured framework that facilitates swift, equitable, cost-effective dispute resolution.

Additionally, including expert witnesses may significantly impact Taiwan's familiar arbitration style. Counsel and parties must invest more effort in engaging and communicating with experts. While this practice is common in international arbitration with other institutions, it is relatively new for CAA arbitration. This trend is noteworthy and worth monitoring.

TANZANIA

Law and Practice

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Bowmans operates across Africa through its offices in South Africa, Kenya, Tanzania, Mauritius, Namibia and Zambia. The firm collaborates closely with its alliance firms Aman Assefa & Associates Law Office in Ethiopia and Udo Udoma & Belo-Osagie in Nigeria. Additionally, Bowmans maintains strong affiliations with Taciana Peão Lopes & Advogados Associados in Mozambique and PFI Partnerships in Malawi. The firm has established strong relationships with other leading law firms across Africa. Bowmans Tanzania, based in Dar es Salaam, comprises over 30 professional and business services staff. The firm leverages the experience and expertise of more than 800 colleagues across Bowmans' other offices. Bowmans Tanzania has distinguished itself as a leading dispute resolution practice, with extensive experience in Tanzanian commercial litigation, cross-border disputes (including international arbitration), and disputes with government bodies and regulators.

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1. General

1.1 Prevalence of Arbitration

In recent years, Tanzania has made significant strides in promoting alternative dispute resolution (ADR) methods such as arbitration, mediation and negotiation. Many commercial contracts in Tanzania now include dispute resolution clauses that mandate some form of ADR before resorting to court litigation.

The Arbitration Act (CAP 15 RE 2020) (the "Arbitration Act"), which replaced the Arbitration Act of 1931 inherited from British rule, is a testament to these efforts. For a long time, the National Construction Council (NCC) and the Tanzania Institute of Arbitrators (TIArb) have been the principal arbitral bodies in Tanzania. However, in 2021, the establishment of the Tanzania International Arbitration Centre (TIAC) marked a significant development, providing a dedicated forum for facilitating international commercial arbitration.

Additionally, the Arbitration Act mandates the creation of the Tanzania Arbitration Centre (the "Centre") as the statutory regulatory body for both domestic and international arbitration. It is important to note, however, that the Centre is not yet operational.

In practice, domestic arbitration remains the most common form of arbitration in Tanzania, with international arbitration proceedings seated in Tanzania being relatively rare.

1.2 Key Industries

Key industries which have historically seen significant activity in international arbitration in Tanzania include construction, telecommunications, finance and mining. Government/investor contracts have also been the subject of international arbitration.

Given the lack of published statistics, it is difficult to ascertain arbitral trends and activities in Tanzania.

1.3 Arbitration Institutions

Tanzania currently has three arbitration institutions, namely, the National Construction Council (NCC), the Tanzania Institute of Arbitrators (TIArb) and the recently established Tanzania International Arbitration Centre (TIAC).

Additionally, the Arbitration Act provides for the establishment of the Tanzania Arbitration Centre (the "Centre"), which is likely to commence operations soon.

1.4 National Courts

Tanzanian courts are, at present, only vested with supervisory authority over arbitration proceedings and the ability to enforce arbitral awards.

2. Governing Legislation

2.1 Governing Law

In Tanzania, arbitration proceedings are governed by the Arbitration Act, and the Arbitration (Rules of Procedure) Regulations, 2021 (the "Rules of Procedure").

The Arbitration Act is based on the UK Arbitration Act, 1996 and not on the UNCITRAL Model Law.

2.2 Changes to National Law

There were no changes to Tanzanian arbitration laws in 2023/2024. There does not appear to be any pending legislation designed to change laws governing arbitration in Tanzania.

3. The Arbitration Agreement

3.1 Enforceability

According to the Arbitration Act, for an arbitration agreement to be enforceable, it must be in writing. An agreement is deemed to be in writing where:

- the agreement is in writing, whether or not it is signed by the parties;
- the agreement is made by exchange of communications in writing; or
- the agreement is evidenced in writing.

Under Section 10(4) of the Arbitration Act, it is possible for a contract to incorporate by reference an arbitration agreement that is contained in a separate document.

3.2 Arbitrability

Arbitration arises from the mutual agreement of the parties as outlined in an arbitration agreement. Under the Arbitration Act, an arbitration agreement is defined as an agreement by the parties to submit to arbitration all or certain disputes that have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not.

Despite this broad definition, which theoretically permits the reference of disputes to arbitration even in the absence of a contractual relationship, in practice, the courts will only enforce an arbitration agreement if it is embedded in a contract between the parties.

In the case of Tanzania Motor Services Ltd & Others v Mehar Singh t/a Thaker Singh (Civil Appeal 115 of 2005) [2006] TZCA 5 (21 July 2006), the Court of Appeal stated the following concerning arbitration clauses:

"I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from other clauses. The other clauses set out the obligations which the parties undertake towards each other but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that if any dispute arises with regard to the obligation which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution. And there is this very material difference, that whereas in an ordinary contract the obligation of the parties to each other cannot in general be specifically enforced and breach of [the obligation] results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages, but is enforcement."

3.3 National Courts' Approach

The Arbitration Act explicitly provides that an arbitral award is final and binding upon the parties involved. Consequently, national courts in Tanzania have been reluctant to interfere with the enforcement of an arbitral award, provided it complies with the provisions of the Arbitration Act. Judicial intervention is limited to instances of serious irregularity or questions of substantive jurisdiction, both of which have clearly defined scopes for any challenges.

The courts' willingness to enforce the arbitration agreement is best seen in winding-up proceedings, where the High Court has exclusive jurisdiction over such proceedings. When a company faces winding-up proceedings for failing to pay a debt under a contract that includes an arbitration clause, the courts have consistently ruled that the dispute must first be arbitrated if the

underlying debt is bona fide disputed. Should the creditor prevail in arbitration and the debtor still fails to settle the debt, the creditor may then seek the remedy of winding-up.

3.4 Validity

Pursuant to Section 12 of the Arbitration Act, an arbitration agreement is treated as a distinct agreement separate from the main agreement. Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement, regardless of whether it is in writing, will not be regarded as invalid or non-existent because the rest of the agreement is invalid or has become ineffective.

However, where the dispute revolves around the parties' capacity to contract, the arbitration agreement will be rendered void if the parties lacked the requisite capacity to make the agreement in the first place.

4. The Arbitral Tribunal

4.1 Limits on Selection

The Arbitration Act gives the parties broad autonomy to agree on the procedure for appointing arbitrators. The arbitration agreement allows the parties to agree on:

- the procedure to be followed for the constitution of the tribunal;
- the number of arbitrators (including whether there is an umpire or chairperson); and
- any qualifications required by the arbitrators.

4.2 Default Procedures

Under normal circumstances, it is expected that the parties' arbitration agreement will provide for the procedure for appointing a tribunal. In the event that it does not, the Arbitration Act sets the following default mechanisms:

- A sole arbitrator – to be jointly appointed no later than 28 days after service of a written request by one of the parties (Section 20(2)(a) of the Arbitration Act).
- A tribunal composed of two arbitrators – each party to appoint an arbitrator no later than 14 days after service of a written request by one of the parties (Section 20(2)(b) of the Arbitration Act). Unless otherwise stated by the parties, an agreement that the number of arbitrators will be two, or any other even number, will be understood as requiring the appointment of an additional arbitrator as chairperson of the arbitral tribunal (Section 19(2) of the Arbitration Act).
- A tribunal composed of three arbitrators – each party to appoint an arbitrator no later than 14 days after service of a written request by one of the parties. The two arbitrators appointed then appoint a chairperson (Section 20(2)(c) of the Arbitration Act).
- A tribunal composed of two arbitrators and an umpire – the same as above, except that the appointment must be made before any substantive hearing, or where the arbitrators cannot agree on a matter relating to the arbitration (Section 20(2)(d) of the Arbitration Act).

Where the parties have not agreed on the number of arbitrators, the tribunal will consist of a sole arbitrator (Section 19(3) of the Arbitration Act).

In an instance where the parties have agreed that the matter will be presided over by two arbitrators, and one of the parties has appointed an arbitrator of its choice while the second party has defaulted, the first party may give notice in writing to the other party for the appointed arbi-

trator to act as a sole arbitrator whose award will be binding on the parties (Section 21(2)(b) of the Arbitration Act).

4.3 Court Intervention

The Arbitration Act provides for the intervention of the Centre, and not the courts, in default of appointment. However, considering that the Centre is not yet functional, such powers will be assumed by the court.

Where the parties fail to appoint an arbitrator, either party may, upon notice to the other party, apply to the Centre, which will give directions as to the making of any necessary appointment or will itself make any necessary appointment (Section 22(2) of the Arbitration Act).

4.4 Challenge and Removal of Arbitrators

Section 28 of the Arbitration Act governs the challenge and removal of arbitrators. A party may apply to the Centre to remove an arbitrator on any of the following grounds:

- there are circumstances which give rise to justifiable doubts as to the arbitrator's impartiality;
- the arbitrator does not have the qualifications required by the arbitration agreement;
- the arbitrator is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to their capacity to do so; or
- the arbitrator has failed or refused to:
  (a) properly conduct proceedings;
  (b) use all reasonable dispatch in conducting the proceedings; or
  (c) make an award, and substantial injustice has been or will be caused to the applicant.

It should be noted that the arbitrator will only be removed after being heard by the Centre.

In the case of Arab Contractors (Osman Ahmed Osman & Co) & Another v Bharya Engineering & Constructing Company Limited (Becco) & Another (Misc. Commercial Case 28 of 2022) [2022] TZHCComD 344 (4 November 2022), the court applied Section 28 to remove an arbitrator on the basis that the arbitrator conducted the proceedings in breach of natural justice.

4.5 Arbitrator Requirements

An arbitrator appointed to preside over an arbitration proceeding is required, under Regulation 14 of the Rules of Procedure, to have the following qualifications:

- to be an arbitrator who is accredited or registered in terms of the Reconciliation, Negotiation, Mediation and Arbitration (Practitioners' Accreditation) Regulations, 2021 (the "Practitioners' Accreditation Regulations");
- to have no family relationship based on descent and/or marriage down to the third generation, with any of the parties involved in the dispute;
- to have no financial interest or any other interest whatsoever in the result of the arbitration;
- to be named in the arbitration agreement by the parties; and
- to be a person of high moral character and recognised competence in the field of law, commerce, industry or finance, who may be relied upon to exercise independent judgement.

As per the Arbitration Act and its Regulations, an arbitrator is obliged to disclose all facts and circumstances which may raise concerns as to their impartiality and independence.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

See **3.2 Arbitrability** and **3.3 National Courts' Approach**.

There is insufficient guidance on matters excluded from arbitration. However, it is evident that where the law vests the courts/quasi-judicial body with exclusive jurisdiction to determine a matter, such matter cannot be arbitrated, for example, winding-up proceedings, criminal matters, or unfair prejudice as a minority shareholder.

5.2 Challenges to Jurisdiction

Section 34 of the Arbitration Act provides that, unless agreed otherwise, the tribunal may rule on its own substantive jurisdiction, as to:

- whether there is a valid arbitration agreement;
- whether the tribunal has been properly constituted; and
- what matters have been submitted to arbitration in accordance with the arbitration agreement.

5.3 Circumstances for Court Intervention

The Arbitration Act provides for three circumstances where it can address the issues of the jurisdiction of an arbitral tribunal.

Section 36 of the Arbitration Act

Section 36 of the Arbitration Act provides that a party subject to arbitration proceedings may apply to the court to rule on any question as to the substantive jurisdiction of the arbitral tribunal. Such an application to the court will not be considered unless the following requirements are met:

- the application is made with the agreement in writing of all the other parties to the proceedings; or
- the application is made with the permission of the arbitral tribunal and the court is satisfied that:
  - (a) the determination of the question is likely to produce substantial savings in costs;
  - (b) the application was made without delay; and
  - (c) there is good reason why the matter should be decided by the court.

Unless the parties agree otherwise, the tribunal may proceed with conducting the proceedings and make an award pending determination of an application.

Section 74 of the Arbitration Act

Under Section 74 of the Arbitration Act, a party to the proceedings has the power to challenge any award made by the tribunal ruling on its substantive jurisdiction, provided that the party challenging said award provides notice to the other parties and to the arbitral tribunal.

Section 79 of the Arbitration Act

Finally, under Section 79 of the Arbitration Act, a party that does not take part in the proceedings can apply to the court for a declaration or injunction to restrain arbitration proceedings by challenging:

- the validity of an arbitration agreement;
- whether the arbitral tribunal has been properly constituted; or
- what matters have been referred to arbitration in accordance with the arbitration agreement.

A party that partakes in the arbitration proceedings, without raising an objection on the jurisdic-

tion of the tribunal, loses its right to raise such objection (Section 80 of the Arbitration Act).

5.4 Timing of Challenge

Pursuant to Section 35 of the Arbitration Act, a party may raise an objection on the ground that the arbitral tribunal lacks substantive jurisdiction, no later than the point at which the party takes the first step in the proceedings to contest the merits of any matter in relation to which the party is challenging the arbitral tribunal's jurisdiction.

Under Section 36 of the Arbitration Act, a party may make an application to the court, as soon as possible, to determine any questions as to the substantive jurisdiction of the arbitral tribunal.

A party may challenge an award of the tribunal ruling on its substantive jurisdiction within 28 days of the award being made (Section 77(3) of the Arbitration Act).

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The standard of judicial review for questions of admissibility and jurisdiction is not stipulated in Tanzania's arbitration laws, nor has it been tested in case law. However, borrowing from decisions in the UK, any party challenging an award based on substantial jurisdiction is entitled to a complete rehearing of the jurisdictional matters, rather than just a review of the tribunal's decision on the issue.

5.6 Breach of Arbitration Agreement

The courts have emphasised in various decisions that the parties are bound by their agreements.

Where a party institutes a suit in court, in breach of an arbitration agreement, the other party can apply to have the suit stayed pending arbitration (Section 15(1) of the Arbitration Act).

Section 15(3) of the Arbitration Act obliges a party seeking to stay the suit pending arbitration, to first take appropriate procedural steps to acknowledge the legal proceedings against them. In Tanzania, this would involve filing a written statement of defence within 21 days of service of the plaint.

Where a party fails to institute an application for stay of suit before the court, after having filed a written statement of defence, they will be deemed to have waived their right to refer their dispute to arbitration. This was held by the High Court of Tanzania in Diamond Motors Limited v STC Construction Limited & Another (Civil Case No 156 of 2023) [2024] TZHC 1520 (19 April 2024).

5.7 Jurisdiction Over Third Parties

The Arbitration Act defines the term "party" to mean a party to an arbitration agreement. The tribunals will only assume jurisdiction over individuals or entities that are party to an arbitration agreement or signatories to the contract containing the arbitration agreement.

In the case I & M Bank (T) Limited v Bayview Properties Limited & another (Miscellaneous Commercial Application 36 of 2022) [2022] TZHCComD 299 (22 September 2022), the High Court addressed a scenario where a third party, who did not participate in the arbitration proceedings, felt affected by the final award and sought to be joined as a party to the petition challenging the award.

The court reaffirmed the fundamental principle that an arbitration agreement is a contract binding only on the parties to the agreement.

However, there are limited circumstances where third parties, not party to the original agreement, may be bound by or benefit from it. These situations include instances where there is an assignment or transfer of contractual rights or cause of action to a third party.

6. Preliminary and Interim Relief

6.1 Types of Relief

It is important to note that the Arbitration Act, like the English Arbitration Act of 1996, intentionally avoids using the term "interim awards" to prevent ambiguity between provisional and partial awards. This distinction was pointed out in paragraph 233 of The Departmental Advisory Committee on Arbitration on the Arbitration Bill 1996.

Nevertheless, while the substance of the Arbitration Act does not use the term "interim", it does appear in the definition of an award and in the Rules of Procedure. An arbitral award under the Arbitration Act is defined to include interim awards. Regulation 37 of the Rules of Procedure stipulates that the tribunal must decide on any challenge to its jurisdiction as a preliminary matter in relation to interim awards. However, the tribunal retains the option to proceed with the arbitration and address the jurisdictional challenge in its final award if it deems this approach suitable. This appears to delineate the scope of interim awards under the Arbitration Act.

Section 45 of the Arbitration Act provides for the general powers of the arbitral tribunal, unless otherwise agreed by the parties, which are:

- to order a claimant to provide security for the cost of the arbitration;
- to give directions relating to property that is the subject matter of the proceedings or about which any question arises in the proceedings;
- to direct a party or witness to be examined; and
- to give directions for the preservation of evidence in the party or witness's custody and control.

Section 46 of the Arbitration Act enables the tribunal to issue provisional awards, should it be so authorised by the parties.

6.2 Role of Courts

Unless otherwise agreed by the parties, Section 51 of the Arbitration Act enables the court to make the following interim orders:

- the taking of the evidence of witnesses;
- the preservation of evidence;
- making orders relating to property which is the subject of the proceedings or as to which any question may arise in the proceedings –
  - (a) for the inspection, photographing, preservation, custody or detention of the property; or
  - (b) ordering that samples be taken from, or any observation be made regarding, or experiment conducted upon, the property; and for that purpose, the court may authorise any person to enter any premises in the possession or control of a party to the arbitration;
- the sale of any goods which are the subject of the proceedings; or
- the granting of an interim injunction or the appointment of a receiver.

Regulation 38 of the Rules of Procedure also makes provision for the appointment of emergency arbitrators in an instance where urgent

interim relief is required prior to the formation of the tribunal. The party seeking such interim relief may apply to the Centre, which will subsequently appoint an arbitrator to preside over the hearing seeking relief. Any order by the emergency arbitrator will be binding on the parties.

The law does not cater for court intervention after an emergency arbitrator has been appointed. Given the strict set of circumstances under which a court may intervene in arbitration proceedings, it is unlikely that a court will be able to intervene once an emergency arbitrator has been appointed.

6.3 Security for Costs

As provided under **6.1 Types of Relief**, Section 45 of the Arbitration Act enables a tribunal with the power to do so to order security for costs, unless otherwise agreed by the parties.

7. Procedure

7.1 Governing Rules

Section 38 of the Arbitration Act enables the parties to agree their own procedural rules. In the absence of such agreement, the default provisions under the Arbitration Act and the Rules of Procedure Arbitration proceedings are governed by the Arbitration Act and the Rules of Procedure.

The procedure for registration and accreditation of arbitrators is governed by the Practitioners Accreditation Regulations.

The conduct of arbitrators is governed by the Code of Conduct and Practice for Reconciliators, Negotiators, Mediators and Arbitrators Regulations, 2021 (the "Code of Conduct").

7.2 Procedural Steps

See **7.1 Governing Rules**. The parties can agree on the procedural rules to govern their dispute.

Arbitration proceedings in respect of a particular dispute will commence on the date on which the request for the dispute to be referred to arbitration is received by the other party. The procedural rules will be as agreed by the parties or directed by the tribunal.

7.3 Powers and Duties of Arbitrators

The tribunal, under Section 37 of the Arbitration Act, has a general duty to:

- act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting their case and dealing with that of their opponent; and
- adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters to be determined.

7.4 Legal Representatives

Section 43 of the Arbitration Act provides that a party may be represented by an advocate or any other person chosen by them. The law does not limit the qualification of the "other person chosen by them".

In the case of M/s Jandu Plumbers Limited v M/s Hodi (Hotel Management) Company Limited (Miscellaneous Civil Cause 3 of 2020) [2021] TZHC 5903 (20 August 2021), the court held that the conduct of foreign lawyers representing a party in domestic arbitration proceedings, without obtaining a special licence from the Chief Justice, was illegal. This ruling deviated from the usual practice where foreign lawyers are permit-

ted to represent parties in arbitration without requiring a special licence.

While the decision in question is currently under appeal, it is arguable that the court erred in its interpretation of the law. The Advocates Act (Cap 341 RE 2019) provides provisions for foreign lawyers to apply to the Chief Justice for a practising certificate, explicitly stating that such a certificate may be granted for "one case" or for one appearance in a "specific case". The cases referred to in Section 39 of the Advocates Act are proceedings before courts of law, over which the Chief Justice holds administrative authority.

The issuance of a practising certificate by the Chief Justice is limited to appearances before the High Court or any court subordinate to it. It does not encompass appearances before an arbitral tribunal, which is a product of an agreement between the parties, rather than a court of law.

8. Evidence

8.1 Collection and Submission of Evidence

The arbitral tribunal has the discretion to decide on all procedural and evidential matters, subject to the agreement of the parties (Section 38 of the Arbitration Act). These include:

- whether and, if so, what form of written statements of claim and defence are to be used, when these should be supplied, and the extent to which such statements can be later amended;
- whether and, if so, which documents or classes of documents will be disclosed and produced by the parties and at what stage;
- whether and, if so, what questions will be put to and answered by the respective parties, and when and in what form this shall be done;
- whether to apply strict rules of evidence or any other rules as to the admissibility, relevance, or weight of any material oral, written, or other evidence sought to be tendered on any matter of fact or opinion, and the time, manner, and form in which such material will be exchanged and presented;
- whether and to what extent the arbitral tribunal will itself take the initiative in ascertaining the facts and the law; and
- whether and to what extent there will be oral or written evidence or submissions.

8.2 Rules of Evidence

See **8.1 Collection and Submission of Evidence**.

8.3 Powers of Compulsion

Pursuant to Section 50 of the Arbitration Act, a witness within Tanzania who is unwilling to attend arbitration proceedings in order to provide oral testimony, or to produce documents or other material evidence, may be compelled to attend the proceedings via an application to the court. A party to the proceedings, with the permission of the arbitral tribunal or by agreement with the other party, may apply to the court for the issuance of a witness summons.

With regard to the production of documents, a witness is not compelled to produce any document or material evidence in arbitration that the witness would not be compelled to produce in proceedings in court (Section 50(3) of the Arbitration Act). This provision is intended to protect the witness's right not to produce evidence that is privileged and to prevent disclosure of documents by way of a "fishing expedition".

9. Confidentiality

9.1 Extent of Confidentiality

Arbitration proceedings are usually conducted privately and in camera (Section 39(1) of the Arbitration Act). Both the parties and the arbitral tribunal are under an obligation to keep the entirety of the arbitration proceedings confidential (Section 39(2) of the Arbitration Act). The law permits very limited circumstances where disclosure of confidential information may be permitted, which include attaching the award if the court is being moved to exercise its supervisory powers or if the award is being executed (Section 39(3) of the Arbitration Act).

Confidential information under the Arbitration Act is defined as:

- "in relation to arbitral proceedings, information that relates to the arbitral proceedings or to an award made in those proceedings, includes:
  - (a) the statement of claim, statement of defence, and all other pleadings, submissions, statements, or other information supplied to the arbitral tribunal by a party;
  - (b) any evidence, whether documentary or otherwise, supplied to the arbitral tribunal;
  - (c) any notes made by the arbitral tribunal of evidence or submissions given before the arbitral tribunal;
  - (d) any transcript of oral evidence or submissions given before the arbitral tribunal;
  - (e) any rulings of the arbitral tribunal; or
  - (f) any award of the arbitral tribunal;
- in relation to confidential information, [this] includes publishing, communicating, or otherwise supplying the confidential information."

10. The Award

10.1 Legal Requirements

Section 59 of the Arbitration Act enables the parties to agree on the form of an award. Unless agreed otherwise, the award must:

- be in writing signed by all arbitrators;
- contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with the reasons; and
- state the seat of arbitration and the date when the award was made.

An arbitral award is required to be made in writing stating the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given. An award granted by an arbitral tribunal will be passed based on the legal stipulations or based on justice and propriety.

Pursuant to Regulation 4(10) of the Rules of Procedure, proceedings under the Rules of Procedure Regulation must be completed within a period of no longer than 180 days from the date of composition of the arbitral tribunal, unless otherwise agreed by the parties. Where the dispute is complex, the tribunal may extend the deadline upon notice to the parties. An award is to be delivered within 30 days of the conclusion of the hearing (Regulation 43 of the Rules of Procedure).

10.2 Types of Remedies

Section 55(1) of the Arbitration Act allows the parties to agree on the powers exercisable by the tribunal in regard to remedies. Barring any agreement otherwise, the tribunal will have the following powers:

- to make a declaration as to any matter to be determined in the proceedings;

- to order the payment of a sum of money, in any currency;
- to require a party to do or refrain from doing something;
- to order specific performance of a contract, other than a contract relating to land; or
- the rectification, setting aside, or cancellation of a deed or other document.

10.3 Recovering Interest and Legal Costs

Unless otherwise agreed by the parties, Section 56 of the Arbitration Act entitles the tribunal to issue pre-award and post-award interest. The tribunal is free to choose whether to issue simple or compound interest, from such dates, at such rates and with such rates as it considers to be just.

Costs under the Arbitration Act include the arbitrators' fees and expenses, the fees and expenses of any arbitration institution concerned, and the legal or other costs of the parties (Section 66 of the Arbitration Act).

In the absence of an agreement otherwise, the tribunal may make an award allocating the costs of arbitration as between the parties. In addition, the tribunal may award costs on the general principle that costs follow suit, except where it appears to the tribunal that this is not appropriate in relation to the whole or part of the costs (Section 68 of the Arbitration Act).

The only restriction on agreements concerning costs between parties is if the agreement requires one party to bear the entire or partial costs, regardless of the outcome of the dispute. Such agreements are considered void. However, they will be upheld if the parties reached the agreement after the dispute had arisen (Section 67 of the Arbitration Act).

11. Review of an Award

11.1 Grounds for Appeal

An arbitral award is deemed to be final, and not open to appeal, unless the parties agree otherwise (Section 65 of the Arbitration Act).

This, however, does not preclude a party from challenging the award on the following grounds:

- the tribunal lacked substantive jurisdiction to make the award (Section 74 of the Arbitration Act); or
- serious irregularity exists that has or is likely to cause substantive injustice to the application (Section 75 of the Arbitration Act).

The law provides for an exhaustive list of grounds for alleging serious irregularity. These are:

- failure by the tribunal to comply with its general duty;
- the tribunal has exceeded its powers other than by exceeding its substantive jurisdiction;
- failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
- failure by the tribunal to deal with all the issues that were put to it;
- any arbitration institution or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding their powers;
- uncertainty or ambiguity as to the effect of the award;
- the award being obtained by fraud, or the award or the way in which it was procured, being contrary to public policy;
- failure to comply with the requirements as to the form of the award; or
- any irregularity in the conduct of the proceedings or in the award, which is admitted by the

tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

Where the court determines that there is a serious irregularity affecting the tribunal, it may:

- remit the award to the arbitral tribunal, in whole or in part, for reconsideration;
- set aside the award in whole or in part; or
- declare the award to be of no effect, in whole or in part.

11.2 Excluding/Expanding the Scope of Appeal

The parties cannot exclude the scope of a challenge on substantive jurisdiction or serious irregularity; however, it may be excluded from the scope of the parties to approach the court on a question of law (Section 76(1) of the Arbitration Act).

11.3 Standard of Judicial Review

The merits of a case cannot be reviewed or determined by a court. A party challenging an award based on substantial jurisdiction is entitled to a complete rehearing of the jurisdictional matters, rather than just a review of the tribunal's decision on the issue.

12. Enforcement of an Award

12.1 New York Convention

Tanzania has signed the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). However, the treaty has not been domesticated into law in Tanzania.

Tanzania is also a party to the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 (the "Geneva Convention"), the Geneva Protocol on Arbitration Clauses (the "Geneva Protocol"), the ICSID Convention 1965, the Multilateral Investment Treaties Guaranteed Agency Convention 1958 (the "MIGA Convention") and several bilateral investment treaties with other countries.

Foreign arbitral awards are recognised and can be enforced by the High Court, subject to compliance with the Arbitration Act. According to the provisions of Section 78(1) of the Arbitration Act, upon application in writing to the High Court, a domestic arbitral award or foreign arbitral award will be recognised as binding and enforceable.

12.2 Enforcement Procedure

Standards

Under Section 83 of the Arbitration Act, in order for an award to be enforceable, it must:

- have been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed;
- have been made by the arbitral tribunal provided for in the agreement or constituted in a manner agreed upon by the parties;
- have been made in conformity with the law governing the arbitration procedure;
- have become final in the country in which it was made;
- have been in respect of a matter which may lawfully be referred to arbitration under the laws of Tanzania, and its enforcement may not be contrary to the public policy or the laws of Tanzania; and
- not contradict conditions for the enforcement of foreign awards, as provided under Section 83(2) and (4) of the Arbitration Act.

Procedures

Regulation 63 of the Rules of Procedure provides for the format in which the application for enforcement of the arbitral award must be made to the court, namely, it must:

- be made by way of petition and be titled "In the matter of the arbitration and in the matter of the Act", and reference must be made in the application to the relevant section of the Arbitration Act;
- contain a brief statement, in summary form, of the material facts; be divided into paragraphs numbered consecutively; and state the nature of the relief sought or the questions of law for the determination of the court, as the case may be;
- have attached to it the submission, the minutes or proceedings of the arbitral tribunal award or the ruling to which the petition relates; or have a copy of the arbitral award, certified by the petitioner or their advocate to be a true copy; and
- specify the persons affected by it and upon whom notice is required to be given as provided in the Regulation, and it must state the address, in detail, of each of them.

No less than seven days before the date for the hearing of a petition, or such lesser time as a magistrate or judge may allow, written notice must be given by the court to all persons specified in the petition and to such other persons as appear likely to be affected by the proceedings, requiring them to show cause, within the time specified in the notice, why the relief sought should not be granted, and if no sufficient cause is shown, a judge may make such order as the circumstances of the case appear to them to require.

Status of an Award That Has Been Set Aside or is Subject to an Ongoing Set-Aside Proceeding

An award that has been set aside by the courts in the seat of arbitration, or that is subject to an ongoing set-aside proceeding in the seat of arbitration, will not be enforceable in Tanzania, as it is not yet final.

Defence of Sovereign Immunity

Tanzania currently has no law in place regulating state immunity, nor is there a judicial precedent discussing the inclination of the judiciary in Tanzania either towards absolute or restrictive immunity. The defence of sovereign immunity will not be available where the state has consented to arbitration contained in a bilateral investment treaty or where it has been expressly waived in the agreement between the parties.

It is important to note that a party will not be able to attach the properties of the Tanzanian government during the enforcement of an award through the Tanzanian courts. This is because the Government Proceeding Act (CAP 5 RE 2019) explicitly prohibits attachment of government assets; instead, the decree-holder may approach the Permanent Secretary of the Treasury, who will then pay the amount lawfully due.

12.3 Approach of the Courts

Tanzanian courts generally recognise and enforce arbitral awards. This is reflected in the Arbitration Act, which sets strict parameters on the grounds on which the court can reject enforcement of an arbitral award.

Among the grounds preventing enforcement of an arbitral award is whether the award is contrary to the domestic public policy of Mainland Tanzania.

In the case of Catic International Engineering (T) Limited v University of Dar es Salaam, Miscellaneous Commercial Cause No 1 of 2020, the High Court of Tanzania (Commercial Division), at Dar es Salaam (unreported), the arbitral tribunal ruled in favour of the petitioner, a public institution, on the grounds of public policy. The court held, however, that the underlying agreement giving rise to the arbitration proceedings did not adhere to the procurement laws of Tanzania.

The court cited, with approval, the Kenyan case of Tanzania National Roads Agency v Kundan Singh, Miscellaneous Civil Application No 171 of 2012 (unreported), where it was held that an award could be set aside on the grounds of public policy if it was shown that the award was:

- inconsistent with the constitution or other laws of the country;
- inimical to national interests; or
- contrary to justice or morality.

13. Miscellaneous

13.1 Class Action or Group Arbitration

The law does not cater for class action or group arbitration, especially since arbitration is typically a contractual affair binding only upon the parties to the agreement.

13.2 Ethical Codes

Arbitrators are bound by a code of conduct that delineates fundamental principles to which they must adhere in the course of dispute resolution. These principles encompass the obligations to act impartially, equitably, confidentially, in the interest of justice and fairness, and to assiduously avoid any conflicts of interest.

