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ASIA

ARBITRATION GUIDE

DR. ANDREAS RESPONDEK

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NOTICE

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

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Dear Reader,

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

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

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

This guide is based on the joint efforts of leading arbitration practitioners in each country. Without their dedicated efforts this guide would not have materialized and I am especially grateful for their participation and excellent contributions.

Singapore, July 2009
RESPONDEK & FAN

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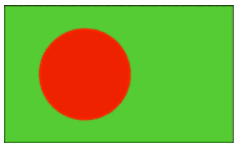

1. BANGLADESH

1.1 Which law(s) apply to arbitration in Bangladesh?

Historically arbitration has always been a form of dispute resolution in Bangladesh. Informally village elders would resolve disputes within their territories. "The Arbitration (Protocol and Convention) Act 1937" and the "Arbitration Act 1940" passed by the United Kingdom Parliament contained the legal framework for arbitrations during the times of the British India and continued at the time of independence of Pakistan and India in 1947 in those countries and in Bangladesh at the time of its independence in 1971. These statutes were repealed by the Arbitration Act 2001 ("**the Act**") and it contains the present legal framework for all arbitrations in Bangladesh whether international or domestic.

The Act came into force on 10 April 2001[1] and it became effective in respect of all disputes referred to arbitration after this date[2]. There is other legislation, for example, the Contract Act 1872, Evidence Act 1872 and Code of Civil Procedure 1908 **("CPC")**, which may also be relevant to arbitrations.

1.2 Is the Bangladesh Arbitration Law based on the UNCITRAL model law?

The Act is based on the UNCITRAL model law. However, it does not contain exactly the same text as used in the model law. Some unique provisions are derived from the Indian Arbitration and Conciliation Act 1996 and some from the English Arbitration Act 1996. There are some important articles of UNCITRAL which are adopted with modifications in the Act, such as: Article 5[3] Article 8[4] , Article 10[5], 'Articles 11, 13, 14'[6], Article 16[7], Article 17[8] (as in the Indian Arbitration and Conciliation Act 1996 ("**IACA**"), section 9(ii)), Article 18[9], Article 34[10] Articles 35 and 36[11] and several other articles.

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1 S.1 (3) of the Act; Notification No. SRO 87-Law/2001 dated 09.04.2001, Published in Bangladesh Gazette Extraordinary dated 10.04.2001

2 S 3(1) and S 3(4) ibid

3 No court shall intervene except where so provided in this Law.

4 Enforcement of arbitration agreement

5 Number of Arbitrators

6 The court should not intervene except in those instances relating to appointment, challenge and termination of the mandate of the arbitrators.

7 In relation to arbitration clause in a contract.

8 Empowers the tribunal to grant interim measures of protection over subject-matter in dispute, quite similar power is given in IACA Section 9(ii), interim measures ordered by a tribunal under Article 17, are always appealable to the courts, section 37 (2)(b) of

9 Each party be given a full opportunity of presenting his case.

10 Setting aside of the arbitral award

11 Recognition and enforcement of awards

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

The Act is applicable for both domestic and 'international commercial arbitration'[12]. Any matter related to international commercial arbitral awards will be dealt directly in the High Court Division of the Supreme Court of Bangladesh under the Act. Domestic arbitrations would be considered by the District Judge in the District where the arbitration is pending.

1.4 Has Bangladesh acceded to the New York Convention?

Bangladesh acceded to the New York Convention on 6th May 1992. However, the convention was not ratified by way of enabling legislation in Bangladesh as a *signatory State to the New York Convention*. This was noted in the case of *Bangladesh Air Service (Pvt) Ltd v British Airways PLC [(1997) 49 DLR (AD) 187*[13] by the Supreme Court of Bangladesh. In Bangladesh, international treaties are not automatically applicable as law unless enacted as such by Parliament. However, the courts will so interpret the treaties as to give it effect within the framework of the existing law unless totally inconsistent with the treaty. The Act allows for recognition and enforcement of awards in situations similar to those contemplated by the New York Convention.

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

If both Parties are domiciled in Bangladesh, they can agree on foreign arbitration institutions. The same applies if one of the parties is domiciled in Bangladesh and other abroad. The Act makes special provisions for "international commercial arbitrations"[14] in contrast to domestic arbitrations. International Commercial Arbitrations are essentially arbitrations between a foreign party and a local party.

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12 Section 2(c) of the Act defines International Commercial Arbitration 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 –
(i) an individual who is a national of, or habitually resident in , any country other than Bangladesh; or
(ii) a body corporate which is incorporated in any country other than Bangladesh; or
(iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than Bangladesh; or
(iv) the Government of a foreign country;

13 A summary of this case in the Yearbook Commercial Arbitration contains the following statement *"It was pointed out that though Bangladesh had acceded to the New York Convention, it had not passed implementing legislation. Thus the New York Convention could not be relied upon to enforce a foreign award in Bangladesh" [YB Comm Arb XXIII (1998) 624 at 625].*

14 S 2 (c)of the Act.

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

There are various general requirements set out in the Act for arbitration procedures to be followed in Bangladesh and the Act applies to disputes arising out of an "arbitration agreement"[15]. However, the Act applies where the agreement between the parties and rules of the arbitration institutions are silent about the procedure.

The parties are given wide options to agree on the procedure to be followed by the tribunal.[16] Where the parties fail to reach an agreement, the tribunal shall decide the procedure in respect of time and place[17] of holding the proceedings either in whole or partly,[18] the language of the proceedings,[19] time of submission of statement of claim, defense and range of amendments,[20] publication of the documents provided and the presentation thereof,[21] worthiness of the written or oral evidence, relevance and weight of any materials,[22] power of the arbitral tribunal in examining the issue of fact and issue of law etc.[23]

The tribunal is not bound to follow the CPC and the Evidence Act 1872.[24] The CPC is the codification of the procedural rules applicable in the Courts of Law in Bangladesh. The Evidence Act is a codification of the rules of evidence based upon the common law of England at the time of enactment. Both of these laws are supplemented by judicial decisions in this jurisdiction.

The law designated by the parties to the arbitration agreement shall be applicable[25] and in the absence of any such designation, the arbitration tribunal shall follow the rules of law it considers appropriate[26] and decide the dispute in accordance with the terms of the contract[27].

As it was observed in India, the dispute must be justiciable in a civil action. Only such 'disputes' as are justiciable in a civil action under Indian Law can be subject to arbitration. *Matru Udesingh v. Dhunnilal Sitaram*, AIR 1951 Nag 287, *Prem Nath L. Ganesh Dass v. Prem Nath L. Ramnath,* AIR 1963 Punj 62; *Gaddipatti Laxminarayana v. Gangineni Venkatasubbaiah*, AIR 1958 AP 679. The disputes must be in respect of civil rights in

15 S 3(4) of the Act.
16 S 25(1) of the Act
17 Similar situation in Section 3 of the English Arbitration Act 1996 which provides that, in the absence of agreement or determination by an arbitral institution or by the tribunal , the place of arbitration is to be determined 'having regard to the parties agreement and all the relevant circumstances'. These wording are also similar to the UNCITRAL Model Law. Eventually court will identify the jurisdiction with which the arbitration has the closest connection, *Dubai Islamic Bank PJSC V's Paymantech Merchant Services Inc [2001] 1 Lloyd's Rep 65.*
18 S 25(3)(a) ibid
19 S 25(3)(b) ibid
20 S 25(3)(c) ibid
21 S 25(3)(d) ibid
22 S 25(3)(f) ibid
23 S 25(3)(g) ibid
24 S 24 ibid
25 S 36(1) ibid
26 S 36(2) ibid
27 S 36(3) ibid

respect of which civil remedies can be sought or claimed. The position is the same in Bangladesh.

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

Where any contractual dispute is covered by an arbitration clause contained in the contract, it must be resolved through arbitration. Writ Jurisdiction cannot be invoked against breach of contract without resort to arbitration[28]. The court shall refer the matter to arbitration and stay the legal proceedings[29] unless the court finds the arbitration agreement void, inoperative or incapable of determination by arbitration[30]. However, the court must refuse to stay proceedings when the claim in the suit is outside the clause of arbitration agreement[31]. Where legal proceedings are commenced at the instance of one party in respect of the matter covered by the arbitration agreement, the other party before filing a written statement (defence) can apply to the court to make an arbitral reference to an arbitration tribunal and stay the further proceedings of the suit.[32] However, if the parties intend to get the dispute settled through arbitration, they may seek at any stage of the proceedings to withdraw the suit and refer the dispute to arbitration in accordance with the provisions of the Act under section 89B of the CPC.

In Bangladesh, there is always an option of recourse against an award if the requirements set by the Act[33] are fulfilled. Any agreement between the parties cannot bar parties from going to court as long as the court is satisfied that the applications challenging the award comes within the parameters set by law.

In the Indian jurisdiction, a similar approach is visible: an arbitration agreement does not preclude the parties from pursuing remedies in court of law. In *Sukanya Holdings Ltd. v. Jayesh Pandey (2003) 5 SCC 531* the Supreme Court observed that an 'arbitration agreement' does not preclude the parties from pursuing remedies in courts of law. Thus, where a party to the arbitration agreement brings an action, the other party is not bound to ask for reference of the dispute for resolution by arbitration. If the Defendant does not apply for reference to arbitration, the court is relieved of the obligation under sec. 8 of the Act to refer the parties to arbitration and can decide the dispute itself.

1.8 What are the main arbitration institutions in Bangladesh?

There are few arbitration institutions running their activities, which are vastly used by the commercial sector of the country. Among them the following are notable:

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28 *Governor, Bangladesh Bank and Others Vs M/s. Shah Islam Construction Ltd. 6 MLR (AD) 245*

29 Section 7 and 10 should be read together.

30 Article 8 of UNICTRAL model Law : 'refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed'. The English Court which contains equivalent provisions in section 9 of the Arbitration Act 1996, do not give the same primacy to the role of the arbitral tribunal, approaching the matter on a case by case basis having regard to 'all the circumstances…the dominant matters being the interest of the parties and the avoidance of unnecessary delay or expense', *Ahmad Al-Naimi Vs Islamic Press Agency Inc[2000] 1Lloyd's Rep 522 CA*

31 *Chittagong Port Authority Vs Crete Construction Company Ltd. 31 DLR (AD) 138*.

32 *Government of Bangladesh Vs Mashriqui Textiles 35 DLR (AD) 123*

33 Section 42 and 43

(a) The Federation of Bangladesh Chambers of Commerce and Industry ("**FBCCI"**)[34] has introduced the Bangladesh Council of Arbitration ("**BCA"**) for the resolution of commercial disputes.

(b) The Metropolitan Chamber of Commerce and Industry **("MCCI")**[35], Dhaka has been accepted in the international market as the only body in Bangladesh eligible and entitled to arbitrate on commercial disputes. The Chamber's arbitration over the period of the last 58 years has been so impartial that it has won wide-spread confidence of the overseas users.

(c) In order to assist the local business for settlement of commercial disputes, the International Chamber of Commerce Bangladesh ("**ICCB**") has taken the lead role in the establishment of the Bangladesh International Arbitration Centre ("**BIAC"**) jointly with two main trade bodies of the country - namely, the Metropolitan Chamber of Commerce & Industry ("**MCCI"**), Dhaka and The Dhaka Chamber of Commerce & Industry ("**DCCI"**).

1.9 Model clauses of the arbitral institutions

Bangladesh Council for Arbitration (BCA)

The parties are free to construct their arbitration clause considering the nature of the contract and refer all or certain disputes which have arisen or which may arise to the BCA. The Bangladesh Council of Arbitration, however, recommends to the parties desirous of making reference to arbitration by the Bangladesh Council of Arbitration to use any of the following arbitration clauses in writing in their contracts:

a. "Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope, opera5tion or effect of this contract or the validity or the breach thereof shall be settled by arbitration in accordance with the Rules of Arbitration of the Bangladesh Council of Arbitration and the Award made in pursuance thereof shall be binding on the parties." Or

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

The dispute resolution clauses and rules of the ICC, SIAC and LCIA are also frequently used in Bangladesh.

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[34] **Address:** Federation Bhaban (2nd Floor), 60 Motijheel C/A, Dhaka, **Telephone** (880) 956 05 89, **Fax** (880) 2 71 760 30 / 956 05 88, URL http://www.fbcci-bd.org/ **Email** fbcci@bol-online.com, Arbitration rules are on the following website:http://www.jurisint.org/en/ctr/146.html

[35] **Address**: Metropolitan Chamber of Commerce and Industry, Chamber Building, 122-124, Motijheel CA, Dhaka-1000, Bangladesh, **Phone:** (880) 2 – 9565208, (880) 2 – 9565209, (880) 2 – 9565210, **Fax:** (880) 2 - 9565211(880) 2 – 9565212, **URL:** http://www.mccibd.org/index.php, The arbitration rules are not visible on the website; however we presume it is accessible through requiring authentication.

1.10 How many arbitrators are usually appointed?

Chapter IV of the Arbitration Act deals with the composition of the Arbitral Tribunal and the number of arbitrators[36] and the appointment[37] of arbitrators. Unless there is an arbitration clause in the contract, the court cannot appoint arbitrators and refer the dispute to arbitration[38]

It is up to the parties' discretion to determine the number of arbitrators.[39] If there is no agreement on the number of arbitrators then the tribunal shall consist of three arbitrators.[40] In case of an appointment of an even number of arbitrators by the parties, the appointed arbitrators are required to mutually appoint an additional arbitrator to act as a Chairman of the tribunal.[41] If there is no agreement as to the number of arbitrators, one party may request the other party in writing for an appointment of a sole arbitrator which has to be accepted by the other party within 30 days of receipt of the request.[42]

In case of arbitration with three arbitrators, each party is required to appoint one arbitrator, and the two appointed arbitrators shall jointly appoint the third arbitrator to act as the Chairman of the arbitral tribunal.[43]

The parties shall jointly decide on a procedure for the mode of appointing the arbitrator or arbitrators.[44] A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.[45] There is a default provision, which allows matters relating to the appointment of an arbitrator,[46] or a third arbitrator[47] to be referred to the appropriate court[48] within 30 days. Our experience is that this can be a long drawn out process, which defeats the objective of an arbitration to be expeditious, particularly in cases which are not regarded as "international commercial arbitration".

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

Section 13[49] provides the grounds on which an arbitrator may be challenged. A person appointed as arbitrator shall first disclose without any delay any circumstances to the parties which are likely to give rise to reasonable doubt about his impartiality and independence[50]. Any party may challenge the authority:

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36 S.11 ibid
37 S.12 ibid
38 *National Sports Council Vs A. Latif & Co 6 MLR (HC) 327*
39 S 11(1) ibid
40 S 11(2) ibid
41 S 11(3) ibid
42 S 12(3)(a) ibid
43 S12(3) (b) ibid
44 S 12(1) of the Act
45 S 12(2) ibid
46 S 12 (4) (a) ibid
47 S 12 (4) (b) ibid
48 S 12 (4) (c) & (d) ibid
49 the Act
50 Section 13(1) and 13(2) of the Act

(a) after being aware of any circumstances which are likely to give rise to reasonable doubt about the arbitrator's impartiality and independence; or

(b) otherwise the appointment of an arbitrator on grounds of his independence, impartiality or having not possessed the requisite qualifications as agreed upon by the parties;

(c) It has been held in India that the composition of the Arbitral Tribunal can always be challenged if it is contrary to the arbitration agreement- *O.N.G.C. v. Oilfield Instrumentation (2004) 3 Arb LR 362 (Bom)*. Under of Sec. 34(2)(a)(v)[51] an award can be challenged if the composition of arbitral tribunal is not in accordance with the agreement of the parties.

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

A party shall be at liberty to make their representation before the tribunal either personally or by engaging a lawyer or any other person of his choice[52]. Therefore, there is no bar whatsoever or requirement of local counsel under the Arbitration Act unless otherwise agreed by the parties. However, it should be noted that only Advocates enrolled by the Bangladesh Bar Council can legally provide legal services in Bangladesh. Therefore, it may be argued that the acting as representative of a party in an arbitration must also be an advocate. However, this approach has not been taken in any arbitration so far.

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

Section 7 puts a bar for judicial authority to hear any legal proceedings commenced by any of the parties to the arbitration agreement against the other party except in so far as provided under this Act. The court or the judicial authority shall stay the further proceedings thereof and refer the dispute to arbitration[53]

The High Court also has the powers of deciding on the matter of jurisdiction if it is satisfied that the determination of the question is likely to produce substantial savings in cost, the application was submitted without any delay, and there is good reason why the matter should be decided by the court.[54]

Judicial authority interferes with arbitration on public policy grounds. An illustrative case is the decision of the Supreme Court of Pakistan in *Hubco v. WAPDA [Civil Appeal Nos. 1398 & 1399 of 1999]*, where the court refused to enforce an arbitration agreement providing for ICC arbitration in London and upheld the jurisdiction of the Pakistan courts to determine a major dispute. The central issue was whether allegations of fraud, illegality and corruption raised by one party (a government party) against the other (Project Company / foreign investors) precluded the resolution of disputes by arbitration as a matter of public policy and, as such, rendered them non-arbitrable.