At present, there is no enacted code of conduct specifically governing counsel representing parties in arbitration proceedings. While each profession is currently guided by its respective ethical code, this situation raises pertinent questions regarding the applicability of these codes in arbitration proceedings and the corresponding disciplinary mechanisms. For instance, it remains unclear whether the Medical Council of Tanganyika would possess the authority to exercise disciplinary action if a medical practitioner, acting as counsel, were to conduct themselves in a manner detrimental to their client's interests. Furthermore, the question arises as to whether a medical professional can be held liable for actions undertaken outside the scope of medical practice.

It could be posited that the sole profession offering adequate redress for a party is when the counsel representing said party is an advocate. Advocates are governed by the Advocates Act (CAP 341 RE 2019), which mandates that they act with confidentiality, competence, honesty, and in the best interests of their clients. In such cases, disciplinary redress can be sought through the established Advocates Committee.

Given that the law does not restrict parties from selecting counsel of their choice, it may be prudent to enact legislation governing the code of conduct for counsel in arbitration proceedings. This consideration becomes particularly salient in light of the fact that the selected counsel may not necessarily be a member of a regulated profession.

13.3 Third-Party Funding

There are no rules or restrictions on third-party funders in Tanzania.

13.4 Consolidation

Arbitration proceedings may be consolidated, or concurrent hearings may be held, only where the parties agree to do so based on terms agreed upon by the parties (Section 42 of the Arbitration Act).

Unless the parties agree to this, an arbitral tribunal does not have the power to order the consolidation of proceedings or concurrent hearings.

13.5 Binding of Third Parties

An arbitration agreement generally only binds the parties that signed the agreement. It will not be binding upon a third party.

The exception to this rule was seen in the case of I & M Bank (T) Limited v Bayview Properties Limited & Another (Miscellaneous Commercial Application 36 of 2022) [2022] TZHCComD 299 (22 September 2022) where the High Court addressed a scenario where a third party, who did not participate in the arbitration proceedings, felt affected by the final award and sought to be joined as a party to the petition challenging the award.

The court reaffirmed the fundamental principle that an arbitration agreement is a contract binding only on the parties to the agreement. However, there are limited circumstances where third parties, who are not party to the original agreement, may be bound by or benefit from it. These situations include instances where there is an assignment or transfer of contractual rights or cause of action to a third party.

Trends and Developments

Contributed by:
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Bowmans

Bowmans operates across Africa through its offices in South Africa, Kenya, Tanzania, Mauritius, Namibia and Zambia. The firm collaborates closely with its alliance firms Aman Assefa & Associates Law Office in Ethiopia and Udo Udoma & Belo-Osagie in Nigeria. Additionally, Bowmans maintains strong affiliations with Taciana Peão Lopes & Advogados Associados in Mozambique and PFI Partnerships in Malawi. The firm has established strong relationships with other leading law firms across Africa. Bowmans Tanzania, based in Dar es Salaam, comprises over 30 professional and business services staff. The firm leverages the experience and expertise of more than 800 colleagues across Bowmans' other offices. Bowmans Tanzania has distinguished itself as a leading dispute resolution practice, with extensive experience in Tanzanian commercial litigation, cross-border disputes (including international arbitration), and disputes with government bodies and regulators.

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Recent Court Rulings on Arbitration Disputes

Are proceedings before an arbitral tribunal necessary when seeking to enforce an award?

In the case of The Higher Education Students' Loans Board v Tanzania Building Works Limited (Miscellaneous Commercial Cause No 39 of 2022) [2023] TZHCComD 254 (3 August 2023), the High Court provided guidance on the necessity of annexing the proceedings before the arbitral tribunal when applying to enforce an award.

The claimant submitted an arbitral award issued by a sole arbitrator to the court through a letter to the Registrar of the High Court. The respondent raised two objections, one of which was that the claimant had failed to annex the record of proceedings before the tribunal in the letter to the Registrar, contrary to Regulation 51(5) of the Arbitration (Rules of Procedure) Regulations, 2021 (the "Regulations").

After expounding on the procedure for recognition and enforcement of an award under the Arbitration Act [Cap 15 RE 2020] (Arbitration Act) and the Regulations, the court held that Regulations 49 and 51(4) of the Regulations, which concern the filing of the award by the arbitral tribunal directly, do not specify the documents required to be attached when filing the award. However, Regulation 51(5) of the Regulations, which concerns a party to the proceedings filing an award in court, clearly states that the party must attach not only the transmittal letter but also the proceedings before the tribunal.

The court further noted that even if an award were transmitted under Regulations 49 or 51(4), prudence would dictate that the award be filed along with the proceedings.

The court upheld the respondent's objection and struck out the award filed in court.

In the case of Oilcom Tanzania Limited v Oryx Energies Tanzania Limited (formerly known as) Oryx Oil Company Limited & Another (Miscellaneous Civil Cause No 27821) [2024] TZHC 1679 (12 April 2024), the court was tasked with determining whether an award filed by the tribunal under Regulation 51(4) of the Regulations needed to be accompanied by a copy of the proceedings before the tribunal.

The court, aligning with the precedent set in the case of the Higher Education Students' Loans Board, held that the proceedings were not necessary when filing an award under Regulation 51(4).

These cases distinguish between the requirements necessary when an award is transmitted by the arbitral tribunal as opposed to when the award is filed by the prevailing party. When the award is filed by the prevailing party, the proceedings before the tribunal must be included.

Distinction between expert determination and arbitration

In the case of Tanganyika Wattle Company Ltd v Dolphin Bay Chemicals (PTY) Ltd (Miscellaneous Commercial Application No 104 of 2023) [2023] TZHCComD 393 (13 December 2023), the High Court of Tanzania was tasked with determining an application for an extension of time to appeal against an order enforcing an arbitral award. The applicant alleged illegality in the arbitral award, arguing that the arbitrator lacked jurisdiction to determine the dispute.

The court ruled that the arbitrator improperly conducted the arbitration proceedings due to the absence of an arbitration agreement. The

parties had initially agreed for any dispute to be determined by an expert, not an arbitrator. The judge emphasised that an arbitrator cannot assume the power to make binding decisions without a valid arbitration agreement.

The court highlighted five essential requirements for a valid arbitration agreement:

- mutual consent – the arbitration agreement must arise out of mutual consent;
- unequivocal intention – the parties must unequivocally intend to submit to arbitration;
- obligation to arbitrate – there must be an obligation on the parties to submit their dispute to arbitration;
- specific provision for arbitration – the agreement must specifically provide for "arbitration" rather than another dispute resolution process; and
- free will.

The court examined whether expert determination could amount to arbitration and responded in the negative. Quoting literature, the court stated that expert determination is a private and confidential method where parties appoint an expert to make a final and binding decision on a matter of fact, valuation or law. Unlike arbitration, expert determination does not involve procedural rules or High Court support and lacks transnational enforcement recognition. The expert's decision is final and cannot be challenged in the High Court, making it distinct from arbitration.

The court considered whether the parties' actions amounted to a tacit understanding to arbitrate. The judge ruled that actions based on error do not constitute consent, and thus, the implied agreement to arbitrate was invalid. The court noted that the situation would have been different if the parties had acknowledged their initial agreement and sought to amend it to cater for arbitration before submitting the dispute to arbitration.

The court upheld the principle of the sanctity of contract, stating that the parties' agreement must be respected. Consequently, the arbitral award was rendered without jurisdiction, a point that would require determination by the Court of Appeal.

This ruling underscores the importance of clear and mutual consent in arbitration agreements and delineates the boundaries between arbitration and expert determination. It also highlights the need for parties to adhere strictly to their contractual terms or seek appropriate amendments when necessary.

Enforcing an adjudicator's decision

In the case of Bogeta Engineering Limited v Kampala International University (Civil Case No 226 of 2018) [2023] TZHC 21672 (28 August 2023), the parties had executed several construction agreements. Under the terms of the agreement, the parties were to resolve any dispute through adjudication. If a party was aggrieved by the adjudicator's decision, they were required to initiate arbitration proceedings within 28 days. Failure to do so would render the adjudicator's decision final and binding.

The plaintiff instituted a suit seeking compliance with the adjudicator's decision. The court raised a preliminary point of law regarding its jurisdiction to entertain the dispute.

In its ruling, the court noted that Tanzanian law does not provide for the enforcement or challenge of adjudicator decisions. The court emphasised that an adjudicator is a creation of the contract between the parties, and their final

decision, being binding, forms an integral part of the contract. Therefore, the appropriate recourse for a party failing to adhere to the contract terms is to institute arbitration proceedings as stipulated in the contract.

The court concluded that the plaintiff's suit was improper and ordered that the suit be struck out. The plaintiff was directed to enforce the adjudicator's decision through arbitration, as provided for in the contract.

This decision offers valuable guidance on the consequences of selecting various dispute resolution methods in contractual agreements. It underscores the necessity of adhering to contractual mechanisms for enforcing adjudicator decisions. The court's ruling may have differed if the contract did not provide for arbitration as a recourse. In such a scenario, the suit might have been deemed proper to give effect to the adjudicator's decision.

The court will assume jurisdiction where a party is unwilling to adhere to the arbitration agreement

In the case of Abdulkadir Elimanzi Rashid & 136 Others v The Attorney General & Another (Land Case No 118 of 2022) [2023] TZHCLandD 118 (16 February 2023), the plaintiffs sued the defendants, seeking refund of sums of money paid under a hire purchase agreement, alleging the agreement was induced fraudulently.

The defendants raised an objection, arguing that the court lacked jurisdiction to determine the dispute, as the parties had agreed to resolve their disputes through arbitration.

While acknowledging the arbitration clause in the agreement, the court noted that evidence showed the defendants were unco-operative in implementing the arbitration clause. They also demonstrated no willingness to participate in the arbitration process.

The court found the defendants' lack of co-operation to be a valid reason for the court to intervene and assume jurisdiction over the dispute. The defendants' actions effectively undermined the arbitration clause. The court further noted that the defendants failed to file an application to stay the suit pending arbitration. By not doing so, they effectively submitted themselves to the jurisdiction of the court.

This decision underscores the importance of implementing the arbitration clause in good faith. A party that has acted in bad faith will not be aided by the court in a bid to stall the attainment of justice. Additionally, it serves as a reminder for parties to timely file applications to stay proceedings in favour of arbitration, to avoid being deemed to have submitted to the court's jurisdiction.

The courts will hear a petition for winding-up of a company where the debt is not disputed, even where the agreement provides an arbitration clause

Diamond Motors Limited (DML) sought to wind up North Mara Gold Mine Limited (NMGM) on an alleged failure to pay invoices for services rendered. This led to NMGM instituting North Mara Gold Mines Limited v Diamond Motors Limited (Miscellaneous Commercial Cause No 51 of 2016) [2023] TZHCComD 320 (4 September 2023), a petition for the stay of winding-up proceedings pending arbitration.

The court was tasked with determining whether the debt was bona fide disputed by NMGM. NMGM contended that the rates used in DML's invoices were neither agreed upon by the parties

nor previously determined by an arbitral tribunal in a prior dispute.

The court ruled in favour of NMGM, stating that there was no evidence to show that the rates were agreed upon or determined by the tribunal previously. Given the dispute over the rates, it was proper to honour the parties' agreement and stay the winding-up proceedings pending arbitration.

It is important to note the precedent set in Sinotruk International v TSN Logistics Limited (Miscellaneous Application Cause 13 of 2021) [2021] TZHCComD 3344 (24 September 2021), which established that if a debt is not genuinely disputed, the existence of an arbitration agreement is irrelevant to the court's discretion in making a winding-up order. The mere fact that the parties have agreed on a different forum for resolving disputes will not prevent the court from assuming jurisdiction in winding-up proceedings. It is merely delaying the inevitable.

Therefore, parties should ensure that a genuine dispute exists that is capable of being arbitrated, to effectively invoke arbitration clauses and prevent the courts from intervening in winding-up matters.

Time limit to file an arbitral award

In the case of Louis Dreyfus Suisse SA v Kahama Oil Mills Limited (Miscellaneous Commercial Cause No 67 of 2023) [2024] TZHCComD 105 (7 June 2024), the court was tasked with determining the time limit within which an arbitral award must be recognised and enforced in Tanzania. The petitioner applied, through a letter dated 5 October 2023, for a foreign arbitral award issued on 9 May 2023, to be recognised and enforced as a decree of the High Court of Tanzania. The respondent objected, arguing that the filing of the award was made too late.

The respondent contended that the law is silent on the specific time period for filing an arbitral award. Therefore, under the Law of Limitation Act [Cap 89 RE 2019] (LLA), where no time limit is prescribed by any written law, the action must be taken within 60 days. The petitioner disagreed, citing Item 18, Part III, of the Schedule of the LLA, which provides a time period of six months for filing an arbitral award. The provision the petitioner relied upon states: "[applications] under the Civil Procedure Code for the filing in court of an award in a suit made in any matter referred to arbitration by order of the court, or of an award made in any matter referred to arbitration without the intervention of a court".

The petitioner relied on multiple precedents from the High Court that upheld a six-month time period for filing an arbitral award. The respondent relied on a sole decision by the Court of Appeal under the repealed Arbitration Ordinance, which upheld a 60-day time period for filing an arbitral award.

The court commenced by interpreting the wording of Item 18, Part III, of the Schedule of the LLA. It concluded that the term "of an award made in any matter referred to arbitration without the intervention of a court" must be read coherently, considering the entire construction of the provision. Consequently, the court determined that the six-month period applies only in the context of enforcing arbitral awards under the Civil Procedure Code [Cap 33 RE 2019] (CPC), and not to applications for recognition and enforcement under the Arbitration Act.

This interpretation is also supported by the wording in the schedule to the CPC which is verbatim

to Item 18, Part III, of the Schedule of the LLA. The schedule to the CPC provides for enforcement of an "award in a suit referred to arbitration by order of the Court" and an "award in a matter referred to arbitration without the intervention of a court".

Given the above holding, the court proceeded to state that the time period under the LLA for the recognition and enforcement of an arbitral award under the Arbitration Act is 60 days. The court also cited the Court of Appeal decision in Tanzania Marketing Board v Cogecot Cotton Company SA (Civil Appeal 60 of 1998) [2002] TZCA 13 (2 September 2002), which was referenced by the respondent. Notwithstanding that this precedent was established under the now-repealed Arbitration Ordinance, the court observed that the legal position remains unaltered under the current Arbitration Act. The court noted that the Arbitration Act retains language analogous to that of the Arbitration Ordinance, which continues to incorporate the provisions of the LLA by reference.

Consequently, the court dismissed the application by the petitioner, affirming that the 60-day time limit for recognition and enforcement of arbitral awards remains applicable under the Arbitration Act.

Parties wishing to enforce their awards in Tanzania must be acutely aware of the relatively short time limitation established by the LLA. The decision to enforce an award in Tanzania should ideally be made well before the tribunal issues the award, to ensure that the necessary steps to enforce the award can be taken promptly and smoothly upon issuance of the decision.

THAILAND

Law and Practice

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Weerawong C&P is an independent Thai law firm established on 1 January 2009. Formerly the Bangkok office of White & Case LLP, which commenced business in Thailand in 1993, Weerawong C&P is now one of Thailand's largest independent law firms. The firm has a deep bench of experienced lawyers providing comprehensive dispute resolution services in pre-litigation and litigation before all levels of court and in domestic and international arbitration at the Thai Arbitration Institute, Hong Kong International Arbitration Centre, Singapore International Arbitration Centre, Geneva and UNCITRAL proceedings – as well as in the enforcement of arbitral awards in Thailand. The team acts for clients across all industry sectors in both domestic and cross-border matters and is ranked as top tier by the leading legal directories for commercial and corporate disputes, contentious government, regulatory, employment, and international trade and customs matters.

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1. General

1.1 Prevalence of Arbitration

Increases in both international and domestic arbitrations are expected to be seen in Thailand. The backlog of cases and the increasing number of disputes submitted to the Thai courts, post-COVID-19, have prompted some courts in Bangkok to actively promote and encourage parties to have their disputes resolved by in-court arbitration or so-called judicial arbitration under the Arbitration Rules of the Thai Arbitration Institute, Office of the Judiciary, since 1 May 2024. Although this form of arbitration has rarely been used in the past and is different from that recognised under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"), the initiative would greatly improve Thai business awareness of arbitration and benefit the system of arbitration in Thailand as a whole.

Domestic parties resort to international arbitration predominantly for cross-border conflicts involving foreign entities and their affiliates – and where the respective contracts contain arbitration clauses.

1.2 Key Industries

Based on the firm's experience and observations, an increasing number of disputes arising from sale and purchase agreements were resolved through international arbitration in 2022–23. This increase in activity can potentially be attributed to the post-pandemic recovery period, which resulted in more active markets, and the consequences of contractual breaches, particularly on the medical equipment market, following the COVID-19 pandemic. Additionally, there have been a significant number of cases arising from disputes within the Thai construction industry, specifically related to construction agreements.

1.3 Arbitration Institutions

Several institutions in Thailand provide arbitration services under their own arbitration rules to facilitate domestic and cross-border disputes that arise in Thailand and other countries. This includes the Thai Arbitration Institute (TAI), the Thailand Arbitration Center (THAC) and the Office of the Arbitration Tribunal of the Thai Chamber of Commerce (TCC).

Arbitration proceedings are also conducted in special government institutions in Thailand, which include the Office of the Insurance Commission (OIC), the Thai General Insurance Association, the Department of Intellectual Property (DIP) and the Securities and Exchange Commission (SEC).

However, when it comes to international commercial disputes, the TAI and THAC have emerged as the two most prominent arbitral institutions in Thailand. In recent years, the THAC has been actively promoting international arbitration through hosting the annual Thailand ADR week. Moreover, it has been engaging in collaborative relationship with a variety of stakeholders, both domestic and internationally. Some of these partnerships have resulted in THAC establishing specialised centres and arbitration rules, such as the Thai-Chinese International Arbitration and Mediation Center (TCIAC), the Thailand Center of ADR for Sport (TCAS), and Thailand Logistics ADR Center (TLAC). Furthermore, its growing number of administered cases may also be attributed to the progressive admission of Thai and foreign arbitrators to its panel. On the other hand, the TAI, while maintaining a single set of arbitration rules, has been comparatively active in fostering co-operative relationships and enter-

ing into Memorandum of Understandings with both private and public organisations. The TAI, having had a longstanding presence in the sector since its establishment in 1990, is well-known for the expertise of its staff, its well-established procedural framework, and comparatively lower administrative fees. Without consolidated public official records on international arbitration, it is difficult to definitively determine which arbitral institution is the preferred choice for international arbitration in Thailand. Both institutions are currently undergoing review of their arbitration rules. The resulting amendments to their arbitration rules remain to be seen, and it is yet to be determined which of the institutions will be introducing a more welcomed change.

No new arbitral institutions were established in 2023-2024.

1.4 National Courts

According to the Arbitration Act BE 2545 (2002) (the "2002 Arbitration Act") the following courts, subject to their respective jurisdictions, are capable of adjudicating disputes pertaining to both international and domestic arbitration:

- the Central Intellectual Property and International Trade Court;
- the Regional Intellectual Property and International Trade Court;
- a court where the arbitral proceedings were undertaken within its jurisdiction;
- a court where either party has established domicile within its jurisdiction; or
- a court that has jurisdiction over a dispute submitted to arbitration.

According to the 2022 THAC Annual Report, the most cases filed in respect of arbitration (including enforcement of arbitration awards and setting aside of arbitration awards) were filed with the Central Administrative Court, while the Central Intellectual Property and International Trade Court received fewer cases in 2022.

2. Governing Legislation

2.1 Governing Law

Thai legislation, particularly the 2002 Arbitration Act, as amended by the Arbitration Act B.E. 2562 (2019), (the "Thai Arbitration Law" or TAL) governs both international and domestic arbitration within Thailand and makes no distinction between the two. The Thai Arbitration Law is based largely on the text of the UNCITRAL Model Law on International Commercial Arbitration (1985). However, Thailand has not adopted the amendments introduced by the UNCITRAL in 2006 (the "Model Law"). As it stands, the Thai Arbitration Law diverges from the UNCITRAL Model Law in the following respects.

- Its scope of application is not limited to international commercial arbitration.
- If the parties fail to reach an agreement on the number of arbitrators, a sole arbitrator shall be appointed.
- It lacks provisions on interim measures and preliminary orders granted by the arbitral tribunal, as adopted by the UNCITRAL Model Law in 2006.
- It permits the parties to request court-ordered interim measures prior to the commencement of arbitral proceedings, provided they commence arbitration within 30 days following the granting of such measures.
- It expressly provides arbitrators with immunity from civil liabilities, except in cases where they cause damage to either party wilfully or as a result of gross negligence.
- It stipulates a three-year limitation period to apply for enforcement of an arbitral award

from the date it becomes enforceable (Section 41, TAL).
- Lastly, it bestows on the presiding arbitrator the authority to independently issue an award, order, or ruling in situations where a majority vote cannot be secured.

2.2 Changes to National Law

Thai arbitration law has not undergone any significant modifications in the past year. There is currently no prospective legislation in the pipeline that might potentially alter the arbitration landscape in Thailand.

3. The Arbitration Agreement

3.1 Enforceability

To be enforceable, an arbitration agreement must take the form of an arbitration clause within a contract or as a standalone agreement. In principle, it must also be in writing and signed by all parties involved.

Nonetheless, the arbitration agreement can also be recognised as such if it has been concluded in an exchange between the parties by means of letters, facsimiles, telegrams, telex, exchange of data with electronic signatures affixed, or other methods that can provide a record of the agreement. This can also be in the form of an exchange of a statement of claim and statement of defence in which the existence of an agreement is not merely alleged by one party and denied by the other.

Additionally, provided they are documented in writing, any references in a contract to a document containing an arbitration clause can be considered as an arbitration agreement. This holds true as long as the reference is such that it makes that clause a part of the contract.

3.2 Arbitrability

The Thai Arbitration Law does not provide comprehensive guidelines on what constitutes an arbitrable matter. It simply stipulates that courts may dismiss an application for the enforcement of an arbitral award if it finds that the award pertains to a dispute "not capable of settlement by arbitration under the law".

The determination of arbitrability is thus left to the discretion of the courts and is assessed on a case-by-case basis. Nevertheless, it is generally acknowledged that the following types of disputes are not arbitrable:

- criminal disputes;
- insolvency disputes;
- civil and commercial disputes involving the violation of public policy or related to a person's legal status (eg, marital status);
- certain category of labour disputes that are subjected to disputes resolution mechanism under the Labour Relations Act B.E.2518; and
- disputes explicitly required by law to be adjudicated by courts – for example, those involving claims for a company's dissolution.

The general approach to determining arbitrability hinges on whether exclusive jurisdiction for certain matters is vested with the courts. This means that if a specific type of dispute or subject matter is explicitly assigned to be resolved by courts per the law, then such matters cannot be arbitrated and must be resolved through court proceedings.

3.3 National Courts' Approach

The courts have generally respected the choice made by the parties regarding the governing law of the arbitration agreement. They will enforce and interpret the agreement in accordance with the law chosen by the parties. In cases where

the parties have not explicitly designated the governing law for the arbitration agreement, the approach of the courts has been to apply Thai law.

Under Thai law, two forms of arbitration are recognised – namely, in-court arbitration and out-of-court arbitration.

In-court arbitration or so-called judicial arbitration refers to a process at the court of first instance whereby the parties agree to refer their disputed issues to arbitration before the court. It is viewed as a case management technique and is governed by Sections 210–220 and 222 of the Civil Procedure Code rather than the Thai Arbitration Law, which stipulate:

- the procedures for establishing an arbitral tribunal (either by the parties themselves, the court, or a combination of both);
- the procedural rules the tribunal must adhere to;
- the formulation of an arbitral award; and
- the enforcement of said award.

Without the instant enforceability of the award incorporated into the court's judgment, it lacks international enforceability under the New York Convention. Despite these provisions, in-court arbitration has seldom been utilised in Thailand, likely due to insufficient public awareness. However, this is poised to change. The President of the Supreme Court's policy announcement in October 2023 called for the Court of Justice to "serve as a dependable place of refuge for people encountering difficulties or disputes by, among other things, promot[ing] alternative dispute resolution methods throughout the court proceedings to… minimise expenses for the involved parties" and to "collaborate with both public and private sectors to enhance the efficiency and expediency of case adjudication and judgment enforcement".

This policy intent has been translated into action by a number of courts in Bangkok metropolitan area, which are now introducing judicial arbitration to disputing parties appearing before them. However, judicial arbitration is only adopted if both parties mutually agree. Guidelines on this process have been developed for the judiciary and the Office of the Courts of Justice has hosted a series of knowledge-sharing sessions. The introduction of judicial arbitration has been met with a positive response, primarily because it offers a shorter timeframe for adjudication.

3.4 Validity

Thailand recognises the rule of separability for arbitration clauses. It is considered an independent agreement separate from the main contract. Consequently, even if the arbitral tribunal determines that the main contract is null and void, this decision does not affect the validity of the arbitration clause.

As stipulated in Section 11 of the Thai Arbitration Law, an arbitration agreement can take the form of an arbitration clause within a contract or exist as a separate agreement altogether. Further reinforcing the distinctness of arbitration clauses, Section 24 of the Thai Arbitration Law confirms their separability. This provision ensures that any invalidity of the primary contract does not impact the legality of the arbitration clause contained therein.

In instances where a claimant presents a case containing a seemingly legally enforceable arbitration clause before a Thai court, the court does not immediately dismiss the case. Instead, it provides the defendant with the opportunity to raise an objection. Subsequently, the court

is mandated to conduct an inquiry hearing to determine the enforceability of the arbitration clause under the provisions of the Thai Arbitration Law. Generally, if an arbitration agreement appears to be legally binding and complies with the Thai Arbitration Law, the Thai court will likely dismiss the case and thereby compel the parties to proceed with the arbitral process.

A generally binding arbitration clause may, however, become unenforceable should it be contained in a standard form contract that gives the party prescribing such contract an unreasonable advantage over the other party. A relevant example is a dispute between a consumer and a business operator where the business operator's standard form contract required any dispute between the parties to be resolved by arbitration. Here, the Supreme Court ruled that the agreement to arbitrate was an unfair contract term due to its effect of increasing the consumer's burden while at the same time reducing the consumer's rights to specialised proceedings under the Consumer Case Procedure Act, B.E.2551, which is part of the Thai consumer protection regime (Supreme Court Judgment No 4183/2565 (2022)).

4. The Arbitral Tribunal

4.1 Limits on Selection

The Thai Arbitration Law does not limit the parties' autonomy to select arbitrators.

It is furthermore the obligation of the arbitrator to disclose any circumstances that might lead to justifiable doubts regarding their impartiality or independence. It is incumbent upon the arbitrator – from the moment of appointment and throughout the entirety of the arbitral proceedings – to promptly disclose such circumstances to all involved parties, unless the parties had previously been made aware of these by the arbitrator themselves.

4.2 Default Procedures

If the parties are unable to reach a consensus on the number of arbitrators, the arbitration process will proceed with the appointment of a sole arbitrator.

In situations where the tribunal should consist of a sole arbitrator and the parties fail to agree on who this arbitrator should be, either party may petition the competent court to appoint the arbitrator on the parties' behalf.

In cases where the arbitral tribunal consists of more than one arbitrator, each party shall appoint an equal number of co-arbitrators and the appointed co-arbitrators are then tasked with appointing a presiding arbitrator. If a party fails to appoint its co-arbitrator(s) within 30 days of receiving notification to do so from the other party or if the parties' appointed co-arbitrators fail to appoint the presiding arbitrator within 30 days from their appointment, either party may petition the competent court for an order appointing the co-arbitrator or the presiding arbitrator.

Where the parties have agreed to an appointing procedure but it has not been complied with successfully, either party may file a petition with the competent court to appoint the arbitrator as it deems appropriate where:

- a party fails to perform as required under such procedure;
- the parties, or the arbitrators appointed by each party, are unable to reach an agreement under such procedure; or

- a third party, including an institution, fails to fulfil any duty entrusted to it under such procedure.

The default process does not differ for multiparty arbitrations.

4.3 Court Intervention

The court is vested with the authority to appoint arbitrators as stipulated under Section 18 of the Thai Arbitration Law. Please refer to **4.2 Default Procedures**.

4.4 Challenge and Removal of Arbitrators

The appointment of an arbitrator can be challenged if there are circumstances that lead to justifiable doubts about their impartiality or independence, or if they lack the qualifications agreed upon by the parties. However, a party may not challenge the appointment of an arbitrator they have appointed or in whose appointment they have participated, unless they were not aware – or could not have been aware – of the grounds for such challenge at the time of appointment.

4.5 Arbitrator Requirements

Please refer to **4.1 Limits on Selection**.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

Please refer to **3.2 Arbitrability**.

5.2 Challenges to Jurisdiction

The principle of competence-competence is applicable in Thailand. Under this principle, an arbitral tribunal has the authority to rule on its own jurisdiction. This includes issues related to the existence or validity of the arbitration agreement, the validity of the appointment of the arbitral tribunal, and determining whether the dispute at hand falls within the scope of its authority.

Any challenge to the jurisdiction of the arbitral tribunal to hear the dispute must be raised before the tribunal no later than the date of the submission of the statement of defence on the merits of the case. A party to the dispute is not precluded from raising such a challenge by the reason that such party has appointed – or participated in the appointment of – an arbitrator. In raising a challenge that the arbitral tribunal is exceeding the scope of its authority, any party to the dispute must raise it immediately upon the occurrence of the incidence during the arbitral proceedings, unless the arbitral tribunal considers the delay justified – in which case, the arbitral tribunal may permit a party to the dispute to make a challenge later than the time limit specified.

In addition to the foregoing, the parties may challenge the jurisdiction only after the rendering of an arbitral award if arbitration proceedings have already been initiated.

5.3 Circumstances for Court Intervention

In a case brought before the Thai Supreme Court involving a competence-competence challenge seeking to set aside an arbitral award, the court demonstrated a reluctance to intervene and dismissed the argument in favour of arbitration (Supreme Court Judgment No 7801/2561(2018)).

Typically, the court treats the motion requesting a ruling on the jurisdictional issue in the same manner as other cases. All procedural submissions exchanged during the proceedings – including rulings from the arbitral tribunal affirming or denying jurisdiction – are usually considered as supporting evidence.

5.4 Timing of Challenge

If the arbitral tribunal renders a preliminary ruling stating that it has jurisdiction over a case, either party may file a motion requesting the competent court to rule on the matter within 30 days of receiving the preliminary ruling. If the tribunal's jurisdiction is addressed in the final award instead, the award debtor can challenge the tribunal's competence during either an annulment action or by objecting to the enforcement action initiated by the award creditor.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

In order to determine the admissibility and jurisdiction of a case, the court will evaluate the existence or validity of the arbitration agreement and other relevant factors under the de novo standard of judicial review. However, if the tribunal issues a preliminary ruling affirming its jurisdiction, it may be accorded a certain level of deference.

The enforcement or refusal of an arbitral award enforcement by a Thai court is determined based on a limited set of grounds as outlined under Section 43 of the Thai Arbitration Law.

This provision specifies that a court may refuse the enforcement of the arbitral award, irrespective of the country in which it was issued, provided the party against whom the enforcement is sought can prove one of the following.

- A party involved in the arbitration agreement was under some legal incapacity according to the law applicable to that party.
- The arbitration agreement is not binding per the law of the country agreed upon by the parties (or, in the absence of any indication thereof, under the law of the country where the award is issued).
- The applicant party did not receive proper advance notice of the appointment of the arbitral tribunal or the arbitral proceedings or was otherwise unable to present their defence in the arbitral proceedings.
- The award involves a dispute not falling within the scope of the arbitration agreement or contains a decision on a matter beyond the scope of the arbitration agreement. However, if the award on the matter beyond the scope can be separated from the part within the scope of the arbitration agreement, the court may set aside only the part that exceeds the scope of the arbitration agreement or clause.
- The composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties (or, in the absence of any agreement by the parties, in accordance with the law of the country where the award is issued).
- The arbitral award has not yet become binding or it has been set aside or suspended by a competent court (or under the law of the country where it was made). Unless the setting aside or suspension of the award is sought from a competent court, the court may postpone the hearing for the enforcement of the award as it deems appropriate. Furthermore, upon the request of the applicant party, the court may order the party against whom enforcement is sought to provide suitable security.