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51 IACA

52 Section 31 of the Act provides: "Legal or other representation.-Unless otherwise agreed by the parties, a party to an arbitral proceeding may be represented in the proceedings by the lawyer or other person chosen by him"

53 *Brexco Bremer Export ContorBrand, West Germany & others Vs M/s. Popular Biscuit Ltd. 6 MLR (HC) 281*

54 S 20 (2) ibid

Another relevant case is *Saipem SpA v Bangladesh Oil Gas and Mineral Corporation MLR (2000) (AD) 245*. In this case, the High Court Division of the Supreme Court of Bangladesh, held that where the district court acting under Sec. 5 of the Arbitration Act 1940, revoked the authority of an ICC arbitral tribunal constituted under the ICC Rules (ICC Arbitration case no. 7934/CK) at the request of one of the parties, the arbitrators could not render any award. The lower court held that the tribunal had conducted the arbitration proceedings improperly by refusing to determine the question of admissibility of evidence and the exclusion of certain documents from the record. Accordingly, the tribunal had acted in manifest disregard of law and the arbitral proceedings were likely to result in a miscarriage of justice. The High Court held that the award by arbitrators whose authority had been revoked acted without jurisdiction.

The Appellate Division of the Supreme Court declined to interfere with this order in the interests of justice. The decision caused some concerns in the international arbitration community. For example, the Editor of the ASA (Swiss Arbitration Association) Bulletin described it as "*in stark contrast with a number of principles of international arbitration*" such as Kompetenz-Kompetenz. The commentary maintained that there was nothing improper in the conduct of the arbitral tribunal. Its conduct was "*completely in line with public policy as well as with standard arbitration practice. The facts reported do not show that the Arbitral Tribunal has overstepped its discretion to freely assess and weigh the evidence ...*". This case also led to the Italian party to file a claim before ICSID for compensation for breach of the Bangladesh-Italian Bilateral Investment Treaty. The decision has now been published holding that the actions of the Bangladeshi courts have infringed its treaty obligations (Saipem S.p.A. v The People's Republic of Bangladesh ICSID Case Bo. ARB/05/7).

There is no prominent case on the issue of "res judicata" or issue estoppel in relation to arbitral proceedings in Bangladesh, but it is anticipated that if such issues were to arise, they would be dealt with according to the principle set by the CPC. However, reliance may be placed on an English case which would be regarded as persuasive authority. In *Good Challenger Navegante SA Vs Metalexportimport SA*[55], the Court of Appeal gave careful consideration to the question of issue of estoppel, but ultimately held that no estoppel arose. However, the award was challenged on the basis that the time permitted for enforcement under the English Limitation Act had expired.

In the case of *Mimetals Germany GmbH vs Ferco Steel Ltd, [1999] 1 All ER (Comm) 315,* the plaintiff sought to enforce an arbitral award in England which was made in China, the defendant tried to invoke the following exceptions:

(a) That it had been unable to present its case to the arbitrators;[56]
(b) That the awards were arrived at by an arbitral procedure not in accordance with the agreement of the parties;[57]
(c) That enforcement of the awards would be contrary to public policy.[58]

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55 [2003] Lloyd's Rep 471 CA.
56 English Arbitration Act, section 103(2)(c) and corresponding to Model Law, Article 36 (1)(a)(iii) and the Convention, Article V (1)(b).
57 English Arbitration Act, section 103 (2)(e) and corresponding to Model Law, Article 36 (1)(a)(iv) and the Convention, Article V (1)(d).

It was only by concluding that none of the exceptions raised was satisfied that the English Court held that there were no grounds for refusing enforcement of the awards. A similar approach by the Bangladesh Court in recognition and enforcement of arbitral awards is highly likely.

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

A new Section 7A[59] was inserted to deal with the powers of court and High Court Division to make interim orders of protection. The court and the High Court Division have been empowered under the Act to make interim orders appointing guardians for minors or insane persons to conduct arbitral proceedings on his or her behalf,[60] for interim custody, or sale or other protective measures regarding the goods or property of the arbitration agreement,[61] pass injunctions to restrain transfer of property or part thereof which may create impediments on way of enforcement of the award[62] and to appoint a receiver[63].

Section 9 of IACA has the same effect in India. In *Inox Air Products Ltd. v. Rathi Ispat (2007)3 RAJ 492 (Del)* a suit was filed at Delhi by Inox, Finding that the suit could not be maintained at Delhi for lack of territorial jurisdiction. The plaintiff requested that the suit may be treated as an Application under sec. 9 for interim measures of protection. He relied on *Sameer Berai v. Ratan Jam (2006)1 SCC 479: (2006)1 RAJ 116* in which it was held that:

"Even if civil court feels that because of existence of arbitration clause a suit is not maintainable, it can treat the 'Application' (sic should be suit) to be one (Application) under sec. 9 of the Act."

The power of the Bangladesh Court, like the English Court, to make an order for an interim mandatory injunction is the same. In *Cetelem SA Vs Roust Holdings Ltd [2005] EWCA Civ 618 CA*, the English Court granted an interim mandatory order requiring the defendant to provide to a foreign government authority the necessary documentation for an application for authorization of a share sale.

The Act empowers the tribunal to make interim orders upon request of a party requiring a party to take protective measures in respect of the subject matter of the dispute with no provision of appeal against such order,[64] subject to furnishing security as the tribunal may consider appropriate.[65] In doing so the tribunal shall cause notice to be served upon the other side.[66] The powers conferred upon the tribunal under section 21 are in addition to and not in derogation to the provision of section 7A.[67]

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58 English Arbitration Act, section 103 (3) and corresponding to Model Law, Article 36 (1)(b)(ii) and the Convention, Article V (2)(b).

59 Section 7A has been inserted by Arbitration (Amedment) Act, 2004 (Act No. 4 of 2004) published in Bangladesh Gazette extraordinary dated 19.02.2004 with effect from 19.02. 2004

60 S7A (1)(a) ibid

61 S7A (1)(b) ibid

62 S7A (1)(c) ibid

63 S7A (1)(f) ibid

64 S21 (1) ibid

65 S21 (2) ibid

66 S21 (3) ibid

67 S21 (5) ibid

The power of arbitrators is based upon contract and is unlike the inherent powers of the courts. Accordingly, unlike a court, the arbitrator has no general powers, which would be effective against parties other than the parties to the arbitration agreement. He cannot, for instance, freeze the accounts of one party, as this would involve making orders to bind the bank, which holds the account[68]. The situation is the same in Bangladesh under the Act[69].

The English High Court in *Petroleum Investment Co Ltd Vs Kantupan Holdings Co Ltd [2002] 1 All ER (Comm)* had to consider whether to uphold an ex parte order for a Mareva injunction passed by arbitrators. At no time was it argued that the court had no power under Section 44 of the Arbitration Act 1996 to make such order. A Bangladesh Court will have the similar power to uphold an interim order passed by arbitrators.

Problems may arise where parties assert that the arbitration agreement itself is null and void. There is a guideline provided by Coleman J in the case of *Vee Networks Ltd Vs Econet Wireless International Ltd [2004] EWHC 2909 (Comm)*[70]where he referred to section 30 of the Arbitration Act 1996 which provides that the arbitrators are free to rule on their own substantive jurisdiction, including in particular 'whether there is a valid agreement'. However, stating the ruling under section 30 as purely provisional, he again referred to Section 67 of the 1996 Act, whereby a party to the arbitration who has registered an objection to jurisdiction at the earliest possible stage is free to challenge the ruling on jurisdiction.

Similar provisions exists in India, namely, Section 17[71], which deals with interim measures ordered by an arbitral tribunal.[72] Cases decided on this provision are *M.*D.Army Hsg. Orgn. V. Sumangal Services, (2003) 3 Arb LR 361[73], H.M. Ansari v. U.O.I., AIR 1984 SC 29[74], Skoda Export Co. Ltd. v. I.O.C, (1997) 1 Arb LR Del[75]

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

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68 In *The Vasso [1983] 2 Lloyd's Rep 346* the court enforced an arbitrators' award of inspection of property but held that '… the property in question is the property of one of the parties to the arbitration. If it had been the property of a third party, the result might well have been different, though it is unnecessary so to decide.

69 Section 43 (a)(v)

70 Reported in Arbitration Law Monthly August 2005, Vol 5, No. 7

71 IACA

72 Section 17 states: *(1)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. (2)The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1).*

73 Supreme Court has observed, "Under Section 17 the power of the arbitrator is a limited one. It cannot issue any direction which would go beyond the 'reference' or the 'arbitration agreement'. The order under Sec 17 may be addressed only to the parties to the arbitration agreement. It cannot be addressed to other parties.. No power is conferred upon the Tribunal to enforce the order, nor does it provide judicial enforcement thereof."

74 It was held, "*the arbitrator will have power to make an interim order directing a party to do certain things before the final award is made*" unless this power is expressly excluded. But the arbitrator cannot give a direction to compel the party to perform his part. [Relied on *Hounslow Council v. Twickenham*, (1970) 2 All ER 326]

75 It was held "under the new Act, during arbitration proceedings, the tribunal has been empowered to give interim measure of protection… The plaintiff may therefore even approach the arbitrator.

The making of an arbitral award and the requirements for an arbitral award are set out in Sections 36 to 41[76]. For making an arbitral award, the law designated by the parties to the arbitration agreement shall be applicable[77] and in the absence of any such designation, the arbitration tribunal shall follow the rules of law it considers appropriate[78] and decide the dispute in accordance with the terms of the contract[79]. Decisions in the case where the arbitration tribunal consists of more than one arbitrator, shall be made by a majority[80] of all the members of the tribunal.

Form of Arbitral award: An award must be in writing and signed by the arbitrators[81]. In case of the arbitration tribunal consisting of more than one arbitrator, the award in order to be valid shall be signed by all the arbitrators or by the majority members of the tribunal and in case of dissent stating the reasons for the minority member not signing the award. The award shall not be invalid for not signing by the dissenting minority members[82].

Contents of the award: Unless otherwise agreed by the parties, the tribunal shall give its reasons in the award. But where the award is made as agreed upon by the parties as provided under Section 22[83], there will be no need to give reasons by the tribunal. The award must be dated and the place of making the award shall be mentioned thereon as required under Section 26[84].

Deadlines and other requirements: There is no deadline for issuing the arbitral award but it is presumed as soon as after the award is made and signed by the arbitrator or arbitrators. After an award is so made, a copy duly signed by the arbitrator(s) shall be delivered to each party. However a party may apply to the arbitration tribunal within 14 days of the receipt of the copy of an award for correction[85] of any clerical errors or to modify the award. If the tribunal finds the request justified it shall correct or modify the award within 14 days of the receipt of the request. The arbitration tribunal may also make an additional award on points omitted on the request of a party within 60 days from the date of the receipt of the request.
The arbitration tribunal is empowered[86] in the case of an award for payment of money, to allow interest at the rate, as it considers reasonable on the award money for the period from the date of cause of action and to the date of making the award. The award money - unless otherwise directed by the tribunal - shall carry 2% interest per annum above the Bank rate as may be determined from time to time by the Bangladesh Bank, from the date of the award to the date of the payment[87]. Where in a case the arbitration agreement

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76 The Act.
77 S 36(1) ibid
78 S 36(2) ibid
79 S 36(3) ibid
80 Section 37 of the Act.
81 Section 38 of the Act/ *AIR 1962 Raj 231 (DB)*
82 1977 SCMR 154.
83 The Act
84 ibid
85 Section 40 of the Act
86 Under sub-section (6) of Section 38 of the Act.
87 *Bax Shipping Line Vs. Bangladesh Water Development Board & another, 7 MLR (AD) 37*

is illegal, the award given because of such agreement is also illegal, and as such, a party to it is not stopped from challenging the same[88].
The court shall take judicial notice of the award, which is void, and without jurisdiction, though no objection is filed[89]. The tribunal shall determine the costs of the arbitration including the arbitrators' remuneration and witness cost etc.

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

An application[90] may be made to the District Court[91] or High Court Division[92] for setting aside an arbitral award.
An award may be set aside if[93] a party to the arbitration agreement was under some legal incapacity;[94] that the arbitration agreement was not valid under the law to which parties have subjected it;[95] that the applicant was not given any notice of the appointment of an arbitrator or of the arbitral proceedings;[96] or that a party was prevented by sufficient reason from presenting his case before tribunal; or that the award is made on matters not submitted to the tribunal;[97] or that the composition of the tribunal was not in accordance with the provisions of the Act[98].
When it is established to the satisfaction of the court that, the subject matter of the dispute is not capable of settlement by arbitration under the law in force in Bangladesh; or that the award is ex facie opposed to the public policy or the law of Bangladesh; or that the award is induced or procured by corruption or fraud the award may be set aside.

In relation to the conduct of the arbitration, the tribunal would deal with the dispute submitted to it fairly and impartially[99] and for this purpose each party shall be given reasonable opportunity to present its case[100], and each party shall be given reasonable opportunity to examine all the documents and other relevant materials filed by the other party or any other person concerned before the tribunal[101]. If such opportunity is not given, this offends the principle of natural justice rendering the award unsustainable in law.[102]

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88 *AIR 1962 SC 1810*
89 *Hashmat Ali Vs. Asmat Ali Jamaddar, 6 DLR, 478.*
90 Section 42 of the Act.
91 S 42(1) ibid
92 S 42(2) ibid
93 S 43(1) ibid
94 S 43(1)(a)(i) ibid
95 S 43(1)(a)(ii) ibid
96 S 43(1)(a)(iii) ibid
97 S 43(1)(a)(iv) of the Act
98 S 43(1)(a)(v) ibid
99 S 23 (1) ibid
100 S 23 (1)(a) ibid
101 S 23 (1)(b) ibid
102 Khan Bahadur Alla Buksh Gabor vs Mrs. Razia Begum, PLD 1960 Karachi 455

The applicant while making an application for setting aside an award is required under sub-section (2) of section 43[103] to deposit the amount of money payable under the award in the court or furnish security therefore as may be directed by the Court[104]

The court is not required to examine the evidence beyond the award, the Court can set aside an award if it finds the same erroneous on points of law, or bad on the face of it by mere perusal[105]. In proceedings arising out of an arbitration, the court cannot sit as court of appeal against the decision of the arbitrator[106].

The High Court Division may set aside any arbitral award made in an international commercial arbitration held in Bangladesh on the application of a party within sixty days from the receipt of the award.[107]

The Act provides for appeal only to the High Court Division against certain specific orders passed by the court of District Judge which includes (i) an order[108] setting aside or refusing to set aside an arbitral award other than an international commercial award. (ii) An order[109] refusing to enforce an arbitral award under section 44[110]. (iii) An order refusing or enforce any foreign arbitral award. Further appeal lies to the Appellate Division of Supreme Court against decision of High Court Division subject to the provision of article 103 of the Constitution of Bangladesh.

In India, there are similar provisions for setting aside arbitral awards[111] and also for an appeal from an order[112].

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

An arbitral award under the Act shall be final and binding upon the parties and on any person claiming under them. However, the parties still have the right to challenge[113] an arbitral award in the manner and on the grounds set out in the Act.

Domestic Award: The Act provides for enforcement of an award by the Court according to the provisions of the Code of Civil Procedure[114]. After the expiry of the period for filing an application to set-aside an award under section 42[115] has expired or

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103 The Act

104 *A Latif and Company Ltd. Project Director P.L. 480 LGED & others 9MLR (HC) 137*, *Chittagong Steel Mills Ltd. & another Vs. M/s. MEC, Dhaka & others, 10 MLR (HC) 113*

105 *Adamjee Sons Ltd. Vs Jiban Bima Corporation, 45 DLR 89.*

106 *Bangladesh T & T Board Vs Lili Enterprise Ltd. 46 DLR 122, 50 DLR (AD) 63*

107 S 42(2) ibid

108 Section 48(a) of the Act

109 Section 48(b) ibid

110 ibid

111 Section 34 of IACA

112 Section 37 of IACA which states that: (1)An appeal shall lie from the following order (and from no others) to the court authorized by law to hear appeals from original decrees of the court passing the order, namely:-
(a) granting or refusing to grant any measure under section 9;
(b) setting aside or refusing to set aside an arbitral award under section 34.

113 Section 42 and 43 of the Act.

114 S 44 of the Act

115 Loc Cit

where no such application is filed or if filed is refused, the award becomes enforceable in the same manner as if it were a decree of the court.[116]

Foreign Award: An application[117] for enforcement need to be made by the parties to the Court[118]. Upon successful application, the award will be enforced by execution by the Court under the Code of Civil Procedure, in the same manner as if it were a decree. This application for the execution of an arbitral award must have: the original arbitral award or a copy thereof which is duly authenticated in the manner required by the law of the country in which it was made[119]; the original agreement for arbitration or a duly certified copy[120]; and such evidence as may be necessary to prove that the award is a foreign award[121].The award or the agreement with application need to be in English or Bengali or it need to be translated into 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[122]. However foreign arbitral awards exclude those made in the territory of a specified state as declared by the Government under Section 47[123].

Grounds for refusing recognition or execution of foreign arbitral awards are set out in Section 46[124].