5.6 Breach of Arbitration Agreement

In 2017, Thailand's Supreme Court ruled on a subcontract agreement arbitration clause, asserting in Judgment No 1115/2560 that such clause does not oblige parties exclusively to submit to arbitration – litigation is also permissible.

However, in 2019, a revised stance was taken. In Judgment No 3427/2562, the Supreme Court ruled that the defendant's witness presentation showed substantiated evidence that the phrase "may refer the dispute to arbitration" in an arbitration clause does not provide for a choice between litigation and arbitration. Instead, the parties in this specific case intended for arbitration to be the only means of resolving their dispute once the 60-day period for amicable settlement had elapsed. Consequently, the court enforced the arbitration agreement, dismissing the litigation. This welcome ruling signalled clear support for arbitration in Thailand.

The key takeaway from these cases is the court's preference for mandatory language to be used in arbitration agreements to ensure enforceability. These judgments sparked debates on the extent to which the court should consider the parties' intentions, as well as the perceived validity and enforceability of the arbitration clause.

5.7 Jurisdiction Over Third Parties

Thai laws only permit a case to be brought to the arbitration process when the parties give their consent to the arbitration proceedings in line with the Thai Arbitration Law. Therefore, in the absence of a clear arbitration agreement in writing or in a specified form under Thai Arbitration Law, there is no circumstance in which Thai laws would allow an arbitral tribunal to assume jurisdiction over those individuals or entities who do not consent to the arbitral proceeding.

6. Preliminary and Interim Relief

6.1 Types of Relief

The Thai Arbitration Law does not provide the arbitral tribunal with the authority to grant interim relief. Even though some arbitration institutions' rules within Thailand permit arbitrators to grant interim measures, such orders inherently lack enforcement power and rely more on the parties' compliance therewith.

Consequently, in a practical context, rather than requesting the tribunal-ordered interim relief, a party will instead submit a request to a competent court to seek the issuance of interim remedies.

6.2 Role of Courts

The courts have the authority to grant interim relief in arbitral proceedings. If a party to an arbitration agreement wishes to protect their interests, they may file a motion requesting the competent court to issue an order imposing provisional measures before or during the arbitral proceedings. If the court determines that it would have been able to issue such an order had the proceedings been conducted in court, it may proceed as requested. The provisions governing provisional measures under the Civil Procedure Code (CPC) will apply mutatis mutandis; thus, the court can also issue seizure orders, grant injunctions, and even issue orders requiring government authorities to suspend any registration related to the property in dispute.

It is worth noting that Thai courts are generally conservative when granting interim remedies. This is because interim remedies are considered to infringe on the rights of the opposing party prior to the conclusion of the proceedings. As such, when considering an interim remedy, Thai courts typically set a very high threshold in practice. This means they exercise their discretion sparingly and usually require a strong case to be presented before they will grant such remedies.

Thai legislation does not include any provisions for the use of emergency arbitrators.

The Thai Arbitration Law does not specifically address whether the right to apply for an order of interim relief from the competent Thai court is available when the arbitration is seated in a foreign jurisdiction. Nonetheless, if the interim relief being sought falls within the jurisdiction of the Thai competent court (ie, assets are located in Thailand) and the court determines that the case has sufficient grounds and it would have been able to issue such an order had the proceedings been conducted in court, it may proceed as requested.

6.3 Security for Costs

Thailand incorporates a provision within the CPC analogous to the concept of security for costs. However, this provision only empowers the respondent to seek such a remedy.

If a respondent desires to seek this form of interim relief, they must file an application with the court requesting the claimant to deposit a sum of money or furnish a guarantee to secure the payment of court fees or costs, which the claimant might be liable for should they lose the case. The burden lies with the respondent to demonstrate that either:

- the claimant is not a resident of Thailand and does not possess any assets within the country; or
- there is reasonable cause to believe the claimant would not be able to pay the court fees if they were to lose the case.

7. Procedure

7.1 Governing Rules

In Thailand, parties are at liberty to choose the arbitration rules that would govern the conduct of the proceedings, so as long as they are not contrary to the mandatory provisions of the Thai Arbitration Law.

Parties may choose institutional rules as they often provide more detailed procedural guidelines compared to the Thai Arbitration Law. International conventions to which Thailand is a party, such as the New York Convention, may also affect the procedure and enforcement of arbitration in Thailand – particularly with regard to international arbitration.

It is important to note that Thai law also has certain mandatory rules that cannot be overridden by agreement between the parties – for example, the rules concerning public policy and order.

7.2 Procedural Steps

The Thai Arbitration Law and the rules of both the main arbitral institutes in Thailand, the TAI and the THAC, specify the procedural steps of arbitral proceedings.

7.3 Powers and Duties of Arbitrators

The Thai Arbitration Law provides that the arbitral tribunal has the power to conduct any proceedings in any manner it deems appropriate. This includes the power to determine the admissibility and weight of the evidence presented by each party, but within limits – the arbitral tribunal must apply the laws of evidence under the CPC to arbitration proceedings mutatis mutandis.

In addition to the foregoing, arbitrators have a duty to uphold impartiality and independence at all times and must possess the qualifications stipulated by the arbitration agreement. If the parties to the contract agree that an agency established for dispute resolution via arbitration is to conduct the proceedings, the arbitrator should also meet the qualifications required by that agency.

In essence, this duty imposes the obligation to disclose any such circumstances that might raise doubts about impartiality or independence. Such disclosure should be made as soon as these circumstances become known and should be consistently updated throughout the arbitral proceedings. If the parties are already aware of these circumstances, the arbitrator need not make any further disclosure. Failure to make these necessary disclosures can lead to the arbitrator's disqualification by the Supreme Court (Judgment No 2231-2233/2553 (2010)).

Moreover, Section 23 of the Thai Arbitration Law holds the arbitrator liable for any civil actions that they conduct in their capacity as arbitrator if:

- such actions are carried out with the intention to cause harm; or
- such actions result from gross negligence, thereby causing damage to any party involved in the arbitration.

7.4 Legal Representatives

National legal representatives are not subject to any additional eligibility criteria beyond what is generally expected for practising law within the country.

However, the 2019 amendments to the 2002 Arbitration Act allow for the appointment of foreigners as representatives in arbitration proceedings, provided that such foreign representatives meet the appropriate visa and/or work permit requirements in order to participate in arbitration proceedings in Thailand. Nevertheless, foreign nationals still remain prohibited from acting as parties' representatives where Thai law is applicable to the substance of the parties' dispute.

8. Evidence

8.1 Collection and Submission of Evidence

Under the CPC, each of the parties is required to submit to the court a list of evidence they plan to use in their case within the timeline specified by the CPC, unless there are sufficient grounds for such party not being able to submit within the timeline specified.

In essence, a list of evidence is a document itemising witnesses and evidence that a party intends to adduce to the court. This serves the purpose of informing the opposing party in a timely manner about the documentary evidence and witnesses that the presenting party intends to rely on. Per the CPC, parties must submit their initial list of evidence to both the court and the opposing party at least seven days before the date of the evidentiary hearing. Furthermore, any additional lists of evidence should be submitted no later than 15 days from the first hearing date. Any evidence that is not declared as part of an accepted list of evidence can be objected to by the court or challenged by the opposing party.

For evidence in their possession, parties must submit this evidence to the court and provide copies thereof to the opposing parties. For evidence not in their possession, they can request the court to issue a subpoena. This subpoena directs the holder of the desired evidence to submit it to the court within a designated timeframe.

Notably, documents intended to be used in the cross-examination process are exempt from being listed in the list of evidence and they do not need to be submitted to the opposing party in advance. This allows for some degree of flexibility and unpredictability in the cross-examination process.

8.2 Rules of Evidence

The laws of evidence under the CPC must apply to arbitral proceedings mutatis mutandis. Therefore, the CPC applies to arbitral proceedings conducted in Thailand, which are the same rules of evidence that apply to domestic matters.

8.3 Powers of Compulsion

Under the Thai Arbitration Law, an arbitrator does not have the powers of compulsion to order the production of documents or require the attendance of witnesses. Any document submission is strictly voluntary and there are no penalties for failure to comply.

If a party wishes to request evidence from any third party or summon a third party to the hearing, such party is recommended to file an application with the court to issue a summons.

9. Confidentiality

9.1 Extent of Confidentiality

While the Thai Arbitration Law does not explicitly address confidentiality, it can be assured through agreement between the involved parties, the terms of reference, or the rules of the arbitral institution. By way of an example, Article 36 of the TAI Arbitration Rules maintains that all arbitration proceedings, claims, defences, documents, evidence, orders, and awards must remain confidential. Disclosure is only permitted with the consent of the parties, for protection of legal rights, enforcement of or challenging an award, or under a legal duty to disclose.

Similarly, Article 87 of the THAC Rules 2015 also reinforces confidentiality in arbitration proceedings. Exceptions are made for instances such as enforcing or setting aside an award, complying with a court order or legal provisions, enforcing a legal right, or complying with a regulatory entity's request related to arbitration proceedings. Confidentiality extends to all aspects of the proceedings, including the names of arbitrators, statements, evidence, documents, and the award itself – unless such information is already in the public domain.

10. The Award

10.1 Legal Requirements

The arbitral tribunal in Thailand will make decisions according to the terms of the contract, while also considering the relevant trade usage in the event of a trade dispute.

In terms of decision-making, all awards, orders, and rulings are determined by a majority vote – unless otherwise agreed between the parties. If a majority cannot be reached, the presiding arbitrator has the authority to make the decision. Procedural questions are also decided by the presiding arbitrator if authorised by the parties or all members of the arbitral tribunal.

The tribunal's award must be in writing and signed by the tribunal members. If there is more than one arbitrator, signatures from the majority will suffice if the reason for any missing signature(s) is given. The award must clearly state the reasons for its decisions, unless the parties agree otherwise. However, it cannot decide on matters beyond the scope of the arbitration agreement or the relief sought by the parties, except for an award made in accordance with a settlement agreement or the fixing of arbitration fees or arbitrator remuneration.

The award must also state the date and place of arbitration and is considered made at that place. After the award is made, a copy is sent to all par-

ties involved without any time limits on delivery specified.

10.2 Types of Remedies

There are no specific limitations imposed on the types of remedies available under Thai law, as long as they do not contravene public order or the good morals of the people of Thailand.

10.3 Recovering Interest and Legal Costs

Successful parties can recover interest and legal costs without significant restrictions. In the event that the enforcement is contested, the Thai courts may take a more conservative stance to reflect amounts more fitting to the local context – although they do not apply a cost-sharing approach. If these remedies align with Thai laws and do not contradict public order or good morals, they can be included in the enforcement of the award.

11. Review of an Award

11.1 Grounds for Appeal

Under the provisions of the Thai Arbitration Law, an arbitral award is not subject to appeal. Therefore, if a party is dissatisfied with the award, they may seek to challenge it by submitting a motion to set aside the award or refuse its enforcement.

The grounds for setting aside the award and refusing its enforcement are generally similar. These grounds may include situations where the award involves a dispute that is not capable of settlement by arbitration, the enforcement of the award would be contrary to public policy, the award deals with a dispute that falls outside the scope of the arbitration agreement, or the composition of the arbitral tribunal or the conduct of the arbitral proceedings is not in accordance with the agreement of the parties.

After the court of first instance issues a judgment on the request for enforcement of an arbitral award, a dissatisfied party may have the option of appealing the judgment directly to the Supreme Court. However, the grounds for appeal are limited and include the following:

- the recognition or enforcement of the award is contrary to public policy;
- the order or judgment is contrary to provisions of law relating to public policy;
- the order or judgment is not in accordance with the arbitral award;
- the judge who presided over the case provided a dissenting opinion; or
- the order pertains to provisional measures.

11.2 Excluding/Expanding the Scope of Appeal

Under Thai law, the scope of appeal or challenge regarding arbitral awards cannot be limited or expanded by the parties.

11.3 Standard of Judicial Review

The court's review of an arbitral award during the enforcement stage is limited, and it does not generally include a review of the merits of the case. However, we found a few precedents where the court conducted a review of the merits because the court viewed that they were contradictory to public policies. In principle and in most cases, however, the court shall deny the enforcement of an arbitral award only on specific grounds. Please refer to **11.1 Grounds for Appeal**.

12. Enforcement of an Award

12.1 New York Convention

Thailand has ratified the New York Convention. Consequently, arbitral awards issued in other countries that are also parties to either the 1927

Geneva Convention or the New York Convention are enforceable in Thailand.

12.2 Enforcement Procedure

A party can apply for the enforcement of an arbitration award at the competent court within three years from the date the award becomes enforceable by filing a motion with the court along with the following documents:

- an original or certified copy of the arbitral award;
- an original or certified copy of the relevant arbitration agreement; and
- a Thai translation of the arbitral award and the arbitration agreement, which must be prepared by a certified translator or by a Thai envoy or consul in the country where the award or agreement was made.

Upon receiving the request, the court will forward the application to the opposing party, so as to give them an opportunity to file an objection. The opposing party has 30 days to file the objection, which can be extended with the court's approval.

Once an objection is filed, the court will schedule one or more hearings to address the issues of the case, number of witnesses, and set trial dates for examining the evidence.

The court will conduct evidence examination trials, where both parties present their evidence and cross-examine the evidence presented by the opposing party. After reviewing the arbitral award and ensuring its compliance with Thai law, the court will render a judgment on whether or not to enforce the award.

The judgment of the court of first instance is immediately enforceable, unless one party files an appeal with the court of appeal and requests a stay of the execution or enforcement process. If the court of appeal orders a stay, the execution or enforcement process will be suspended until the case is finalised.

The judgment can be appealed to the Supreme Court on limited grounds, such as when:

- the recognition or enforcement of the award would be contrary to public order;
- the judgment contradicts legal provisions related to public order;
- the judgment conflicts with the arbitral award itself; or
- the presiding judge has provided conflicting opinions in the judgment.

The Thai Arbitration Law does not explicitly specify whether or not the Thai courts have the authority to annul a foreign arbitral award. A Supreme Court ruling (in case No 5511-5512/2552 (2009)) ruled that the Thai courts could set aside a foreign arbitral award. However, this ruling was revisited in 2015 by a further Supreme Court ruling (in case No 9476/2558 (2015)), which stated that the Thai courts cannot set aside a foreign arbitral award as the Thai Arbitration Law only bestows on the Thai courts the authority to annul an award with the seat of arbitration in Thailand.

Regardless of the country in which the arbitral award was made, the court has the authority to deny enforcement if the party against whom enforcement is sought provides evidence that the award has been set aside by the courts at the seat of arbitration.

In situations where an award is currently undergoing set-aside proceedings at the seat of arbitration, the court has the discretion to delay the

enforcement hearing as it deems necessary and appropriate.

According to the Thai Arbitration Law, the Thai courts cannot raise a defence of sovereign immunity at the enforcement stage, unless the recognition or enforcement of such award will be against public order or the good morals of the people of Thailand.

12.3 Approach of the Courts

In general, Thai courts have a pro-enforcement approach when it comes to the recognition and enforcement of arbitral awards. There are only limited circumstances where the court has refused to recognise or enforce an arbitral award based on public policy or other grounds. For example, an award granting compound interest was refused enforcement by the Thai Court as it was inconsistent with Section 224 of the Civil and Commercial Code, a provision of law concerning the public policy of Thailand (Supreme Court Judgment No 500-501/2565(2022)).

13. Miscellaneous

13.1 Class Action or Group Arbitration

Class action arbitrations are allowed in Thailand under the Regulation of the Office of the Judiciary Governing Arbitration, Arbitration Institute (No 3) BE 2563 (2020). The limitations or requirements for the arbitrability of such claims are similar to those for regular arbitration, with the stipulation that there must be at least three claimants pursuing a claim under the same rights, based on identical facts and legal grounds.

13.2 Ethical Codes

Please refer to **4.1 Limits on Selection**.

13.3 Third-Party Funding

In Thailand, there are no specific laws or regulations that explicitly prohibit third-party funding in arbitration cases. However, Thai courts have historically had a negative view of third-party funding – positing that a party who has no direct interest in a matter, yet still seeks to claim any proceeds, is acting immorally and contravening public policy.

13.4 Consolidation

Under the Thai Arbitration Law, the power of arbitral tribunals or courts to consolidate separate arbitral proceedings is not explicitly specified. However, it is worth noting that Article 13 of the TAI Rules 2017 grants the TAI the authority to consolidate proceedings – even if the arbitration agreements are not identical – based on the criteria of convenience.

The TAI Rules 2017 provide the TAI with broad discretion in determining whether to consolidate separate arbitral proceedings. This discretion appears to be wider than the powers granted to some other arbitral institutions in relation to consolidation. Nevertheless, it remains to be seen how the discretion will be exercised by the TAI.

In addition, it is important to consider the potential challenges that may arise when consolidating proceedings where the arbitration agreements are not identical. There is a risk that a decision to consolidate – and any subsequent award resulting from the consolidated proceedings – could be subject to a challenge in court, either in Thailand or in other jurisdictions during the enforcement process.

13.5 Binding of Third Parties

Third parties cannot be bound by an arbitration agreement or award.

TURKEY

Law and Practice

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Aktay Law Firm is a full-service law firm providing legal consultancy to domestic and international clients, successfully blending business insight with legal expertise. The firm is recognised by leading international law firms around the world, actively contributes legal articles to international publishers, and participates in seminars and panels in its areas of expertise. The firm represents clients in a broad range of domestic and international commercial transactions, dispute resolution and arbitration. Mr Faruk Aktay and Dr Can Eken have recently established International Arbitration Advisors, a global boutique platform for international investment and commercial disputes. With presences in Istanbul, New York, London, Dubai and Singapore, it aims to be a premier platform dedicated to providing expert guidance and comprehensive support in the field of international commercial arbitration, bringing together an elite team of seasoned professionals with extensive experience in navigating the complexities of cross-border disputes.

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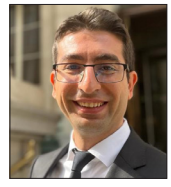

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1. General

1.1 Prevalence of Arbitration

In Türkiye, international arbitration is increasingly preferred as a method of resolving disputes, reflecting a growing confidence in its efficiency and effectiveness. Domestic parties commonly opt for international arbitration by the express inclusion of arbitration clauses. The Turkish legal framework under the Turkish International Arbitration Act, numbered 4686 and dated 5 July 2001 (the "Act"), mimics the UNCITRAL Model Law on International Commercial Arbitration and is in favour of arbitration proceedings, thus making it attractive for domestic and international parties seeking a reliable and neutral forum for resolving cross-border disputes.

1.2 Key Industries

In Türkiye, industries such as construction, banking and finance, maritime and shipping, energy and telecommunications have experienced significant international arbitration activity in recent years. These sectors often involve complex projects, contracts with international counterparties, and substantial investments, which can lead to disputes requiring efficient and specialised dispute resolution mechanisms. Turkish construction companies with projects awarded all around the world have a significant tendency to refer disputes to arbitration.

The complexity of the disputes as well as the calculation of damages requires expertise and neutrality. These factors, alongside a level of efficiency only offered by arbitral tribunals, and the enforceability of awards both domestically and internationally, combine to make arbitration an attractive choice for resolving cross-border disputes in these industries.

1.3 Arbitration Institutions

In Türkiye, the Istanbul Chamber of Commerce Arbitration and Mediation Center (ITOTAM) and the Istanbul Arbitration Centre (ISTAC) are the most prominent arbitral institutions for international arbitration. Established to enhance Istanbul's status as a regional hub for dispute resolution, ISTAC offers modern arbitration rules, experienced arbitrators and efficient administration of cases. In addition to these, the Energy Disputes Arbitration Center (EDAC) offers a specialised centre for energy-related disputes inside and outside of Türkiye. During the course of 2023-24, no new arbitral institutions have been reported to have been established in Türkiye.

1.4 National Courts

In Türkiye, there are designated courts to oversee disputes relating to international and domestic arbitrations. For international arbitrations, the Istanbul Civil Courts of First Instance (Istanbul 1st Commercial Court) and the Istanbul Circuit Courts of Appeal (Istanbul Regional Court of Justice) generally handle international arbitration cases with their specialised hearings. These courts are particularly specialised in handling disputes arising from international commercial arbitration agreements by applying both Turkish law and international arbitration principles such as those found in the UNCITRAL Model Law. For domestic arbitrations, disputes typically fall under the jurisdiction of regular civil courts, with jurisdiction determined by the monetary value and subject matter of the dispute. However, there are no specialised courts which exclusively rule over domestic arbitrations. The recently established Istanbul Finance Center also has an agenda to strengthen the legal infrastructure for the swift resolution of financial disputes, yet it favours national courts and has opted out of establishing specialised courts and divisions.

2. Governing Legislation

2.1 Governing Law

Türkiye has not adopted the UNCITRAL Model Law as of 2024. International arbitration is primarily governed by the Act. This legislation is largely based on the UNCITRAL Model Law, providing a familiar and internationally recognised framework for resolving international arbitration disputes. The Act adopts many of the key provisions and principles of the UNCITRAL Model Law, including provisions on the arbitration agreement, composition of arbitral tribunals, conduct of arbitration proceedings, recognition and enforcement of arbitral awards, and judicial assistance in arbitration matters. Turkish legislation diverges from the UNCITRAL Model Law in areas such as the form and validity of arbitration agreements and the procedural rules for challenging arbitral awards and tribunal jurisdiction. Despite these differences, the Act aligns with international standards to ensure efficient and fair resolution of international disputes through arbitration in Türkiye.

2.2 Changes to National Law

There have been no significant changes to Türkiye's national arbitration law in the past year. However, Türkiye continues to demonstrate a dynamic and determined approach in improving its arbitration framework to attract more international investments and become a preferred seat of arbitration for international disputes. While there are ongoing discussions for legislative amendments to further streamline arbitration procedures or address emerging issues, specific changes that could significantly alter the arbitration landscape in Türkiye have not been reported.

3. The Arbitration Agreement

3.1 Enforceability

There are certain legal requirements for the legality and enforceability of an arbitration agreement in Türkiye.

- *Written condition:* According to Turkish law, the arbitration agreement must be in writing. The written requirement rules that the agreement can be part of a contract as a clause or a separate contract on its own.
- *Specific matters:* The topic of arbitration must concern matters that would be enforceable under the law. For example, it may focus on a

commercial dispute between the parties or a specific legal issue.
- *Competency of the parties:* The parties must have legal capacity to enter into the arbitration agreement.
- *Compliance with Turkish law:* The arbitration agreement must comply with the general principles of Turkish law and public order.
- *Arbitration rules:* Parties must choose specific arbitration rules or institutions to determine how they will conduct the arbitration process. These rules provide guidance throughout the process of executing and concluding an arbitration agreement.
- *Independence and impartiality:* The arbitration agreement should ensure that the arbitral tribunal is independent and impartial. Parties must take the necessary measures to protect the independence and impartiality of arbitrators.

3.2 Arbitrability

Under Turkish law, disputes involving criminal matters, disputes involving bankruptcy and administrative disputes within the exclusive jurisdiction of administrative courts cannot be resolved through arbitration. However, an exception to the general rule for administrative disputes exists for those that relate to concession agreements executed with the administration.

Turkish law follows a dual-track approach when establishing the arbitrability of a dispute. The first part of this approach is determining the nature of the subject matter. In order to consider a dispute arbitrable, the subject matter must be open to settlement by the parties. The second part of this approach is determining whether or not the dispute is explicitly closed to arbitration by any legislation under Turkish law. If the subject matter at hand is not closed to arbitration by law and is open to settlement by the parties themselves, then it is considered arbitrable under Turkish law.

3.3 National Courts' Approach

Turkish courts generally view arbitration as a favourable method of dispute resolution. Therefore, they demonstrate a high level of determination to ensure the enforcement of arbitration agreements, which strengthens the growing and developing field of Turkish arbitration.

Determining the Law Governing the Arbitration Agreement

Turkish courts place high importance on party autonomy as a principle of arbitration; therefore, they substantially uphold the choice of the parties when determining the choice of law and jurisdiction governing arbitration agreements. This willingness to endorse party autonomy generally results in the parties choosing the governing law of the arbitration agreement. The root of this respect for autonomy comes from the influence of the UNCITRAL Model Law and the New York Convention. However, while Turkish courts generally respect the choices of the parties, in cases where the party autonomy leads in a direction that contradicts Turkish public policy or mandatory provisions set by Turkish law, the courts have no choice but to intervene, thus reducing party autonomy to a certain extent. This respectful yet watchful approach towards arbitration ensures a stable and lawful arbitration process in Türkiye.

Enforcement of Arbitration Agreements

Turkish courts generally hold the enforcement of arbitration agreements in high regard, with the condition that those agreements meet the necessary validity requirements set by Turkish law. The validity requirements of arbitration agreements are clearly stated in the Act and the Turkish Code of Civil Procedure (Law No. 6100,

dated 12 January 2001). This eager approach to upholding and enforcing arbitration agreements is due to the recognition of the binding nature of arbitration and it being the preferred method of dispute resolution.

Regular Enforcement of Arbitration Agreements

As mentioned above, arbitration agreements are generally upheld and enforced by Turkish courts due to the method of arbitration being favoured as an alternative to litigation. The principle of competence-competence has been firmly adopted by the Turkish courts, which in essence means that arbitrators have the autonomy to rule on their own jurisdiction. This principle has been adopted to ensure the transparency and independence of the arbitration process.

3.4 Validity

The principle of separability, commonly known as the doctrine of severability, is adopted by Turkish courts and is applied to certain arbitration clauses that are a part of an otherwise invalid arbitration agreement. The main aim of the principle of separability is to ensure that arbitration clauses that are a part of an invalid contract retain their validity. The principle dictates that even if the contract to which the arbitration clause is attached is deemed invalid due to reasons such as illegality, lack of legal capacity of a party or non-compliance with legal requirements, the arbitration clause remains valid under Turkish law.

The Act firmly integrates this principle into arbitral proceedings, which aligns with internationally recognised arbitration norms, for instance, the norms that are found in the UNCITRAL Model Law.

Due to the adoption of the principle of separation, Turkish courts view arbitration clauses, and therefore arbitration agreements, separately from the main contracts and shield the institution of arbitration from the invalidity of the main contract. This method ensures that arbitration remains a reliable, stable and independent method of dispute resolution for all parties involved.

4. The Arbitral Tribunal

4.1 Limits on Selection

Turkish courts fully respect the autonomy of parties participating in arbitration proceedings. However, this substantial room for autonomy involves certain legal necessities in order to be considered legitimate and lawful. Türkiye has organised a legal framework within which the parties can exercise their autonomy in selecting the arbitrators for their proceedings.

A crucial limitation on the autonomy of the parties in choosing the arbitrators is the condition that the arbitrators have to be impartial and independent. The relevant Article in the Act states that arbitrators must be impartial and independent throughout the arbitral proceedings. This means that the parties cannot appoint arbitrators with conflicts of interest or bias. The Act also provides that if an arbitrator has a conflict of interest at any point in the arbitral proceedings, they must immediately disclose that conflict of interest.

While the parties to the arbitration agreement are free to choose their arbitrators within the limits of the law, it should be noted that the number of arbitrators must be an odd number. In addition, if the parties cannot agree on the number of arbitrators, the legally prescribed number of arbitrators is three. If the parties agree on the

number of arbitrators but cannot agree on an arbitrator, they are appointed by the civil court of first instance.

Furthermore, both the Turkish Code of Civil Procedure and the Act dictate that arbitrators are required to have the necessary qualifications required by law, and by the parties themselves if they specified the qualifications that they seek.

4.2 Default Procedures

In Türkiye, the parties have the autonomy to select arbitrators freely. Turkish arbitration law states that if the parties have not chosen or agreed on the method of selecting an arbitrator in the agreement or cannot reach an agreement on that method after the dispute arises, the court intervenes and appoints the arbitrator upon the request of one or both parties.

The aim of this intervention by the courts is to make sure that the arbitration process goes forward smoothly and efficiently even in situations where the parties are unable to come to an agreement. The principle behind this default procedure is to maintain the efficacy and integrity of arbitration proceedings by providing a mechanism to resolve disputes over arbitrator selection swiftly and effectively, and this intervention ensures the continuation of this principle.

4.3 Court Intervention

The intervention of courts typically occurs when there are disputes or challenges relating to the appointment or disqualification of arbitrators. The grounds on which a court may intervene include the following:

- *Failure of parties to agree on arbitrators:* If the parties to the arbitration agreement cannot agree on the appointment of arbitrators within the agreed-upon time frame or according to the procedure set out in their agreement, any party may request the court to appoint an arbitrator.
- *Challenge to an arbitrator's appointment:* If a party challenges the appointment of an arbitrator, alleging reasons such as lack of impartiality or independence, the court may decide on the challenge and, if necessary, replace the arbitrator.
- *Failure of party-appointed arbitrators to agree on a third arbitrator:* In cases where each party has appointed an arbitrator and those arbitrators fail to agree on the appointment of a third arbitrator (in a three-member tribunal), either party may request the court to make the necessary appointment.
- *Subsequent court review of arbitrator's authority:* Although rare, there are instances where a court may review an arbitrator's authority, particularly in cases of alleged misconduct or procedural irregularities that might affect the integrity of the arbitration process.

However, it is important to note that Turkish law places limitations on the court's power to intervene in arbitrator selection. Courts generally respect the principle of party autonomy in arbitration, meaning they will intervene only when necessary to safeguard the integrity and fairness of the arbitration process. The grounds for challenge or intervention are strictly defined, and courts must adhere to procedural rules set out in the arbitration laws.

Moreover, once an arbitral tribunal is constituted, the tribunal itself usually has primary authority over procedural matters and the conduct of the arbitration.

4.4 Challenge and Removal of Arbitrators

In Türkiye, there are special provisions on the rejection or dismissal of arbitrators.

Firstly, arbitrators may be challenged under the relevant article of law if there are reasonable grounds for questioning their independence or impartiality. This article emphasises the significance of arbitrators being impartial and free from any conflicts of interest that could sway their decision-making, in line with international arbitration standards.

Secondly, the relevant article of law allows the parties to object to an arbitrator if they do not meet the agreed criteria or if there are other grounds that call into question the independence or impartiality of the arbitrator. There may be a number of factors that may affect their ability to make a fair decision, such as financial or personal interest in the outcome of the arbitration, personal or professional connections to one of the parties, or any other circumstance.

In order to challenge an arbitrator, one must usually notify the arbitral tribunal of the grounds for challenge and provide a written statement outlining the reasoning behind the challenge within a predetermined amount of time. After reviewing the challenge, the tribunal makes a decision regarding its legitimacy. According to Turkish legislation, the judgment on a successful challenge may be subject to judicial review if the challenged arbitrator does not resign freely.

In order to maintain the validity and integrity of the arbitration process, parties engaged in arbitration proceedings in Turkey must carefully analyse the grounds for contesting arbitrators. In Türkiye's legal system, the framework strives to respect justice and impartiality, which promotes trust in arbitration as a useful alternative conflict settlement method.

4.5 Arbitrator Requirements

Arbitrators must act impartially and independently throughout the arbitration process in accordance with Turkish legislation. The term "independence" means the absence of any connections or situations that could jeopardise the arbitrator's objectivity or decision-making in the case, whereas impartiality requires arbitrators to address the disagreement objectively, without showing bias in favour of one side or the other.

The Act underlines that arbitrators are required to reveal any information that could cast doubt on their independence or impartiality. This covers any prior involvement in the case, financial stakes in the resolution of the conflict, and interpersonal or professional ties to the parties or their agents. If a party to the arbitration reasonably suspects that an arbitrator may lack independence or impartiality, they have the right to challenge the arbitrator and to be informed of such circumstances. Similar emphasis is placed on the value of arbitrator independence and impartiality in ISTAC's Arbitration Rules.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

Under Turkish law, which is mainly governed by the Act and the Turkish Code of Civil Procedure, several subjects are not arbitrable. These exclusions are meant to safeguard vulnerable parties, uphold the public interest or guarantee that certain judicial bodies decide cases. The topics that are excluded from arbitration include disputes involving criminal matters, disputes involving bankruptcy, and administrative disputes within the exclusive jurisdiction of administrative courts. However, an exception to the general rule for administrative disputes exists for those

relating to concession agreements executed with the administration.