In the case of *ABCI Vs Banque Franco-Tunisienne & Ors*[125], the plaintiff had received an arbitral award in its favour which was sought to be enforced against the defendant in England. The defendant resisted enforcement on the grounds, inter alia, that the arbitration agreement had been entered into, and the arbitration proceedings had been made and conducted, on its behalf by persons without authority to represent it, and the plaintiff knew that these putative agents lacked the necessary authority. These same grounds were raised in a French court which dismissed them eventually.

It is stated in the case that the *Henderson Vs Henderson* principles of issue of estoppel as modified by the House of Lords in *Johnson Vs Gore Wood & Co*[126] could be applied to foreign judgments, before this could be done, it must be established that such an estoppel must also arise under the law of the court where the decision was made. The Court relied on *Minmetals Germany GmbH Vs Ferco Steel Ltd*[127]. English Courts accepted that, in principle, res judicata and issue estoppel principles applied to foreign judgments on the setting aside of awards in the same manner as they would apply to any other foreign judgment.

Section 36[128] specifies how an award can be enforced. Where the time for making an application to set aside the arbitral award under Section 34 has expired, or such

116 S 44 ibid
117 Section 45 (1)(b) of the Act.
118 Section 45 of the Act.
119 Section 45 (2)(a) ibid
120 Section 45 (2)(b) ibid
121 Section 45 (2)(c) ibid
122 Section 45 (3) of the Act.
123 The Act.
124 The Act.
125 *[2002] 1 Lloyd's Rep 511* (England, High Court)
126 *[2001] 2 WLR 72* (England, House of Lords)
127 Loc Cit
128 IACA

application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.

In *Morgan Securities v. Modi Rubber Ltd. AIR 2007 SC 183: (2007) 1 RAJ 133 (SC): (2007) 136 Comp Cas 113(SC)* their Lordships in the Indian Supreme Court observed: *"In terms of sec. 36, an award becomes enforceable as if it were a decree where the time for setting it aside under sec. 34 has expired or such Application having been made is rejected".*[129]

An arbitral award, if not challenged under sec 34 or if not set aside when challenged, "attains the character of 'decree' without any further approval of the court". *City Scope Developers Ltd. v. Alka Builders, (2000) 1 Cal HN 381.*

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

The Arbitral Tribunal will fix the costs of arbitration unless the parties agreed otherwise[130]. The arbitral tribunal shall specify[131] the following related to costs in an arbitral award: (i) the party entitled to costs (ii) the party who shall pay the costs (iii) the amount of costs or method of determining that amount, and (iv) the manner in which the cost shall be paid. However the arbitral tribunal may fix the amount of the deposit as an advance for the costs which it expects to incur in respect of the claim submitted to it[132].Section 49[133] and sub-section (7) of section 38[134] shall be read together while determining by the arbitral tribunal the amount of arbitration cost and deposit thereof by the parties in equal share and the mode of payment and refund of any balance.

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

No.

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

The environment for arbitration in Bangladesh was intended to, and has indeed, changed following the introduction of the Act and it appears to be more "arbitration friendly" now. The courts have started to deal with all arbitration applications and challenges more expeditiously and the trend seems to be that the courts are interfering less in matters

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129 The court explained, "Section 36 of the Arbitration Act, 1996 merely specifies as to how an award can be enforced by laying down that it "can be enforced as if it were a decree. An award is thus treated to be a decree even without intervention of the court for the only purpose of enforceability.

130 Section 38(7)(a) of the Act

131 Section 38(7)(b) of the Act

132 Section 49(1) of the Act

133 ibid

134 ibid

of arbitration than before. The ICSID decision in Saipem v Bangladesh is likely to be challenged by Bangladesh but that decision at the moment makes the courts of Bangladesh and in the developing countries in South and South East Asia more vulnerable when dealing with international commercial arbitrations. Anything perceived as interference with international commercial arbitrations can potentially be regarded as a breach of treaty obligations with serious adverse consequences falling on the state for the actions of the courts

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2. CAMBODIA

2.1 Which law(s) apply to arbitration in Cambodia?

Cambodia has promulgated in March 2006 the "Law on Commercial Arbitration" and the "Law on Recognition and Enforcement of Foreign Arbitral Awards". Foreign arbitration is valid and binding under the laws of Cambodia, and there are currently no restrictions on the forum, venue or rules of arbitration.

2.2 Is the Cambodian Arbitration Law based on the UNCITRAL model law?

Yes, the 2006 law is based on the UNCITRAL rules.

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

No, the same law applies to domestic and international arbitration.

2.4 Has Cambodia acceded to the New York Convention?

Cambodia is a signatory to the United Nations Convention of Recognition and Enforcement of Foreign Arbitral Awards (1958), which became effective in 2001 upon the passage of the Law on the Ratification and the Implementation of the UN Recognition and Enforcement of Foreign Arbitral Awards.

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

Yes, there are no restrictions.

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

The Law on Commercial Arbitration contains detailed substantive requirements for the procedures to be followed during arbitration that reflect the UNCITRAL requirements. It should also be noted that there is a Sub-Decree waiting for passage that will establish a National Arbitration Center which then will set further specific rules.

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

Cambodia has only municipal and provincial courts of first instance. Technically, a valid arbitration clause should bar access to the courts, with the exception of cases involving public policy. However, in Cambodia arbitration is a relatively new concept and the courts are not clear regarding their role vis-à-vis arbitration.

2.8 What are the main arbitration institution(s)?

At this point there is only an Arbitration Council for labor disputes (http://www.arbitrationcouncil.org/eng_index.htm). Cambodia is currently in the process of establishing a National Arbitration Center. There are no other means of institutional arbitration at the moment.

2.9 How many arbitrators are usually appointed?

The 2006 law requires an odd number of arbitrators, but does not state a particular number, leaving the parties free to decide. However, the practice has been that if the arbitration clause does not state a number, then the number will be set at three arbitrators.

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

An arbitrator can be challenged if circumstances exist that give rise to justifiable doubts as to impartiality or independence, or if the arbitrator does not possess the qualifications agreed upon by the parties.

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

The draft sub-decree will allow foreign arbitrators (who can be lawyers but who must have arbitration experience) to be members of the National Arbitration Center and also to represent clients in disputes.

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

Courts can intervene in cases where the Appeals Court or the Supreme Court rule that the subject matter is against public policy, or the subject matter of the dispute is not capable of settlement by arbitration under the laws of the Cambodia. Other conditions are: if a party has proof that (a) the agreement was not valid, (b) there was insufficient notice of the appointment of arbitrators or the proceedings, (c) the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, (d) the composition of the arbitral panel or the procedure was not in accordance with the agreement of the parties.

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

Yes, unless otherwise agreed by the parties.

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

Arbitral awards must be in writing and signed by the arbitrators; the reasons for the award must be stated; the award must allocate among the parties the costs of arbitration which includes the fees of the arbitrators; the award must state the date of the award; and copies of the award must be signed and delivered to the parties.

There are no deadlines for issuing arbitral awards stated in the law. There are also no further formal requirements.

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

An arbitral award can be set aside as exclusive recourse by the Appeal Court or Supreme Court under the same conditions as in the above point 2.12.

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

An arbitral award is binding irrespective of the country in which it is made; it shall be recognized as binding upon application in writing to the competent court. The party relying or applying for enforcement shall supply an authenticated original award or a duly certified copy thereof, and the original arbitration agreement.

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

If the parties have so agreed, or the arbitrator(s) deem it appropriate, the award may also provide for recovery by the prevailing party of reasonable counsel fees.

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

No.

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

As stated above, Cambodia is currently in the process of establishing a National Arbitration Center.

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3. CHINA

3.1 Which laws apply to arbitration in China?

The PRC Arbitration Law ("Arbitration Law"), effective as of 1 September 1995, applies to arbitration in the People's Republic of China ("PRC"). This law is not applicable in the Special Administrative Regions of Hong Kong and Macau.

3.2 Is the Chinese arbitration law based on the UNCITRAL model law?

No, the Chinese Arbitration Law is not based on the UNCITRAL model law.

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

The Arbitration Law applies to domestic and international arbitration.

3.4 Has China acceded to the New York Convention?

Yes, the PRC has been a member state since 22 April 1987.

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

Under Article 128 of the PRC Contract Law, parties to a contract with a "foreign element" can opt for arbitration before Chinese arbitral institutions or at a foreign arbitral institution. Conversely, parties to a contract without a "foreign element" will have no choice but to choose arbitration at a Chinese arbitral institution. The Supreme People's Court has published two interpretations which indicate disputes with one or more of the following three elements are "foreign related".

- At least one of the parties is "foreign". In case of companies, the place of incorporation is relevant. Thus, no companies incorporated under the laws of Mainland China - including foreign invested entities and wholly foreign owned enterprises - are treated as "foreign", whereas all companies outside mainland China (including Hong Kong, Macau and Taiwanese companies) are treated as "foreign". For individuals, PRC citizens can never be "foreign". Conversely, all non-PRC citizens are considered "foreign".

- The second element is whether the subject matter of the contract is or will be wholly or partly outside mainland China. For example, if the contract concerns

land or goods outside mainland China, or goods which will cross the border of mainland China pursuant to the contract, then it is likely to be treated as "foreign related". If the Chinese court considers the cross border element artificial or minor, however, there is a significant risk that the court will treat the matter as purely domestic.

- The third element is whether there are other legally relevant facts "as to occurrence, modification or termination of civil rights and obligations" that occurred outside of mainland China. The meaning of this factor in practice remains highly uncertain. However, the fact that the contract was signed outside of mainland China may not be enough to constitute such foreign related element.

  In short, if no "foreign element" exists, the parties are barred from selecting a foreign arbitration institution. They may only do so if a foreign element is established according to the above criteria.

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

According to the Arbitration Law, a party must meet the following conditions when it applies for arbitration in China:

There must be an arbitration agreement in existence, the party must make a specific arbitration claim, such arbitration claim must be based on certain facts and reasons and the application must fall within the scope of cases accepted by the arbitration commission. For example, with respect to the last criteria, labor disputes cannot be arbitrated before commercial arbitration commissions in the PRC.

The claimant must then submit to the arbitration commission the arbitration agreement and application together with relevant copies. The application for arbitration must specify the following: (1) the name, sex, occupation, work unit and domicile of the party, the name and domicile of the legal representatives or other organizations and the name and duties of the legal representatives or persons in charge; (2) the arbitration claim and the facts and reasons on which the claim is based and (3) evidence, sources of such evidence and the names and domiciles of witnesses.

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

Yes, a valid arbitration clause will generally bar access to the courts. However, if a party institutes an action at a People's Court without declaring the existence of the arbitration agreement and, after the People's Court has accepted the case, but prior to the first hearing, the other party submits the arbitration agreement, and the People's Court concludes that the arbitration agreement is void, then arbitration may not proceed.

Another case is where - while a valid arbitration agreement exists - the other party does not raise an objection to the People's Court's acceptance of the case prior to the first

hearing. Such a party is deemed to have renounced the arbitration agreement, and the People's Court can proceed with the trial.

3.8 What are the main arbitration institutions in China?

The main arbitration institution in China is the "China International Economic and Trade Arbitration Commission ("CIETAC")".

CIETAC is the most important arbitration institution in China. Formerly known as the Foreign Trade Arbitration Commission, CIETAC was set up in April 1956 under the China Council for the Promotion of International Trade ("CCPIT"). To meet the needs of the continuing development of China's economic and trade relations with foreign countries after the adoption of the "reform and opening-up" policy, the Foreign Trade Arbitration Commission was renamed as the Foreign Economic and Trade Arbitration Commission in 1980, and the China International Economic and Trade Arbitration Commission in 1988. Since 2000, CIETAC has also been known as the Arbitration Court of the China Chamber of International Commerce ("CCOIC").

CIETAC independently and impartially resolves economic and trade disputes by means of arbitration and conciliation (mediation).

CIETAC's headquarters are located in Beijing. Its two sub-commissions, located in Shanghai and Shenzhen, are the CIETAC Shanghai Sub-Commission and the CIETAC South China Sub-Commission. In order to meet the needs of the development of arbitration practices, CIETAC has also successively established 19 liaison offices in different regions in the PRC and specific business sectors to provide parties with handy arbitration advice.

In addition, there are multiple arbitration commissions established in cities, provinces and autonomous regions. The most well-known are the Beijing and Shanghai Arbitration Commissions

3.9 Addresses of major arbitration institutions

CIETAC Beijing

6/F, Golden Land Building,
32 Liang Ma Qiao Road,
Chaoyang District, Beijing 100016
P.R. China
Tel: +86 10 6464 6688
Fax: +86 10 6464 3500/6464 3520
E-mail: cietac@public.bta.net.cn; info@cietac.org
Website: http://www.cietac.org

Beijing Arbitration Commission

16/F, Zhaoshang Building
No.118 Jianguo Road

Chaoyang District, Beijing 100022
P.R. China
Tel: +86 10 6566 9856
Fax: +86 10 6566 8078
Email: bjac@bjac.org.cn
Website: http://www.bjac.org.cn

CIETAC Shanghai
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P.R. China
Tel: +86 21 6387 7878
Fax: +86 21 6387 7070
Email: info@cietac-sh.org
Website: http://www.cietac-sh.org

Shanghai Arbitration Commission
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Website: http://www.accsh.org.cn

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Tel: +86 755 8350 1700
Fax: +86 755 8246 8591
Email: info@sccietac.org
Website: http://www.sccietac.org

3.10 Arbitration Rules of major arbitration institutions

CIETAC Beijing:
http://www.cietac.org.cn/english/rules/rules.htm

Beijing Arbitration Commission:
http://www.bjac.org.cn/en/arbitration/index.html

CIETAC Shanghai:
http://www.cietac-sh.org/english/guize-1.htm

Shanghai Arbitration Commission:

http://www.accsh.org.cn/accsh/english/node67/node68/index.html

CIETAC Shenzhen:
http://www.sccietac.org/cietac/en/content/index.jsp?board_id=4

3.11 Model clauses of the arbitration institutions

Model arbitration clause - CIETAC

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

Model arbitration clause for financial disputes – CIETAC

"Any dispute arising from or in connection with this Contract or this transaction shall be submitted for arbitration to China International Economic and Trade Arbitration Commission and such arbitration shall be conducted in accordance with the Financial Arbitration Rules of the Arbitration Commission."

3.12 How many arbitrators are usually appointed?

Unless otherwise agreed by the parties or otherwise provided by the CIETAC Rules (see below), three arbitrators are appointed. If the parties have not agreed on the number of arbitrators, the chairman of the arbitration commission shall make a decision. Further, according to the CIETAC Arbitration Rules, unless otherwise agreed by the parties, a summary procedure applies to any case where the amount in dispute does not exceed RMB 500,000.00 (approx. USD 70,000.00), or one party applies for arbitration under the summary procedure and the other party agrees in writing. In such cases, an arbitral tribunal of a sole arbitrator shall be formed.

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

According to the Arbitration Law, parties may challenge the appointment of an arbitrator if circumstances exist that give rise to justifiable doubts about his impartiality or independence. (The arbitrator is a party involved in the case or a blood relation or he/she is a relative of the parties concerned or their attorneys; the arbitrator has vital personal interests in the case; the arbitrator has other relations with the parties or their attorneys involved in the case that might effect the fair ruling of the case; the arbitrator meets the parties or their attorneys in private or accepts gifts or attends banquets hosted by the parties or their attorneys.) A party may challenge an arbitrator before the first

hearing of the arbitral tribunal. If the reason is known only after the first hearing, the party may state the challenge before the end of the last hearing. The chairman of the arbitration commission shall decide whether to withdraw the challenged arbitrator. If the chairman of the arbitration commission serves as an arbitrator in such a case, the decision shall be made by the arbitration commission collectively.

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

According to the CIETAC rules (and also in line with the rules of other arbitration commissions in China), Chinese as well as a foreign citizen may accept the authorization to act as a so-called "arbitration agent" in arbitration proceedings. Therefore, foreign lawyers/law firms may appear as party representatives in arbitration proceedings. There is therefore no requirement for foreign lawyers to be joined by local counsel. However, as foreign law firms/foreign lawyers are not permitted to advise on Chinese law, there is a certain risk, in case the arbitration award will have to be enforced at a People's Court, that the Chinese party to the proceedings may raise objections with regard to that matter. Therefore, a foreign party should retain a Chinese lawyer to work with foreign counsel as its representatives.

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

As mentioned above, the courts may intervene in the arbitration if one party applies to the People's Court claiming that the arbitration agreement is void. In such case, the People's Court will make a ruling. This is even the case if one party requests an arbitration commission to make a decision on the validity of the arbitration agreement, and the other party requests a People's Court to give a ruling. The Arbitration Law stipulates that in this case the People's Court shall take a decision.

Another area where the courts may intervene are interim measures (see below 3.16).

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

Contrary to international standards, the Arbitration Law does not empower the arbitral tribunal to grant interim or conservatory relief. Such application of orders shall be submitted by the arbitration commission to the People's Court.

Interim measures include the custody of property and evidence. Upon the application of a party, the arbitration commission shall submit the application to the respective People's Court.

In international cases, an application for the custody of evidence shall be submitted to the Intermediate People's Court at the places where the evidence is located.

This structure has two main disadvantages. First, the decision whether to grant interim measures will have to be made by a judge who does not have knowledge of the case. Second, the necessity to forward the application can cause additional delays that can harm the applicant. However, these provisions of the Arbitration Law are mandatory, so the parties may not agree otherwise.

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

- **Formal requirements for arbitral awards**

The arbitral award shall specify the arbitration claims, facts in disputes, reasons for the award, result of the award, arbitration expenses and the date of the award.

The award needs not include a party's objection to the facts and reasoning as presented in the ruling.

The arbitral award shall be signed by the arbitrators and affixed with the seal of the arbitration commission. An arbitrator who holds a different opinion may sign or not sign the award.

- **Deadlines for issuing arbitral awards**

There is no deadline stipulated in the Arbitration Law. However, according to the CIETAC Arbitration Rules 2005, the arbitral tribunal shall render an arbitral award within six (6) months (four (4) months for domestic cases) from the date on which the arbitral tribunal is formed. Upon the request of the arbitral tribunal, the chairman of the CIETAC may extend the time period if he/she considers it truly necessary and has justified reasons for the extension.

- **Other formal requirements for arbitral awards**

According to the Arbitration Law, there is no other formal requirement for arbitral awards. On the other hand, the CIETAC Arbitration Rules 2005 request the arbitral tribunal to submit its draft award to CIETAC for scrutiny before signing the award. CIETAC may remind the arbitral tribunal of issues in the award on the condition that the independence of the arbitral tribunal in rendering the award is not affected.

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

The arbitral award is final. Therefore, as a general rule, no appeal is allowed.

If parties concerned have evidence to substantiate one of the following, they may apply for a rescission of the award with the Intermediate People's Court at the place where the arbitration commission resides.

- There is no agreement for arbitration (including an invalid or revoked arbitration agreement).
- The matters ruled were out of the scope of the agreement for arbitration or the limits of authority of an arbitration commission.
- The composition of the arbitral tribunal or the arbitral proceedings violated the legal proceedings.
- Evidence on which the ruling is based was forged.
- Things that have a substantial impact on the impartiality of the ruling have been discovered that were concealed by the opposing party.
- Arbitrators have accepted bribes, resorted to deception for personal gain or perverted the law in the ruling.

The People's Court will form a collegial bench to verify the case, and can rescind an award on the basis of one of the above reasons. It will also rescind an award that contravenes the public interest.

In domestic cases, the Court may notify the arbitration commission to re-arbitrate within a fixed period if evidence on which the ruling is based is forged or evidence that has a substantial impact on the impartiality of the ruling has been discovered that was concealed by the opposing party. If the arbitration tribunal refuses to re-arbitrate the case, the Court shall resume the rescission procedure.

The application for rescission must be made within six (6) months from the date of the arbitral award. The People's Court will decide to rescind the arbitral award or reject the application for rescission within two (2) months after accepting the case.

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

The Arbitration Law states that parties shall execute the arbitral award. If one of the parties refuses to execute the arbitral award, the other party may apply for enforcement with the People's Court according to the relevant provisions of the Civil Procedure Law. The People's Court with which the application is filed should enforce it.

The prevailing party may seek to have the arbitral award enforced by applying to the Intermediate People's Court where the losing party resides or has property in the PRC. If the losing party resides or has property outside the PRC in a country that has acceded to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), the prevailing party may apply to the competent court in that country for enforcement in accordance with the New York Convention.

According to a circular issued in 1995 regarding foreign-related arbitration and foreign arbitration matters undertaken by a People's Court, if an Intermediate People's Court

intends to refuse an application for enforcement of an arbitral award issued by a foreign-related arbitration commission in China or a foreign arbitral award, it must refer the application to the Higher People's Court for review before making the ruling. If the Higher People's Court is of the same view as the Intermediate People's Court, it must further refer the application to the Supreme People's Court in Beijing.

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

The Arbitration Law does not address this issue. However, CIETAC Arbitration Rules 2005 state that the arbitral tribunal has the power to decide, according to the specific circumstances of the case, that the losing party shall compensate the winning party for expenses reasonably incurred in pursuing its case. In deciding whether the winning party's expenses are reasonable, the arbitral tribunal shall consider such factors as the outcome and complexity of the case the workload of the winning party and/or its representative(s), and the amount in dispute.

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

In 2008, there were 65,074 arbitration cases handled by 202 arbitration institutions nationwide; 1,230 of them were CIETAC cases.

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

The CIETAC Online Arbitration Rules ("Online Arbitration Rules") took effect on 1 May 2009. They mainly focus on E-Business disputes and the entire arbitration process is conducted by online communication methods, supplemented by traditional communication methods. In order to resolve disputes efficiently, besides the standard procedure, the Online Arbitration Rules contain summary and expedited procedures.

The Shanghai Intellectual Property Arbitration Commission was founded on 29 October 2008. It was established to meet the rising number of intellectual property disputes that involve special requirements. It accepts both domestic and international intellectual property arbitration cases.

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4. THE CHINESE EUROPEAN ARBITRATION CENTRE - HAMBURG

4.1 Introduction to the Chinese European Arbitration Centre

The Chinese European Arbitration Centre ("CEAC") is a newly founded arbitration institution which has its seat in Hamburg, Germany.

The idea to build up an arbitration institution that is specialized in China-related disputes arose in 2004 after the Hamburg Bar Organization had entered into a Cooperation Agreement with the Tianjin Bar Association. Preparing the visit of Hamburg's mayor Mr. Ole von Beust to China, the City asked the Hamburg Bar Organization to contribute to improve relations with China.

The first discussions took place at the Conference of World City Bar Leaders in Shanghai in September 2004. This and further discussions at the Annual Meeting of the Inter-Pacific Bar Organisation in Beijing in April 2008 led to worldwide support among arbitration experts and to numerous further discussions. The project was presented at a kick-off luncheon organised by the Hamburg Bar Organization at the Singapore Cricket Club with 32 experts from 17 countries on 15 October 2007 and was finally supported by more than 470 law firms, lawyers, academics, scientists, business men and women and companies from 47 nations.

In July 2008, the non-profit Chinese European Legal Association e.V. ("CELA") was founded to support the exchange between China and Europe in legal and legal cultural issues as well as education in these topics. This also included the foundation of CEAC, which was finally inaugurated on 18 September 2008.

The reason for establishing the Chinese European Arbitration Centre was to create a specialized arbitration institution dealing with China-related matters. Since China has become the second largest economy in the world measured by purchasing power, more and more companies are interested and involved in contracts for China-related trade and investments. In case of conflicts between the contracting parties, a neutral arbitral institution is necessary to resolve such disputes:

It is not only the Chinese party which may be interested in solving the problem without a judgment of a national or foreign court and rather allowing the losing party to save her face in general, but also both parties may be interested in avoiding hearing a case in front of a foreign court.

Moreover, dispute resolution by institutional arbitration is the only effective way for parties in China and in Europe as judgements of ordinary courts of law are generally not enforceable in the other parties' country due to lack of reciprocity.

However, more than 140 states including China and all EU states have signed the 1958 New York Convention on Recognition and Enforcement of International Arbitral Awards in order to guarantee the recognition and enforcement of arbitral awards in member states. This gives the parties the opportunity to get an arbitral award recognised and enforced.

CEAC is an excellent neutral solution for China-related matters as it has rules tailor-made for China-related disputes and guarantees the principles of party autonomy and neutrality in its CEAC rules, which are based on the UNCITRAL Arbitration Rules.

During the process of negotiating an international contract related to China, the parties can refer to a CEAC Arbitration Clause to agree on CEAC arbitration, on a neutral place of arbitration, on the languages to be used in the arbitral proceedings and on the number of arbitrators.

4.2 CEAC Model Arbitration Clause and Model Choice of Law Clause

In order to simplify discussions of the contracting parties about the applicable law, the rules for the arbitral proceedings and the place of arbitration, for example, as well as to remind the parties of important issues that should be dealt with in international commercial arbitration, CEAC provides both a model arbitration clause and a model choice of law clause. Both clauses are already available in various languages (English, German and Mandarin). See www.ceac-arbitration.com under CEAC Download Centre. Further languages will follow soon.

The **model arbitration clause** in which the parties can decide on the formalities of the arbitral process reads:

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

This basic clause can be supplemented by a number of options which the CEAC Rules propose. They correspond to a number of practical issues which are useful to determine at the moment of the conclusion of an arbitration agreement (the last option mentioned hereinunder refers to the special issue that, in view of expected changes to the UNCITRAL Arbitration Rules, the UNCITRAL based CEAC Rules may change between the date of the arbitration agreement and the commencement of the arbitration proceedings). The provisions in lit. a) through f) are intended as a service element to remind the parties of important issues to be dealt with related to arbitration proceedings. This is of vital importance as China related contracts involving smaller and medium sized companies are often drafted without professional legal advice and input. The options read:

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

(b) The arbitration proceedings shall/may take place (also) in _____ (town or country);

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

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

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

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

Furthermore, the parties can use the **model choice of law clause** to agree on the substantive law that shall apply. It reads:

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

The contract shall be governed by

O a) the law of the jurisdiction of_____ [country to be supplemented], or

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

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

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

In the event that none of the parties succeeds or wishes to insist on its own law, the model clause offers the reference to well known international neutral legal rules. The CISG is part of Chinese law and of about 72 other legal systems around the globe. Thus, for example, the international law of sales in China, Germany, Italy, New York and Russia is identical (except for national reservations which the model clause excludes to provide for an international neutral ground). The UNIDROIT Principles are also well known worldwide. They provide an excellent neutral ground and have inspired not only the Chinese legislator but also numerous other legislators including Germany.

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

4.3 How many arbitrators are usually appointed?

Pursuant to Art. 5 of the CEAC Arbitration Rules the parties can choose between one or three arbitrators. They can do this prior to commencing the arbitration or within 15 days after the receipt by the Respondent of the notice of arbitration. If the parties do not agree on the number of arbitrators, Art. 5 of the CEAC Arbitration Rules states that three arbitrators shall be appointed.

The way of appointment varies depending on the number of the arbitrators appointed. If three arbitrators have to be appointed, a general rule is that each party shall appoint one arbitrator and the two party-appointed arbitrators shall appoint the presiding arbitrator. If the party appointed arbitrators cannot agree on the presiding arbitrator (or if the parties cannot agree on a sole arbitrator) the Appointing Authority shall decide. The Appointing Authority of the CEAC is divided in chambers, whereas each chamber is responsible for countries whose names begin with certain letters of the alphabet to preserve its neutrality. The Appointing Authority is always a neutral body to decide on the arbitrator to be appointed as its chambers shall always consist of three members, one from China, one from Europe and one from other parts of the world beyond China and Europe. This leads to a division of power between China, Europe and the world with the consequence that there is always one neutral member coming from a different region than the parties concerned. The Appointing Authority is committed to observe a high level of transparency. Thus, as a matter of policy, it cannot appoint as arbitrator those who serve on the Advisory Board of CEAC.

Pursuant to § 1025 ZPO (German Civil Procedure Code) – which corresponds to Art. 1 of the UNCITRAL Model Law on International Commercial Arbitration – the award is considered to be a German award if the place of the arbitral proceedings is in Germany. Therefore, German civil procedural law applies. For this reason, a rough comparison to the UNCITRAL based German civil procedural law will be given at the end of each question below.

In German civil procedural law, the parties can also agree on the numbers of arbitrators as well as the rules of appointment (§§ 1034, 1035 ZPO). If they have not done so, three arbitrators shall be appointed by the arbitral tribunal.

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

Generally, each arbitrator that gives reason to doubt his impartiality or independence can be challenged, Art. 9 - 12 CEAC Arbitration Rules. For any reasons that occur after the appointment of the arbitrator(s) or after the party having appointed the arbitrator(s) learns about such reasons, the arbitrator can then be challenged by the respective party. The other party, the appointed arbitrator, the other members of the Arbitral Tribunal

and the CEAC shall be notified by a written statement including the reasons for the challenge.

If the other party, however, does not agree to the challenge and if the challenged arbitrator does not withdraw, the Appointing Authority shall decide. In the case of confirmation of the challenge, a new arbitrator will be appointed according to the general rules (e.g. a party whose party appointed arbitrator was successfully challenged can appoint a new arbitrator; this procedure also complies with the German civil procedure law).

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

Pursuant to Art. 4 of the CEAC Arbitration Rules, the parties may be represented or assisted by persons of their choice. There is neither a requirement that the representing party is a lawyer nor that foreign lawyers as representing persons have to be joined by a local counsel. The names and addresses of such persons, however, must be communicated in writing to the other party; such communication must specify whether the appointment is being made for purposes of representation or assistance. (The German civil procedure law, however, does not provide any rules concerning the representation of the parties in arbitration proceedings.)

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

In addition to making the final award, the arbitral tribunal is entitled to make interim awards, Art. 26 CEAC Arbitration Rules. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods. Such interim measures are established in the form of an interim award. The arbitral tribunal is entitled to require security for the costs of such measures. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

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

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

Unless otherwise agreed upon by the parties, according to Art. 31a CEAC Arbitration Rules, the time limit within which the arbitral tribunal shall render its final award is nine

months. This time limit runs from the date on which the Notice of Arbitration is received by CEAC. However, the management of CEAC may extend this time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative if it decides this to be necessary.

Pursuant to Article 32 of the CEAC Rules, the award shall be made in writing and shall be final and binding on the parties. The award shall contain the reasons upon which the award is based unless the parties have agreed that no reasons shall be given. The award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. The award may be made public only with the consent of both parties. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal. If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.

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

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

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

The CEAC Rules themselves do not provide any rules for an appeal or rescission of the arbitral award. The arbitration process at CEAC is a single-level arbitration procedure. According to German civil procedural law an award can be rescinded, for example:

- if, it is not possible to submit this issue in an arbitral proceeding,
- if the recognition and enforcement of the arbitral award would violate the "ordre public",
- if the constitution of the arbitral tribunal or the arbitral proceeding violated German civil procedural law, or
- if the petitioner claims that he had not been properly informed about the appointment of an arbitrator or the arbitral proceeding (§ 1059 ZPO).

An arbitral award cannot be appealed.

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

Pursuant to Art. 40 CEAC Rules, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case. The costs of legal representation and assistance of the successful party generally have to be claimed during the arbitral proceedings to be recoverable.

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

4.10 Further Information about the Chinese European Arbitration Centre

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

The Chinese European Arbitration Centre can be reached under:

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Further information on the supporting association of CEAC, the Chinese European Legal Association, can be found under www.cela-hamburg.com

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5. HONG KONG

5.1 Which law(s) apply to arbitration in Hong Kong?

Arbitration in Hong is governed by the Hong Kong Arbitration Ordinance (Chapter 341 of the Laws of Hong Kong ("Arbitration Ordinance"). The Arbitration Ordinance is widely recognized as being one of the most advanced arbitration statutes in the world. It provides a maximum of support to the arbitration process with a minimum of interference.

5.2 Is the Hong Kong Arbitration Law based on the UNCITRAL model law?

Yes. The Arbitration Ordinance applies the UNCITRAL Model Law as the statutory regime for international commercial arbitration.

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

The Hong Kong Arbitration Ordinance applies to national and international arbitrations, but the Hong Kong International Arbitration Centre ("HKIAC") has its own Domestic Arbitration Rules and recommends the UNCITRAL Arbitration Rules for international arbitration.

In addition, new rules for administered arbitration in Hong Kong were introduced in 2008. The HKIAC has published the HKIAC Administered Arbitration Rules, which took effect from 1 September 2008.
The drafters of the HKIAC Administered Arbitration Rules considered the arbitration rules of different institutions around the world. Key features include the use of plain language and more party autonomy, which addresses the needs of individual cases. The drafters also considered international practices and legislative changes.

5.4 Has Hong Kong acceded to the New York Convention?

Upon resumption of sovereignty over Hong Kong on 1 July 1997, the Government of the People's Republic of China ("PRC") extended the territorial application of the New York Convention to Hong Kong, Special Administrative Region of China, subject to the statement originally made by the PRC upon accession to the Convention.

Thus, Hong Kong applies the Convention only to the recognition and enforcement of awards made in the territory of another contracting State; and Hong Kong applies the

Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.

The Arbitration Ordinance also applies the New York Convention to arbitral awards from various arbitration commissions in the PRC.

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

Consistent with the principle of party autonomy, the parties, no matter whether domiciled in Hong Kong or elsewhere, are free to agree on other rules and arbitration institutions to govern their arbitration in Hong Kong in both domestic and international arbitrations.

5.6 What mandatory requirements are there under national arbitration legislation that must be followed?

A written notice to the other party specifying the general nature of the dispute is sufficient. If the rules of arbitration have been chosen in the arbitration agreement, they must be followed. Unlike litigation in Hong Kong, no special procedures are required for overseas service of the notice of arbitration on a foreign party.

There are no mandatory requirements, but the usual procedures for an arbitration in Hong Kong are as follows:

The Claimant will ask the arbitrator(s) to hold a preliminary meeting with the parties. During the preliminary meeting, the arbitrator(s) will decide the rules to be used for the arbitration (if none have been agreed), and the timetable for service of pleadings, exchange of lists of documents and exchange of witness statements.