5.2 Challenges to Jurisdiction

The principle of competence-competence is firmly applied in Turkish law. This principle gives arbitral tribunals the authority to rule on their own jurisdiction. The competence-competence principle gives arbitral tribunals the choice to challenge the jurisdiction of the proceeding. This right to challenge includes objections that may be raised by parties regarding the existence or validity of the arbitration agreement.

In accordance with Turkish law, parties that wish to contest the jurisdiction of the tribunal are required to bring up these objections as soon as possible in their initial declaration of the content of the dispute, unless they can provide evidence of legitimate reasons for delay. Before moving on to the main issues of the case, the tribunal is then at liberty to rule on these objections as a preliminary matter.

Moreover, Turkish courts have the authority to examine arbitral tribunal awards granted in their own jurisdiction. Within 30 days of receiving notice of the tribunal's award, parties that are unhappy with the decision may file an application with the appropriate court. Subsequently, the court will evaluate the jurisdictional decision of the tribunal, considering the competence-competence and due process principles.

5.3 Circumstances for Court Intervention

In Türkiye, courts may address issues regarding the jurisdiction of the arbitration court, primarily if a party objects to the court's jurisdiction before or during the arbitration proceedings. Courts generally adopt the principle of competence-competence and allow arbitral tribunals to decide according to their own jurisdiction. However, in cases of serious allegations of irregularities or violations of public policy, Turkish courts may intervene. Upon a party's application to set aside or enforce an arbitral award, courts may review adverse decisions of arbitral tribunals regarding jurisdiction and ensure compliance with procedural fairness and legal standards.

5.4 Timing of Challenge

In Turkish law, parties have the right to challenge the jurisdiction of the arbitral tribunal at different stages of the arbitration process.

- *Initial stage (as soon as a case has been filed for arbitration):* Parties contesting the jurisdiction of the arbitral tribunal must raise their objections as soon as possible in their initial declaration of the content of the dispute, unless they can provide evidence of legitimate reasons for delay.
- *After the constitution of the arbitral tribunal:* Once the arbitral tribunal is constituted, it can rule on its own jurisdiction, including any objections raised by the parties regarding the existence or validity of the arbitration agreement. This is done as a preliminary matter before addressing the main issues of the case.
- *After an award has been rendered:* If the arbitral tribunal rules that it has jurisdiction and proceeds to make an award, parties that are dissatisfied with the tribunal's decision on jurisdiction can challenge it in court. Under Turkish law, parties have the right to apply to the appropriate court to review the tribunal's jurisdictional ruling within 30 days of receiving notice of the award. The court will then evaluate the tribunal's jurisdictional decision, taking into account the competence-competence principle and due process guidelines.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

In Türkiye, the standard of judicial review for questions of admissibility and jurisdiction in arbitral proceedings is generally deferential rather than de novo. The courts typically respect and defer to the decisions of the arbitral tribunal on matters such as its own jurisdiction and the admissibility of evidence. However, this deference is not absolute. Turkish courts have the authority to review challenges to the arbitral tribunal's jurisdiction and admissibility rulings, particularly if a party files a specific objection regarding these issues. The courts will examine whether the arbitral tribunal exceeded its authority, acted beyond the scope of the arbitration agreement, or made a decision that contravenes public policy or fundamental principles of law. This approach aims to balance the autonomy of arbitral tribunals with the need for judicial oversight to ensure fair and effective arbitration proceedings in Türkiye.

5.6 Breach of Arbitration Agreement

In Türkiye, national courts generally defend the principle of party autonomy and the enforceability of arbitration agreements. If a party initiates litigation contrary to the arbitration agreement, Turkish courts are generally willing to dismiss such litigation in favour of arbitration, provided that certain conditions are met.

If a party challenges jurisdiction based on an arbitration agreement, the court will generally defer to the arbitral tribunal's determination of jurisdiction unless it finds that the arbitration agreement is expressly void, or invalid. Turkish courts follow an approach supportive of arbitration as an alternative dispute resolution mechanism to litigation.

5.7 Jurisdiction Over Third Parties

Under Turkish law, the general rule is that an arbitral tribunal's jurisdiction is limited to the parties that have explicitly agreed to arbitration in an arbitration agreement. However, there are limited circumstances where an arbitral tribunal might assume jurisdiction over individuals or entities that are not signatories to the arbitration agreement. This applies to domestic parties as well as international ones.

6. Preliminary and Interim Relief

6.1 Types of Relief

In Turkish law, arbitration courts have the authority to take preliminary or interim measures. Such injunctions are issued to ensure that certain temporary arrangements are made during the dispute resolution process or to preserve the situation between the parties.

According to Turkish law, preliminary or provisional injunction decisions issued by the arbitration court are binding. The parties must comply with these decisions.

If a party fails to comply with an injunction issued by the arbitral tribunal, this may adversely affect the course and outcome of the arbitration process. In addition, the courts may also request the implementation of these injunctions.

6.2 Role of Courts

In Türkiye, courts can play a role in preliminary or interim relief in arbitral proceedings, particularly before an arbitral tribunal is constituted or to support ongoing proceedings. They can grant interim relief in aid of foreign-seated arbitrations under specific conditions, such as preserving assets or preventing irreparable harm. Turkish legislation allows for the use of emergency arbi-

trators, whose decisions are generally binding and can include injunctions, asset preservation orders and other interim measures. National courts may intervene after an emergency arbitrator has been appointed in exceptional cases, such as procedural irregularities or breaches of public policy, but generally respect and enforce their decisions unless compelling reasons justify otherwise.

6.3 Security for Costs

In Turkish law, both courts and arbitration tribunals have the authority to request security for costs. This practice is especially common when a party's financial situation is uncertain or litigation would be costly. Such security requests are made to ensure the right to a fair trial and the financial sustainability of the litigation process.

7. Procedure

7.1 Governing Rules

The Act governs the procedure of arbitration in Türkiye. The Act is based on the UNCITRAL Model Law. Importantly, the parties are free to agree on rules that apply to them on many points since many provisions in the Act are not mandatory and can be decided by the parties. So, parties can choose major arbitration institutions and their rules can apply to arbitrations when the seat is Türkiye, if the Act allows.

Also, notably, Türkiye has the competence-competence and separability/severability principles well established in the Act. In Türkiye, there are also some arbitration institutions. The Istanbul Arbitration Centre (ISTAC) has ISTAC Rules. Moreover, some chambers of commerce have well-established arbitration bodies. The Istanbul Chamber of Commerce has the Istanbul Chamber of Commerce Arbitration and Mediation Center (ITOTAM) and it has its arbitration rules. If parties choose these centres, their rules can apply.

7.2 Procedural Steps

There are no particular procedural steps that are required by law specific to Türkiye. Parties are free to agree on the procedural rules within the law. The overarching principles are that the parties must be treated equally and must be given opportunities to put forward their claims and defences.

7.3 Powers and Duties of Arbitrators

Article 7 of the Act introduces a provision on the selection/challenge/responsibility of the arbitrator or arbitration committee, the termination of their duties and their authority. According to this provision, juridical persons cannot be arbitrators. Again, under this provision, if the parties agree to have a sole arbitrator but cannot agree on the arbitrator and there is no appointing authority decided by the parties, the appointing authority in such circumstances is the civil/commercial court of first instance and this court will determine the sole arbitrator.

Apart from this, the arbitrators must be independent and impartial. There are also some rules on the nationality of arbitrators. According to these rules, if the parties have different nationalities, and if a single arbitrator is to be selected, this arbitrator should not be of the nationality of either of the parties, and if three arbitrators are to be selected, two of them should not be of the nationality of one party. A similar procedure applies in cases where more than three arbitrators are selected.

The arbitrator may be challenged if the arbitrator does not have the qualifications agreed upon by the parties. If there is a reason that justifies

doubting the arbitrator's impartiality, then the arbitrator may be challenged as well.

7.4 Legal Representatives

In Türkiye, as a general rule, only Turkish attorneys registered with a Bar in Türkiye can represent parties in courts. Parties in arbitration proceedings, however, may also be represented by foreign natural or juridical persons. This provision does not apply to requests filed in court in connection with arbitration. Requests filed in court in connection with arbitration can only be filed by Turkish lawyers, as explained.

8. Evidence

8.1 Collection and Submission of Evidence

There are no specific rules in the Act on the collection and submission of evidence at the pleading stage and at the hearing.

According to Article 10/D of the Act, within the period agreed upon by the parties or determined by the arbitrator or arbitral tribunal, the parties can add written evidence to their petitions and refer to the evidence they will present in the future. Under Article 11/C-4, if one of the parties does not attend the hearing or refrains from presenting evidence without showing a valid reason, the arbitrator or arbitral tribunal may continue the arbitration proceedings and make a decision based on the available evidence.

According to Article 12/A, the arbitrator or arbitral tribunal can (i) appoint one or more experts to report on the issues determined, (ii) order the parties to provide the necessary explanations and information and provide the relevant documents to the expert, and (iii) conduct discovery regarding the case. Under the same Article, unless otherwise agreed by the parties, upon the request of one of the parties or when deemed necessary by the arbitrator or the arbitral tribunal, experts may attend the hearing to which they will be summoned after submitting their written or verbal reports. At this hearing, the parties can ask questions to the experts and may bring experts of their choice to the hearing to be heard on the dispute. According to Article 12/B, the parties submit their evidence within the period determined by the arbitrator or arbitral tribunal. The arbitrator or arbitral tribunal may request assistance from the civil/commercial courts of first instance in collecting evidence. If the parties ask for the assistance of the Turkish courts, the Turkish courts apply the provisions of the Turkish Code of Civil Procedure. So, discovery, direct examination and cross-examination, the use of witness statements, and disclosure are all possible under the Act. The parties can ask for the assistance of Turkish courts during this process.

8.2 Rules of Evidence

As explained above, the rules of evidence in international arbitration proceedings are largely left to the parties to decide. In domestic matters, and especially in court, the parties do not have as much flexibility to agree on procedural rules as they have in international arbitration proceedings. However, the Turkish Code of Civil Procedure also has similar rules on discovery, direct examination and cross-examination, the use of witness statements and other relevant rules of evidence.

8.3 Powers of Compulsion

Under Article 3/2 of the Act, for issues arising from international arbitration, courts may intervene only in line with the provisions of the Act. There are several occasions where arbitrators or parties can ask for the assistance of courts.

Regarding the evidence, as explained above, under Article 12/B, the arbitrator or arbitral tribunal may request assistance from the courts of first instance in collecting evidence, which includes both the production of documents and the attendance of witnesses. In this case, the Turkish Code of Civil Procedure will apply in securing witnesses and documents. In terms of the difference between parties and non-parties, the arbitral tribunal cannot order any decision binding third parties that are not party to the arbitration. This issue is explicitly stated in the Act for provisional measures. According to Article 6/2, arbitrators cannot decide on interim measures or liens binding third parties.

9. Confidentiality

9.1 Extent of Confidentiality

There is no specific provision in the Act on confidentiality. So, similar to many other procedural issues, confidentiality is also subject to the agreement of the parties. In practice, parties sometimes sign a confidentiality agreement or include a confidentiality clause. In institutional arbitration, major Turkish arbitration institutions may have confidentiality provisions; for instance, ISTAC and ITOTAM have included confidentiality provisions in their arbitration rules.

10. The Award

10.1 Legal Requirements

Article 14/A of the Act lists the requirements for an arbitration award. According to this Article, the following are required:

- names, surnames, titles and addresses of the parties and their representatives and attorneys, if any;
- the legal reasons and justification on which the decision is based, and the amount of compensation awarded in claims for compensation;
- place of arbitration and date of decision; and
- names and surnames, signatures and dissenting votes of the arbitrator or arbitral tribunal that made the decision.

A set-aside proceeding may be initiated against the decision.

There is no specific time limit on delivery of the award. In the same Article, it is stated that the arbitrator or arbitral tribunal's decision is notified to the parties by the arbitrator or the president of the arbitral tribunal.

10.2 Types of Remedies

There are no limits on the types of remedies specified in the Act. Unless otherwise agreed by the parties, the arbitrator or arbitral tribunal may also render partial awards.

10.3 Recovering Interest and Legal Costs

The general practice in Türkiye is that the winning party generally receives statutory interest or interest at a reasonable rate agreed by the parties. The winning party is also awarded the costs of the proceedings and a sum based on a tariff (published yearly) for the lawyer, if the winning party is represented, as the representation costs. According to Article 164 of the Attorney Act numbered 1136 and dated 7 April 1969, at the end of the case, the attorney fee to be charged to the losing party based on the tariff belongs to the lawyer. So, Türkiye follows a "costs follow the event" principle, but there is a cap on the lawyer's costs.

In the Act, the distribution of the costs can be agreed between the parties. Unless there is such an agreement, the losing party pays for all the legal costs as specified in the Act. There is no specific provision on interest in the Act. Interest can be awarded according to the applicable laws in arbitration. If there is a very high rate of interest, in certain circumstances such interest rate might not be enforced in Türkiye on public policy grounds.

11. Review of an Award

11.1 Grounds for Appeal

The arbitration award is final and binding and there is no appeal procedure against arbitration awards, unlike court judgments. There is the possibility of a set-aside proceeding with very limited grounds. The grounds the losing party must raise are listed in Article 15 of the Act, and they are:

- One of the parties to the arbitration agreement was under some incapacity, or the arbitration agreement is invalid under the law to which the parties have subjected it or, failing any indication thereon, under Turkish law.
- In the selection of the arbitrator or arbitral tribunal, the procedure specified in the agreement of the parties or stipulated in the Act was not followed.
- The decision was not made within the arbitration period.
- The arbitrator or arbitral tribunal decided that they do not have jurisdiction, or the arbitrator or arbitral tribunal was unlawfully authorised.
- The arbitrator or arbitral tribunal decided on an issue outside the arbitration agreement, or did not decide on the entire request, or exceeded their authority.
- The arbitration proceedings were not conducted in accordance with the agreements of the parties in terms of procedure or, in the absence of such an agreement, with the provisions of the Act, and this situation affects the merits of the decision.
- The principle of equality of the parties was not observed.

Apart from the grounds listed above that a party must raise, the court, on its own motion, may set aside an award if it finds that:

- the dispute subject to the decision of the arbitrator or arbitral tribunal is not arbitrable under Turkish law; or
- the decision is against public policy.

11.2 Excluding/Expanding the Scope of Appeal

Importantly, parties may agree to waive, wholly or partially, their right to bring set-aside proceedings in Türkiye according to Article 15 of the Act.

11.3 Standard of Judicial Review

Under Article 15 of the Act, a set-aside request is reviewed and decided without going through the merits of the case with a full hearing (similar to summary judgment in the UK and USA), unless the regional court hearing the case decides otherwise.

12. Enforcement of an Award

12.1 New York Convention

The New York Convention entered into force in Türkiye on 30 September 1992. Türkiye made two reservations:

- That it will will apply the Convention only to the recognition and enforcement of awards

made in the territory of another contracting state.
- That it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.

So, reciprocity and commerciality are the two reservations Türkiye noted.

Türkiye has also signed the ICSID Convention and nearly 100 bilateral investment treaties.

12.2 Enforcement Procedure

Türkiye follows the grounds under the New York Convention for the enforcement of awards. We cannot give a conclusive answer whether an award that has been set aside by the courts in the seat of arbitration will be enforced for every case. In each case, the courts will consider the issues in the case and decide on the enforcement or sovereign immunity defence according to the specifics of the case.

12.3 Approach of the Courts

Türkiye has gradually become a more and more arbitration-friendly jurisdiction. While there are many cases where the losing party challenged the award on the public policy grounds, the courts have gradually applied those grounds for stopping enforcement more cautiously over the last decades. Unless there is a situation that would be against public policy and the fundamental principles of law in Türkiye, an arbitration award would not be stopped on public policy grounds. Such an example that might be considered against public policy might be a severe penalty clause in a contract or a very high interest rate that would lead to the bankruptcy of the losing party.

13. Miscellaneous

13.1 Class Action or Group Arbitration

The Act does not have any specific provision for class action arbitration or group arbitration. However, institutional rules in Türkiye such as those of ISTAC and ITOTAM have provisions where arbitration between multiple parties are possible if the parties agree on such rules.

13.2 Ethical Codes

As mentioned above, arbitrators must be impartial and independent, and they must operate at these standards by treating both parties equally and giving them equal opportunity to present their cases. Lawyers licensed in Türkiye and acting in arbitration must also follow the professional and ethical rules for lawyers in Türkiye.

13.3 Third-Party Funding

There are currently no rules or restrictions on third-party funding in Türkiye. So, Turkish law does not explicitly prohibit or permit third-party funding. General contract law principles would determine the issues.

13.4 Consolidation

There is no specific provision on consolidation in the Act. However, arbitration institutions provide consolidation provisions, and consolidation might be possible if the parties agree on such rules. Both ISTAC's and ITOTAM's arbitration rules have consolidation provisions.

13.5 Binding of Third Parties

Depending on the formation and interpretation of an arbitration agreement, a third party might be bound by the arbitration agreement. Article 2 of the Act will be important in determining this issue. Also, under Article 6 of the Act, if one of the parties requests interim measures or liens from the court before or during the arbitration

proceedings, the court can grant such measures, which might affect foreign or local third parties.

Trends and Developments

Contributed by:
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Aktay Law Firm is a full-service law firm providing legal consultancy to domestic and international clients, successfully blending business insight with legal expertise. The firm is recognised by leading international law firms around the world, actively contributes legal articles to international publishers, and participates in seminars and panels in its areas of expertise. The firm represents clients in a broad range of domestic and international commercial transactions, dispute resolution and arbitration. Mr Faruk Aktay and Dr Can Eken have recently established International Arbitration Advisors, a global boutique platform for international investment and commercial disputes. With presences in Istanbul, New York, London, Dubai and Singapore, it aims to be a premier platform dedicated to providing expert guidance and comprehensive support in the field of international commercial arbitration, bringing together an elite team of seasoned professionals with extensive experience in navigating the complexities of cross-border disputes.

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International Arbitration and Dispute Resolution in Turkey

In Türkiye, the general trend for international arbitration is upwards. Starting with a law to establish the Istanbul Arbitration Centre (ISTAC) in 2014, arbitration has since gained further momentum. ISTAC launched Istanbul Arbitration Days in 2024 and aims to organise this event every year from now on. In Istanbul, there are also other arbitration events happening yearly such as GAR Istanbul and Istanbul Arbitration Week.

Another trend in Türkiye is the increasing links between Türkiye and Central Asian countries. Ibn Haldun University (Türkiye), Baku State University (Azerbaijan) and the Turkish Arbitration Academy with the support of the Organization of Turkic States launched the first International Summer School on Arbitration from 26 to 30 June 2023 in Baku, Azerbaijan, and the summer school took place for a second time this year between 24 and 28 June in the same city. The participants were students and practitioners from the member countries of the Organization of Turkic States.

There are other organisations that also organise arbitration programmes in Istanbul for students and practitioners from Central Asian countries. In June 2024, a delegation from Uzbekistan visited the Istanbul Chamber of Commerce Arbitration and Mediation Center (ITOTAM), another eminent arbitration centre in Istanbul. Thus, looking at these developments we can see that there is increasing co-operation between Türkiye and Central Asia. It seems this trend will continue to increase in the coming years.

The activities and support of the Organization of Turkic States are not limited to summer schools. Turkic states and the Organization of Turkic States collaborate on important publications as well. There is a book coming out later this year supported by Turkic states and the Organization of Turkic States, and one of the authors of this report, Dr Can Eken, has been asked to write a chapter on the development of arbitration in Turkic states.

Turkish academics and practitioners are following global trends in Türkiye as well. The effects of artificial intelligence and technological developments on international arbitration is one of the important subjects followed in Istanbul.

There was a panel at Istanbul Arbitration Days on the effects of technological developments in the arbitration world. There have been several other important conferences organised in Istanbul on artificial intelligence and technological developments in arbitration in recent years. With the increasing global trend on these important issues, Türkiye is following this global trend closely as well.

Türkiye's leading arbitration institutions also closely follow developments globally. Thus, Turkish arbitration institutions follow emergency arbitration rules, fast-track arbitration rules and other innovative rules in arbitration. We are seeing increasing collaboration between arbitration institutions in Türkiye and globally. Turkish arbitration institutions have recently signed a memorandum of understanding between each other and other arbitration institutions in the world.

Apart from the traditional financial and retail sectors, specific sectors hold higher importance in Türkiye. The construction, hotel and tourism, mining and energy sectors are such sectors that require special attention in Türkiye. Either Türkiye attracts foreign investors or Turkish investors invest in those sectors in other countries. Technology is another important sector where Türkiye has incentives. Thus, we can expect a continuing increasing trend regarding disputes in these sectors.

FIDIC contracts and construction arbitration is an important topic in Türkiye since there are many Turkish construction businesses that operate in many countries and are parties to arbitration in major arbitration institutions. With a growing construction and projects sector, arbitration work related to the construction industry will continue to grow.

Investment arbitration continues to be important in Türkiye, too. In ICSID, there have been two cases against Türkiye in the last two years alone, which increases the total number of cases pending at ICSID against Türkiye to six. There have also been 25 cases concluded against Türkiye at ICSID. Moreover, Turkish investors are actively using investment arbitration. With foreign investors active in Türkiye and Turkish investors investing abroad, the importance of investment arbitration in Türkiye is also expected to grow.

Overall, Türkiye has great potential to be an important international arbitration hub. By following and updating its rules and creating close links with targeted jurisdictions and arbitration institutions, Türkiye is getting closer to this goal. If Türkiye continues its activities to create further links, we might see Istanbul become an important hub for specific regions such as Central Asia or for disputes between the West and the East.

We can also see Türkiye attracting more arbitration practitioners and scholars. With the increasing number of international arbitration conferences, many foreign practitioners are visiting the city and learning about the important issues discussed in Türkiye. Thus, this may lead to foreign practitioners being more familiar with the rules of Turkish arbitration institutions. Whether they advise their clients to include them in their contracts or not is another issue, but there is a possibility that this might be the case. These developments will surely help Istanbul to become a more active arbitration centre.

Since international arbitration cases enjoy greater confidentiality than court cases unless reported, it is more difficult to discover the trends occurring in the practice. Everyone can only speak from their own experiences in practice. Thus, there is some anecdotal information

we can share as well. It is said that there have been an increasing number of Turkish users of the Milan Chamber of Arbitration in recent years. We can continue to see increasing relationships between Italian and Turkish businesspeople.

It seems that the number of disputes in construction, energy and mining will continue to increase directly proportionally to the number of activities in those sectors. Thus, it might be reasonable to devise specific arbitration rules for those sectors. This would address the needs of the industry better, and ISTAC or ITOTAM could be leading centres in the sector if they reach out to the industry and show the merit in their endeavours.

Türkiye – Regional Hub in International Dispute Resolution

Türkiye, and especially Istanbul, is a geopolitically very important country/city connecting two continents, Asia and Europe, with each other. As arbitration is a bridge between nations, countries and cultures to resolve cross-border disputes, Türkiye has this natural feature serving such function geographically. If Türkiye succeeds in turning this geographical feature into a legal feature, we could see Istanbul and Türkiye become a leading arbitration seat globally.

One of Türkiye's objectives is to become an international and regional centre for alternative dispute resolution, which requires a multi-pronged legal strategy including legal reforms, development of infrastructure, preparing educational programmes and establishing foreign partnerships. In order to fulfil this goal, Türkiye needs take into account the trends and changes in the broader region.

In order to become a regional hub for dispute resolution for international parties, the country has made significant improvements in aligning its arbitration laws with international standards. Most notably, the amendments to the Turkish International Arbitration Law in 2001 and the subsequent updates that have followed have aimed to improve the procedural efficiency and enforceability of arbitral awards. These reforms are incredibly important as they provide the solid legal framework that instils confidence in international parties seeking dispute resolution in Türkiye. Türkiye's ratification of both the Singapore Convention and the New York Convention dated 1958 highlights the country's commitment to creating a safe and stable arbitration environment for international disputes and making Turkey a safe harbour for foreign investors.

The promotion and development of arbitration institutions is crucial in putting Türkiye in a position to be considered as a regional hub for dispute resolution. Arbitral institutions such as ISTAC and the Energy Disputes Arbitration Center have played an important role in promoting Türkiye as a preferred seat of arbitration for resolving international disputes. ISTAC, in particular, has amassed international recognition for its professionalism, adherence to international arbitration standards, efficiency and neutrality. By creating and sustaining a conducive environment for arbitration and offering advanced facilities and administrative support, ISTAC is boosting Türkiye's appeal as a leading arbitration destination in the Middle East. In this respect, both Istanbul Arbitration Week and Istanbul Arbitration Days managed to attract thousands of practitioners from all around the world to Istanbul.

In order to be considered a regional hub for conflict resolution, it is also essential to keep up with and adopt new technologies to improve the availability and effectiveness of arbitral proceed-

ings in Türkiye. Online document management systems, conducting virtual hearings if necessary, and digital platforms for aiding the arbitral process are being used to simplify arbitration procedures and meet the needs of parties that are located abroad. By adapting to and making use of new technology, Türkiye is putting itself at the forefront of international arbitration standards and showing that it is committed to innovation in conflict settlement.

Beyond institutional infrastructure and legislative frameworks, public awareness and promotion are essential components of Türkiye's plan to establish itself as a regional centre for alternative dispute resolution. Well thought out and conducted promotions increase the exposure of Türkiye as an option for international conflict resolution as well as creating a confident image regarding its stance on its arbitral procedures. Türkiye can promote its arbitration skills by utilising many outlets. Turkish legal practitioners and organisations are continually demonstrating the depth of their knowledge by taking part in international arbitration conferences and forums, and they will continue to do so in order to draw internationals seeking conflict resolution towards Türkiye.

Furthermore, important stakeholders can be successfully reached by focused marketing campaigns and promotional materials that promote Türkiye's benefits as a hub for arbitration. Türkiye has a competitive advantage when it emphasises aspects such as legality and procedural efficiency in comparison to other international arbitration centres. Türkiye's standing in the international arbitration community is further enhanced through strategic alliances with associations and entities. Relationships are strengthened and Türkiye's commitment to adhering to international arbitration norms and best practices is exhibited through co-operative efforts, collaborative events and reciprocal referrals.

The importance of diversity and inclusivity in Türkiye's arbitration ecosystem cannot be overstated. The arbitration community is vocally encouraging participants who come from a large range of backgrounds, including women, certain minorities, and professionals equipped with different linguistic and cultural backgrounds. As a result of this encouragement, Türkiye is becoming a more inviting and attractive location for international parties searching for impartial dispute resolution. Training programmes and mentorship activities aimed at helping the development of new, young and eager arbitrators and promoting diversity in leadership roles within arbitration organisations are extremely important in creating and nurturing an inclusive and diversified arbitration environment.

Türkiye has the opportunity to offer more options for conflict resolution than just traditional arbitration, thanks to emerging trends such as the popularity of conciliation and mediation as alternatives to arbitration. It is offering parties more options for quickly and amicably resolving conflicts and adding flexibility to its arbitration procedures and legal framework by implementing these strategies.

Trends and Developments in the Middle East

The Middle East has experienced dramatic and positive growth in arbitration proceedings in recent years, supported by the conduct of regional forums and some strategic efforts that clearly reflect the region's goal of becoming a dispute resolution hub in its own right.

The first Riyadh International Disputes Week (RIDW), held in Saudi Arabia in March 2024, has become a significant occasion that highlighted

the Kingdom's ongoing projects to improve its arbitration framework and advance global practices in line with Saudi Vision 2030. Mr Faruk Aktay participated in the RIDW conferences to bolster the arbitral co-operation between Türkiye and the Middle East. In addition, the inaugural Doha Arbitration Day, which hosted talks on legal changes, case studies and business trends, has also made Qatar into a major promoter and centre of arbitration. Mr Faruk Aktay also personally attended this event in Doha and met with leading arbitrators and experts.

Dubai also hosts the Dubai International Arbitration Centre (DIAC) and is the home of the Dubai International Financial Centre (DIFC) Courts, which include the DIFC-LCIA Arbitration Centre. Mr Faruk Aktay has joined the ranks of international arbitration practitioners who have registered with the DIFC Courts. The DIFC Courts, as an independent court and centre, offer specialised services and operate with arbitration rules that are in line with international standards, which make them attractive to international parties. DIFC Courts' specialised technology and construction divisions also offer an important example of the future of alternative dispute resolution. Consequently, the DIFC Courts in the first half of 2024 handled 480 cases worth over AED1 billion.

Together with these attempts, there have been important legal revisions to bring arbitration laws into line with international norms. This will strengthen the enforceability of arbitral rulings and increase trust in the region's conflict resolution processes. Furthermore, the expansion of arbitration into new industries such as technology and finance, as well as more established ones like construction, is a reflection of the Middle East's expanding economic goals and the growing complexity of regional conflicts. The Middle East is on its way to solidifying its position as a top location for arbitrating international disputes as long as institutions increase their support for arbitration proceedings and investment in arbitration infrastructure keeps growing.

UK

Trends and Developments

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King & Spalding International LLP is widely recognised as one of the world's leading law firms in international arbitration and litigation. The firm represents clients in commercial and investment arbitration, and in courts around the world in international litigation, including motions to compel arbitration, anti-suit injunctions and enforcement actions. The firm's highly integrated global team of more than 120 lawyers works collaboratively across 23 offices worldwide, handling arbitral proceedings spanning a broad range of industry sectors involving projects and parties in more than 140 countries. With advocacy skills tested in the most complex of international disputes, King & Spalding is known for its unsurpassed written and oral advocacy, including four London-based King's Counsel. In the international commercial arbitration field, the firm has represented clients in hundreds of commercial disputes under the rules of all the major arbitral institutions. In the investment arbitration field, King & Spalding has handled matters brought under contracts and bilateral, regional and multilateral treaties, and has obtained some of the most significant awards in history.

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Introduction

The 2023 chapter of this guide detailed the proposals by the Law Commission of England and Wales (the "Law Commission") for potential reforms to the Arbitration Act 1996 (the "Arbitration Act"). On the arbitration front, much has happened since, but much has also stayed the same.

As of 22 May 2024, significant progress towards a new amended Arbitration Act had been achieved. The UK Parliament had taken up the Arbitration Bill introduced in November 2023 and it had reached the committee stage in the House of Lords. Also relevant to arbitration, the UK government had introduced the Litigation Funding Agreements (Enforceability) Bill 2024 (the "LFA Bill") to confirm the availability of litigation finance in England and Wales following the UK Supreme Court's decision in R (PACCAR Inc) v Competition Appeal Tribunal (2023) UKSC 28 ("PACCAR"). But that legislative excitement died a quiet death on 22 May 2024 when Prime Minister Rishi Sunak called a general election on 4 July 2024. Perhaps unsurprisingly, neither the Arbitration Bill nor the LFA Bill made it to the "wash-up" period of the Parliament, in which pending bills that had the potential to become law were considered. Any forward progress on either legislation thus fell to Keir Starmer's new Labour government.

All (arbitration) eyes were therefore on the Starmer government's first King's Speech on 17 July 2024. The plans for economic stability and growth outlined by the King included the Arbitration Bill but made no mention of the LFA Bill. At the time of writing (August 2024), there is still no enacted amendment to the Arbitration Act or a new litigation funding act. This update briefly summarises the developments that led to this point on both fronts and considers the possible path forward.

Amendment to the Arbitration Act

As mentioned in the 2023 chapter update, in March 2021, the Ministry of Justice asked the Law Commission to conduct a comprehensive review of the Arbitration Act. The purpose of the review was to determine if any amendments were necessary to ensure the Arbitration Act remains effective and attractive internationally. In 2022 and 2023, the Law Commission conducted two public consultations on the Arbitration Act and received feedback from 118 and 60 participants respectively. The responses were overwhelmingly positive, with respondents expressing support for the proposed reforms. On 5 September 2023, the Law Commission presented its report and a draft bill to Parliament. This draft bill incorporated all the recommended reforms put forth by the Law Commission.