The preparation of pleadings is similar to that in court, except that the style can be less formal and, in many cases, supporting documents will be annexed to the pleadings to assist each party to understand the other's case.

The exchange of lists of documents can be limited to certain types of documents or completely dispensed with, especially where the parties have annexed all supporting documents to their pleadings.

Either party may ask the arbitrator(s) to fix a date for the main hearing at any time. Usually, the main hearing will be fixed after the completion of documents submission or whenever the parties are ready for it. It is also possible to agree on a "documents-only arbitration" for which no hearing is required. This may be appropriate where only the legal issues, rather than the facts, are in dispute.

It is usual in most arbitrations in Hong Kong for evidence (both factual and expert) to be exchanged in advance of the hearing. Opening submissions of the parties may also be exchanged in advance of the hearing.

After considering the evidence and the parties' submissions, the arbitrator(s) will make an award, which may be provided with or without reasons, depending on the prior request of the parties.

The legal costs awarded by the arbitrator(s) are subject to taxation either by the arbitrator or the Court. Taxation is a process used in litigation by which the Court assesses a fair amount of legal costs to be paid by the losing party. As a rule of thumb, the "taxed costs" will be about two-thirds of the actual costs spent by the winning party in the arbitration.

Unlike Court proceedings, where the Court does not charge the parties for the service of the judges or the provision of the courtroom, arbitrators require the parties to pay, usually on an hourly basis. Leading arbitrators in Hong Kong charge an average of between HKD3,000 and HKD4,000 per hour. Until an award has been rendered on costs, both parties normally bear half of the interim bills for the arbitrator's fees.

Special procedural rules apply for maritime arbitration, electronic transaction arbitrations and domain name disputes.

5.6.1 Hong Kong Maritime Arbitration Procedure

Either before or after the dispute has arisen, the parties are free to choose the rules of an arbitral institution, such as the rules of the London Maritime Arbitrators Association (LMAA), UNCITRAL Rules or HKIAC Rules. If the parties so agree, the dispute resolution process may follow these rules, yet be heard at and/or administered by the HKIAC. It is not uncommon for shipping arbitrations to be "ad hoc" and follow no particular rules, leaving the parties or the tribunal to agree on the procedures to be followed. Maritime arbitrations can be by documents alone or by oral hearing.

5.6.2 Electronic Transaction Arbitration Rules

With the rapid development in the use of the Internet and, in particular in the area of online shopping, the Hong Kong International Arbitration Centre launched the HKIAC Electronic Transaction Arbitration Rules as a third-party arbitration framework for use and adoption by online merchants to handle consumer disputes online. Details of the Rules are available on the HKIAC website at www.hkiac.org.

5.6.3 Domain Name Disputes

In June 2001, the HKIAC was appointed as the sole domain name dispute resolution provider for the .hk ccTLD (www.hkiac.org) and, in December 2001, the Asian Domain

Name Dispute Resolution Centre (ADNDRC) (www.adndrc.org). A joint undertaking between the China International Economic and Trade Arbitration Commission ("CIETAC") and the HIAC was formed to provide dispute resolution services in regard to disputed generic top level domain names (gTLD's), which are the top level domains approved by the Internet Corporation for Assigned Names and Numbers (ICANN). The ADNDRC is one of only four domain name dispute providers in the world, and the first and only one in Asia. In September 2002, HKIAC was named as the second domain name dispute resolution provider for .cn domain names, the ccTLD for Mainland of China. While in August 2004 the HKIAC was also named as a dispute resolution provider for .pw domain name disputes, the ccTLD for Palau.

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

Except as noted below, a party that has agreed to go to arbitration cannot unilaterally repudiate the agreement by going to Court. Under the Arbitration Ordinance, if one party to an arbitration agreement commences legal proceedings in any Court against the other party, the latter may insist on arbitration and apply to that Court to stay the proceedings.

The Hong Kong Court will only refuse to stay the proceedings in one of the following situations:

- The defendant has submitted its first statement on the substance of the dispute (acknowledgement of service and application for extension of time for filing the defence not included).

- The arbitration agreement is ineffective (e.g., it is not in writing, null and void, inoperative or incapable of being performed).

5.8 What are the main arbitration institutions in Hong Kong?

5.8.1 Hong Kong International Arbitration Centre

The main arbitration institution in Hong Kong is the Hong Kong International Arbitration Centre ("HKIAC").

The HKIAC is an independent, non-profit making company limited by guarantee. It was founded in 1985 to provide advisory and support services for the resolution of local and international disputes by arbitration, adjudication and mediation.

5.8.2 Hong Kong Maritime Arbitration Group

In response to demand from the shipping industry, in February 2000, the Hong Kong Maritime Arbitration Group ("HKMAG") was formed as a division of the HKIAC. The primary objective of the group is to promote the development and use of maritime

arbitration in Hong Kong. The HKMAG maintains a list of arbitrators (and mediators) with shipping experience who are willing to hear maritime disputes.

Together, the HKIAC and the HKMAG provide extensive and professional services to parties who wish to resolve their maritime disputes by arbitration.

5.8.3 Contact details

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

HKIAC Arbitration Rules:

http://www.hkiac.org/HKIAC/HKIAC_English/main.html

5.9 Model arbitration clauses in Hong Kong

There are several model clauses recommended for various types of arbitration in Hong Kong:

5.9.1 Arbitration Clause for Domestic Arbitration:

"Any dispute or difference arising out of or in connection with this contract shall be referred to and determined by arbitration at Hong Kong International Arbitration Centre and in accordance with its Domestic Arbitration Rules."

5.9.2 General Arbitration Clause for International Arbitration:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force and as may be amended by the rest of this clause.
The appointing authority shall be Hong Kong International Arbitration Centre.
The place of arbitration shall be in Hong Kong at Hong Kong International Arbitration Centre (HKIAC).
There shall be only one arbitrator.*
Any such arbitration shall be administered by HKIAC in accordance with HKIAC Procedures for Arbitration in force at the date of this contract including such additions to the UNCITRAL Arbitration Rules as are therein contained."#

Notes:
**This sentence must be amended if a panel of three arbitrators is required.*
**This sentence may be deleted if administration by HKIAC is not required. If it is retained the Centre will then act as a clearing house for communications between the parties and the arbitral tribunal and will liaise with the arbitral tribunal and the parties on timing of meetings and other matters, hold deposits from the parties and assist the tribunal with any other matters required.*
If the language to be used in arbitration proceedings is likely to be in question, it may also be useful to include in contracts:
"The language(s) to be used in the arbitral proceedings shall be....."

5.9.3 Arbitration Clause for Arbitration administered by the HKIAC:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in Hong Kong under the Hong Kong International Arbitration Centre Administered Arbitration Rules in force when the Notice of Arbitration is submitted in accordance with these Rules.
**** The number of arbitrators shall be ... (one or three).***
The arbitration proceedings shall be conducted in .... (insert language)."

Note:
**Optional*

5.9.4 "Opting-Out of Model Law" and Exclusion Agreement Clauses"

As Hong Kong has adopted the UNCITRAL Model Law for international arbitrations, parties not wishing to arbitrate under that law can opt out of it and select the domestic regime set out in Part II of the Arbitration Ordinance (see section 2M of the Arbitration Ordinance). Parties who have done this may also opt out of any judicial review of the award pursuant to the terms of section 23B of the Arbitration Ordinance. Clauses covering both situations are set out below.

5.9.5 "Opting-Out of Model Law" Clause

"The parties to this agreement hereby agree that this agreement is or is to be treated as a domestic arbitration agreement notwithstanding the provisions of the Arbitration Ordinance Chapter 341 of the Laws of Hong Kong. The parties further agree that all or any dispute that may arise under the terms of this agreement are to be arbitrated as a domestic arbitration."

Note:
This clause could be adapted for use by parties to domestic arbitrations for selecting the Model Law.

5.9.6 Exclusion Agreement

"In relation to all matters referred to arbitration by this agreement, the right of appeal under section 23 of the Arbitration Ordinance Chapter 341 of the Laws of Hong Kong and the right to make an application under section 23A thereof are hereby excluded."

5.10 How many arbitrators are usually appointed?

The Arbitration Ordinance also gives the HKIAC the power to decide whether an arbitral tribunal should consist of one or three arbitrators in international arbitrations if the parties have not regulated this matter or cannot agree on such number.

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

In accordance with the UNCITRAL Model Law, an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him or in whose appointment he has participated only for reasons of which he becomes aware after the appointment has been made. The parties may in addition agree on a procedure for challenging an arbitrator. If there is no such agreement, a party who intends to challenge an arbitrator shall within 15 days of becoming aware of the constitution of the arbitration tribunal or after becoming aware of any circumstances that would give rise to justifiable doubts or his impartiality or independence shall send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other parties agree to the challenge, the arbitral tribunal shall decide the challenge on its own.

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

Foreign lawyers are permitted to represent their clients in arbitrations in Hong Kong. Although this applies to preparatory work and advice as well as to representation at hearings and other stages of the arbitration proceedings, it is not operative if court proceedings are necessary. Court appearances, in person or through papers filed in court, require that the party representative be appropriately qualified and admitted to practice in Hong Kong or otherwise authorized to appear in court.

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

In the domestic regime, an arbitrator may be removed upon application to the court "where he has misconducted himself or the proceedings." Awards may be set aside on the basis of an arbitrator's personal or procedural misconduct. Personal grounds for removal, for instance, involve actual or imputed bias stemming from the arbitrator's interest in the outcome of the dispute or a connection with one of the parties.

Under the international regime, "an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties." Where the parties are unable to agree on a procedure for challenging an arbitrator, the relevant laws provide that, within 15 days of becoming aware of the circumstances giving rise to the challenge, the party must make a written submission to the tribunal stating the reasons for its challenge. Thus, it will be for the tribunal, at least initially, to decide on the challenge. If the challenge is unsuccessful, the challenging party may within 30 days apply to the court to decide this challenge. The Court's decision is not subject to appeal.

The domestic regime also permits application to the court for determinations of preliminary points of law. Such a preliminary determination at an early stage may lower costs and save time. However, there are substantial restrictions in place limiting the circumstances when such determinations may be taken out of the hands of an arbitrator. As with the appeal of an award, the court's jurisdiction is limited to questions of law. Further, the application for such determination may only be made (i) with the consent of the arbitrator, or (ii) with the consent of all the other parties.
This procedure is however not available under the international regime.

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

The Arbitration Ordinance empowers both the tribunal and the court to make certain orders to ensure that the purpose of the arbitration is not frustrated prior to the issuance of the final award. It covers preserving the subject matter of the dispute, regulating the conduct of the parties and conserving evidence.

The interim measures that may be taken by the tribunal include (i) requiring the claimant to give security for the costs of the arbitration; (ii) requiring that the money in dispute be secured; (iii) "directing the inspection, photographing, preservation, custody, detention or sale" of the relevant property; and (iv) "granting interim injunctions or directing other interim measures to be taken".

The Arbitration Ordinance gives the court similar concurrent powers to order interim measures. In such instances of concurrent jurisdiction, where an arbitrator has already been appointed, the court will usually defer to the arbitrator unless it is a matter that is more appropriately or effectively dealt with by the court. Thus, in seeking interim measures it may be more appropriate to approach the court in respect of ex parte matters or in situations where the action sought will affect the rights of a third party.

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

5.15.1 Form; contents

The UNCITRAL Model Law requires that the award be made in writing and signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal suffice, provided that the reason for any omitted signature is stated. The award states the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms. The award further mentions the country and place of arbitration. After the award is made, a copy signed by the arbitrators is delivered to each party.

5.15.2 Deadlines for issuing arbitral awards

There is no formal deadline by which an arbitrator has to make an award. In accordance with the Arbitration Ordinance, the arbitrator has the power to make an award at any time. A restriction applies with regard to domestic awards which have been remitted by the court. In such case, an arbitration award shall be made within three months after the award is remitted.

5.15.3 Other formal requirements for arbitral awards

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

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

Provisions are made in the domestic regime for the setting aside of awards by the court. The grounds for setting aside an award are that the arbitrator "has misconducted himself or the proceedings or an arbitration or award has been improperly procured." "Misconduct" under the Hong Kong Ordinance refers to a broad spectrum of inappropriate action from gross misconduct, such as bribery or corruption, to technical misconduct, which may involve a minor mishandling of a procedure by the arbitrator, acting in total good faith. Regardless of how flagrant the misconduct is or is not, it will only provide a basis for setting aside an award if it has resulted in a miscarriage of justice or breach of the rules of justice. If it is a mere technical misconduct that has caused some unfairness it is more likely to result in the remission of the award rather than the more drastic remedy of setting aside the award.

The somewhat vague language related to the domestic regime is in contrast to the much more specific grounds for setting aside set forth in Article 34(2) of the UNCITRAL Model Law, which applies to international arbitrations in Hong Kong. The grounds for

setting aside in Article 34(2) are the same grounds found in Article V of the New York Convention for refusing to enforce an award.

An unusual feature of the domestic regime is the provision for appeal of arbitration awards. However, successful appeal of an arbitrator's award is rare.

No appeal is allowed under the international regime. The right to appeal in the domestic regime, however, is a limited one. First, appeal is only allowed on a question of law. Moreover, the appeal may be brought only with the consent of all parties or with leave of court, unless the parties previously have agreed to exclude the right to appeal.

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

The Arbitration Ordinance states that an arbitration award may, except in very limited circumstances, be enforced in the same manner as a judgment of the High Court. As Hong Kong is a party to the New York Convention, an award obtained in Hong Kong is enforceable in other countries that are signatories to the New York Convention.

If the losing party has no assets in Hong Kong but does in another jurisdiction, an arbitration award may be more valuable than a judgment of the Court if the foreign state where the assets of the losing party are situated has no reciprocal judgment enforcement arrangement with Hong Kong but is a signatory to the New York Convention. Notably such states include the United Kingdom, the United States of America and Japan, the three major trading partners of Hong Kong. If one happens to be doing business with entities in these three countries, arbitration as a means to resolve disputes that may arise can be chosen rather than going to Court in Hong Kong.

5.17.1 Enforcement in Mainland China

Since 1 July 1997, when sovereignty over Hong Kong returned to China, Hong Kong awards have become domestic awards for the purpose of enforcement within China. Applications for enforcement of Hong Kong awards in Mainland China had been held up pending the signing of an agreement for mutual recognition of arbitration awards between Hong Kong and mainland China (the Agreement) and making of the appropriate changes to the arbitration law to reflect the contents of the Agreement.

The Agreement was signed on 21 June 1999 and came into force on 1 February 2000. It reflects the provisions in the New York Convention and restores pre-handover enforcement procedures.

Pursuant to the Agreement, there are only limited grounds for refusing to enforce a Hong Kong award, which mirror the grounds for refusal in the New York Convention. The most controversial of these is that an award will not be enforced if this would be contrary to the public policy or interests of China.

Applications for the recognition and enforcement of foreign arbitral awards should be filed with the Intermediate People's Court in the place where the Respondent is domiciled or has property. If the place where the Respondent is domiciled or the place where the Respondent has property falls within the jurisdiction of different Intermediate People's Courts, the applicant may apply to any People's Court but is not permitted not apply to more than one People's Court.

One major limitation under the Agreement which is not found in the New York Convention is that the applicant is not entitled to file applications in both Hong Kong and Mainland China at the same time. Only when the result of the enforcement of the award by the court of one place is insufficient to satisfy the liabilities may the applicant apply to the court in another place for enforcement of the outstanding liabilities. This restriction may pose difficulties to an applicant when choosing the jurisdiction in which it should first file the application.

5.17.2 Enforcement in Hong Kong

The Agreement mentioned above includes procedures for enforcing the awards of Mainland China courts in Hong Kong. Important aspects of the procedures are as follows:

- Applications for enforcement of the award should be made to the Hong Kong High Court.
- The applicant cannot file the application in both the Mainland and Hong Kong at the same time (see also Enforcement in Mainland China above).
- If the applicant has applied for enforcement in Mainland China, only when the result of the enforcement in Mainland China is insufficient to satisfy the award may the applicant apply to the High Court for enforcement.
- The time limit for the application is governed by the law on limitation period in Hong Kong (i.e., six years from the date when the other party fails to fulfill its obligation under the award).
- The grounds for refusing to enforce the award are similar to those under the New York Convention.

The Arbitration Ordinance was amended to implement the Agreement. Under the amended Arbitration Ordinance, awards given by recognized arbitration commissions in mainland China may be summarily enforced in Hong Kong.

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

The Arbitration Ordinance makes specific provision for the allocation of the costs.

Costs in the context of the Arbitration Ordinance refer both to the costs of the reference, which are the legal costs reasonably incurred in presenting one's case (including lawyers' fees), as well as to the costs of the award, which are the fees of the arbitrators and related expenses. Hong Kong follows the English rule of "costs follow

the event", whereby the unsuccessful party pays the costs of the successful party. However, there are recognized situations where the tribunal may depart from this general rule, such as where there have been grossly exaggerated claims that have resulted in wastage or where the winning party is only partly successful. Indeed, there are even exceptional circumstances where the winning party may be required to pay some or all of the costs of the unsuccessful party, such as where the successful party has engaged in serious impropriety in the conduct of the proceedings, or where the claimant's success was so small that there was no merit in bringing the claim.

Formal offers of settlement that are not accepted may affect the final award of costs. This is premised on the notion that if a party rejects a reasonable offer to settle, namely, an offer that is equal to or greater than the amount awarded to the claimant in the final award, the party rejecting such an offer should bear the costs of continuing the reference subsequent to the time the offer was extended. If the final award exceeds the amount of the settlement offer, the normal rules of cost apply.

Under the Arbitration Ordinance, unless the parties have agreed to the contrary, arbitrators may impose a limit on recoverable costs so as to discourage a party from conducting its case in a needlessly extravagant manner, or in order to prevent a party from using superior wealth as a means of intimidating an adversary who may not be able to bear an adverse costs award. However, this authority does not limit how much a party may spend on an arbitration; it limits only how much a winning party may expect to recover in costs from a losing party.

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

International Arbitration Cases accepted by the HKIAC:

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
HKIAC	240	257	298	307	320	287**	280	281	394	448

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

It is very likely that a new arbitration law will replace the existing Arbitration Ordinance in 2009. A pending draft recommends a unitary regime to govern both domestic and international arbitrations.

The purpose of the reform is to make the law on arbitration in Hong Kong even more user friendly.

The draft bill retains the existing enforcement mechanisms for arbitral awards and adopts the framework and content of the UNCITRAL Model Law. Those familiar headings used in the UNCITRAL Model Law are also retained for the benefits of the

users. In particular, those amendments to the UNCITRAL 2006 concerning the interim measures were mostly adopted in the draft bill, except for the mechanism for enforcement of such measures.

The consultation period of the draft bill ended in July 2008. After consolidation of views, it seems that a new arbitration law for Hong Kong should be appearing in the third quarter of 2009.

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Brief Profile:	**BEITEN BURKHARDT** is an independent international commercial law firm. With more than 370 lawyers in 13 officers throughout the world, we advise medium-sized companies, large corporations, banks and groups of various industries as well as the public sector comprehensively on all aspects of commercial law. Apart from our offices in Germany, we have a strong international presence in Eastern Europe, China and Brussels. We cooperate closely with excellent law firms in other key markets. In teams managed by partners we are developing solutions for our clients on performance-minded terms. **Founded** 1990, Munich **Offices:** Beijing, Berlin, Brussels, Dusseldorf, Frankfurt am Main, Hong Kong, Kyiv, Moscow, Munich, Nuremberg, Shanghai, St. Petersburg, Warsaw
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6. INDIA

6.1 Which law(s) apply to arbitration in India?

India's arbitration law is the Arbitration and Conciliation Act 1996 (the "Act").

6.2 Is the Indian Arbitration and Conciliation Act based on the UNCITRAL model law?

Yes, Indian arbitration law is based on the UNCITRAL model law.

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

No. Besides the Act, there is no other law applicable to domestic and international arbitration. Part I of the Act applies to arbitrations held in India, and Part II deals with the enforcement of certain foreign awards.

6.4 Has India acceded to the New York Convention?

Yes. India became signatory to the New York Convention on 13 July 1960. Part II of the Act applies to the foreign awards of such jurisdictions that are signatories of the New York Convention, which includes most of the prominent countries.

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

There are no statutory restrictions under Indian law regarding choice of arbitration institutions by the parties. The parties are free to determine the place of arbitration irrespective of their domicile.

6.6 What mandatory requirements are there under Indian arbitration legislation that must be followed?

The Act does not prescribe any specific arbitration procedure to be followed by the arbitral tribunal to conduct the proceedings. The parties are free to agree on the procedure to be followed by the arbitral tribunal. In case the parties fail to agree on the arbitration procedure, the arbitral tribunal will conduct the proceedings in the manner it considers appropriate. The arbitral tribunal can also determine the admissibility, relevance and materiality of any evidence. Further, the arbitral tribunal shall not be

bound by other procedural laws in India, such as the Code of Civil Procedure, 1908, or the Indian Evidence Act, 1872. Although there are no mandatory procedures for conducting the arbitration proceedings, the Act *inter alia* requires the arbitral tribunal to follow the natural justice principles and grant adequate hearing to the parties.

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

A valid arbitration clause does not bar access to the courts unless the arbitration clause specifically excludes it. Nevertheless, the parties can approach the courts for seeking interim relief such as appointment of receiver, preservation of sale of goods, specific performance, injunctive relief, etc.

6.8 What are the main arbitration institutions in India?

The (i) Indian Council of Arbitration ("ICA"), (ii) the International Centre for Alternative Dispute Resolution and (iii) Indian Institute of Arbitration & Mediation are the arbitration organizations at the national level.

Arbitration proceedings at the state level are conducted through the (i) Indian Merchants Chamber, (ii) the Bombay Chamber of Commerce and Industry, (iii) the Bengal Chamber of Commerce and Industry, and (iv) the Madras Chamber of Commerce and Industry.

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The contact details of each institute are as follows:

Indian Council of Arbitration

Federation House
Tansen Marg, New Delhi-110001
Phone: +91-11-23738760-70, 23719103, 23350087, 23319849, 23319760
Fax: +91-11-23320714, 23721504
Email: ica@ficci.com
Website: www.ficci.com/icanet/services.htm

International Centre for Alternative Dispute Resolution

Plot No.6, Vasant Kunj Institutional Area,
Phase-II (Near the Grand Hotel)
New Delhi
Phone-No: +91115593 1884
Email: icadr@yahoo.co.in, icard@pol.net.in
Website: www.icadr.org

Indian Institute of Arbitration & Mediation

64/64, 10th Mile, Old Madras Road,
Virgonagar Post, Bangalore - 560 049, INDIA.
Email: info@arbitrationindia.com
Website: www.arbitrationindia.org

Indian Merchants Chamber

IMC Bldg., IMC Marg,
Churchgate, Mumbai - 400 020 India.
Tel: +91-22-22046633
Fax: +91-22-22048508 / 22838281
Email : imc@imcnet.org
Website: www.imcnet.org

Bombay Chamber of Commerce and Industry

Mackinnon Mackinzie Building, 3rd Floor,
4,Shoorji Vallabhdas Road, Ballard Estate,
Mumbai 400001,
India.
Tel: +9122-22614681-84
Fax: +9122-22621213
Email: bcci@bombaychamber.com
Website: www.bombaychamber.com

Bengal Chamber of Commerce and Industry

Royal Exchange
6, Netaji Subhash Road
Kolkata – 700001
Ph: +91-33-22303711, 91-33-2230 8394-97
Fax: +91-33-2230 1289
Email: bencham@bengalchamber.com
Website: www.bengalchamber.com

The Madras Chamber of Commerce & Industry

Karumuttu Centre, I Floor
634 (Old No.498), Anna Salai,
Chennai - 600035
Tel: +91-44 - 24349452 / 24349720 / 24349871
Fax: +91-44 - 24349164
E-mail: madraschamber@mascham.com
Website: www.mascham.com

Each of the foregoing institutions has framed their own rules for conducting arbitration. These rules are available on their respective websites mentioned above.

6.9 Model arbitration clauses

All the arbitration institutions in India recommend their own model arbitration clause. Below is the model arbitration clause of the ICA, which is the apex arbitration institution in India.

"Any dispute or differences whatsoever arising between the parties out of or relating to the construction, meaning and operation or effect of this contract or

the breach thereof shall be settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the Award made in pursuance thereof shall be binding on the parties."

6.10 How many arbitrators are usually appointed?

Under the Act, the parties are free to determine the number of arbitrators, provided, such number is not an even number. If the parties have not agreed to the number of arbitrators in the agreement, the arbitration will be conducted by a sole arbitrator appointed by the parties. If there are three (3) arbitrators, each party shall appoint one arbitrator and the two (2) arbitrators shall appoint the third arbitrator.

Further, under the Act, the parties are free to specify the procedure for appointment of the arbitrators. If the parties agree to choose a sole arbitrator or three (3) arbitrators, and are unable to finalize the arbitrator(s) within thirty (30) days from the receipt of the request by one party to agree to an appointment, the appointment shall be made by the Chief Justice of Supreme Court of India in case of International commercial arbitration or by the Chief Justice of High Court in any other case. Such appointment shall be final and binding on the parties. (Sections 10 and 11 of the Act.)

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

The appointment of an arbitrator can be challenged by either of the parties on the following grounds:

(i) if there are circumstances to doubt the independence or impartiality of the arbitrator; and

(ii) if the arbitrator does not possess the qualifications agreed to by the parties. (Section 12 of the Act.).

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

The Act does not prescribe any conditions for appointment or qualifications of the parties' representatives in the arbitration proceedings. Therefore, any person, including a foreigner, may appear as a party representative in the arbitration proceedings. Further, the person appearing need not be a qualified lawyer.

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

The courts cannot *suo moto* intervene in arbitration proceedings. However, if approached by any of the parties, the courts may intervene in the following situations:

- passing interim orders (section 9 of the Act.)
- hearing challenges against the appointment of arbitrators (section 13 pf the Act.)
- assisting the arbitral tribunal in taking evidence (section 27 of the Act.)
- setting aside arbitral awards (section 34 of the Act.)
- making rules under the Act (section 82 of the Act.)

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

Under the Act, the arbitral tribunal may, at the request of a party, grant interim relief in respect of the subject matter of the dispute. The arbitral tribunal may also require a party to furnish appropriate security for the relief granted. (Section 17 of the Act.)

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

6.15.1 Formal requirements

Section 31 of the Act specifically provides for the form and contents of arbitral award. Some of the important requirements are:

(i) The award must be in writing and must be signed by the members of the arbitral tribunal;
(ii) The award must state the reasons upon which it is based, unless the parties have agreed otherwise;
(iii) The award must state the date and place of arbitration;
(iv) After the award is issued, a signed copy of the award must be delivered to each party; and
(v) If the award relates to payment of money, the award must specify the sum payable, the rate of interest and duration for which the interest is payable.

6.15.2 Deadlines for issuing arbitral awards

There is no statutory deadline within which the arbitral tribunal must issue the arbitral award. The award is passed by the arbitrators after completion of the arbitration proceedings which is dependant on a number of factors, such as the types of claims, number of parties involved, ability to work with the schedules of the parties and their advocates, etc.

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

Arbitral awards can be appealed / rescinded if the aggrieved party proves to the court that:

- the parties to the agreement were under some incapacity;
- the party against whom the award was invoked was not given proper notice of the appointment of the arbitrator or the arbitral proceedings;
- the award deals with disputes beyond the scope of the submission to arbitration;
- the arbitral tribunal was not constituted in accordance with the agreement of the parties or 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 by a competent authority of the country where the award was passed;
- the subject matter of the dispute is not capable of settlement by arbitration under the law of India; and
- the enforcement of the award would be contrary to public policy of India. (Section 34 of the Act.)

The term "public policy" although not defined under Indian law, has been explained by the Indian courts on various occasions. For instance, India's Supreme Court has held that an award is against public policy if its enforcement is contrary to:

(i) fundamental policy of Indian law; or
(ii) the interest of India; or
(iii) justice or morality. (*Renusagar Power Co. Ltd. v. General Electric Company*, AIR 1994 SC 860, as cited in Justice R. S. Bachawat's *Law of Arbitration and Conciliation* (3rd ed.), p. 1009.)

If any of the foregoing grounds is satisfied, the court may set aside the arbitral award.

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

6.17.1 Enforcement of Domestic Awards

In India, when any person applies to a court for enforcement of a domestic award, the court enforces the award as a court's decree, in accordance with the procedure specified under the Code of Civil Procedure, 1908, (Section 36 of the Act).

6.17.2 Enforcement of Foreign Awards

As regards the enforcement of foreign arbitral awards in India, an application for enforcement of a foreign arbitral award has to be made in the court having original jurisdiction. The following documents have to be submitted with the application:

- the original award or copy (authenticated in the manner required by the law of the country in which it was made);
- the original arbitration agreement (or a certified copy);
- evidence necessary to prove that the award is a foreign award; and

- where the award is in a foreign language, the applicant has to produce an English translation, certified by a diplomatic or consular agent of the country from which the applicant belongs, or certified in the manner required by Indian law. (Section 47 of the Act.)

If the court is satisfied that the foreign award is enforceable, the award will be enforceable as a decree of that court. The foreign award so enforced will be binding on the parties and may be relied on in any legal proceedings in India. (Section 49 of the Act.)

However, enforcement of a foreign award can be refused on the following grounds:

(i) the parties to the agreement are under some incapacity;

(ii) the party against whom the award is passed was not given adequate opportunity to present its case;

(iii) the award contains decision beyond the scope of the submission to arbitration;

(iv) the composition of the arbitration tribunal was not in accordance with the arbitration agreement;

(v) the award has been set aside by a competent authority of the country in which the award was made;

(vi) the subject matter of the difference is not capable of settlement by arbitration under Indian law; and

(vii) enforcement of the award would be contrary to the public policy of India. (Section 48 of the Act.)

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

At the outset, the Act does not specify any procedure for the assessment and award of costs. However, the winning party may request the arbitral tribunal and be awarded the costs along with the interest at the sole discretion of the tribunal.

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

Although there may be some statistics available on the websites of the arbitration institutions or otherwise on the Internet relating to arbitration, such statistics are not authoritative and may not be accurate.

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

In a recent judgment, the Supreme Court of India has held that in case of international commercial arbitrations held out of India, the aggrieved party may approach Indian courts for setting aside the foreign arbitral award on the grounds stated under the Act. The court held that a party could not be deprived of his right under Section 34 of the Act to invoke the public policy of India to set aside the award. Therefore, although Part -1 of the Act containing sections 9 and 34 applies to arbitrations in India, they will also be applicable to the international arbitrations as there are no corresponding provisions in Part–II of the Act which deals with enforcement of foreign arbitral awards. Notwithstanding the foregoing, the court has also held that if the parties want to exclude the applicability of Part-1 of the Act to the arbitration, they must incorporate a specific clause to this effect in this agreement. (*Venture Global Engineering v. Satyam Computer Services* Ltd., AIR 2008 SC 1061.)

Based on the foregoing judgment, it is recommended that the parties agreeing to the international arbitration must specifically exclude the application of Part -1 of the Act.

In another judgment, the Supreme Court of India, while interpreting the scope of international commercial arbitration, observed that where both the companies are registered in India, the arbitration between them will be a domestic arbitration, notwithstanding that the central control and management of both the companies are outside India. Further, the Court observed that in case of domestic arbitration, the Indian law should apply, as it is the part of the public policy that Indian nationals should not derogate from Indian law. This decision of the Supreme Court has restricted the scope of international commercial arbitration under the Act, and the freedom to choose governing law where both the parties are domiciled in India. (*TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd.*, (2008) 84 SCL 394 (SC).)

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7. INDONESIA

7.1 Which law(s) apply to arbitration in Indonesia?

Arbitration has been recognized, and applied, as a formal means of dispute resolution in Indonesia since the mid-nineteenth century. However, until late 1999 there was no specific law governing arbitration and for over 150 years all arbitrations were regulated under a handful of provisions of the mid-19th Century Dutch Code of Civil Procedure, the *Reglement op de Rechtsvordering* (generally known as the "RV"),[135] while the substantive basis for the ability of the parties to agree to arbitrate was to be found in the general freedom of contract provisions of the Indonesian Civil Code,[136] also taken from the Dutch. After years in the drafting, on 12 August 1999, Indonesia finally promulgated its new comprehensive Law concerning Arbitration and Alternative Dispute Resolution, Law No. 30 of 1999 (the "Arbitration Law"), superseding those articles of the RV covering arbitration.

7.2 Is the Indonesian arbitration law based on the UNCITRAL model law?

Although there are more similarities than differences, the Indonesian Arbitration Law is not based upon the UNCITRAL Model Law and, to date of writing, there has been no indicated intention to amend it in order to adopt any of the Model Law provisions with which it differs, nor for any other purpose.

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

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

7.4 Has Indonesia acceded to the New York Convention?

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135 State Gazette No. 52 of 1847, juncto No. 63 of 1849. Arbitration was covered in Arts. 615 through 651 of Title I of the Third Book thereof, which have been repealed and replaced by the Arbitration Law.

136 Article 1338, Indonesian Civil Code.

Indonesia ratified the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") in 1981[137] but it was not until 1990 that implementing regulations were promulgated to facilitate enforcement of foreign-rendered awards. Most of the problems encountered with such regulations, Supreme Court Regulation No. 1 of 1990, have been eliminated with the promulgation of the Arbitration Law, which does not repeal but reflects and improves upon these.

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

The Arbitration Law makes it very clear that where the parties have agreed to arbitrate their disputes, no court has, nor may take, jurisdiction over such disputes[138] and court intervention is only permitted for enforcement of an eventual award or to appoint or entertain a challenge to an arbitrator where, and only where, the parties have not agreed upon a different appointing authority.