Rishi Sunak's government introduced the Arbitration Bill in Parliament in November 2023. The Arbitration Bill made steady progress and by May 2024 had reached the committee stage in the House of Lords. Once the election was called on 22 May 2024, no further progress was made on the Arbitration Bill.

Re-introduction

Keir Starmer's Labour government swept to power on 4 July 2024 and wasted no time in announcing the Arbitration Bill in its first King's Speech on 17 July 2024. The Arbitration Bill was then promptly (re-)introduced in Parliament the very next day on 18 July 2024. And the day after that, on 19 July 2024, a detailed "Arbitration Bill: Factsheet" ("the Factsheet") followed.

Even though there are significant policy differences between the former Conservative govern-

ment and the present Labour government, when it comes to arbitration reform, they have spoken with one voice. By way of example, the following justification for the Arbitration Bill from Lord Ponsonby, the Justice Minister, in the House of Lords is remarkably similar in tone and content to the stated impetus for the Arbitration Bill when introduced under the Conservative government: "This government is committed to securing the UK as a world leader in dispute resolution. Modernising the quarter-century-old laws around arbitration will make it quicker, cheaper and more efficient for people and businesses looking to settle legal disputes. And helping our world-leading legal services sector to flourish will cement the UK's position in this high-value sector – worth at least GBP2.5 billion to the British economy every year." The UK government's unstinting support for a cutting-edge arbitration ecosystem in England and Wales is a welcome source of stability amid otherwise changing attitudes to arbitration across the world.

The Arbitration Bill introduces several updates and improvements to the Arbitration Act consistent with the Law Commission's recommendations. These updates include:

- providing clarity on the applicable law for arbitration agreements to enhance certainty, minimise unnecessary litigation, and ensure appropriate support from arbitration laws;
- establishing a duty of disclosure for arbitrators to uphold impartiality and foster trust in the arbitration process;
- strengthening arbitrator immunity to protect against liability for resignations and applications for removal, thus enabling arbitrators to make fair and unbiased decisions;
- granting arbitrators the authority to issue summary awards on issues lacking genuine prospects of success – in doing so, improving efficiency and aligning with similar summary judgments in court proceedings;
- empowering emergency arbitrators to issue peremptory orders and to make relevant applications for court orders, thereby enhancing arbitrators' effectiveness and providing them with access to court enforcement in a similar manner as non-emergency arbitrators; and
- amending the framework for challenges to an arbitral tribunal's jurisdiction under Section 67 of the Arbitration Act, allowing new court rules to stipulate that such applications should not contain new evidence or arguments, thereby preventing jurisdiction challenges from becoming full rehearings and avoiding unnecessary delays and costs.

The Factsheet also crystallises the motivations behind the Arbitration Bill – namely, to ensure both:

- support for a sector that contributes substantially to the British economy; and
- competitiveness with other burgeoning arbitration hubs.

As regards the first rationale, per the Law Commission, at least 5,000 domestic and international arbitrations take place in England and Wales annually and contribute (as Lord Ponsonby noted) GBP2.5 billion in fees alone to the economy. The UK government wants to ensure – as it should – that the arbitration sector continues to thrive. For that to happen, England and Wales as a jurisdiction needs to measure up to its competition, which brings us to the second rationale.

While the Arbitration Act established a renowned legislative framework and confirmed London as a preferred venue for commercial arbitration

worldwide, other jurisdictions have not sat still in the ensuing 28 years. To take just a few recent examples, Singapore amended its arbitration legislation in 2023, Hong Kong in 2022, Sweden and Dubai in 2018, and India in 2015 and then again in 2019. Additionally, in 2021, Singapore shared the top rank with London as the globally preferred choice for international arbitration. The former government rightly surmised the need to maintain, if not extend, the competitive edge enjoyed by London – and England and Wales. And the new government looks almost certain to succeed in enacting the vehicle considered most likely cement that edge (ie, the Arbitration Bill).

Put another way, given the strength of the Labour majority – and the opposition's agreement with the Arbitration Bill they themselves had introduced – the authors anticipate reporting on the enacted amendments to the Arbitration Act in 2025's update. Although it is not anticipated that the act as finally enacted will differ materially from the Law Commission's recommendations, it is worth detailing certain concerns that have been raised during the consideration of the first Arbitration Bill, which may attract further amendments before passage.

During the Special Public Bill Committee (SPBC)'s debate of the Arbitration Bill in the House of Lords, as documented in Hansard, Lord Thomas introduced a new point regarding the potential impact of the new rule concerning the applicable law of arbitration agreements – specifically, in relation to investment treaty arbitration. Although the record does not delve into further specifics, it mentions that the UK government is actively considering this matter. Nevertheless, the House of Lords introduced an amendment providing for a carve-out provision in the new rule on the applicable law of arbitration agreements. The carve-out applies expressly to cases involving arbitration agreements in investment treaty cases (excluding ICSID arbitrations) and similar cases arising under foreign investment legislation. This amendment addresses earlier concerns raised about the need to maintain the application of public international law or relevant foreign law in such cases. ICSID arbitrations remain unaffected by the reform, as they are governed by a separate regime – namely, the ICSID Convention and the ICSID rules and regulations.

The House of Lords also considered the need to introduce enhanced powers for arbitrators to ensure the integrity of the proceedings. This discussion followed on from the blockbuster decision in Nigeria v PIDL (2023) EWHC 2368, in which the English High Court threw out a USD11 billion-plus award (including interest) as tainted by corruption. Hansard records that the UK government stated it was examining this area in consultation with major institutions. The current Arbitration Bill does not make any specific provision for such concerns, but arbitrator powers in respect of the integrity of proceedings appear to be a likely subject on which the present bill may see amendments.

Litigation Funding Bill

To tell the story of the LFA Bill, it is necessary to briefly canvas:

- the legal position in relation to litigation funding agreements in England and Wales before PACCAR;
- the changes wrought by PACCAR; and
- the ensuing need for clarity and the UK government's response, as well as the potential path forward.

Before the PACCAR decision in 2023, litigation funding agreements (LFAs) in England and Wales

were not generally considered to fall under the purview of the Courts and Legal Services Act 1990 ("CLSA 1990") or the Damages-Based Agreement Regulations 2013 (the "DBA Regulations"). LFAs involve a third-party funder, usually an independent financial institution, who finances some or all of the legal costs in exchange for a portion of any damages awarded. LFAs typically did not comply with the DBA Regulations, which (among other things):

- require agreements to specify the reason for setting the payment amount at the agreed level;
- do not require payment of costs or disbursements already paid or payable by another party to the proceedings; and
- do not provide for a payment exceeding 50% of the sums ultimately recovered.

In this way, LFAs were widely used and considered attractive thanks to their flexibility. Many significant cases have benefited from LFA funding – the most recent notable example being the Post Office Horizon case.

PACCAR decision

PACCAR was a competition law case involving multiple truck manufacturers. The facts that led to this claim relate to a group of customers who had purchased trucks between 1997 and 2011. The EC determined that the sellers of these trucks had engaged in anti-competitive collusion behaviour. The affected customers wanted to bring collective anti-competition proceedings before the Competition Appeal Tribunal (CAT) in order to seek compensation for the losses caused by the agreement between multiple truck manufacturers.

The CAT only allows such claims to continue where it is satisfied that the class representative has sufficient resources to pursue the claim and satisfy any adverse costs order made against the representative. In this particular case, UK Trucks Claim Ltd (UKTC) and the Road Haulage Association (RHA) applied to the CAT for a collective proceedings order (CPO) against Paccar Inc, DAF Trucks NV, and DAF Trucks Deutschland GmbH (DAF) under Section 49B of the Competition Act 1998. They secured an order from the CAT that confirmed their ability to cover costs and adverse cost orders through funding arrangements with litigation funders and after-the-event insurance. However, the issue in question arose when DAF contended that the funding agreements qualified as damages-based agreements (DBAs) under Section 58AA(3)(a) of CLSA 1990, rendering them unenforceable owing to non-compliance with specified requirements of the DBA Regulations.

The CAT and the Divisional Court rejected the argument that the LFAs were DBAs, on the basis that they did not involve the provision of "claims management services". The matter was referred to the Supreme Court.

In its judgment of 26 July 2023, the Supreme Court determined that LFAs in which the funder is entitled to a percentage of any damages fall within the statutory definition of DBAs. The court further ruled that such LFAs must comply with the DBA Regulations. Among other things, the majority concluded that litigation funding falls within the definition of "claims management services" as outlined in the relevant legislation, which encompasses the provision of financial services.

PACCAR aftermath

The PACCAR decision ignited widespread concern among litigants and funders. The court's decision had the potential to make many LFAs

unenforceable as drafted in the pre-PACCAR world. The regulations governing damages-based agreements are highly specific and strict, and the LFAs as drafted largely do not meet those requirements. This outcome raises concerns about the potential denial of access to justice for claimants.

The UK government tried to respond promptly. On 31 August 2023, the Department of Business and Trade publicly stated that it was "aware of the Supreme Court decision in Paccar and is looking at all available options to bring clarity to all interested parties".

Shortly after, in November 2023, the UK government made amendments to the Digital Markets, Competition and Consumers Bill (the "DMCC Bill") in order to address certain effects of the PACCAR ruling. However, the government later removed the amendments because it introduced a standalone LFA Bill in March 2024.

On 4 March 2024, Alex Chalk (who was Lord Chancellor and Secretary of State for Justice at the time) announced that the UK government would introduce legislation to reinstate the position before the PACCAR ruling – specifically, that LFAs were not subject to the DBA Regulations. This legislation aimed to ensure continuity of funding through LFAs. The UK government noted that the Supreme Court judgment had made many LFAs unenforceable owing to non-compliance with the DBA Regulations and CLSA 1990. The government expressed concerns that the uncertainty surrounding LFAs resulting from the PACCAR ruling could hinder access to justice and diminish the attractiveness of England and Wales as a hub for commercial litigation and arbitration. The proposed legislation would seek to restore the position and maintain litigation funding as a viable method of financing.

The cover note accompanying the LFA Bill synthesised the concerns widely shared in the aftermath of PACCAR and posited the LFA Bill as necessary to "allow the government to deliver a return to a litigation funding regime which promotes access to justice, as well as enhancing the competitiveness of the jurisdiction".

In operative part, the LFA Bill amended Section 58AA of CLSA 1990 to provide that LFAs as defined by the amendment are not DBAs, thereby effectively reversing the Supreme Court's decision in PACCAR. Clause 1 also provided that the amendments made to Section 58AA of CLSA 1990 therein would be treated as always having had effect, thus removing any apprehension as to LFAs pre- or post-dating PACCAR.

Like the Arbitration Bill, the wording of the LFA Bill seemed to enjoy cross-party support, and there is generally widespread support for taking action to address issues related to litigation funding. The LFA Bill had advanced relatively smoothly through the House of Lords and had successfully passed its second reading on 15 April 2024. If and when the LFA Bill returns, it is likely that the drafted intention to give it retroactive effect may attract dissension. During the readings in the House of Lords, this aspect – which could potentially give rise to future disputes between funders and litigants – continued to be subject to debate.

Despite the widespread support and the generally recognised need for reform, uncertainty lingers over the LFA Bill and LFAs in general. While certain specifics still need to be resolved, such as the potential introduction of more explicit regulations for funders and funding agreements, clarifying the status of LFAs should be an important consideration for the new government. Demonstrating a commitment to ensur-

ing access to justice through a new LFA Bill will complement the UK government's efforts in relation to the Arbitration Bill and further cement the appeal of England and Wales as a favourable destination for dispute resolution.

URUGUAY

Law and Practice

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Bergstein Abogados is a full-service law firm based in Montevideo and its practice covers virtually all areas of the law (including corporate, tax, litigation, employment law, real estate, cybersecurity, and oil and gas). Established in 1957, Bergstein is widely recognised as one of the most prominent law firms in Uruguay, with a long-standing tradition for sound legal counsel. The team is large enough to provide clients with sophisticated legal advice, yet flexible enough to focus attention on each client's specific needs. The firm's clientele includes national and foreign companies, one-person ventures, international credit organisations and top Fortune 500 companies. Bergstein combines more than 60 years of experience with the drive and energy of a young team of outstanding professionals who take pride in their responsiveness and understanding of their clients' needs.

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1. General

1.1 Prevalence of Arbitration

In Uruguay, domestic parties do not resort to the use of international arbitration as the main tool to resolve disputes on a regular basis. The situations that domestic parties refer to arbitration or, eventually, local courts depend on the sophistication or complexity of the dispute.

Uruguay has a long-standing tradition of respect for the rule of law, which has been cemented in the independence and quality of its judges. This tradition explains a certain under-development in its arbitration practice, both local and international.

The main local arbitration institution is the Conciliation and Arbitration Centre (*Centro de Conciliación y Arbitraje*, orCCA) created by the Uruguayan Chamber of Commerce (*Bolsa de Comercio de Uruguay*) in 1997. The CCA is a member of the ICC, the Inter-American Commission of Commercial Arbitration, and the Ibero-American Centre of Arbitration.

That said, international arbitration is prevalent with regard to disputes involving the Uruguayan state (or state-owned companies), particularly against foreign investors. International arbitration is also significantly used for disputes between local and foreign construction companies involved in large construction projects. Disputes related to distribution agreements and concessions are also referred to arbitration on a regular basis.

The enforcement of foreign arbitral awards is regularly allowed by local courts as long as those awards comply with the local regulations and/or treaties ratified by Uruguay. In this respect, Uruguay ratified the first and the second Montevideo Procedural Law Treaties in 1899 and 1940 respectively ("1899 MPLT" and "1940 MPLT"), which allow the enforcement of foreign arbitral awards. Uruguay has also ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention") by means of Law Decree No 15.229 of 11 December 1981. Therefore, under the New York Convention, Uruguayan courts are bound to recognise and enforce foreign awards.

1.2 Key Industries

Construction is one industry that has seen an increase in the number of disputes that have been referred to arbitration. Construction disputes also arise from the relationships the investors have with the real estate developers and/or the constructions trust established to build a project or plant.

The credit card payments industry and the financial sector have both seen an increase in conflicts during the past year.

1.3 Arbitration Institutions

For international arbitration, the ICC is the most-used arbitral institution. For local arbitration, the CCA is the most prominent. No new arbitral institution was established in 2023–24.

1.4 National Courts

There are no specific courts with particular jurisdiction to hear disputes related to international arbitration. Disputes related to international arbitration commonly fall within the jurisdiction of the civil courts first. As regards enforcement of international arbitral awards, the Supreme Court of Justice holds exclusive jurisdiction in the analysis of the main legal requirements for enforcement (exequatur procedure). Once the Supreme Court of Justice has rendered a ruling on whether the legal requirements have been

met, the arbitral award enforcement will be filed with the local court that would have assumed jurisdiction in the dispute.

2. Governing Legislation

2.1 Governing Law

In recent times, the Uruguayan government has started to promote Uruguay as a main seat for international arbitration in Latin America. This ambition is grounded in solid respect for the institutions and a new legal framework established by Act on International Commercial Arbitration No 19.636 of 13 July 2018 (AICA). The AICA is based on the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law") and represents a legislative milestone for Uruguayan dispute resolution practice, as it is fully aligned with international legal standards. The AICA does not deviate in any significant way from the UNCITRAL Model Law.

2.2 Changes to National Law

After the enactment of the AICA in 2018, the local arbitral regulations have been updated by Act 20.257, passed on 25 April 2024 (ALA). The ALA primarily deals with reforms to enhance the arbitration framework within the country. The Act modernises and clarifies the legal framework governing arbitration in Uruguay. It aims to align Uruguay's arbitration practices with international standards and enhance the efficiency and effectiveness of arbitration proceedings.

A few of the key reforms can be summarised as follows.

- Arbitration agreement – the Act specifies the requirements for arbitration agreements, including the need for clarity and mutual consent between parties, but does not require a prior arbitral written agreement.
- Prior commitment to arbitration – the requirement for granting an arbitration commitment prior to commencing the arbitration proceedings, as required by previous legislation, is repealed by the Act.
- Arbitral procedure – the Act provides detailed guidelines on the arbitral process, including the appointment of arbitrators, the conduct of hearings, and the issuance of awards.
- Enforcement of awards – the Act outlines procedures for the recognition and enforcement of arbitral awards, emphasising compliance with international conventions to which Uruguay is a party.
- Role of institutions – the Act establishes or reinforces institutional mechanisms for supporting arbitration, including the role of arbitration centres and the appointment of arbitrators.

The Act defines the extent of judicial intervention in arbitration, focusing on ensuring minimal interference while safeguarding procedural fairness and the rule of law.

3. The Arbitration Agreement

3.1 Enforceability

In order to be valid, the arbitration agreement must be in writing and take the form of an arbitration clause included in a contract or take the form of a separate agreement. According to the AICA, the agreement is considered written when it is reflected in a document signed by the parties or in an exchange of letters, communications or means of electronic communication that can evidence the existence of the agreement. In addition, a reference made in a contract to a document containing an arbitration clause con-

stitutes an arbitration agreement as long as the contract is in writing and the reference implies that said clause is part of the contract.

3.2 Arbitrability

According to Article 476 of the Civil Procedural Code (CPC), matters that may not be referred to arbitration are those that relate to rights that cannot be settled or waived by a party. In light of the legal definition, case law has interpreted criminal and family law claims as excluded from arbitration, along with – although this has been a source of recent debate – labour disputes. A recent ruling from the Supreme Court of Justice found that there is no reason to exclude labour disputes from local or international arbitration. However, labour courts of appeal have rejected the possibility of arbitrating labour disputes, arguing that an employee cannot waive a most favourable forum and legal framework in favour of their employer. Moreover, labour courts of appeal understand that the employee cannot agree to arbitrate a labour dispute because the employee is not free to negotiate the terms and conditions of the agreement.

3.3 National Courts' Approach

As per Article 28.1 of the AICA, the arbitral tribunal must decide the dispute in accordance with the rules of the law chosen by the parties as applicable to the merits of the dispute. Any indication of the law or legal system of a particular state will be understood to refer – unless otherwise stated – to the substantive law of that state and not to its rules on the conflict of laws.

In a case where the parties have failed to agree on a certain "applicable law", the court will apply the substantive law it deems most adequate to the dispute; in addition, the court will apply to the dispute the contract terms and the uses and customs of international trade that are applicable to the case. Although this legal provision does not diverge from the various arbitration regulations, in this connection, Article 28 No 2 of the UNCITRAL Model Law establishes that "failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules [that] it considers applicable". In Uruguayan law, the arbitral tribunal is entitled to apply the substantive law as it sees fit.

Arbitration agreements are favoured by local courts and regularly enforced in application of Article 494 of the CPC. However, as case law has concluded that arbitration is an exception to the ordinary jurisdiction of the local courts, rulings have established that the subject matter of the dispute should be clearly included in the arbitration agreement. That is to say, if the arbitration agreement is not clearly written, local courts would feel inclined to assume jurisdiction.

3.4 Validity

The AICA establishes in Article 16 that, even if the contract into which the arbitration clause or agreement is inserted is considered null and void, this does not determine that the arbitration clause or agreement will be considered invalid. Therefore, the principle of separability is applied to arbitration clauses in Uruguay. Similar considerations should be made in connection with local arbitration regulated under the CPC.

4. The Arbitral Tribunal

4.1 Limits on Selection

The parties are free to determine the number of arbitrators and respective qualifications of the arbitral tribunal to be appointed. However, once someone is approached by a party to become an arbitrator, they have a duty to disclose any circumstance that could give rise to a challenge

to their impartiality or independence. In cases where they disclose a circumstance that impairs them from accepting the appointment, parties should appoint a replacement arbitrator.

Arbitrators may be challenged by the parties on the grounds that their impartiality or independence could be compromised. It is possible to also challenge the appointment of an arbitrator if they lack sufficient credentials in accordance with the qualifications agreed by the parties. In addition, it is not possible for a party to challenge an arbitrator appointed by the same party unless the grounds for such a challenge were only known by the appointing party after the appointment. The parties are not allowed to challenge an arbitrator by reason of nationality or background. Finally, in arbitrations in which a state or a public entity is a party, the status as a public official of an arbitrator appointed by that party does not necessarily constitute grounds for challenge.

4.2 Default Procedures

Parties are free to choose the method for selecting arbitrators. Nevertheless, if the parties fail to establish such a method of appointment, the AICA provides a default procedure. In arbitration proceedings with three arbitrators, each party appoints an arbitrator and the two arbitrators so appointed appoint the third one. If a party fails to appoint the arbitrator within 30 days of the written request from the other party to do so, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment will be made – at the request of one of the parties – by the competent court without delay. In arbitration proceedings with a sole arbitrator, if the parties cannot agree on the appointment of the arbitrator, the arbitrator will be appointed – at the request of any of the parties – by the competent court.

4.3 Court Intervention

In an appointment procedure previously agreed by the parties, either party may request the competent court to take the necessary measures to enforce the procedure if:

- a party does not act in accordance with the provisions of the arbitration agreement; or
- the parties or two arbitrators cannot reach an agreement in accordance with the aforementioned procedure; or
- a third party, including an arbitral institution, fails to comply with the function conferred in said procedure.

Any decision on these issues by the competent court shall be final.

When appointing an arbitrator, the competent court will take due account of the conditions required for an arbitrator by the agreement between the parties and take the necessary measures to guarantee the appointment of an independent and impartial arbitrator. In the case of sole arbitrator proceedings, the court will also take into account the convenience of appointing an arbitrator of a nationality different from the parties' nationality.

4.4 Challenge and Removal of Arbitrators

A party that wishes to challenge an arbitrator must send a notification to the arbitral tribunal within 15 days following the day on which it becomes aware of the constitution of the arbitral tribunal or of any of the circumstances that give rise to the challenge. As stated in **4.1 Limits on Selection**, challenges of arbitrators may be based on the absence of impartiality or independence. An additional ground to challenge an arbitrator is the lack of qualifications agreed by the parties in the arbitration agreement or separate document. The challenge must state in writ-

ing the reasons for that challenge. Unless the challenged arbitrator resigns or the other party accepts the challenge, it will be for the arbitral tribunal to decide on the challenge.

If the challenge initiated is not successful because the arbitral tribunal rejects the request, the challenging party may request the court to review that decision within 30 days following the receipt of notification of that decision. The court will have a maximum of 60 days to rule and its decision will be final. While that request is pending, the arbitral tribunal will suspend its proceedings, which will resume once the challenge is resolved or 60 days after its initiation.

4.5 Arbitrator Requirements

Arbitrators are subject to the same independence and impartiality standards applicable to local judges (Article 485.3 of the CPC). Arbitrators are obliged to disclose any prior relationship (of any kind) maintained with any of the parties that could affect their impartiality. Although there is no statute or specific regulation in this respect, the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration are a source of reference for scholarly opinions and rulings. For local arbitration, it is established that no judge or individual under the age of 25 can be appointed as an arbitrator.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

Criminal investigations or other matters excluded from arbitration should be referred to the competent criminal or ordinary courts (Article 493 of the CPC). See **3.2 Arbitrability** for more details.

5.2 Challenges to Jurisdiction

In Uruguay, the arbitral tribunal is entitled to rule on its own jurisdiction; the competence-competence principle is consistently applied by local courts in international and local arbitration. According to Article 475.2 of the CPC, the arbitral tribunal is competent to rule on all matters related to the validity and effectiveness of the arbitration clause or agreement. In addition, according to Article 16 of the AICA, the arbitral tribunal is empowered to decide on its own jurisdiction, including on objections relating to the existence or validity of the arbitration clause or agreement.

A defence based on absence of jurisdiction must be filed jointly with the response to the complaint at the latest. The parties will not be prevented from filing an absence of jurisdiction defence due to the fact that they have already appointed an arbitrator or participated in their appointment. An objection based on the argument that the arbitral tribunal has exceeded its mandate must be made as soon as the matter that allegedly exceeds its mandate arises during the arbitral proceedings. The arbitral tribunal may, in any case, examine an objection filed after the term elapses if it considers the delay to be justified. The arbitral tribunal may rule on the absence of jurisdiction defence as a preliminary procedural matter or in the final award.

5.3 Circumstances for Court Intervention

If the arbitral tribunal decides that it has jurisdiction over the dispute, any of the parties – within 30 days following the notification of that decision – may request the competent court to review the matter within a maximum period of 60 days and the decision of this court will be final. During that time, the arbitral tribunal may continue its proceedings and issue an award.

Courts in Uruguay have shown a general reluctance to intervene in disputes that are subject to an arbitration agreement. In fact, case law tends to confirm the jurisdiction of the arbitral tribunal. In this connection, it is worth mentioning that the Supreme Court of Justice ruled that there is no reason to exclude labour disputes from the arbitral jurisdiction (Ruling No 596/2017). Although the ruling of the Supreme Court of Justice was not unanimous, and there are recent conflicting decisions issued by the labour courts of appeal, it reveals that Uruguayan courts favour arbitration as an alternative method to resolve disputes. The reverse side of this judicial policy is the severe analysis conducted by the local courts into those matters that are excluded from arbitration or matters other than the specific matters the parties have agreed to be arbitrated in the arbitration agreement.

5.4 Timing of Challenge

See **5.2 Challenges to Jurisdiction**.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The standard of judicial review is a de novo analysis. Higher courts act as though they were considering the question for the first time, affording no deference to the decisions of the lower courts.

5.6 Breach of Arbitration Agreement

Parties subject to an arbitration agreement are not prevented from pursuing an action with local courts. Local courts do not raise absence of jurisdiction ex officio; the defendant must raise the existence of an arbitration agreement and request a declaration of absence of jurisdiction. According to Article 475 of the CPC, in a local arbitration, if the party fails to raise the absence of jurisdiction at the time of answering the complaint, it will be interpreted that the party has waived the arbitration clause. However, for international arbitration under the AICA, the court to which a dispute over a matter that is the subject of an arbitration agreement is submitted shall refer the dispute to arbitration if so requested by any of the parties at the time of filing the first brief on the merits at the latest. The only exception is when it is proven that said agreement is null, ineffective or impossible to enforce.

The fact that a party has commenced litigation with local courts does not suspend or prevent the initiation or continuation of the arbitration proceedings.

5.7 Jurisdiction Over Third Parties

There are no specific regulations that allow a third party to join an existing arbitration. Given that local courts consider arbitration an exceptional jurisdiction, the absence of participation in the arbitration agreement will preclude a third party from participating in the proceedings. Participation of third parties is limited to the effect of interim measures and mandatory gathering of evidence. The only option for a third party to participate in an existing arbitration would be the explicit acceptance from the claimant and defendant in the course of the arbitration proceeding.

6. Preliminary and Interim Relief

6.1 Types of Relief

Arbitral tribunals are allowed to award interim relief or preliminary measures. However, it is customary that the parties pursue interim relief with local courts. The practice of pursuing interim relief prior to arbitration with local courts is based on their powers to enforce the decision in a more expeditious manner. The lack of arbitrators' power to enforce the decision as a con-

sequence of the absence of coercive powers (so-called imperium) limits the ability to request interim measures from the arbitral tribunal.

Having said that, according to Article 17 of the AICA, unless otherwise agreed by the parties, the arbitral tribunal may – at the request of one of them – order the adoption of precautionary measures that it deems necessary with regard to the subject matter of the dispute. The arbitral tribunal may require the applicant to provide a performance bond to cover potential damages.

Such precautionary measures ordered by an arbitral tribunal will be considered as binding between the parties. If the party subject to an interim measure does not comply with the arbitral tribunal interim award, it can be enforced by the competent local court.

As per the AICA, a precautionary measure would be a temporary measure, granted in the form of an award, whereby – at any time prior to the issuance of the final award – the court orders one of the parties to:

- maintain the status quo pending settlement of the dispute;
- take steps to prevent any actual or imminent damage or impairment of the arbitral proceedings, or to refrain from certain acts that are likely to cause such damage or impairment of the arbitral proceedings;
- provide some means to preserve assets that will allow the award issued to be enforced; and/or
- preserve evidence that could be relevant and pertinent to the dispute.

The precautionary measure will be granted by the arbitral tribunal when necessary for the protection of a right and whenever there is potential irreversible damage in light of the duration of the process. This decision of the arbitral tribunal will not be considered as a prejudgment regarding the main subject of the dispute.

6.2 Role of Courts

Local courts play a relevant role in ensuring that the preliminary or interim measure is pursued by one of the parties prior to the initiation of the arbitral proceedings in cases of international arbitration. In this case, the arbitral proceedings should be started within 30 days, counted from the date the measure takes effect.

If the interim measure is decided by the arbitral tribunal in the course of an arbitration proceeding, the arbitral tribunal may also request the assistance of a local court to enforce the measure against a party in breach.

To that end, the local court will have the same jurisdiction to issue precautionary measures as the arbitration proceeding, regardless of whether or not the arbitration is seated in Uruguay. For purposes of deciding on the issuance of an interim or precautionary measure, the local court should take into account the principles of international arbitration and the particularities of the dispute. As regards the types of measures that could be granted by local courts, see **6.1 Types of Relief**.

Although the role of an emergency arbitrator has not been established in the AICA, local arbitral institutions such as the CCA have ruled that an emergency arbitrator may issue interim and precautionary measures. According to the CCA rules, the emergency arbitrator's competence would be limited to precautionary measures to secure evidence or anticipated evidence that – owing to its nature or circumstances – should be

received prior to the appointment of the arbitral tribunal.

A party that wishes to request the intervention of an emergency arbitrator should file its request with the CCA in writing. The prior appointment of an emergency arbitrator does not prevent the local courts from assuming jurisdiction at the request of one of the parties or for the enforcement of the interim or precautionary measure.

6.3 Security for Costs

Uruguayan law does not allow the local courts or the arbitral tribunal to ask security for costs only from the claimant. Costs for the arbitration are requested in advance from both parties equally.

7. Procedure

7.1 Governing Rules

Parties are free to establish the arbitral procedure in the arbitration agreement or after the dispute started. If the parties fail to establish the arbitral procedure, the arbitral tribunal is entitled to decide the procedure that is most adequate for the dispute. Such a procedure would also regulate the admissibility and assessment of evidence.

7.2 Procedural Steps

There are no particular steps that are required prior to pursuing an international arbitration. However, if one of the parties refuses to enter into the arbitration and consequently to honour the procedure established by the AICA, the other party is entitled to pursue the judicial enforcement of the arbitration agreement with the local courts. In this case, the local court would – on behalf of the breaching party – enforce the arbitration agreement, appoint the arbitrator, set the procedure and indicate the matters that must be subject to decision by the arbitral tribunal.

7.3 Powers and Duties of Arbitrators

Arbitrators' powers over the arbitration procedure are equal to the ones held by a local judge, but without the imperium (ie, coercion powers). Arbitrators are entitled to collect their fees and they have a duty to exercise their analysis with independence and impartiality. Arbitrators' main duties are to issue their decision within the agreed term but limited to the matters subject to arbitration.

7.4 Legal Representatives

There are no particular qualifications or other requirements necessary for legal representatives to appear in an international arbitration.

8. Evidence

8.1 Collection and Submission of Evidence

The arbitral tribunal, or any of the parties with the prior authorisation of the arbitral tribunal, may request the assistance of a competent local court in the gathering of evidence or enforcing a request for evidence. The court may grant the request in accordance with the applicable rules of evidence.

8.2 Rules of Evidence

Given that the parties are free to establish the procedure, this choice also includes rules concerning evidence and its assessment. The same applies to the domestic procedure. As explained, if parties fail to set the rules of procedure, the arbitral tribunal in an international arbitration would establish rules that are appropriate to the dispute. In domestic arbitrations, if the parties fail to set the rules of procedure, the CPC

will apply. However, the set of procedural rules established by the parties or by the international tribunal must respect the due process of law.