The Arbitration Law allows parties mutually to designate in their agreement to arbitrate any administering institution or *ad hoc* rules they may wish for the procedure of their arbitration, provided such rules do not conflict with the provisions of the Arbitration Law; and the arbitration may be held wherever the parties may mutually agree.[139] If no rules are designated, the Arbitration Law itself provides some adequate rules for the purpose.[140]

7.6 What are the main arbitration institutions in Indonesia?

There are a number of arbitration institutions in Indonesia, most of them industry-specific but also general. Probably the most commonly used arbitral body is *Badan Arbitrase Nasional Indonesia* ("BANI"),[141] which maintains a panel of local and international arbitrators and utilizes relatively modern rules of procedure, which are available in both Indonesian and English.[142]

Other established institutions include the Capital Market Arbitration Board (*Badan Arbitrase Pasar Modal Indonesia,* or BAPMI), set up in 2002 to administer arbitrations relating to capital market disputes and the National Shariah Arbitration Board (*Badan Arbitrase Syariah Nasional,* or Basyarnas), established by the Indonesian Ulema Council in 1993, originally under the name of *Badan Arbitrase Muamalat Indonesia*, to resolve disputes arising out of *shariah* transactions or transactions based on Islamic principles. Each of these bodies maintains its own panel of approved arbitrators and has its own rules of

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137 By Presidential Decree No 34 of 1981, published in the State Gazette (*Berita Negara*) of 1981, as No. 40, of 5 August, 1981. Indonesia made both the commerciality and the reciprocity reservations in its accession.

138 Article 3 and 11, Arbitration Law.

139 Articles 31 (1) and Article 34, Arbitration Law

140 Chapter IV, Procedures Applicable before the Arbitration Tribunal, Arbitration Law

141 See http://www.bani-arb.org.

142 See http://www.bani-arb.org/bani_prosedur_eng.html.

procedure and arbitrator conduct, but these are not yet available online. So far neither of these institutions has been widely used in practice.

There is also an Indonesian Chapter of the Chartered Institute of Arbitrators based in Jakarta. The Chapter is involved primarily in the training of arbitrators and does not administer cases, although it can act as appointing authority if so designated.

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

7.7 Model arbitration clause in Indonesia

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

"*All disputes arising from this contract shall be binding and be finally settled under the administrative and procedural rules of arbitration of BANI by arbitrators appointed in accordance with said rules.*"

But the writers would recommend that parties wishing to avail themselves of BANI arbitration also specify the language of the arbitration, as the Arbitration Law requires arbitrations to be held in Indonesian if not otherwise agreed upon by the parties. Other provisions might also be included to counteract some of BANI's idiosyncrasies, such as a provision to the effect that transcripts or other records must be made available to the parties and not only the arbitrators, and also that the parties shall have the absolute right to appoint whomsoever they wish to act as arbitrator, subject only to conflicts of interest and misconduct.

7.8 Arbitrators

7.8.1 Arbitrators' Qualifications

There is no restriction on the nationality or profession of arbitrators. The Arbitration Law only requires that arbitrators be competent and over the age of 35 years, have at least 15 years experience in the "field" (not defined), have no conflict of interest or ties with either party and not be judges or court or government officials.[143]

7.8.2 How many arbitrators are usually appointed?

[143] See Article 12, Arbitration Law.

Under the prior legislative regime of the RV, parties were free to designate any number of arbitrators, so long as it was an odd number. This restriction is continued by the new Arbitration Law, but only where the parties have not previously agreed upon a certain number of arbitrators. Article 8 (2) (f) of the Arbitration Law, in setting out the requirements for the notice of arbitration, requires such notification, among other things to include:

"The agreement entered into by the parties concerning the number of arbitrators or, if no such agreement has been entered into, the Claimant may propose the total number of arbitrators, provided such is an odd number."[144]

Under the BANI Rules, parties may appoint either a sole arbitrator or three arbitrators to sit as the arbitral tribunal adjudicating their dispute. If the parties have not previously agreed as to the number of arbitrators, the Chairman of BANI shall rule whether the case in question requires one or three arbitrators, depending on the nature, complexity, and scale of the dispute in question. However, in special circumstances where there are multiple parties in dispute, and if so requested by the majority of such parties, the BANI rules allow the Chairman of BANI to approve the formation of a tribunal comprising of five arbitrators.[145]

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

The Arbitration Law allows the parties to challenge, or request recusal of, an arbitrator if:

"…there is found sufficient cause and authentic evidence to give rise to doubt that such arbitrator will perform his/her duties independently, or will be biased in rendering an award[146] **or** ***"…if it is proven that there is any familial, financial, or employment relationship with one of the parties or its respective legal representatives."***[147]

Article 26 (2) of the Arbitration Law also provides that:

"An arbitrator may be dismissed from his/her mandate in the event that he/she is shown to be biased or demonstrates disgraceful conduct, which must be legally proven."

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

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144 There is no official English Translation of the Arbitration Law. All quoted provisions herein are from a translation prepared by KarimSyah Law Firm

145 BANI Rule No. 10.

146 Article 22 (1), Arbitration Law.

147 Article 22 (2) Arbitration Law.

The Arbitration Law does not impose any conditions as to what counsel may represent a party in an arbitration, as long as such counsel is given power of attorney to do so. Thus there is no impediment to foreign counsel appearing on behalf of any party, whether foreign or Indonesian.

In an arbitration before BANI, however, Indonesian counsel will be required to accompany any foreign counsel if Indonesian law governs the merits of the dispute.[148] Although this is not a legal requirement for a non-BANI arbitration, it would certainly be foolhardy of any party not to engage counsel conversant with the governing law wherever their arbitration is held.

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

Article 1338 of the Indonesian Civil Code provides that a contract validly entered into has the force of law as between the parties thereto. Validity depends upon satisfying the requirements of Article 1320 which include, among other things that the parties must be legally competent to enter into an agreement; the contractual terms must be clear and certain; the parties have agreed to such terms voluntarily and the contract may not be for a purpose contrary to law or public policy. Thus a clear arbitration clause in a valid underlying commercial agreement should be binding upon the parties.

Articles 3 and 11 of the Arbitration Law mandate that where there is such clear arbitration clause between parties to a validly entered-into contract, that is they have designated arbitration as the means of resolution of any disputes arising out of and/or in connection with that contract, then the courts do not have, and may not take, jurisdiction to hear any case within the scope of the parties' agreement to arbitrate. Article 3 provides:

"*The District Court shall have no jurisdiction to try disputes between parties bound by an arbitration agreement;*"

and Article 11:

"*(1) the existence of a written arbitration agreement shall eliminate the right of the parties to seek resolution of the dispute or difference of opinion contained in the agreement through the District Court.*
***(2) the District Court shall refuse and not interfere in settlement of any dispute which has been determined by arbitration except in particular cases determined in this Act.*"**

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

Article 32 of the Arbitration Law states as follows:

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148 BANI Rule No. 5.

"At the request of one of the parties, the arbitrator or arbitration tribunal may make a provisional award or other interlocutory decision to regulate the manner of running the examination of the dispute, including decreeing a security attachment, ordering the deposit of goods with third parties, or the sale of perishable goods."

Of course an arbitral tribunal has no executory powers, and both court procedures and Article 64 of the Arbitration Law allow for enforcement only of judgments and awards that are *final and binding*. Therefore it is questionable, and has not as yet been tested, whether the courts would enforce any such interlocutory orders or awards if the affected party fails to comply.

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

7.12.1 Time Limitations

After the close of hearings (which are required to be completed within 6 months of the date of constitution of the full Tribunal,[149] unless such time limit is extended by mutual written consent of the parties[150]), the tribunal is allowed only thirty days to render its award,[151] but this time limit also may be extended by mutual written consent of the parties, in which case an alternative limitation should be designated or the extension may be deemed ineffective.

7.12.2 Form and Content

Article 54 of the Arbitration Law sets out the requirements for the Award. Prospective arbitrators should be aware that the award must contain: "*a heading . . . . containing the words* 'Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa' *(for the sake of Justice based on belief in the Almighty God)*", and it must be signed by the arbitrators and indicate both the date and place it was rendered.

The other minimum criteria which an award must contain are:

". . . The full name and addresses of the disputing parties;

A brief description of the matter in dispute;

The respective position of each of the parties;

The full names and addresses of the arbitrators;

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149 Article 48, Arbitration Law.
150 Article 33, Arbitration Law.
151 Article 57, Arbitration Law.

The considerations and conclusions of the arbitrator or arbitration tribunal concerning the dispute as a whole;

The opinion of each arbitrator in the event that there is any difference of opinion within the arbitration tribunal;

The order of the award;. . ."[152]

7.12.3 Split Decisions

Note that Article 54 (1) (g) of the Arbitration Law requires that the award include differing or dissenting opinions of the arbitrations, and 54 (3) requires that the award state the reason if one arbitrator fails to sign. But there is no provision made in the Law for issuance of an award where the arbitrators are unable to reach a majority decision at all. This situation is covered in the BANI Rules, however, which provide that in such case the points in question shall be decided by the Chair of the tribunal.[153]

No mention is made specifically of dissenting opinion, but there is no impediment to the inclusion of such a dissenting opinion and to our knowledge this has occasionally occurred.

7.12.4 Registration

The Tribunal, or its duly authorized representative, is required to register a signed original, or authentic copy, of the award with the court within 30 days of its rendering.[154] This time limit does not apply to registration of foreign-rendered awards, but in either case the award must be registered in order to be enforceable.[155] Domestic awards (those rendered in Indonesia) are registered in the District Court having jurisdiction over the respondent.[156] International awards are registered in the District Court of Central Jakarta.[157]

7.12.5 Translations

In order to register an award the court will require an original or authenticated copy to be submitted in the Indonesian language.[158] Although not specified in the law, for purposes of registration and eventual enforcement in Indonesia, that Indonesian version will be considered as the original. Therefore it is imperative that all awards that may

152 Article 54 (1) (b) – (h), Arbitration Law.
153 BANI Rule 27.
154 Article 59 (1), Arbitration Law.
155 Article 59 (4), Arbitration Law.
156 Articles 59 (1) and 1 (4), Arbitration Law.
157 Article 65, Arbitration Law.
158 Article 67, Arbitration Law.

require enforcement in Indonesia be rendered in Indonesian, as well as in whatever language the arbitration is held, most normally English. Note also that BANI will deem the Indonesian version as the original even if in fact the award has been drafted in another language and the Indonesian version is a translation.[159] It is important to ensure that any translation into Indonesian is accurate, because that is the version which will be operative in case the award must be enforced in Indonesia.

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

7.13.1 Domestic Awards

The enforcement procedure for domestic awards allows the appropriate District Court to issue an order of execution directly if the losing party does not, after being duly summoned and so requested by the court, satisfy the award. Although no appeal is available, the losing party does have the opportunity to contest execution by filing a separate contest. Although the District Court may not review the reasoning in the award itself,[160] it may only execute the award if both the nature of the dispute and the agreement to arbitrate meet the requirements set out in the Arbitration Law[161] (the dispute must be commercial in nature and within the authority of the parties to settle, and the arbitration clause must be contained in a signed writing) and if the award is not in conflict with public morality and order.[162] There is no recourse against rejection by the court of execution.[163]

7.13.2 International Awards

As in the case of domestic awards, international awards must also be registered in the court before one can apply to have them enforced. There is no time limit for registration of international awards. However such registration is required to be effected by the arbitrators or their duly authorized representatives. Arbitrators who regularly sit in arbitrations within Indonesia are aware of this requirement and will provide a power of attorney to the parties to effect registration *on behalf of the arbitrators.* However, arbitrators sitting outside of Indonesia generally are not aware of this requirement and, unless so requested by one or both of the parties, are unlikely to grant such authority. This can cause considerable delay, and often difficulty, for a party seeking to register the award later on, as the arbitrators will need to be contacted and requested to provide powers of attorney after the fact.

Aside from such powers of attorney, applications for registration of International awards

159 See BANI Rule 14 (d).
160 Article 62 (4), Arbitration Law.
161 Articles 4 and 5, Arbitration Law.
162 Article 62 (2), Arbitration Law.
163 Article 62 (3), Arbitration Law.

must attach the following:

> ***"(i) the original or a certified copy of the award, together with an official translation thereof*** (to Indonesian, unless the original award is rendered in Indonesian)***;***
>
> ***(ii) the original or a certified copy of the document containing the agreement to arbitrate, together with an official translation thereof; and***
>
> ***(iii) a certification from the diplomatic representative of the Republic of Indonesia in the country in which the award was rendered, stating that such country and Indonesia are both bound by a bilateral or multilateral treaty on the recognition and implementation of International Arbitration Awards."***[164]

Despite the Arbitration Law having been in effect for almost ten years at the time of writing, this last-mentioned requirement still often proves difficult to satisfy. Unfortunately the Foreign Ministry has not advised its diplomatic missions of the requirement and thus many Consulates are at a loss when asked to provide such certification. This can also cause considerable delays, as well as some annoyance for all concerned.

Orders of *exequatur*, granting enforcement of an award, including those ordering injunctive relief, will be issued by the court as long as the parties have agreed to arbitrate their disputes, unless the subject matter of the award was not commercial[165] and therefore not arbitrable, and as long as the award does not violate public order.[166]

7.13.3 Execution

Once an order of execution is issued, for either a domestic or an international award, the same may be executed against the assets and property of the losing party in accordance with the provisions of the RV, in the same manner as execution of judgments in civil cases which are final and binding. But note that only those assets which can be specifically identified can be attached or seized and sold. There is no provision for general orders of attachment or seizure in Indonesia.

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

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164 Since Indonesia is not party to any such bilateral treaty, in effect the certification should state that both countries are parties to the New York Convention. It is implicit that awards rendered in states that are not party to the New York Convention (or other such conventions, such as the ICSID, Washington convention, to which Indonesia is also a party) will not be enforced in Indonesia.

165 Elucidation of Article 66 b, Arbitration Law. "Commercial" refers to activities in trade, banking, finance, investment, industry, and intellectual property.

166 Article 66 (c), Arbitration Law.

There is no appeal against an arbitral award. However, application may be made to the applicable District Court to annul either domestic or international awards, but on very limited grounds, primarily involving withholding of decisive documentation, forgery or fraud. Article 70 of the Arbitration Law provides;

"*An application to annul an arbitration award may be made if any of the following conditions are alleged to exist: (a) letters or documents submitted in the hearings are acknowledged to be false or forged or are declared to be forgeries after the award has been rendered; (b) after the award has been rendered documents are found which are decisive in nature and which were deliberately concealed by the opposing party; or (c) the award was rendered as a result of fraud committed by one of the parties to the dispute*."

Any such application must be submitted within 30 days of registration of the award,[167] and a decision must be made upon such application within 30 days of submission thereof. Appeal may be made to the Supreme Court against any such decision, and the Law requires the Supreme Court to decide upon such appeal within 30 days of application.[168]

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

7.15.1 Costs of Arbitration

Under the Arbitration Law, arbitrators shall determine the arbitration fee, which consists of the arbitrators' honoraria, expenses incurred by the arbitrators and costs for (expert) witnesses and administrative matters.[169] The fee shall be borne by the losing party. In the event that a claim is partially granted, the arbitration fee shall be charged to the parties equally.[170]

7.15.2 Legal Costs

Generally under Indonesian Law, parties do not have the right to recover their legal costs in litigation or arbitration, unless they have agreed that such costs can be recovered, either in their underlying agreement or in any other valid contract. Despite this general rule, many arbitrations with any international character do see legal costs awarded and as far as the writers can determine, this has never been challenged.

7.16 Statistics on Arbitration Proceedings

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167 Article 71, Arbitration Law.
168 Article 72, Arbitration Law.
169 Article 76, Arbitration Law.
170 Article 77, Arbitration Law.

Indonesia being a Civil Law jurisdiction, where prior cases do not have precedential value, very few cases are reported. This lack of reported information, coupled with the fact that both registration and enforcement of domestic awards is effected in the District Court in the domicile of the losing party, and since there are 292 judicial districts spread throughout the archipelago, it is almost impossible to obtain full data on enforcement of domestic awards, except with respect to cases sufficiently notorious to raise a stir in legal or business circles or warrant comment in the press. It is generally understood, however, that most domestic awards have been enforced without delay or difficulty as a matter of course.

The Clerk of the Central Jakarta District Court does keep records of the registration of international awards, indicating when application is made to enforce any of these, and when the execution order is issued. Access to such records is difficult but possible and they show that no more than 40 international awards have been registered since 1990 and, since the promulgation of the new Arbitration Law, only one or two applications for enforcement have encountered any difficulty in execution.

BANI keeps records of the cases it administers, but these records are not publicly accessible.