8.3 Powers of Compulsion

The arbitral tribunal has no compulsion powers regarding the production of evidence. The power to compel the production of evidence is exercised through the assistance of the local courts within the limits of the local regulations. This means that, if a document is requested by the arbitral tribunal but – according to local rules – such document would be deemed to be secret or confidential, it is likely that the local court would refuse to order the production of the document. On the other hand, in a case where a party refuses to co-operate with the production of evidence, the arbitral tribunal may issue the award on the basis of the evidence already produced, taking into consideration such absence of co-operation.

9. Confidentiality

9.1 Extent of Confidentiality

The AICA does not regulate confidentiality, so the parties are the ones that should establish the confidentiality rules applicable to the international arbitration (including disclosure in subsequent proceedings).

10. The Award

10.1 Legal Requirements

The award must be made in writing and in the language agreed by the parties. In order to be valid, the award should be signed by the majority of the members of the arbitral tribunal, provided that the reasons for the lack of one or more signatures are set out in the award. The date and place of issuance should be clearly stated.

The award should be grounded in the applicable law and contracts selected by the parties.

Parties are free to determine the term in which the arbitral award should be rendered. In the case of local arbitrations, if the parties do not determine the term for the issuance of the award, the term to produce the award will be 90 days counted from the date of the first procedural act by the arbitral tribunal.

10.2 Types of Remedies

The limits on the types of remedies an arbitral tribunal may impose are determined by the applicable law selected by the parties and the terms and conditions of the contract that gave rise to the dispute.

Having said that, local courts are reluctant to award punitive damages in light of the absence of a legal framework for this type of remedies.

10.3 Recovering Interest and Legal Costs

According to Article 34 of the AICA, the parties are free to establish whether legal costs are reimbursed to the winning party. Unless the parties have decided otherwise in the arbitration agreement, the arbitral tribunal shall allow the winning party to recover the legal costs. However, regarding the legal fees, a costs-sharing approach is normally followed. In cases where the losing party has not co-operated with the arbitral tribunal in the production of evidence or where the procedural conduct of the losing party has not met good-faith standards, fees and costs are imposed on the losing party.

11. Review of an Award

11.1 Grounds for Appeal

The award may only be appealed before a court by petition for annulment. In order to succeed, the party pursuing annulment should demonstrate one or more of the following:

- that one of the parties to the arbitration agreement was affected by some incapacity or that said agreement is not valid;
- that it has not been duly notified of the appointment of an arbitrator or the arbitration proceedings have breached the due process of law;
- that the award refers to a dispute not provided for in the arbitration agreement or contains decisions that exceed the scope of the arbitration agreement;
- that the members of the arbitral tribunal or the arbitral procedure have not followed the arbitration agreement in place;
- that, according to the law of the Republic of Uruguay, the subject matter of the controversy is not subject to arbitration; or
- that the award is contrary to the international public order of Uruguay.

The annulment petition must be filed within three months following the date of the last notification of the award.

11.2 Excluding/Expanding the Scope of Appeal

Parties cannot agree to exclude or expand the scope of the appeal or challenge under national law.

11.3 Standard of Judicial Review

The judicial review on the merits of the case is a de novo standard.

12. Enforcement of an Award

12.1 New York Convention

Uruguay has ratified the New York Convention without reservations.

12.2 Enforcement Procedure

An arbitral award, regardless of the country in which it was issued, will be recognised as binding in Uruguay upon filing of a written request to the competent court. The party that invokes an award or requests its enforcement must file the original award or a duly certified copy along with the original of the arbitration agreement. If the award or agreement is not written in Spanish, the party must file a sworn translation of the documents. Even where the arbitral award has been set aside by the courts in the seat of arbitration, enforcement before the local courts would be admissible. A new analysis would be performed by the local court.

Regarding sovereign immunity at the enforcement stage, case law has supported the thesis that rejects the general immunity of states. The national rulings are aligned with the international regulations on this matter, allowing enforcement in cases where the assets or activities in question were not related to an official purpose.

That is to say, assets such as embassies are excluded from enforcement; nevertheless, commercial assets can be subject to enforcement. In summary, case law suggests that immunity of the state will not be applied if the enforcing party demonstrates that the assets are intended for a commercial activity.

12.3 Approach of the Courts

International public order should be construed as the basic set of common principles on which a state grounds its legal individuality. There-

fore, for the recognition of a foreign award to be rejected, such an award must infringe the essence of international public order principles in a concrete and serious manner. It should be borne in mind that in order to reject the recognition of an award based on the public order exception, the public order to be considered is international public order, not internal public order. Therefore, the approach of local courts regarding recognition of foreign arbitral awards is more favourable than the one established in the UNCITRAL Model Law, which also includes the exception of internal public order.

13. Miscellaneous

13.1 Class Action or Group Arbitration

Uruguay does not regulate class action or group arbitration claims.

13.2 Ethical Codes

The only ethical code applicable to the legal profession is the Uruguayan Bar Code of Ethics. However, the code would only apply to Uruguayan practitioners who are members of the Uruguayan Bar. In Uruguay, it is not mandatory for a legal practitioner to become a member of the local Bar.

13.3 Third-Party Funding

Uruguay has no restrictions regarding third-party funders.

13.4 Consolidation

An arbitral tribunal would only be entitled to consolidate separate agreements upon the acceptance of all parties involved in the dispute.

13.5 Binding of Third Parties

A third party cannot be bound by an arbitration award issued in a proceeding in which it did not actively participate. National courts would not bind a third party to an arbitration proceeding if such party did not participate.

VANUATU

Law and Practice

Contributed by:
Anna Kirk, Lauren Lindsay, Polly Pope and Ben Prewett
Bankside Chambers

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BANKSIDE CHAMBERS

1. General

1.1 Prevalence of Arbitration

There is a lack of available information on the prevalence of international arbitration as a method of dispute resolution in Vanuatu.

1.2 Key Industries

We are not aware of any industries in Vanuatu for which international arbitration is more or less popular.

We are, however, aware that parties operating in the maritime sector (including salvage) routinely agree international arbitration clauses, which is standard practice.

Vanuatu is also an international finance centre with an active banking and insurance sector. As we know from other jurisdictions, those sectors are particularly well suited to international arbitration, but it remains to be seen whether participants are agreeing to arbitrate any disputes that may arise and, if so, where.

Vanuatu is also a member of the WTO and a signatory to two bilateral investment treaties, with China and the UK, although these BITs appear not to have entered into force. In addition, as part of the Belt and Road Initiative, Vanuatu signed a series of agreements with China in 2018, although these do not appear to provide for arbitration.

1.3 Arbitration Institutions

There are no arbitral institutions established in Vanuatu.

1.4 National Courts

There are no specific courts in Vanuatu that are designated to hear disputes relating to arbitration. However, the Supreme Court is Vanuatu's court of general jurisdiction.

2. Governing Legislation

2.1 Governing Law

Vanuatu has no legislation that governs arbitration generally. However:

- The Trade Disputes Act 1983 permits arbitration of trade disputes in certain circumstances.
- The Judicial Services and Courts Act was amended in 2008 to introduce several provisions relating to arbitration:
  - (a) The Supreme Court was given the power to refer disputes to an arbitrator with the consent of the parties (s 42B). There are also provisions relating to questions of law arising from such arbitrations (ss 42C and 42D), and the immunity of arbitrators (s 42E).
  - (b) Upon application, the Supreme Court may make an order in accordance with the terms of an award (regardless of whether that arbitration was conducted in accordance with an order under Section 42B), which "is enforceable in the same manner as if it had been made in an action in the Supreme Court" (s 42F).

The law applicable to arbitration in Vanuatu is therefore primarily to be found in the other sources of law in Vanuatu. Notably, Vanuatu is a Commonwealth nation, which gained its independence in 1980. The English common law in existence as at 1980 applies to the extent it has not been expressly amended by the Vanuatu Parliament. French law and customary law may also be relevant. It is beyond the scope of this

guide to assess the English common law of arbitration in 1980.

2.2 Changes to National Law

There have not been any significant changes to Vanuatu's legal regime for arbitration in the past year.

The Asian Development Bank has been providing technical assistance to States in the South Pacific with the aim of establishing effective commercial dispute resolution regimes via international arbitration reform (principally, the ratification of the New York Convention and the adoption of legislation that reflects the UNCITRAL Model Law). It is unknown to us whether, and if so to what extent, Vanuatu is presently obtaining such assistance. We are not otherwise aware of any pending legislation that may change the arbitration landscape in Vanuatu.

On 12 June 2024, Vanuatu acceded to the 1907 Hague Convention for the Pacific Settlement of International Disputes. This took effect on 11 August 2024 and makes Vanuatu the 123rd member of the Permanent Court of Arbitration.

3. The Arbitration Agreement

3.1 Enforceability

There are no particular provisions of Vanuatu law governing the legal requirements for an arbitration agreement to be enforceable.

3.2 Arbitrability

We have not identified any judgments of the Vanuatu courts relating to the basis on which a dispute will be determined to be arbitrable.

However, it is to be expected that, among other matters, disputes relating to rights and obligations under Vanuatu's Constitution of 1980 are not arbitrable. For example, in Bebe v Republic of Vanuatu [2013] VUCA 36, the government had argued that a dispute relating to the treatment of a government employee ought to be arbitrated in accordance with the Trade Disputes Act. The Vanuatu Court of Appeal instead identified the issue for decision in that case as being "whether for the purposes of Article 58(2) of the Constitution a Director General is a 'senior public servant'", because Article 58(2) provides that "[s]enior public servants in Ministries may be transferred by the Prime Minister to other posts of equivalent rank". The Court concluded that this issue was not "amenable to arbitration law" because it was "a legal issue which needs to be progressed with alacrity in a Court".

3.3 National Courts' Approach

There are no judgments of the Vanuatu courts relating to the determination of the law governing the arbitration agreement. However, given that the Vanuatu courts have referred to decisions of the English courts in relation to the enforcement of arbitration agreements (as described further below), it seems likely that the Vanuatu courts would follow the UK Supreme Court decision in Enka v Chubb [2020] UKSC 38.

In relation to the enforcement of arbitration agreements, the decisions of the Vanuatu courts are somewhat anachronistic and difficult to reconcile.

In SPIE-EGC Ltd v FIFA [2003] VUCA 11, the Vanuatu Court of Appeal considered a contract between two foreign parties, containing a clause in French that, as put by the Court, "appears to be an arbitration clause". It was noted that "[t]he question whether or not the dispute should have been referred to arbitration before any relief was sought before a Court was not, appar-

ently, argued before the Chief Justice [at first instance]". The Court remitted this question to the Chief Justice for consideration.

In Dick v Property Ltd [2013] VUSC 2, the Vanuatu Supreme Court considered a contract providing for disputes to be decided as follows: "If any dispute, question or difference shall arise between the parties as to the meaning, operation or effect of any of the provisions of this Agreement or the rights or liabilities of any of the parties hereto, such dispute, question or difference shall be referred to the arbitration of an independent arbitrator to be appointed by the President or the person for the time being fulfilling the office of the President of the Law Institute of Victoria whose decision or award shall be conclusive and binding upon the parties… [A] reference to arbitration in accordance with the provisions hereof shall be a condition precedent to any action or other legal proceedings between the parties relating to such dispute, question or difference."

The Court held that:

- On the one hand: "agreements to refer matters in dispute to arbitration are sometimes regarded as attempts to 'oust the jurisdiction of the Courts,' and to that extent will not be specifically enforced. Thus, an agreement to refer to arbitration, though so far valid that an action can be maintained for its breach, will not be enforced, and does not oust the jurisdiction of the Court."
- On the other hand: "Parties to a contract may, however, make arbitration a condition precedent to a right of action for breach of the contract, and such a condition is valid."

In support of this distinction, the Court referred to the 19th century judgment of the House of Lords in Scott v Avery [1856] 10 ER 1121. That decision related to a contractual clause that was drafted to overcome the objection to ousting the courts' jurisdiction that prevailed at the time. As put by Lord Campbell in that case, there was "no principle or policy of the law which prevents parties from entering into such a contract" containing a condition precedent because "no breach shall occur until after a reference has been made to arbitration". That is, no breach could occur, and therefore no cause of action that might enliven the courts' jurisdiction could accrue, until after the arbitral award had been rendered.

In Dick v Property Ltd, the Vanuatu court concluded that the arbitration clause established a permissible condition precedent. In doing so, it also referred to the fact that the contract was governed by Victorian law, and to the earlier judgment in SPIE.

Several years later, in Sacksack v Vanuatu Investment Promotion Authority [2018] VUCA 35, the Vanuatu Court of Appeal considered the enforcement of the following clause: "Any dispute arising out of this contract shall be dealt with amicably by both parties, failure of which an independent arbitrator shall be agreed upon by both parties to consider the matter. The decision of the independent arbitrator shall be final."

The Court stated that "[t]his type of clause is often referred to as a Scott v Avery clause". That conclusion is doubtful: the clause did not provide for arbitration as a condition precedent to court proceedings; it provided for arbitration as the "final" means of resolving a dispute. Indeed, the error in the Court's reasoning is made apparent later in its judgment, which states: "It is also clear to us that in this case the words 'condition precedent' do not need to appear in the clause setting up arbitration in order for the require-

ment for arbitration to be considered as a condition precedent. On a logical construction of the clause under consideration, the parties intended first that they would try and deal with the dispute amicably between themselves and then if they failed in that endeavour, the parties would be required to use their best efforts to agree on an independent arbitrator to consider the matter." That is, the Court appears to have been satisfied by identifying any condition precedent – albeit a condition precedent to arbitration – rather than an arbitration clause that was a condition precedent to court proceedings. It is, however, the latter that matters under the rule established in Scott v Avery.

The Court went on to refer to SPIE-EGC Ltd v FIFA and Dick v Property Ltd and observed that "[i]n neither case did the Court say that an arbitration clause was unlawful because it purported to oust the jurisdiction of the Courts". In doing so, however, it expressly relied on the rationale set out in Scott v Avery and Dick v Property Ltd, quoting from Dick v Property Ltd as follows: "Parties to a contract may, however, make arbitration a condition precedent to a right of action for breach of the contract, and such a condition is valid."

In RMS Engineering and Construction v Vanuatu [2019] VUSC 139, the Vanuatu Supreme Court held that an arbitration clause did not oust the jurisdiction of the court and was valid and binding (at [42]). While the Court did not further explain the reasons for its decision, counsel had described the arbitration clause as "substantially similar" to that in Sacksack, and a "typical Scott v Avery clause" (at [39]). In sum, the judgments of the Vanuatu courts suggest that:

- The Vanuatu courts are likely to give effect to a clause that makes arbitration a condition precedent to court proceedings, in accordance with Scott v Avery.
- If a clause instead provides for arbitration to be final and binding, there is a real risk that the Vanuatu courts will not give effect to such a clause on the basis that it improperly ousts the jurisdiction of the courts.

Separately, in RMS the Supreme Court noted that the arbitration clause provided for arbitration in Singapore, and therefore enforcement in Vanuatu would require "an application to and an order made by the Vanuatu Supreme Court", which "would be the end step after an expensive arbitration process had been conducted in Singapore". The Court held that: "Given the costs involved, I do not consider the justice of the case allows that all disputes arising from or in connection with the Contract, including for debt recovery, must be finally settled by arbitration" (at [35]). No authority was cited for this conclusion, which is difficult to reconcile with the plain text of the arbitration clause: "Any dispute between the Parties arising out of or in connection with the Contract not settled amicably…and in respect of which the [Dispute Board's] decision (if any) has not become final and binding shall be finally settled by arbitration." Not only that, but this conclusion seems to have been unnecessary, given that (a) the contract's dispute resolution clause provided for disputes to be referred to a Dispute Board in the first instance, (b) the claim was for debts owing pursuant to decisions of the Dispute Board, and (c) the parties were obliged to give effect to a decision of the Dispute Board "unless and until it shall be revised in an amicable settlement or an arbitral award".

3.4 Validity

We are not aware of any judgments of the Vanuatu courts that address whether the rule of separability applies to arbitration clauses contained

in an otherwise invalid contract. However, given that this is a longstanding rule of English common law (see Heyman v Darwins [1942] AC 356), it seems likely that this rule would be applied by the Vanuatu courts.

4. The Arbitral Tribunal

4.1 Limits on Selection

There are no particular provisions of Vanuatu law that limit the parties' autonomy to select arbitrators.

4.2 Default Procedures

Vanuatu does not have a default procedure for the selection of arbitrators.

4.3 Court Intervention

There are no particular provisions of Vanuatu law that set out the circumstances in which the courts may intervene in the selection of arbitrators.

4.4 Challenge and Removal of Arbitrators

There are no particular provisions of Vanuatu law governing the challenge or removal of arbitrators.

4.5 Arbitrator Requirements

There are no particular provisions of Vanuatu law relating to arbitrator independence, impartiality or disclosure.

Notably, however, in Halliburton Company (Appellant) v Chubb Bermuda Insurance Ltd [2020] UKSC 48, the UK Supreme Court endorsed the English Court of Appeal's conclusion that "[u]nder the common law, judges should disclose facts or circumstances which would or might provide the basis for a reasonable apprehension of lack of impartiality" (at [37], [115]). It is to be expected that the Vanuatu courts would follow this rule of common law.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

We have not identified any judgments of the Vanuatu courts relating to the basis on which a dispute will be determined to be arbitrable. It is, however, to be expected that disputes relating to rights and obligations under Vanuatu's Constitution of 1980 are not arbitrable.

5.2 Challenges to Jurisdiction

There are no particular provisions of Vanuatu law that concern the principle of competence-competence, nor are we aware of any judgments of the Vanuatu courts on this subject.

5.3 Circumstances for Court Intervention

There are no particular provisions of Vanuatu law that concern the circumstances in which courts may intervene in relation to the jurisdiction of an arbitral tribunal. For the reasons give above, however, there is good to reason to believe that the Vanuatu courts would be more ready to intervene than the courts in a jurisdiction with arbitration legislation that reflects the Model Law.

5.4 Timing of Challenge

There are no particular provisions of Vanuatu law that address the timing of any challenge to the jurisdiction of an arbitral tribunal.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

There are no particular provisions of Vanuatu law that address the standard of judicial review for questions of admissibility and jurisdiction.

5.6 Breach of Arbitration Agreement

It appears that the Vanuatu courts (a) may be willing to stay court proceedings that are commenced in breach of certain types of arbitration agreements, but (b) are likely to be more willing to allow such proceedings than are courts in jurisdictions with arbitration legislation that reflects the Model Law.

5.7 Jurisdiction Over Third Parties

There are no particular provisions of Vanuatu law that address the position of third parties in relation to arbitration.

6. Preliminary and Interim Relief

6.1 Types of Relief

There are no particular provisions of Vanuatu law that address the availability of preliminary or interim relief.

6.2 Role of Courts

There are no particular provisions of Vanuatu law that address the role of the courts in relation to preliminary or interim relief in arbitral proceedings.

6.3 Security for Costs

There are no particular provisions of Vanuatu law that address the ability of the courts or arbitral tribunal to order security for costs.

7. Procedure

7.1 Governing Rules

There are no particular provisions of Vanuatu law that govern the procedure of arbitration in Vanuatu.

7.2 Procedural Steps

There are no particular provisions of Vanuatu law that require particular procedural steps.

7.3 Powers and Duties of Arbitrators

There are no particular provisions of Vanuatu law that address the powers and duties of arbitrators.

7.4 Legal Representatives

Under Section 31 of the Legal Profession Act 2005, it is an offence for a person to practise law in Vanuatu unless that person is admitted to legal practice. Neither “practise law” nor “legal practice” is defined in the Act. In any event, pursuant to Section 21 of the Act, foreign lawyers may be admitted to legal practice in Vanuatu on a temporary basis, “if in the opinion of the Admissions Committee it is in the public interest for the person to be so admitted”.

8. Evidence

8.1 Collection and Submission of Evidence

There are no particular provisions of Vanuatu law that address the collection or submission of evidence in arbitrations in Vanuatu.

8.2 Rules of Evidence

There are no particular provisions of Vanuatu law that address the applicable rules of evidence in arbitral proceedings seated in Vanuatu. Notably, the Civil Procedure Rules only apply to “civil proceedings in the Supreme Court and the Magistrates’ Court” (Rule 1.6).

8.3 Powers of Compulsion

There are no particular provisions of Vanuatu law that address the powers of compulsion or court assistance for arbitrators.

9. Confidentiality

9.1 Extent of Confidentiality

There are no particular provisions of Vanuatu law that address the confidentiality of arbitration.

10. The Award

10.1 Legal Requirements

There are no particular provisions of Vanuatu law that address the legal requirements for an arbitral award.

10.2 Types of Remedies

There are no particular provisions of Vanuatu law that address the types of remedies that an arbitral tribunal may award.

10.3 Recovering Interest and Legal Costs

There are no particular provisions of Vanuatu law that address the recovery of interest or legal costs in arbitration.

11. Review of an Award

11.1 Grounds for Appeal

There are no particular provisions of Vanuatu law that address the parties' entitlement to appeal an arbitral award, or the applicable procedure (except for references to arbitration made by the Supreme Court by consent of the parties, as set out in **2.1 Governing Law**).

11.2 Excluding/Expanding the Scope of Appeal

There are no particular provisions of Vanuatu law that address whether the parties are entitled to exclude or expand the scope of appeal or challenge to an award.

11.3 Standard of Judicial Review

There are no particular provisions of Vanuatu law that address the standard of judicial review.

12. Enforcement of an Award

12.1 New York Convention

Vanuatu has not signed or ratified the New York Convention.

12.2 Enforcement Procedure

As set out in **2.1 Governing Law**, upon application, the Supreme Court may make an order in accordance with the terms of an arbitral award. That order "is enforceable in the same manner as if it had been made in an action in the Supreme Court" (s 42F of the Judicial Services and Courts Act).

There are no particular provisions of Vanuatu law that address the impact on enforcement in Vanuatu of an award being set aside, or of pending setting-aside proceedings. Nor have we identified any judgments of the Vanuatu courts on that subject.

In relation to sovereign immunity, it is likely that the common law doctrine continues to apply in Vanuatu.

12.3 Approach of the Courts

There are no particular provisions of Vanuatu law that address the standards for recognising and enforcing arbitral awards, including in relation to public policy, nor have we identified any judgments of the Vanuatu courts on that subject. It is notable, however, that Section 42F of the Judicial Services and Courts Act goes no further than that the Supreme Court "may" make an order in accordance with the terms of an arbitral award.

13. Miscellaneous

13.1 Class Action or Group Arbitration

There are no particular provisions of Vanuatu law that address class action or group arbitration.

13.2 Ethical Codes

There are no specific ethical rules that apply to counsel and arbitrators conducting arbitration proceedings in Vanuatu. As set out in **7.4 Legal Representatives**, lawyers may require special temporary admission to conduct arbitral proceedings in Vanuatu.

13.3 Third-Party Funding

Third-party funding in Vanuatu may be restricted by the doctrines of champerty and maintenance, which were part of the English common law.

13.4 Consolidation

There are no particular provisions of Vanuatu law that address the consolidation of separate arbitral proceedings.

13.5 Binding of Third Parties

There are no particular provisions of Vanuatu law that address the circumstances in which third parties can be bound by an arbitration agreement or award, or by the courts in aid of arbitration.

VIETNAM

Law and Practice

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Le & Tran

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Le & Tran was founded in 2011 and has rapidly ascended to the pinnacle of the legal industry in Vietnam. Under the leadership of the formidable Stephen Le, the firm has established itself as a powerhouse in the legal arena. Combining unmatched legal expertise, local insight, and a global perspective, Le & Tran delivers outcome-driven solutions across a wide range of practice areas including dispute resolution, asset recovery, white-collar crime, family and private client, HR and employment, tax and finance, and all aspects of corporate and enterprise operations. Their multidisciplinary, holistic approach and steadfast commitment to impartiality and transparency sets them apart from the rest of the field. Le & Tran consistently garners international acclaim and recognition from multinational clients including QBE, Marvell Technologies, and Petronas, and esteemed organisations such as Chambers and Partners.

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1. General

1.1 Prevalence of Arbitration

In Vietnam, international arbitration is increasingly favoured for resolving commercial disputes involving foreign parties, driven by global integration and cross-border transactions. Its benefits – flexibility, confidentiality, and expert arbitrators – are widely acknowledged.

For purely domestic disputes, Vietnamese parties still prefer litigation or mediation, owing to their familiarity, lower costs, and trust in domestic courts. However, international arbitration is preferred for disputes with foreign parties, leveraging enforceability under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention") and its perceived neutrality.

Key contexts for international arbitration in Vietnam include:

- contractual agreements – many international contracts involving Vietnamese parties specify international arbitration, especially in sectors such as construction, energy, and trade;
- enforcement of foreign awards – Vietnam's adherence to the New York Convention facilitates recognition and enforcement of foreign arbitral awards; and
- Arbitration venue – Vietnam is increasingly chosen as a preferred arbitration venue, notably through the Vietnam International Arbitration Center (VIAC), which is gaining prominence in regional disputes.

1.2 Key Industries

Construction Industry

International arbitration is common in Vietnam's construction sector, owing to large-scale projects, complex contracts, and multiple parties from different jurisdictions. Common disputes include contract interpretation, delays, and cost overruns. Foreign investment in infrastructure projects and the technical nature of these disputes necessitate the use of expert arbitrators.

Energy Industry

The energy sector, involving projects such as power plants and renewable energy installations that are often funded by international investors, also sees significant arbitration activity. Long-term contracts and regulatory changes frequently lead to disputes. International arbitration is favoured for its neutrality and stability, which are essential for resolving high-value, long-term contracts.

Banking and Finance Sector

Cross-border transactions and investments in the banking and finance sector drive the use of international arbitration. Complex financial instruments require specialised knowledge, which arbitration provides.

Factors Driving Arbitration Preference

The reasons behind certain industries' preference for international arbitration include:

- expertise – allows selection of arbitrators with specific industry knowledge;
- confidentiality – protects sensitive commercial information; and
- speed – provides faster resolution than court litigation which is crucial for time-sensitive transactions.

1.3 Arbitration Institutions

The VIAC is the foremost arbitration institution in Vietnam for international arbitration, owing to:

- reputation and expertise – the VIAC is renowned for handling domestic and international disputes proficiently, with arbitrators skilled across various industries;
- convenient process – known for user-friendly procedures and administrative support, the VIAC ensures efficient dispute resolution;
- international standards – the VIAC's rules align with global standards, making it favourable for foreign parties seeking familiar arbitration practices; and
- recognition of awards – awards issued by the VIAC are enforceable under the New York Convention, providing assurance of enforceability globally.

Besides the VIAC, institutions such as the Singapore International Arbitration Centre (SIAC) and the ICC are occasionally preferred for disputes involving Vietnamese parties.

No new arbitral institutions have been established in Vietnam in the past year.

1.4 National Courts

Vietnam has established a robust legal framework supporting domestic and international arbitration, designating specific courts for arbitration-related disputes. This ensures efficiency in the arbitration process and effective enforcement of arbitral awards.

Provincial Courts

At the core of this framework are the courts at the provincial level. The provincial courts handle various arbitration-related responsibilities, including:

- recognition and enforcement of foreign arbitral awards;
- addressing challenges to the validity of arbitration agreements; and
- handling requests for the annulment of arbitral awards.

The provincial courts operate under the guidance of the Civil Procedure Code (CPC) of Vietnam. The CPC incorporates provisions from the New York Convention, ensuring that foreign arbitral awards are recognised and enforceable in Vietnam. This alignment tends to give foreign investors confidence that their arbitral awards will be upheld, making Vietnam an attractive destination for international business.

Supreme Court of Vietnam

The Supreme Court of Vietnam oversees the uniform application of arbitration law across the country. It provides guidance and interpretations of legal provisions related to arbitration, ensuring consistency and clarity in rulings by the lower courts. By handling appeals and reviews of decisions made by the provincial courts and High Courts, the Supreme Court maintains a coherent and predictable arbitration environment in Vietnam.

2. Governing Legislation

2.1 Governing Law

Vietnam's primary legislation for international arbitration is the Vietnamese Law on Commercial Arbitration, enacted by the National Assembly on 17 June 2010 and effective from 1 January 2011. This law provides the legal framework for arbitration, influenced by the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law"), in order to ensure fair and efficient resolution of business disputes.

Alignment With UNCITRAL Model Law

The Vietnamese Law on Commercial Arbitration incorporates the following key UNCITRAL Model Law principles:

- party autonomy – allowing customisation of the arbitration process by parties;
- competence-competence doctrine – empowering arbitral tribunals to decide on their jurisdiction; and
- procedural rules – ensuring binding and enforceable arbitral awards.

Divergences From the UNCITRAL Model Law

Although aligned on the above-mentioned aspects, Vietnam's legislation differs from the UNCITRAL Model Law in respect of:

- scope – by applying uniformly to both domestic and international arbitration;
- interim measures – by allowing tribunals to grant interim measures with specific enforcement procedures;
- arbitrator qualifications – by setting criteria for arbitrators in order to ensure impartiality and expertise;
- grounds for annulment – additional grounds are included under Vietnamese law;
- court involvement – by specifying instances requiring court intervention; and
- confidentiality – by mandating confidentiality of arbitration proceedings.

2.2 Changes to National Law

Vietnam's arbitration framework has evolved recently to align more closely with international norms. While the Vietnamese Law on Commercial Arbitration has remained largely unchanged since 2010, regulatory updates and judicial interpretations have shaped the current environment as well as future directions – with pending legislation looking set to change Vietnam's arbitration landscape.

Regulatory Updates

The Ministry of Justice has streamlined regulations for recognising and enforcing international arbitral awards, thereby expediting procedures and ensuring consistent enforcement nationwide. These updates enhance Vietnam's reputation as an arbitration-friendly jurisdiction by reassuring foreign parties of effective award enforcement.

Judicial Clarifications

The Supreme People's Court has provided interpretations of key provisions in the Vietnamese Law on Commercial Arbitration, particularly concerning the grounds for nullifying awards. These clarifications enhance the reliability of arbitration outcomes by minimising the risk of awards being vacated.

Pending Legislation

Upcoming amendments to the Vietnamese Law on Commercial Arbitration are expected to:

- formalise recognition of electronic arbitration agreements for greater accessibility;
- enhance arbitrator qualifications and ethical standards to uphold credibility;
- strengthen enforcement mechanisms for both domestic and foreign arbitral awards; and
- expand enforceability of interim measures ordered by arbitral tribunals.

3. The Arbitration Agreement

3.1 Enforceability

Under the Vietnamese Law on Commercial Arbitration, several conditions must be met for arbitration agreements in Vietnam to be enforceable

and legally binding. These requirements ensure clarity, consent, and proper documentation, as follows.

- Written form – arbitration agreements must be in writing, complying with international norms such as the UNCITRAL Model Law. This can be achieved through:
  (a) contractual clause – an arbitration provision within a business contract;
  (b) separate agreement – an independent arbitration agreement signed before or after a dispute arises; and
  (c) electronic communication – agreements made via email or fax, documented to accommodate modern communication practices.
- Clear intent to arbitrate – the agreement must clearly state the parties' intention to resolve disputes through arbitration rather than litigation, thus preventing ambiguity.
- Scope of arbitration – arbitration applies to commercial disputes involving business transactions and investments, as long as they align with Vietnamese law and moral standards. Certain matters, such as administrative decisions or family disputes, are exempt.
- Legal capacity – parties entering into arbitration agreements must have legal capacity, ensuring they are of legal age and able to understand and agree to the terms.
- Procedural details – enforceable agreements should outline arbitration specifics, including tribunal selection, arbitration location, applicable law, and procedural rules, so as to enhance clarity and minimise procedural disputes.
- Compliance – agreements must adhere to all formal legal requirements under Vietnamese law, including public policy considerations, to avoid being deemed void and unenforceable.

3.2 Arbitrability

To determine whether a dispute is arbitrable in Vietnam, the following factors are considered:

- nature of the dispute – arbitration is generally permitted for commercial disputes arising from transactions and contracts;
- legal provisions – specific laws outline non-arbitrable dispute;
- arbitration agreement – must clearly state the intention to arbitrate, as disputes excluded in the agreement are not arbitrable; and
- judicial interpretation – courts interpret arbitration agreements and legal provisions to clarify ambiguities.

Please refer to **5.1 Matters Excluded From Arbitration** for details of subject matters that may not be referred to arbitration under Vietnamese law.

3.3 National Courts' Approach

Determining the Law Governing the Arbitration Agreement

Vietnamese courts respect the parties' choice of law in arbitration agreements under the Vietnamese Law on Commercial Arbitration. If specified, the chosen law governs unless it conflicts with Vietnamese public policy. When no governing law is specified, courts consider factors such as the nature of the contract, place of performance, and parties' locations. Vietnamese law is typically applied if the agreement is silent and the contract is performed in Vietnam.

Enforcement of Arbitration Agreements

Vietnamese courts generally uphold arbitration agreements per the New York Convention. For enforcement, agreements must be written, clearly express intent to arbitrate, and involve arbitrable disputes under Vietnamese law. Courts dismiss jurisdiction in favour of arbitration when a valid clause exists.

Challenges to Enforcement

Enforcement may face challenges based on agreement invalidity, non-arbitrable matters or conflicts with Vietnamese public policy. Courts rigorously assess these challenges to uphold the integrity and predictability of arbitration proceedings in Vietnam.

3.4 Validity

In Vietnam, an arbitral clause can remain valid even if the rest of the contract is invalid. This principle, known as the "rule of separability", treats the arbitration agreement as independent. Thus, if the main contract is invalid due to fraud, illegality, or lack of consent, the arbitration clause can still be enforced if it meets legal requirements.

Vietnamese law applies the rule of separability to arbitration clauses in invalid agreements. The Vietnamese Law on Commercial Arbitration explicitly endorses this principle. According to Article 19, the invalidity of the main contract does not invalidate the arbitration agreement within it. This ensures that the arbitration agreement remains autonomous and can proceed independently of the main contract's validity.

4. The Arbitral Tribunal

4.1 Limits on Selection

In Vietnam, the parties involved in arbitration have significant autonomy in selecting arbitrators. However, this autonomy is guided by specific legal limits to ensure fairness and integrity. These limits are established under the Vietnamese Law on Commercial Arbitration.

Qualifications

Arbitrators must meet specific qualifications to be eligible. They must have:

- full civil capacity to act;
- a university degree; and
- at least five years of work experience.

In exceptional cases, significant practical experience may suffice in lieu of these qualifications. These requirements ensure that arbitrators have the necessary expertise and experience to handle disputes effectively.

Independence and Impartiality

Arbitrators must also be independent and impartial. They cannot:

- be related or the representatives of any party involved;
- have a direct or indirect interest in the dispute; and
- be current or recent (within three years) employees of any party involved.

Number of Arbitrators

The law allows the parties to agree on the number of arbitrators.

4.2 Default Procedures

Default Procedure for Selecting Arbitrators

If the parties' chosen method for selecting arbitrators fails, Vietnamese law provides a default procedure to ensure that the arbitration can proceed. Under the Vietnamese Law on Commercial Arbitration, the following steps are taken.

- Arbitration institution involvement – if the arbitration agreement specifies an arbitration institution, that institution will appoint the arbitrators according to its rules.
- Court involvement – if no institution is specified or the institution fails to appoint the arbitrators, either party can request a competent court to make the appointment. The court

will then appoint the necessary arbitrators to ensure that the arbitration proceeds.

Default Procedure for Multiparty Arbitrations

Vietnamese law also provides a default procedure for multiparty arbitrations to ensure fair representation in the selection of arbitrators, as follows.

- Joint appointment – if multiple parties are involved, they must attempt to jointly appoint arbitrators.
- Institution or court appointment – if the parties cannot agree, the specified arbitration institution or the competent court will step in to appoint the arbitrators so that all parties are fairly represented and the arbitration process continues smoothly.

4.3 Court Intervention

Circumstances of Court Intervention

In Vietnam, under the Vietnamese Law on Commercial Arbitration, courts intervene in arbitrator selection in the following circumstances.

- Parties' inability to agree – if the parties fail to agree on arbitrator selection within the specified time, either party can apply to the court to prevent arbitration delays.
- Failure of arbitration institution – if the designated institution fails to appoint arbitrators promptly, parties can seek court assistance.
- Multiparty disputes – in disputes involving multiple parties unable to agree on arbitrators, courts will ensure fair representation and facilitate arbitration.

Procedure for Court Intervention

A party can formally apply to the court for an arbitrator appointment. The court reviews the request and then will appoint arbitrators, while reviewing fairness and legal compliance.

Limitations on Court Intervention

Court intervention is restricted to upholding party autonomy and arbitrator integrity, as follows.

- Respect for autonomy – courts intervene only when necessary, respecting parties' arbitrator selection agreements.
- Legal compliance – appointed arbitrators must meet legal qualifications and independence criteria.
- Minimal interference – once appointed, courts minimise involvement to maintain arbitration independence.
- Judicial review – court decisions on arbitrator appointments can be reviewed to ensure legal standards and fairness, safeguarding arbitration legitimacy.

4.4 Challenge and Removal of Arbitrators

In Vietnam, the Vietnamese Law on Commercial Arbitration governs the challenge or removal of arbitrators to ensure impartiality, independence and competence throughout the arbitration process.

Vietnamese law outlines several grounds for challenging or removing an arbitrator, as follows.

- Impartiality and independence – arbitrators must be impartial and independent. Parties can challenge an arbitrator if there are doubts regarding their impartiality or independence due to personal or financial interests or to relationships with one of the parties.
- Qualification requirements – arbitrators must meet specific qualifications. If an arbitrator lacks the required qualifications or fails to maintain them, they can be challenged and removed.
- Conflict of interest – any direct or indirect interest in the dispute outcome constitutes a conflict of interest. Arbitrators with significant

conflicts, such as previous employment with a party or substantial business dealings, can be challenged.
- Incapacity – if an arbitrator becomes physically or mentally incapable of performing their duties, they can be removed to prevent delays and ensure efficiency.
- timeliness – arbitrators must conduct proceedings efficiently. If an arbitrator causes undue delays, they can be challenged and potentially removed.

4.5 Arbitrator Requirements

Independence and Impartiality

In Vietnam, providing for arbitrator independence and impartiality is crucial for maintaining arbitration integrity under the Vietnamese Law on Commercial Arbitration, as well as the VIAC Rules.

- Legal requirements – arbitrators must be independent and impartial and devoid of personal interests in the dispute outcome to ensure fair proceedings.
- VIAC Rules – the VIAC emphasises arbitrator neutrality, prohibiting conduct that may compromise impartiality, such as affiliations with involved parties.

Disclosure of Conflicts of Interest

Transparency is ensured through stringent disclosure obligations, as follows.

- Legal requirement – Article 42 mandates that arbitrators disclose potential conflicts of interest before and during arbitration.
- VIAC Rules – arbitrators promptly disclose any financial, professional or personal relationships that could create conflicts, including those arising during proceedings.

Procedures for Handling Conflicts

Vietnamese law outlines the following procedure by which to challenge arbitrators if their independence or impartiality is questioned.

- Challenging process – parties submit written challenges within a specified timeframe, detailing the grounds. The tribunal or the VIAC reviews the challenges.
- Decision – if the arbitrator does not withdraw voluntarily, the tribunal or institution will decide. Dissatisfied parties may seek a final court review.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

The Vietnamese Law on Commercial Arbitration delineates certain disputes that cannot be arbitrated, as follows.

- Administrative disputes – disputes derived from government actions are resolved through administrative procedures and courts rather than arbitration.
- Family and inheritance matters – issues related to marriage, divorce, child custody and inheritance are handled by family courts to protect the involved parties.
- Employment disputes – matters such as wrongful termination or labour strikes fall under the jurisdiction of labour courts and administrative bodies.
- Criminal matters – criminal disputes are excluded from arbitration and handled by the criminal justice system.
- Consumer protection disputes – disputes involving non-negotiable consumer contracts are often excluded from arbitration to protect consumer rights.

- Public interest disputes – state secrets or national security issues are non-arbitrable and handled by the public judicial system.

5.2 Challenges to Jurisdiction

In Vietnam, the principle of competence-competence is applicable, allowing an arbitral tribunal to rule on its own jurisdiction. This includes addressing any objections regarding the existence or validity of the arbitration agreement. The competence-competence doctrine is recognised and upheld under the Vietnamese Law on Commercial Arbitration, aligning Vietnam's arbitration practices with international standards.

5.3 Circumstances for Court Intervention

In Vietnam, courts address issues of arbitral tribunal jurisdiction in specific circumstances defined by the Vietnamese Law on Commercial Arbitration, in an attempt to balance the right to legal arbitration with the protection of parties' rights. Court intervention may be required in the following circumstances.

- Challenge to tribunal's jurisdiction – parties may challenge jurisdiction if and whether the arbitration agreement is deemed valid, invalid, non-existent, or inapplicable to the dispute. The challenge may be filed with the competent court.
- Preliminary rulings – after a tribunal affirms jurisdiction, the parties can seek court review to confirm its legality.
- Enforcement challenges – during award enforcement, the parties may contest tribunal jurisdiction, prompting a court examination of tribunal authority.

Vietnamese courts minimise intervention, upholding arbitral autonomy – although may intervene to ensure the legal process or fairness. Courts intervene if legal principles such as the agreement's validity or jurisdictional scope are unclear, so as to shield the parties from unjust arbitration.

Courts may review rulings on jurisdiction by arbitral tribunals, thereby ensuring accuracy and protecting the arbitration rights of the parties.

5.4 Timing of Challenge

Parties have the right to go to court to challenge the jurisdiction of the arbitral tribunal at certain stages, in the following ways.

- Upon filing – parties can challenge jurisdiction immediately upon filing, following institution-specific procedures.
- Tribunal constitution – after tribunal formation, parties can contest jurisdiction directly with the tribunal, per Article 43 of the Vietnamese Law on Commercial Arbitration.
- Preliminary rulings – if disagreements occur after tribunal affirmations, parties can seek court review on legality.
- Post-award – challenges during enforcement may question tribunal jurisdiction per Article 68 of the Vietnamese Law on Commercial Arbitration for enforcement or annulment.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

In Vietnam, judicial review standards for questions of jurisdiction and admissibility in arbitration are in place to guarantee fairness and adherence to legal principles. Although the concept of de novo review – generally recognised in common-law jurisdictions – is not explicitly articulated in Vietnamese law, the practical approach taken by Vietnamese courts often mirrors this rigourous standard.

As such, Vietnamese courts conduct a thorough and independent review when addressing ques-

tions of jurisdiction and admissibility. This means that courts do not simply defer to the arbitral tribunal's decisions but instead evaluate the issues afresh. This approach aims to provide:

- legal validity – the court independently assesses the legal validity of the arbitration agreement and the tribunal's jurisdiction; and
- adherence to legal principles – the court reviews whether the arbitration proceedings comply with Vietnamese legal standards and public policy.

5.6 Breach of Arbitration Agreement

In Vietnam, national courts firmly uphold arbitration agreements, dismissing court proceedings initiated in breach of such agreements. This reflects a strong policy favouring arbitration as the agreed-upon dispute resolution mechanism.

Vietnamese courts are generally unwilling to allow court proceedings to continue if there is a valid arbitration agreement in place. The courts will enforce the arbitration agreement by referring the parties to arbitration and dismissing or staying the court proceedings.

Article 6 of the Vietnamese Law on Commercial Arbitration states that if a party initiates court proceedings in a matter subject to an arbitration agreement, the court must refuse to accept the case unless the arbitration agreement is null and void, inoperative, or incapable of being performed. This legal provision supports the principle that arbitration agreements are to be respected and enforced by the judiciary.

There is a general reluctance by Vietnamese courts to intervene in disputes covered by an arbitration agreement. The courts aim to respect the autonomy of the parties and the arbitration process, adhering to the principle of minimal judicial intervention in arbitration matters.

5.7 Jurisdiction Over Third Parties

Vietnamese law allows an arbitral tribunal to assume jurisdiction over individuals or entities that are neither party to an arbitration agreement nor signatories to the contract containing the arbitration agreement in the following circumstances.

- Agency and representation – non-signatories acting as agents or representatives of arbitration agreement parties are bound to the arbitration agreement if within their granted authority.
- Assignment and succession – transferred contractual rights bind assignees or successors to the arbitration agreement, ensuring continuity.
- Third-party beneficiaries – express contract terms extending rights or duties to third parties bind them to the arbitration agreement based on benefit acceptance.

Rules apply universally to domestic and foreign third parties, with foreign enforceability governed by international arbitration norms and jurisdictional laws.

6. Preliminary and Interim Relief

6.1 Types of Relief

Arbitral tribunals are permitted to award preliminary or interim relief in Vietnam. Orders from arbitral tribunals are binding and enforceable through Vietnamese courts if voluntary compliance fails.

The following types of preliminary or interim relief can be awarded:

- asset preservation – preventing asset dissipation or concealment relevant to the dispute;
- status quo maintenance – preventing actions worsening disputes or causing irreparable harm;
- security provision – requiring a deposit or security to fund arbitration or potential awards;
- evidence production – preserving, inspecting, or revealing evidence and preventing destruction or concealment; and
- necessary measures – other interim actions ensuring fair dispute resolution and the protection of parties.

6.2 Role of Courts

In Vietnam, the courts play a role in preliminary or interim relief in arbitration proceedings under the following circumstances.

- Support for arbitration – courts offer relief when tribunals are not yet assembled or face operational issues, ensuring timely measures can be provided.
- Tribunal order enforcement – non-compliance may lead to court action and tribunal orders are often treated as similar to judicial orders.

Relief Types for Foreign Arbitrations

Vietnamese courts can grant the following types of preliminary or interim relief in aid of foreign-seated arbitrations:

- asset safeguarding – preventing asset misuse or concealment;
- injunctions – maintaining status quo to prevent harm;
- cost security – requiring funding assurance; and
- evidence retention – protecting critical data.

Use of Emergency Arbitrators

Vietnamese legislation permits the use of emergency arbitrators for immediate relief. Decisions are binding, ensuring swift compliance until full tribunal assembly.

Emergency arbitrators are permitted to use similar types of relief to the courts. This includes asset safeguarding, injunctions, and security.

Vietnamese courts can intervene once an emergency arbitrator has been appointed. However, this tends to be limited to urging compliance with arbitrator orders and generally avoiding direct intervention.

6.3 Security for Costs

Under Vietnamese law, arbitral tribunals have the authority to order security for costs. This power is provided by the Vietnamese Law on Commercial Arbitration, which allows tribunals to take necessary measures to ensure the proper conduct of the arbitration proceedings and protect the interests of the parties involved.

Vietnamese courts also have the authority to order security for costs, in order to guarantee that the parties can cover arbitration expenses and potential awards. This dual authority supports the effective management of arbitration proceedings and safeguards the financial interests of both parties.

7. Procedure

7.1 Governing Rules

Vietnam's arbitration framework is governed by the Vietnamese Law on Commercial Arbitration and guidance from the Supreme Court and rel-

evant decrees from the Vietnamese government. These laws and rules uphold a structured and fair arbitration process by outlining the responsibilities and rights of parties, the powers and duties of arbitrators, and the judiciary's supportive role. This robust legal infrastructure maintains effective dispute resolution through arbitration, reinforcing Vietnam's position as a reliable forum for both domestic and international arbitration.

7.2 Procedural Steps

In Vietnam, arbitral proceedings must follow specific procedural steps as required by law.

Step 1: Initiation and Statement of Defence

- The claimant submits a Notice of Arbitration to the VIAC.
- The VIAC sends the Notice of Arbitration and related documents to the respondent.
- The respondent submits a Statement of Defence and any Counterclaim to the VIAC.

Step 2: Formation of the Arbitral Tribunal

In a tribunal with three arbitrators:

- each party selects one arbitrator or requests the VIAC's president to appoint one;
- the two appointed arbitrators select a third arbitrator as the chair; and
- if they cannot agree, the VIAC's president appoints the chair.

In a tribunal with a sole arbitrator:

- the parties agree on a sole arbitrator or request the VIAC's president to appoint one; and
- if they cannot agree, the VIAC's president appoints a sole arbitrator.

Step 3: Review of Documents and Preliminary Tasks

- Arbitrators review the case documents.
- The tribunal may verify facts, collect evidence, summon witnesses, and apply interim measures.

Step 4: Dispute Resolution Hearing

- The tribunal holds hearings to resolve the dispute.
- The tribunal may mediate between the parties. If mediation is successful, the settlement is recorded, and a Decision of Mediation is issued.

Step 5: Issuing the Arbitral Award

- If mediation is not conducted or is unsuccessful, the tribunal issues an arbitral award within 30 days from the end of the final hearing.
- The tribunal sends the award to the VIAC, which then sends the original or certified copies to the parties.

7.3 Powers and Duties of Arbitrators

Pursuant to Article 21 of the Vietnamese Law on Commercial Arbitration, arbitrators in Vietnam have specific rights and obligations.

Arbitrators have rights to:

- accept or refuse to resolve disputes;
- be independent in resolving disputes;
- refuse to provide information related to the dispute; and
- receive remuneration.

Arbitrators have obligations to:

- keep the content of the dispute confidential, except where information must be provided

to competent state authorities as prescribed by law;
- ensure impartial, swift and timely resolution of disputes; and
- adhere to professional ethical standards.

7.4 Legal Representatives

Domestic Matters

In Vietnam, legal representatives in domestic matters must meet specific qualifications and requirements to practice law and represent clients. These are governed by the Law on Lawyers (Law No 65/2006/QH11) and subsequent amendments.

The key qualifications for domestic legal representatives (lawyers) are:

- legal education – a bachelor's degree in law or higher from a recognised institution;
- professional training – completion of a lawyer training programme at an accredited law training centre;
- probation period – a specified duration of practice at a law firm or legal organisation following the training programme;
- Bar association membership – membership of a Bar association and a practising certificate issued by the Vietnam Bar Federation; and
- ethical standards – adherence to strict professional ethical standards and continuing legal education requirements.

International Arbitration

In the context of international arbitration, the requirements for legal representatives are generally more flexible. Vietnam recognises the need for specialised knowledge in international legal practices, allowing for varied qualifications.

Legal representatives in international arbitration are expected to meet the following requirements.

- Flexibility in qualifications – legal representatives in international arbitration do not necessarily need Vietnamese legal qualifications. Lawyers from other jurisdictions can represent parties in arbitration proceedings held in Vietnam.
- International experience – preference is given to lawyers with qualifications from other countries and experience with international arbitration.
- Adherence to arbitration rules – legal representatives must comply with the rules of the arbitration institution (eg, the VIAC or other international bodies).
- Ethical standards – legal representatives must maintain high ethical standards and professional conduct throughout the arbitration process.

8. Evidence

8.1 Collection and Submission of Evidence

In Vietnam, the approach to collecting and submitting evidence in arbitration is structured to ensure a fair and efficient resolution of disputes. The procedures accommodate both domestic and international arbitration, with specific principles guiding the process from the pleading stage to the hearing stage.

Pleading Stage

Unlike common-law jurisdictions, Vietnam does not have a formal discovery system. Parties are expected to voluntarily disclose evidence supporting their claims and defences.

Parties submit relevant documents and information with their initial pleadings, including written statements, contracts, emails, and other pertinent materials. Witness statements are also cru-

cial at this stage, providing preliminary insights into the facts and issues.

Hearing Stage

During hearings, parties present their cases orally, reinforcing written submissions with additional testimony and arguments. Witnesses who have provided written statements may testify in person, affirming their statements and offering further oral testimony.

A key aspect of the hearing stage is allowing the opposing party to challenge the credibility and reliability of witness testimony. The goal of such cross-examination is to ensure a thorough and critical evaluation of the evidence.

Legal Privilege and Confidentiality

Communications between a client and their legal counsel are protected by legal privilege unless the client consents to disclosure. This allows free communication without fear of it being used against them.

Both parties and arbitrators are bound to keep the proceedings and the evidence confidential. This protects sensitive information and maintains process integrity.

Procedural Orders and Tribunal Discretion

The arbitral tribunal has broad discretion in managing evidence, including determining admissibility, relevance, materiality and weight.

Procedural orders are issued by the tribunal and provide detailed instructions on evidence collection, submission and presentation. These orders ensure an orderly process and procedural clarity for all parties.

8.2 Rules of Evidence

The following rules of evidence apply to arbitration proceedings seated in Vietnam.

- Tribunal discretion – under Article 46 of the Vietnamese Law on Commercial Arbitration, tribunals have broad discretion over evidence admissibility, relevance, materiality, and weight, which are tailored to each case.
- Focus on relevance – the emphasis is on evidence relevance and materiality rather than strict formal rules. Documents, witness testimony, expert reports, and electronic records may be admitted.
- Flexible procedures – the process of evidence collection and presentation (including written witness statements and expert reports) is less formal, with opportunities for elaboration during hearings.
- Witness testimony – written testimony is supplemented by oral testimony during hearings, with the allowance of cross-examination to challenge credibility.
- Privilege and confidentiality – legal privilege and strict confidentiality ensure privacy unless legally required or agreed upon.

Compared with the rules of evidence that apply to domestic matters, the foregoing rules are more flexible. Arbitration proceedings seated in Vietnam offer more adaptability than domestic courts governed by the CPC, which mandates detailed evidence rules.

Vietnamese courts follow strict procedural rules and formal discovery processes, contrasting with arbitration's focus on substantive issues and flexibility. Balancing adaptability and procedural integrity in arbitration proceedings enhances efficiency and fairness in examining evidence in Vietnam.

8.3 Powers of Compulsion

In Vietnam, the effectiveness of arbitration is supported by the powers granted to arbitrators and the availability of court assistance. These provisions stipulate that arbitrators can compel the production of documents and the attendance of witnesses, thereby maintaining the integrity and efficiency of the arbitration process.

Powers of Arbitrators

Arbitrators can order parties to submit relevant documents, records, and other pertinent materials. This power is crucial for ensuring that all relevant information is available to the tribunal, thus facilitating a comprehensive evaluation of the case.

Arbitrators can request the attendance of witnesses to provide oral testimony. Witnesses affiliated with the parties are generally expected to comply, allowing the tribunal to obtain first-hand accounts and clarifications on disputed facts.

Court Assistance

If a party fails to comply with an arbitrator's order, the tribunal can seek court assistance. Article 46 of the Vietnamese Law on Commercial Arbitration permits tribunals to request court intervention in order to enforce their orders. The court can compel parties to comply, so that the arbitration process is not impeded by non-cooperation.

Arbitrators do not have direct authority over non-parties. To secure the co-operation of non-parties, the tribunal can request the court to issue subpoenas or enforcement orders. This judicial support is intended to provide access to all relevant evidence and testimonies, regardless of the involvement of non-parties.

Distinction Between Parties and Non-Parties

Parties to the arbitration agreement are obligated to comply with the arbitrator's orders. Failure to do so can lead to court enforcement and penalties.

Non-parties are not directly bound by the arbitration agreement and do not have an inherent obligation to comply with the tribunal's orders. For non-parties, the tribunal must rely on the court's authority to compel compliance.

9. Confidentiality

9.1 Extent of Confidentiality

Confidentiality is a fundamental principle in arbitration proceedings in Vietnam, which are designed to protect the integrity of the process and the privacy of the parties involved. The Vietnamese Law on Commercial Arbitration provides a comprehensive framework that ensures various elements of arbitration (eg, pleadings, documents, and the final award) are kept confidential.

Extent of Confidentiality

All pleadings and documents submitted during arbitration – including statements of claim and defence, witness statements, expert reports, and other exchanged materials – are confidential. This ensures that detailed information about the dispute is protected.

Arbitration hearings are conducted in private, with only parties directly involved in the case allowed to attend. This includes the parties, their legal representatives, arbitrators, and invited witnesses or experts. This maintains the confidentiality of discussions and testimonies.

The final decision of the tribunal, including the contents of the arbitral award and any delib-

erations, is also confidential. Disclosure of the award is limited to what is necessary for enforcement or compliance, unless both parties agree to make the award public.

Disclosure in Subsequent Proceedings

When a party seeks to enforce an arbitral award, they must present the award and relevant parts of the arbitral proceedings to the competent court. This disclosure is necessary for the court to verify the validity and enforceability of the award and to determine whether it complies with legal standards and due process.

10. The Award

10.1 Legal Requirements

An arbitral award in Vietnam is a decision made by the arbitral tribunal that resolves the entire content of the dispute and terminates the arbitration proceedings. The key legal requirements are outlined in the Vietnamese Law on Commercial Arbitration.

Arbitral awards are made based on the following principles.

- Majority vote – the arbitral tribunal makes an arbitral award by voting according to the majority principle.
- Chair's decision – if a majority vote is not reached, the arbitral award is made according to the opinion of the chair of the arbitral tribunal.

According to Article 61 of the Vietnamese Law on Commercial Arbitration, the arbitral tribunal must issue the final award within 30 days from the date of the last hearing. This time limit ensures that the arbitration process is conducted efficiently and that disputes are resolved promptly.

10.2 Types of Remedies

Arbitral tribunals in Vietnam must adhere to the scope of the arbitration agreement and Vietnamese public policy when awarding remedies, as outlined in the Vietnamese Law on Commercial Arbitration. Tribunals can only award remedies within the scope of the parties' agreement. Unauthorised remedies cannot be awarded. Remedies must align with Vietnamese public policy. Awards violating public policy may be set aside or refused enforcement by the courts.

Compensatory Damages

Under Vietnamese law, compensation for damages must be actual, resulting directly from the breach, and the aggrieved party must take reasonable steps to mitigate the damage. Damages correspond to the degree of fault. The defendant may be exempt from compensation if the damage is entirely due to the fault of the aggrieved party or a force majeure event.

Punitive Damages

Vietnamese law prioritises compensatory damages over punitive damages, which are generally not recognised. Arbitral tribunals typically cannot award punitive damages, focusing on reparation rather than punishment.

However, Vietnamese law allows for a "penalty" or "fine" as a punishment for breach in a contractual relationship. For commercial contracts, the penalty amount must be agreed upon by the parties and cannot exceed 8% of the breached portion's value (or 12% for construction contracts in certain circumstances).

Rectification (Specific Performance)

Tribunals can award specific performance if it is within the arbitration agreement and does not contravene Vietnamese law so that contractual obligations may be fulfilled or breaches correct-

ed. Enforceability depends on the practicality and legal compliance of specific performance orders.

Equitable Remedies

Tribunals may award declaratory relief to clarify legal rights and obligations without monetary compensation, provided they align with the arbitration agreement and comply with legal standards. Enforceability depends on the fairness of the remedy and alignment with public policy principles.

10.3 Recovering Interest and Legal Costs

Recovery of Interest

Parties can recover interest on overdue payments based on Article 306 of the Vietnamese Law on Commercial Arbitration (principle of compensatory damages). This interest can be contractually agreed upon or determined by statutory interest rates.

Arbitral tribunals can award both pre-award interest (accruing from the due date to the award date) and post-award interest (accruing from the award date until payment). The interest rate is based on contractual terms or statutory provisions so that the claimant is compensated for the lost time value of money.

Recovery of Legal Costs

Article 34 of the Vietnamese Law on Commercial Arbitration allows arbitral tribunals to decide on the allocation of arbitration costs, including legal fees. Generally, the losing party bears the legal costs of the winning party. This discourages frivolous claims and compensates the successful party.

Arbitral tribunals have broad discretion in allocating costs. They may consider factors such as party conduct, case complexity, and reasonableness of costs. In some cases, a "costs-sharing" approach may be adopted, where each party bears its own costs.

11. Review of an Award

11.1 Grounds for Appeal

Parties are entitled to appeal an arbitral award in Vietnam on certain grounds. Article 68(2) of the Vietnamese Law on Commercial Arbitration specifies that an arbitral award may be annulled by the court if:

- there is no arbitration agreement or the agreement is invalid;
- the composition of the arbitral tribunal or the arbitration procedure does not comply with the parties' agreement or the law;
- the dispute is not within the jurisdiction of the arbitral tribunal;
- the award includes content beyond the jurisdiction of the arbitral tribunal;
- the evidence used for the award is found to be forged;
- an arbitrator has received improper benefits affecting the award's objectivity; and
- the award contradicts the fundamental principles of Vietnamese law.

The procedure for annulling an arbitral award in Vietnam is as follows.

- Filing a request for annulment – within 30 days from the date of receiving the arbitral award, the party seeking annulment must file a request with the competent court (provincial court).
- Court notification – immediately upon accepting the request, the competent court will notify the arbitration centre or ad hoc arbitra-

tors, the disputing parties, and the procuracy at the same level (provincial level).
- Designation of the examination council – within seven working days following the acceptance of the request, the chief judge of the competent court designates an examination council consisting of three judges, including one chair.
- Examination meeting – within 30 days following the designation of the examination council, the council holds a meeting to examine the annulment request.
- Conducting the meeting – the examination council conducts the meeting with the disputing parties, their legal representatives (if any), and a procurator from the procuracy.
- Council decision – the council decides to annul or not annul the arbitral award and notifies the parties, the arbitration centre or ad hoc arbitrator, and the procuracy within five working days following the decision.
- Suspension for correction – the examination council may suspend the examination for up to 60 days to allow the arbitral tribunal to correct any errors.
- Post-annulment actions – if the award is annulled, parties may agree to arbitration again or initiate a lawsuit in court; if not annulled, the award becomes enforceable.

11.2 Excluding/Expanding the Scope of Appeal

Exclusion of Appeal or Challenge

Arbitral awards are final and binding under Vietnamese law, with limited grounds for setting aside as specified in Article 68 of the Vietnamese Law on Commercial Arbitration. These grounds include issues related to the validity of the arbitration agreement, proper notice, the ability to present a case, the tribunal exceeding its authority, improper composition, and contravention of public policy.

Parties may agree to exclude the possibility of an appeal to the extent that they waive their right to challenge the award on substantive grounds. However, statutory grounds for setting aside an award cannot be completely excluded. Protections such as proper notice and adherence to public policy are fundamental and cannot be waived.

Expansion of Scope for Appeal or Challenge

Parties may agree to expand the scope for appeal or challenge beyond what is provided by law, such as allowing appeals for errors of law or fact. However, the enforceability of such agreements under Vietnamese law is limited.

Vietnam's legal framework promotes the finality and efficiency of arbitration by limiting the grounds for challenging an award. Agreements introducing broader grounds for appeal than those in Article 68 of the Vietnamese Law on Commercial Arbitration may not be recognised by Vietnamese courts. Courts are likely to adhere strictly to the statutory grounds, emphasising that arbitration should remain a swift and conclusive method of dispute resolution.

11.3 Standard of Judicial Review

Vietnamese courts adopt a deferential standard of judicial review for arbitral awards, focusing on ensuring fairness and legality rather than reassessing the merits of the case. This approach upholds the integrity of the arbitral process, recognising the expertise and autonomy of arbitrators.

Grounds for setting aside arbitral awards can be found in **11.1 Grounds for Appeal**.

Focus on Procedural Fairness

Judicial review in Vietnam primarily concerns procedural fairness. The court's role is to ensure

that the arbitral tribunal follows the proper procedures, respects the parties' rights to a fair hearing, and acts within its jurisdiction. This procedural focus preserves the finality of arbitration awards and minimises court intervention, reflecting arbitration's aim to be a swift and conclusive dispute resolution method.

Deference to Expertise of Arbitral Tribunal

Vietnamese courts generally defer to the expertise and autonomy of arbitral tribunals, understanding that parties choose arbitration for its specialised knowledge, efficiency, and finality. Judicial intervention is minimal and arbitral tribunal decisions are respected and upheld unless significant procedural flaws are present.

12. Enforcement of an Award

12.1 New York Convention

Vietnam has signed and ratified the New York Convention. This provides that arbitral awards are recognised and enforced across member states, solidifying Vietnam's commitment to international arbitration as a reliable dispute resolution method.

Vietnam has also strengthened its arbitration framework through various international agreements and conventions in order to facilitate cross-border dispute resolution, as follows.

- Bilateral investment treaties (BITs) – Vietnam has numerous BITs with various countries that include provisions for arbitration to resolve investment disputes. These treaties often allow investors to choose international arbitration forums such as ICSID, ICC, or UNCITRAL rules, enhancing investor confidence in the protection and resolution of their investments.
- Free trade agreements (FTAs) and regional agreements – Vietnam is a party to several FTAs, including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Regional Comprehensive Economic Partnership (RCEP). These agreements include mechanisms for settling investment disputes through arbitration, thereby providing robust legal avenues for foreign investors.
- ASEAN Framework – as a member of the Association of Southeast Asian Nations (ASEAN), Vietnam is part of the ASEAN Comprehensive Investment Agreement (ACIA), which includes provisions for investor-state dispute settlement (ISDS). This allows investors from ASEAN member states to resolve disputes through arbitration under recognised international rules.

Vietnam's domestic legal framework, particularly the Vietnamese Law on Commercial Arbitration, supports its commitments under international agreements. This law aligns with international standards, facilitating the recognition and enforcement of foreign arbitral awards and providing a solid legal foundation for arbitration within the country.

12.2 Enforcement Procedure

Arbitral awards in Vietnam are enforced under civil judgment enforcement laws as outlined in Article 67 of the Vietnamese Law on Commercial Arbitration. Article 65 of this law encourages parties to voluntarily enforce arbitral awards. Awards by a domestic arbitral tribunal are enforced by civil enforcement agencies without needing court approval, promoting a streamlined enforcement process.

Standards for Enforcement

Vietnamese courts apply standards consistent with the New York Convention, which Vietnam has ratified with reservations. Key considerations include:

- recognition requirements – ensuring the award meets recognition standards; and
- public policy – the award must not violate public policy or fundamental Vietnamese law principles (this alignment underscores Vietnam's commitment to international arbitration norms).

Enforcement of Set-Aside Awards

According to Article V of the New York Convention, enforcement can be refused if the award has been annulled at the seat of arbitration. This principle maintains consistency and respects the judicial authority of the arbitration seat.

Approach to Ongoing Set-Aside Proceedings

When an arbitral award is undergoing set-aside proceedings at the seat of arbitration, Vietnamese courts typically suspend enforcement proceedings pending the outcome of the set-aside proceedings. This cautious approach is to certify that the enforcement decision aligns with the final judicial determination at the arbitration seat.

Sovereign Immunity as a Defence

State entities may raise sovereign immunity to resist enforcement, with success depending on the following factors.

- Waiver of immunity – immunity may be waived explicitly in the arbitration agreement or implicitly by participating in arbitration without raising the defence.
- Nature of the dispute – immunity is less likely to succeed if the dispute arises from commercial activities rather than sovereign acts.
- International conventions – Vietnam's adherence to conventions such as the New York Convention influences the courts' consideration of sovereign immunity claims, aligning with international norms.

12.3 Approach of the Courts

The enforcement of arbitration awards in Vietnam is governed by international treaties and national laws, with the New York Convention being paramount. The New York Convention requires signatory countries to recognise and enforce arbitration awards from other signatory states, with limited exceptions, thus fostering a pro-enforcement bias.

Vietnamese courts generally uphold arbitration, respecting parties' agreements to arbitrate and the finality of arbitral decisions. This approach is based on principles of party autonomy, finality, and judicial efficiency, ensuring that arbitration remains a viable and efficient dispute resolution method.

Grounds for Annulment of Commercial Arbitration Awards

An arbitration award can be annulled under the following conditions:

- invalid arbitration agreement – if there is no valid arbitration agreement or if the agreement is invalid;
- improper composition or procedure – if the composition of the arbitral tribunal or the arbitration proceedings do not adhere to the parties' agreement or the Vietnamese Law on Commercial Arbitration;
- jurisdictional issues – if the dispute is outside the jurisdiction of the arbitral tribunal or if the award contains matters beyond its jurisdiction;

- forged evidence or arbitrator misconduct – if the evidence on which the award is based is forged, or if the arbitrator received money, property,or other material benefits from one of the parties, thus affecting the award's impartiality and fairness; and
- contravention of public policy – if the award violates the fundamental principles of Vietnamese law.

Authority to Annul Commercial Arbitration Awards

The court reviews annulment requests upon a party's application. The party requesting annulment must demonstrate that the arbitral tribunal made the award under circumstances such as an invalid agreement, improper composition, jurisdictional issues, forged evidence, or arbitrator misconduct. For public policy violations, the court actively verifies and collects evidence.

Public Policy Grounds

Vietnamese courts apply both domestic and international public policy standards when refusing to enforce foreign arbitral awards in order to align with Vietnamese legal principles and societal norms while respecting international arbitration norms.

13. Miscellaneous

13.1 Class Action or Group Arbitration

In Vietnam, the legal framework, including the Vietnamese Law on Commercial Arbitration, does not explicitly provide for class action arbitration or group arbitration. Arbitration is typically conducted on an individual basis between the parties who have entered into an arbitration agreement.

Limitations and Requirements

Given the absence of explicit recognition for class action or group arbitration, there are inherent limitations to arbitrating such claims, as follows.

- Individual basis – arbitration proceedings are usually conducted individually, meaning each dispute is handled separately unless all parties explicitly agree to a collective process.
- Arbitration agreement – for group arbitration to be considered, all parties must enter into an arbitration agreement that specifically allows for such a procedure, complying with general arbitration law principles in Vietnam.

Practical Implications

Owing to the lack of explicit provisions for class action or group arbitration, parties must consider alternative approaches for disputes involving multiple claimants or respondents, as follows.

- Separate proceedings – separate arbitration proceedings may be conducted for each party involved, even though this can lead to inefficiencies and increased costs.
- Consolidation – parties can agree to consolidate individual arbitrations into a single proceeding. This requires mutual consent and a clear framework within the arbitration agreement to manage the consolidation.

13.2 Ethical Codes

Ethical Codes for Legal Counsel

Legal counsel in Vietnam, including those involved in arbitration, are governed by the Vietnam Bar Federation through the Code of Ethics and Professional Conduct for Lawyers. The key principles are as follows.

- Independence and integrity – lawyers must maintain independence from external influ-

ences and act with integrity, ensuring their advice and representation are based solely on the law and client interests.
- Confidentiality – lawyers must keep all client information confidential, which is crucial for building trust and protecting sensitive commercial information in arbitration.
- Competence and diligence – lawyers must provide competent legal services and act diligently, staying updated on legal developments and thoroughly preparing for arbitration proceedings.
- Conflict of interest – lawyers must avoid conflicts of interest and disclose any potential conflicts to clients so that their professional judgment remains uncompromised.
- Professional conduct – lawyers are expected to conduct themselves professionally, respecting the rights of all parties and adhering to court and tribunal rules.

Professional Standards for Arbitrators

Arbitrators in Vietnam are governed by the Vietnamese Law on Commercial Arbitration. Key principles include the following.

- Impartiality and neutrality – arbitrators must remain impartial and neutral, disclosing any circumstances that might raise doubts about their impartiality or independence.
- Confidentiality – arbitrators must keep all information related to the arbitration proceedings confidential and not disclose case details, the parties involved, or the award without consent.
- Competence and diligence – arbitrators must be competent in the relevant areas of law and conduct the proceedings diligently, ensuring fairness and efficiency.
- Integrity and ethical conduct – arbitrators must act with integrity, avoiding actions that could compromise the arbitration process' integrity, including not accepting any inducements or gifts.
- Compliance with legal standards – arbitrators must comply with relevant laws and arbitration rules, adhering to the procedural rules in the arbitration agreement and verifying that the award is based on a sound understanding of the applicable law.

13.3 Third-Party Funding

Vietnamese law currently lacks specific provisions addressing third-party funding in arbitration. However, existing legal principles and related regulations offer some guidance on its treatment.

- Freedom of contract – under Vietnamese contract law, parties can generally enter into agreements, including third-party funding arrangements, provided these agreements do not violate the law or public policy. This principle underpins the legitimacy of third-party funding agreements.
- Civil Code and commercial law – these laws govern aspects of contractual relationships, including the assignment of rights and obligations. They impact the structuring of third-party funding agreements, particularly regarding the funder's rights to the arbitration proceeds.

Restrictions and Considerations

Despite the absence of explicit prohibitions, the following legal and ethical considerations must be addressed.

- Independence and conflict of interest – both arbitrators and legal counsel must maintain independence and avoid conflicts of interest. Third-party funding could influence the conduct of the funded party's legal team or raise concerns about the impartiality of the

arbitrators if there are any connections to the funding party. Proper disclosure and transparency are essential to mitigate these risks.
- Confidentiality – arbitration proceedings in Vietnam are generally confidential. Third-party funding arrangements must respect this confidentiality. Disclosure of information to the funding party must be carefully managed to avoid breaching confidentiality obligations.
- Control and influence – the involvement of a third-party funder should not lead to undue influence over the arbitration process. The funded party must retain control over key arbitration decisions, ensuring the funding party's involvement does not compromise the process' integrity.
- Enforceability – given that third-party funding agreements are not explicitly regulated, their enforceability under Vietnamese law may be uncertain. Parties should ensure that the terms are clear and comply with general contract law principles to avoid potential disputes over the agreement.

13.4 Consolidation

The Vietnamese Law on Commercial Arbitration does not explicitly address the consolidation of arbitral proceedings. Therefore, any consolidation must be based on general principles of arbitration law, the rules of arbitration institutions, and relevant practices.

- General arbitration principles – the principles of efficiency and fairness in arbitration suggest that consolidation may be permissible if it serves the interests of justice and the parties agree. However, without explicit legal provisions, this remains a matter of interpretation.
- Arbitration institution rules – some arbitration institutions, such as the VIAC, may have specific rules allowing the consolidation of related proceedings. In the case of the VIAC, Rule 15 of the VIAC Rules of Arbitration provides such guidelines. Parties can agree to follow these institutional rules in their arbitration agreements.
- Relevant practices – in practice, consolidation may occur if all parties involved consent. This is typically done to prevent conflicting decisions and streamline related disputes. Arbitrators and parties should ensure that consolidation does not prejudice any party's rights or overly complicate the proceedings.

13.5 Binding of Third Parties

In Vietnam, the Vietnamese Law on Commercial Arbitration governs arbitration, emphasising consensual agreements. Arbitration agreements generally bind parties who expressly agree to them. However, certain legal doctrines extend this binding effect to third parties, as follows.

- Assignment of rights – when contractual rights are assigned, the assignee may be bound by the arbitration agreement.
- Third-party beneficiaries – contracts conferring benefits to third parties can bind them to arbitration if they accept the benefits.
- Agency and representation – principals can be bound by arbitration agreements made by their agents or representatives.

Binding foreign third parties generally involves the following complex jurisdictional considerations and international principles.

- Jurisdictional limits – Vietnamese courts require sufficient connections or activities within Vietnam to bind foreign entities.
- International treaties – Vietnam's adherence to the New York Convention facilitates enforcement of arbitration awards internationally.

- Comity and reciprocity – courts may apply these principles when foreign jurisdictions reciprocate enforcement of Vietnamese arbitration agreements.
- Public policy – courts consider Vietnamese public policy and fairness when deciding to bind foreign third parties.

Trends and Developments

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Le & Tran

Le & Tran was founded in 2011 and has rapidly ascended to the pinnacle of the legal industry in Vietnam. Under the leadership of the formidable Stephen Le, the firm has established itself as a powerhouse in the legal arena. Combining unmatched legal expertise, local insight, and a global perspective, Le & Tran delivers outcome-driven solutions across a wide range of practice areas including dispute resolution, asset recovery, white-collar crime, family and private client, HR and employment, tax and finance, and all aspects of corporate and enterprise operations. Their multidisciplinary, holistic approach and steadfast commitment to impartiality and transparency sets them apart from the rest of the field. Le & Tran consistently garners international acclaim and recognition from multinational clients including QBE, Marvell Technologies, and Petronas, and esteemed organisations such as Chambers and Partners.

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Stephen Le Hoang Chuong is the founder and chairman of Le & Tran, a multi-award-winning attorney, and a commanding figure in the legal industry. Armed with profound insight into Vietnam's legal landscape, client successes have cemented his reputation as Vietnam's most trusted legal specialist. Stephen's accomplishments have been consistently recognised by the likes of Chambers and Partners. Multinational corporations, including Petronas, have hailed him as the "best trial lawyer" they have ever worked with in Vietnam. An authoritative voice in the Vietnamese business community, Stephen is also the first and only Vietnam attorney to have been admitted to the Fellowship of the International Academy of Financial Crime Litigators.

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Introduction

International arbitration is a recognised and widely used method for resolving cross-border disputes in international commercial transactions and investments. Unlike litigation, arbitration involves a neutral third party or panel making binding decisions. This process is favoured for its flexibility, neutrality, and the enforceability of awards under international treaties such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"). However, despite Vietnam's established legal framework for commercial arbitration, there are some features of the system that do not meet the standards of international economic integration. As such, a comprehensive review and enhancement of the arbitration laws so that they align with practical requirements is necessary for the future. This article explores recent trends and developments in international arbitration, focusing on legal, political and socio-economic contexts relevant for clients engaged in international business.

Trends

Online dispute resolution through arbitration

The COVID-19 pandemic accelerated the need for online dispute resolution (ODR), including online commercial arbitration. Today, the shift to ODR is driven by the need for faster and more convenient dispute resolution compared with traditional methods. Further, ODR offers significant cost savings by eliminating expenses associated with physical venues, travel, and accommodation for the parties involved.

Numerous arbitration institutions worldwide have incorporated provisions for online arbitration into their rules or have issued separate rules specifically for online arbitration. Examples include the China International Economic and Trade Arbitration Commission (CIETAC), the Shenzhen Court of International Arbitration (SCIA), and the Istanbul Arbitration Center (ISTAC). Additionally, these institutions have established systems for online filing and case management and are equipped to conduct online hearings and proceedings.

Vietnam's arbitration institutions have also made provisions for online hearings within their procedural rules. Article 25(2) of the Vietnam International Arbitration Center (VIAC) Rules stipulates that the arbitral tribunal may conduct hearings via teleconference, videoconference, or other suitable forms, subject to the agreement of the parties. Similarly, the Hanoi International Arbitration Center (HIAC) has provisions for online dispute resolution for small-value e-commerce and consumer disputes, cross-border commercial disputes, and other commercial disputes in Vietnam.

Challenges and legal considerations

A critical issue in online arbitration is determining the legal venue for arbitration when the parties and arbitrators are located in different locations. If the parties agree to a Vietnamese venue but the arbitrators are from different countries, questions may arise whether online hearings conform with the agreed arbitration venue. It follows that there is concern whether these online hearings are in violation of procedural requirements and possibly risk non-recognition or enforcement of arbitral awards under the New York Convention or the Vietnamese Law on Commercial Arbitration 2010.

It is notable that international practice varies regarding the definition of the arbitration venue. By way of example, UK law defines the arbitration venue as a "legal seat" designated by the parties, the appointing authority, or the arbitral tribunal, rather than a physical location. Thus, even if parties choose Vietnam as the venue,

online hearings do not conflict with the legal venue being Vietnam, and awards made in such hearings would be recognised and enforceable in the UK. However, Vietnamese law does not adopt the concept of a "legal seat". Instead, the Vietnamese Law on Commercial Arbitration defines the arbitration venue as the place where the arbitral tribunal conducts proceedings. Consequently, there is a potential risk that online arbitration awards could be denied recognition and enforcement or be annulled for procedural violations under Vietnamese law.

To fully support online arbitration, Vietnam needs to revise its legal framework to accommodate the concept of a "legal seat" rather than a strictly geographic location. This change would align Vietnamese law with international practice and facilitate the broader adoption of ODR methods, ensuring the legal robustness of online arbitration awards.

Application of generative AI trends in arbitration

The integration of generative AI in various sectors has revolutionised traditional processes, and the field of arbitration is no exception. Generative AI – with its ability to create content, analyse vast amounts of data and predict outcomes – is poised to transform how arbitration is conducted globally. AI's most significant contribution to arbitration lies in its ability to process and analyse vast amounts of legal documents quickly and accurately. Traditional arbitration involves extensive document review and data analysis, which can be time-consuming and prone to human error. AI tools can expedite this process, ensuring more efficient and accurate handling of cases.

In addition, AI algorithms can predict arbitration outcomes based on historical data, helping parties make informed decisions about pursuing arbitration or negotiating settlements. By automating repetitive tasks and streamlining processes, AI reduces the need for extensive human resources, thereby lowering the overall cost of arbitration. AI also has the ability to draft legal documents (including arbitration agreements, procedural orders, and awards) by analysing the context and requirements of the case – although qualified human oversight remains a requirement. This automation not only saves time but also ensures consistency and adherence to legal standards.

Global adoption of AI in arbitration

In the USA, AI has been increasingly adopted in arbitration. By way of example, the American Arbitration Association (AAA) has started using AI tools to assist in the management and analysis of arbitration cases. These tools help streamline case management – from filing to final award – by automating administrative tasks and enhancing data analysis capabilities. The UK's legal sector has also embraced AI, particularly in international arbitration. AI-driven platforms such as Kira Systems and ROSS Intelligence are used to review and analyse contracts, identify relevant case law, and predict outcomes. The result is that the efficiency of legal teams is enhanced and valuable insights are provided for arbitrators. Another example can be found in Singapore, a global arbitration hub that has integrated AI into its arbitration processes through initiatives such as the Singapore International Arbitration Center (SIAC). Additionally, the SIAC has collaborated with tech firms to develop AI systems that assist in case management and document review, improving the speed and accuracy of arbitration proceedings.

Challenges and legal considerations

The use of AI in arbitration raises concerns about data privacy and security. Arbitrators and parties must guarantee that sensitive information is protected and that AI systems comply with data protection regulations.

AI's decision-making capabilities raise ethical questions about transparency and accountability. It is crucial to ensure that AI systems are used to assist human arbitrators rather than replace them entirely.

Another challenge concerns AI's dependence on quality data. AI systems rely on high-quality data for accurate analysis and predictions. Poor data quality can lead to incorrect outcomes, undermining the arbitration process' integrity.

Application of AI for arbitration in Vietnam

Vietnam's arbitration framework, governed by the Vietnamese Law on Commercial Arbitration of 2010, is relatively young compared with international frameworks. While there have been advancements in arbitration practices, the integration of AI is still in its early stages. However, there is a growing interest in leveraging AI to enhance arbitration efficiency and accuracy. Some Vietnamese legal firms have started experimenting with AI tools for document review and legal research. Although these initiatives are still in the early stages, they demonstrate a willingness to embrace AI's potential in improving legal services, including arbitration.

It should be mentioned that the Vietnamese government and legal institutions have recognised the importance of adopting advanced technologies to enhance the legal framework. Initiatives to modernise legal education and promote technology adoption in the legal sector are currently being implemented, paving the way for broader AI integration in arbitration.

Overall, generative AI is set to revolutionise arbitration worldwide by enhancing efficiency, accuracy and accessibility. While developed arbitration hubs such as the USA, the UK and Singapore have already integrated AI into their structures, Vietnam is gradually recognising the potential benefits of AI in arbitration. As Vietnam continues to modernise its legal framework and embrace technological advancements, the integration of AI in arbitration is likely to follow, offering significant benefits to the business community and enhancing the entire arbitration process.

Third-party funding

Third-party funding in international arbitration refers to the financial support provided by an external entity, unrelated to the dispute, to a party involved in arbitration. This funding is usually provided in exchange for a share of the monetary award or settlement. third-party funding has become increasingly prevalent in international arbitration, offering a means for parties to pursue claims without bearing the full financial burden of litigation or arbitration costs.

Global trends and applications

The UK is one of the leading jurisdictions for third-party funding, particularly in London, which is a global arbitration centre. The Association of Litigation Funders (ALF), a self-regulatory body, provides guidelines and a code of conduct for funding parties. The case of Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd in 2016 highlighted the legitimacy of recovering third-party funding costs as part of arbitration awards in the UK, setting a precedent for other jurisdictions.

third-party funding is also widely used in the USA, especially in commercial and investor-state arbitrations. Although there are no federal regulations, disclosure of third-party funding arrangements is increasingly becoming a requirement in arbitral proceedings to avoid conflicts of interest. The case Chevron Corp v Donziger illustrated the significant role of third-party funding in facilitating access to justice in high-stakes international disputes.

Australia was one of the early adopters of third-party funding, initially in insolvency cases and later expanding into arbitration. The Federal Court of Australia has recognised the legitimacy of third-party funding, ensuring transparency and managing potential conflicts through required disclosures.

As major arbitration centres in Asia, Hong Kong and Singapore have recently revised their legal frameworks to permit third-party funding. In 2017, Hong Kong enacted the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance and Singapore followed with the Civil Law (Amendment) Act 2017. Both jurisdictions require disclosure of third-party funding arrangements to ensure transparency and address potential conflicts of interest.

third-party funding is gaining acceptance in the EU, with jurisdictions such as Germany, France, and the Netherlands witnessing a rise in third-party funding arrangements. The European Parliament is also considering proposals for a unified regulatory framework to ensure consistent standards across EU member states.

Application of third-party funding in Vietnam

Vietnam's arbitration landscape is evolving, with third-party funding gradually being recognised and utilised. The Vietnamese government and arbitration institutions have been observing global trends and are currently considering incorporating third-party funding into their legal framework. As of 2024, Vietnam does not have specific regulations governing third-party funding in arbitration. However, the VIAC and other arbitration bodies have started acknowledging third-party funding's potential benefits. The Ministry of Justice is also exploring regulatory frameworks that ensure that third-party funding is as transparent and ethical as possible.

Further, there has been a noticeable increase in arbitration cases involving third-party funding in Vietnam. In 2023, approximately 15% of new cases registered with the VIAC were funded by third parties, compared with 10% in 2022. This trend is expected to continue, with projections indicating that cases backed by third-party funding could constitute up to 20% of the VIAC's caseload by the end of 2024. One of the landmark cases in 2023 involved a Vietnamese tech company receiving third-party funding to pursue a USD50 million claim against a multinational corporation. The funding enabled the claimant to hire top-tier legal representation and expert witnesses, significantly improving their chances of success.

In sum, third-party funding allows parties with meritorious claims but limited financial resources to pursue arbitration, facilitating greater access to justice. By transferring the financial risk to the funding parties, claimants can focus on the merits of their case, leading to an increase in case filings as financial barriers are reduced. However, the lack of specific regulations in Vietnam creates uncertainty regarding the legality and enforceability of third-party funding agreements. Ensuring that third-party funding arrangements are disclosed to avoid conflicts of interest is imperative and safeguards are needed to pre-

vent funding parties from exerting undue influence on the arbitration process.

Arbitration with emergency arbitrators and expedited procedures

Arbitration is often known for its efficiency and time-saving nature compared with traditional litigation. However, many disputes in international arbitration tend to experience delays, particularly at the beginning and end of the arbitration process. In fact, this time lag is the most significant source of dissatisfaction among parties to the arbitration. The 2015 International Arbitration Survey by Queen Mary University of London highlighted that cost and lack of speed are the two major drawbacks of international arbitration. As a result, special mechanisms in arbitration proceedings – such as emergency arbitrators and expedited procedures – have been developed to accelerate dispute resolution.

Global trends and applications

The emergency arbitrator mechanism ensures that interim emergency measures can be implemented promptly before the arbitration tribunal is constituted. This procedure is widely utilised in international arbitration under the rules of various arbitration institutions, including the ICC, the LCIA, the International Center for Dispute Resolution (ICDR), the Stockholm Chamber of Commerce (SCC), the Swiss Arbitration Center (SAC), the SIAC, the Hong Kong International Arbitration Center (HKIAC), and the CIETAC.

To take one example, in Hong Kong the arbitration laws explicitly provide for the application and enforcement of interim measures decided by emergency arbitrators. Although the current Vietnamese Law on Commercial Arbitration allows parties to request interim measures from the courts before the arbitration tribunal is established, this court-supported mechanism lacks the flexibility and responsiveness of the emergency arbitrator system. There are various reasons that strong support for this mechanism is not provided by Vietnamese courts, which include current workload and the lack of priority for arbitration matters.

Applying for emergency arbitrators and expedited procedures in Vietnam

In order to enhance the rights of disputing parties seeking timely and flexible interim measures and to align Vietnamese arbitration law with international practices, it will likely become necessary to amend Vietnam's Law on Commercial Arbitration to include provisions for emergency arbitrators. Any new provisions will not need to detail the procedures for emergency arbitrators; rather, they are only required to acknowledge the mechanism and delegate the specifics to arbitration centers. The law must also ensure the enforceability of interim measures ordered by emergency arbitrators.

In a similar manner to the emergency arbitrator mechanism, expedited arbitration procedures have been increasingly adopted by global arbitration centres. Expedited procedures are designed to resolve disputes more quickly and at a lower cost than regular arbitration. Several Vietnamese arbitration centers, such as the VIAC, the Mediation Center of Arbitration and Conciliation (MCAC), the Southern Trade Arbitration Center (STAC) and the Ho Chi Minh City Commercial Arbitration Center (TRACENT) have begun to implement expedited procedures, inspired by practices from major international arbitration institutions.

The current Law on Commercial Arbitration in Vietnam does not explicitly address expedited procedures. To provide clearer legal guidance and facilitate the application of expedited

arbitration, Vietnamese arbitration law should include provisions for these procedures. This legislative support would create a more defined legal framework, allowing arbitration centres to apply expedited procedures effectively.

Developments

Developing Vietnam's commercial arbitration law based on the UNCITRAL Model Law

Vietnam's legislation on commercial arbitration is relatively young compared to international frameworks. In fact, the Vietnamese Law on Commercial Arbitration was enacted on 17 June 2010 and came into effect on 1 January 2011. In contrast, the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law") was adopted in 1985 and amended in 2006. Thus, Vietnam's arbitration law was introduced more than two decades after the UNCITRAL Model Law. To date, Vietnam has not been recognised as a country that follows the UNCITRAL Model Law and this poses a significant barrier to international economic integration, as the country lacks a dispute resolution mechanism aligned with the global legal framework. As such, despite its positive contributions to out-of-court dispute resolution in Vietnam during the past decade, the Vietnamese Law on Commercial Arbitration has revealed several limitations.

First, it must be acknowledged that the UNCITRAL Model Law plays a crucial role in shaping arbitration laws worldwide. According to UNCITRAL's website, 87 countries have adopted or been influenced by the UNCITRAL Model Law when developing their national arbitration laws. While Vietnamese law-makers and experts assert that the Vietnamese Law on Commercial Arbitration has actually referenced the UNCITRAL Model Law and included many provisions drafted accordingly, it has not yet been recognised by UNCITRAL as compliant with the UNCITRAL Model Law.

However, in recent years, the proposal to develop Vietnamese Law on Commercial Arbitration so that it is more in line with the UNCITRAL Model Law has gained support from experts and practitioners. Professor Do Van Dai has noted that "aligning arbitration law with the [UNCITRAL] Model Law is a priority [in order] to meet investors' expectations" and that "revising the law in accordance with the UNCITRAL Model Law to attract arbitration-based dispute resolution is a global trend".

In 2020, the Ministry of Justice conducted a study and published its Report on Assessment, Comparison of the Vietnamese Law and the UNCITRAL Model Law Regarding the Recognition and Enforcement of Arbitration Awards and Recommendations on Applying the UNCITRAL Model Law in Vietnam. This report emphasised: "The [UNCITRAL] Model Law is particularly suitable for countries without a comprehensive arbitration law or those with arbitration laws not fully compatible with international cases. This signifies the harmonisation of arbitration laws. Furthermore, studying the application of the [UNCITRAL] Model Law will help achieve widely accepted international standards across countries with different legal foundations."

The Draft Report on Reviewing the Commercial Arbitration Law (Draft 6) by the Vietnam Lawyers Association also emphasised the need to "improve the institutional framework for commercial arbitration and related laws to ensure arbitration is an effective mechanism for resolving investment, business and commercial disputes" and that "this should align with Vietnam's socio-economic conditions, the UNCITRAL

Model Law, and international arbitration practices".

Limiting the annulment and non-recognition of arbitral awards in Vietnam

The efficacy of commercial arbitration in fostering international economic integration and development hinges on a robust enforcement mechanism. To ensure the effectiveness of arbitral awards, it is imperative to minimise the annulment of domestic awards and any arbitrary non-recognition or non-enforcement of foreign arbitral awards.

Under the current Vietnamese Law on Commercial Arbitration, the grounds for annulling domestic arbitral awards are outlined in Article 68(2). These grounds include:

- the absence of a valid arbitration agreement or an invalid arbitration agreement;
- the composition of the arbitral tribunal or the arbitral proceedings not conforming to the parties' agreement or the Vietnamese Law on Commercial Arbitration;
- the dispute not being within the tribunal's jurisdiction;
- the award containing matters outside the tribunal's jurisdiction;
- fraudulent evidence submitted by the parties influencing the award;
- arbitrators accepting bribes or other material benefits affecting the impartiality of the award; and
- the award contravening the fundamental principles of Vietnamese law.

These grounds lack clarity and have been inconsistently applied by the courts – in particular, the ground that the award contravenes the fundamental principles of Vietnamese law. This inconsistency poses significant risks to arbitral awards and undermines confidence in arbitration among the disputing parties.

It is significant that the recognition and enforcement of foreign arbitral awards in Vietnam are not governed by the Vietnamese Law on Commercial Arbitration but, rather, by the Civil Procedure Code (CPC). Additionally, since 1995, Vietnam has been a party to the New York Convention. Despite this, the enforcement rate of foreign arbitral awards in Vietnam remains low. According to the Ministry of Justice, from 1 January 2012 to 30 September 2019, there were 84 applications for the recognition and enforcement of foreign arbitral awards in Vietnam. Of these applications, 39 were granted recognition and enforcement (47%), 12 were suspended, and 33 were denied recognition and enforcement (39.3%).

The low rate of recognition and enforcement may be attributed to several factors, including unclear and inadequate legal provisions. By way of example, the terminology – whether it refers to "foreign arbitral award", "decision of a foreign arbitrator" or "foreign arbitration decision" – is not uniformly defined. Further, the grounds for non-recognition and non-enforcement outlined in the CPC are ambiguous, leading to varied interpretations and inconsistent application across different court levels – especially the provision regarding a foreign arbitral award being contrary to the fundamental principles of Vietnamese law.

Given these issues, it is essential to amend the Vietnamese Law on Commercial Arbitration to provide clearer and more specific grounds for the annulment of arbitral awards and to establish a more effective mechanism for protecting and ensuring the enforceability of all arbitral awards. This may include introducing a supervisory

mechanism for the annulment of arbitral awards by courts. Furthermore, the Vietnamese Law on Commercial Arbitration should clearly define terms such as "foreign arbitral award" and "decision of a foreign arbitrator" and provide specifically worded grounds for recognising or not recognising and enforcing foreign arbitral awards. The CPC can then focus on the procedures for the handling of applications for recognition, non-recognition and enforcement of foreign arbitral awards in Vietnam.

Conclusion

Vietnam's journey towards establishing a robust framework for international arbitration reflects a broader trend of integrating with the global economy and adhering to international standards. However, the existing legal infrastructure requires significant enhancements in order to fully meet the expectations and demands of international businesses.

The deficiencies in Vietnam's arbitration laws, particularly regarding the annulment of arbitral awards and the recognition and enforcement of foreign awards, pose substantial risks to the credibility and reliability of arbitration as a dispute resolution method. To address these issues, it is crucial to amend the Vietnamese Law on Commercial Arbitration to provide clearer and more specific grounds for annulment and to establish a more effective mechanism for protecting and ensuring the enforceability of arbitral awards. Introducing a supervisory mechanism for the annulment process by courts could help further enhance the stability and predictability of arbitration outcomes.

Moreover, clarifying the definitions and criteria related to foreign arbitral awards in the Vietnamese Law on Commercial Arbitration and detailing the procedures for recognition and enforcement in the CPC will help align Vietnam's arbitration practices with international standards. This will not only boost the confidence of international commercial entities in choosing arbitration in Vietnam but also promote the country as a favourable destination for resolving international disputes.

By refining its legal framework for international arbitration, Vietnam can significantly enhance the efficiency and reliability of its arbitration system. This will facilitate smoother international commercial transactions and investment, reinforcing Vietnam's position in the global economic landscape and ensuring that it remains competitive and attractive to international business ventures.

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