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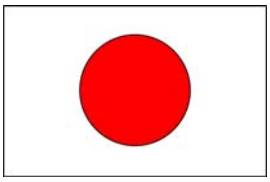
8. JAPAN



8.1 Which laws apply to arbitration in Japan?

The various methods of alternative dispute resolution ("ADR"), including arbitration, are not popular methods of solving problems between individuals or companies in Japan, where involving third parties in the dispute settlement is often avoided.[171] Even litigation in Japan is used primarily as a last resort, when the negotiating parties cannot settle the dispute amicably.[172]

Japan's Code of Civil Procedure, which was modeled on the German Code of Civil Procedure of 1877, originally contained the pertinent provisions on arbitration.[173] Promulgated in 1890, Japan's Code of Civil Procedure remained largely unchanged for more than a century. Numerous calls for arbitration law reformation, principally motivated by a desire to increase Japan's attractiveness to international investors, eventually led to the passage of a new arbitration law ("Arbitration Law"), which came into effect in March of 2004.[174]

8.2 Is the Japanese Arbitration Law based on the UNCITRAL model law?

The Arbitration Law is based on the United Nations Commission on International Trade Law's (UNCITRAL) Model Law on International Commercial Arbitration of June 1985 ("Model Law");[175] however, it contains new provisions not seen in the Model Law, bringing Japan's Arbitration Law up to date with modern international requirements.[176]

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

As adopted by Japan, the Arbitration Law applies not only to international arbitration, but to domestic arbitrations as well.[177] Further, the Arbitration Law covers both

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171 Osamu Inoue and Tatsuya Nakamura, 'Litigation and Alternative Dispute Resolution' in Gerald Paul McAlinn (ed.), *Japanese Business Law* (Wolters Kluewer, The Netherlands 2007), p.689.

172 Ibid, p. 690.

173 Ibid, p. 694.

174 Ibid, pp. 694-95. The Arbitration Law is Law No. 138 of 2003, and was last amended in 2006. An English version of the Arbitration Law, as translated by The Arbitration Law Follow-up Research Group, is available online at: http://www.kantei.go.jp/foreign/policy/sihou/arbitrationlaw.pdf.

175 Tatsuya Nakamura, 'Salient Features of the New Japanese Arbitration Law Based Upon the UNCITRAL Model Law on International Commercial Arbitration' [April 2004] JCAA Newsletter 17 http://jcaa.or.jp/e/arbitration-e/syuppan-e/newslet/news17.pdf. Japan was the 45th country to adopt the Model Law.

176 Ibid.

177 Peter Godwin, 'Japanese Arbitration in the wake of the 2004 reforms: time to recognize the end of the Ragan myth' [November 2008] JCAA Newsletter 21, http://jcaa.or.jp/e/arbitration-e/syuppan-e/newslet/news21.pdf.

commercial and non-commercial civil arbitration (excluding matters pertaining to divorce or separation), as long as the arbitration itself takes place within the territory of Japan. The Arbitration Law thus applies to the arbitral proceedings themselves, as well as to court proceedings in connection with such arbitral proceedings. Such court proceedings are governed by Japan's Code of Civil Procedure.[178]

Unlike the UNCITRAL Model Law, the Arbitration Law contains special provisions for the protection of consumers and individual employees in arbitration (e.g. the consumer may cancel the arbitration agreement with a commercial counterparty, provided the consumer is not the claimant;[179] the agreement to submit future individual labor-related disputes to arbitration is null and void[180]). Japan's legislature provided such special provisions to make the Arbitration Law a comprehensive set of rules which could also govern civil disputes, rather than primarily focusing on international commercial disputes, like the Model Law.

8.4 Has Japan acceded to the New York Convention?

Japan has acceded to the New York Convention on 20 June 1961 and it entered into force on 18 September 1961.

8.5 What are the main arbitration institutions in Japan?

The leading Japanese private institution concerned with the resolution of disputes arising from international and domestic business transactions is the Japan Commercial Arbitration Association ("JCAA") :

Japan Commercial Arbitration Association
Tokyo Office
3rd Floor, Hirose Building,
3-17, Kanda Nishiki-cho, Chiyoda-ku,
Tokyo, 101-0054 Japan
Telephone: +81 3 5280 5161
Telefax: +81 3 5280 5160
Website: www.jcaa.or.jp
Rules: http://www.jcaa.or.jp/e/arbitration-e/kisoku-e/pdf/e_shouji.pdf

In 1953, the JCAA became independent from the Japan Chamber of Commerce and Industry and has developed a set of rules[181] ("JCAA Rules") forming a supplement to the Arbitration Law and evidencing Japan's efforts to promote private arbitration proceedings.

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178 Article 10 Japanese Arbitration Law 2003. The Code of Civil Procedure is Law No. 109 of 1996.

179 Supplementary Provisions, Article 3 Japanese Arbitration Law 2003. "Consumer" and "business" are defined in Art. 2 par. 1 and 2 of the Consumer Contract Act Law No. 61 of 2000.

180 Supplementary Provisions, Article 4 Japanese Arbitration Law 2003. "Individual Labor Related Disputes" as defined in Art. 1 of the Law Promoting the Resolution of Individual Labor Disputes, Law No. 112 of 2001.

181 The JCAA Rules were revised in 2004 and amended in 2008 to meet the current global standards.

Other permanent bodies in Japan related to arbitration are:

The National Committee of the International Chamber of Commerce (ICC)[182]

Tokyo Chamber of Commerce & Industry Bldg. 7F
3-2-2, Marunouchi, Chiyoda-ku
Tokyo, 100-0005 Japan
Telephone: +81 3 3213 8585
Telefax: +81 3 3213 8589
Website: www.iccjapan.org
Rules:
http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf

Japan Shipping Exchange Inc.[183]

TOMAC (Tokyo Maritime Arbitration Commission of JSE)
3rd Floor, Wajun Building, Koishikawa 2-22-2, Bunkyo-ku,
Tokyo, 112-0002 Japan
Telephone: +81 3 5802 8361
Telefax: +81 3 5802 8371
Website: http://www.jseinc.org/index_en.html
Rules: http://www.jseinc.org/en/tomac/arbitration/ordinary_rules.html

Japan Intellectual Property Arbitration Center[184]

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8.6 Can parties agree on foreign arbitration institutions?

The appointment of a foreign arbitration institution is acceptable, provided that the public policy provisions contained in the Arbitration Law are not violated by that institution. [185] Failing an agreement of the parties in this respect, the arbitral tribunal has

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182 The International Chamber of Commerce (ICC) National Committees represent the ICC in their respective countries, recommending to the ICC their respective national business concerns in its policy recommendations to governments and international organizations. ICC has access to national governments through its network of national committees. *See* http://www.iccwbo.org/id15542/index.html

183 Solely for maritime disputes.

184 The Japan Intellectual Property Arbitration Center is an organization established by the Japan Federation of Bar Associations in cooperation with the Japan Patent Attorneys Association, in order to provide specialized dispute resolution in the field of intellectual property rights.

185 Article 26 Japanese Arbitration Law 2003.

discretion in conducting the arbitral proceeding as it considers appropriate, including the selection and admission of evidence.

One such arbitration institution which can be chosen is the JCAA. Below, it is noted where the JCAA Rules expand upon the Arbitration Law itself. However, such expansion only applies if the JCAA Rules are chosen by the parties. The JCAA recommends using the following arbitration model clause:

> *"All disputes, controversies or differences which may arise between the parties hereto, out of or in relation to or in connection with this Agreement shall be finally settled by arbitration in (name of city) in accordance with the Commercial Arbitration Rules of the Japan Commercial Arbitration Association."*[186]

8.7 Does the Japanese Arbitration Law contain substantive requirements for the arbitration procedures to be followed?

The fundamental rule of arbitration proceedings is that the parties must be treated equally and must be given full opportunity to present their cases in the arbitral proceeding.[187] Most provisions of the Arbitration Law are non-mandatory and are applicable only when there is no other agreement between the parties.

All arbitral proceedings in Japan must follow the Arbitration Law, but the parties are free to agree on the rules of arbitration procedures to be followed by the arbitral tribunal.

The parties may agree on the applicable substantive law under which the dispute should be decided.[188] If the parties to the dispute have not agreed on this, the arbitral tribunal shall apply the substantive law of the state with which the dispute is most closely connected, excluding conflict of laws rules. The arbitral tribunal may also determine other applicable law *ex aequo et bono* if the parties have expressly authorized it to do so.[189]

Further, the parties are allowed to determine the place of arbitration.[190] Failing an agreement of the parties in this respect, the arbitral tribunal determines the place of arbitration by considering the circumstances of the case, including the convenience of the parties. Also, should there be no contrary agreement of the parties, the arbitral tribunal can decide where to carry out the internal consultation of the arbitral tribunal, the inspection of goods and documents, and the hearings of the parties, experts and witnesses.

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186 The standard JCAA arbitration clause is available at: http://www.jcaa.or.jp/e/arbitration-e/jyoukou-e/clause.html.

187 Article 15 Japanese Arbitration Law 2003. The JCAA applied this Article when promulgating its own rules. *See* Rule 32(2) JCAA Rules.

188 Article 36 Japan Arbitration Law 2004.

189 Ibid.

190 Ibid, Art. 28.

Article 13 of the Arbitration Law introduces the requirement that the arbitration agreement must be in writing,[191] and this writing requirement also includes electromagnetic records (e.g. email), bringing arbitration proceedings up to date with rapidly developing communication and information technologies.[192] The Arbitration Law further contains a "separability principle,"[193] aiming to conserve the parties' arbitration agreement. Once the parties agree on arbitration in a particular contract, even if the provisions of the contract are found to be null or void, the validity of the arbitration agreement will not be affected.

The arbitral proceeding is deemed to commence on the date the claimant gives notice to the respondent that the dispute will be referred to the arbitral tribunal, [194] which suspends the running of the statute of limitations applied respectively to substantive rights arising under Japanese law.[195]

Moreover, the parties can decide on the language or languages to be used in the arbitral proceedings.[196] Again, in the event that the parties cannot reach a consensus, the arbitral tribunal will designate the language or languages to be used in the arbitral proceedings.[197]

The arbitral tribunal may order translations of documentary evidence in the designated language(s).[198] Rule 11 of the JCAA states that correspondence by the parties or the arbitrators with the JCAA shall be conducted in Japanese or English.
The arbitral tribunal can hold oral hearings for the presentation of evidence or statements by the parties; however, the parties may waive such oral hearings and proceed with arbitration based only on documents.[199] In order to reduce the travelling costs of the parties, the JCAA Rules include a provision that the date and place of hearings shall be decided by the arbitral tribunal upon consultation with the parties, and, if hearings should last more than one day, they will be held on consecutive days to the best extent possible.[200]

The party who provides evidence to the arbitral tribunal must take measures to ensure the availability of such evidence to the other party, and when the arbitral tribunal intends to rely on any expert report or on other evidence, the arbitral tribunal must ensure that the report or the evidence is available to both parties.[201]

Unless otherwise agreed upon by the parties, the arbitral tribunal may set any time restrictions on the parties for filing their respective statements, claims, defenses,

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191 Arbitration agreements made before the enforcement of the Arbitration Law are still governed by the old law, which allowed oral agreements to be enforceable.
192 Article 13 Japanese Arbitration Law 2003.
193 Ibid, Art. 13(6).
194 Ibid, Art. 29.
195 Osamu Inoue and Tatsuya Nakamura, *supra* n.1, p.701.
196 Article 30 Japanese Arbitration Law 2003.
197 Ibid.
198 Ibid.
199 Article 32 Japanese Arbitration Law 2003.
200 Rule 34(1) JCAA Rules.
201 Article 33 Japanese Arbitration Law 2003.

amendments, and supplements.[202] The proceeding will be terminated if the claimant does not comply with any of these time restrictions. [203] However, when any of the parties fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may make an arbitral award based on the evidence collected up until such time. In practice, arbitrators usually still consider the interests of the defaulting party, evaluating all the circumstances on a fair basis, particularly when a party has sufficient cause for not complying with the deadline.

The arbitral tribunal may, upon the request of either party, order the other party to take an interim measure of protection at any time during the arbitration proceedings, as it considers necessary, in respect of the subject matter of the dispute.[204] In such case, the arbitral tribunal may order either party to provide appropriate security in connection with such interim measure.[205] However, the Arbitration Law does not provide for the arbitral tribunal's power to enforce such a measure. In this respect, it should be noted that the Model Law has been changed in 2006 and now stipulates that an interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court. It remains to be seen whether this amendment will also be adopted for the Arbitration Law.[206]

The JCAA Rules contain provisions for accelerated procedures applicable to disputes involving an economic value below twenty million Japanese yen (e.g. shorter deadlines for the parties to submit counterclaims; a prohibition against amendments or supplements to claims and counterclaims; one single arbitrator).[207]

The Arbitration Law requires that, unless otherwise agreed upon by the parties, the arbitral tribunal may appoint one or more experts to appraise any necessary issues and report their findings in oral or written form.[208] The arbitral tribunal may require the parties to cooperate with the appointed experts. In addition, such appointed expert may be requested by either party or by the arbitral tribunal to participate and be questioned in an oral hearing. The parties may appoint their own experts to participate in such hearings.[209]

The arbitral tribunal may attempt to settle the dispute during the arbitral proceeding only if the parties have given consent in writing to such attempt.[210] In Japan, it is customary for both judges and arbitrators to encourage amicable settlements during proceedings, as Japan is not traditionally a litigious country.[211] Finally, the JCAA Rules keep the arbitral

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202 Article 31 Japan Arbitration Law 2003.
203 Ibid, Art. 33.
204 Ibid, Art. 24. *See also* JCAA Rule No. 48.
205 Ibid.
206 Several legal scholars expect this to soon happen. *See* Takeshi Kojima and Hiroshi Shimizu, 'Special Authorities of Arbitrators: Interim and Preservation Measures' in Takeshi Kojima and Akira Takakuwa (eds.), *The Arbitration Law: Explanations and Issues* (Seirin Shoin, Tokyo 2007), pp. 152-56.
207 Rules 59-67, JCAA Rules (Expedited Procedures).
208 Article 34 Japanese Arbitration Law 2003.
209 Ibid.
210 Ibid, Art. 38. The JCAA further adopted this law in Rule 47.
211 Peter Godwin in JCAA Newsletter 21, page 2, stated "I dare suggest the judges appear to see it as a sign of failure if a case reaches judgment!" *Supra* n.7.

proceeding and its records closed to the public. Furthermore, the JCAA Rules expressly impose confidentiality obligations on all parties involved in the proceeding (including the arbitrators, the members of the JCAA and the party's representatives).[212]

8.8 How many arbitrators are usually appointed?

The parties are free to determine the number of arbitrators[213] and the procedure for their appointment.[214] According to the Arbitration Law, if the number of arbitrators has not been agreed upon, and two parties are involved in such arbitration, there will be three arbitrators; however, if the parties are three or more, the court with the competent jurisdiction determines the number of arbitrators upon the request of a party.[215] The Arbitration Law further sets forth a procedure for appointing arbitrators when the parties disagree.[216]

The JCAA Rules define the default number of arbitrators for the parties to agree upon as one.[217] If the amount and economic value of the claim is below twenty million Japanese yen ("Expedited Procedures"), the arbitral tribunal will consist of only one arbitrator.[218] However, if the claim has a higher economic value, the parties may agree to appoint three arbitrators.[219] Other numbers of arbitrators are not explicitly addressed under the JCAA Rules. In order to facilitate the process of appointing arbitrators, the JCAA maintains a panel of more than one hundred experts in various fields, who are both Japanese and non-Japanese.[220]

The Arbitration Law does not require any specific qualification for arbitrators. However, the parties may agree on specific qualifications of the arbitrators, and each party may challenge an arbitrator based on the lack of qualifications agreed upon or when there are doubts as to such arbitrator's impartiality or independence.[221] The Arbitration Law allows the parties extensive autonomy with respect to the appointment of arbitrators, provided that the appointed arbitrators are independent. When a person is approached to be appointed as an arbitrator, such person must fully disclose any circumstances that are likely to raise doubts with respect to impartiality or independence, and this obligation persists on the part of the appointed arbitrators during the proceeding.[222]

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

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212 Rule 40 JCAA Rules.
213 Article 16(1) Japanese Arbitration Law 2003.
214 Ibid, Art. 17(1).
215 Ibid, Art. 16.
216 Ibid, Art. 17.
217 Rule 24(1) JCAA Rules.
218 Ibid, Rule 63(1).
219 Ibid, Rule 24(2).
220 JCAA Brochure, p. 6, http://jcaa.or.jp/e/pdf/brochure.pdf.
221 Article 18(1) Japanese Arbitration Law 2003.
222 Ibid, Art. 18.

The parties can agree to discharge an arbitrator.[223] In addition, according to Article 19 of the Arbitration Law, which is similar to the Model Law, the parties are free to agree on a procedure for challenging an arbitrator. If the parties cannot agree, the arbitral tribunal decides on the challenge upon request of a party.[224] A party should send a written challenge request, specifying the reasons, to the arbitral tribunal within fifteen days after the later of either: (1) the day it became aware of the constitution of the arbitral tribunal; or (2) when it became aware of any circumstances providing grounds for such challenge. If the challenge is not successful, the party may appeal the decision to the district court with the competent jurisdiction. Such request must be made to the district court within thirty days after having received notice from the arbitral tribunal of the decision rejecting the challenge. In order to avoid deliberate delay in the arbitration proceeding by either party, the arbitral tribunal may commence or continue the proceeding and even decide on the arbitral award during the district court proceeding. Additionally, the Arbitration Law provides that a party may request the district court to remove an arbitrator if such arbitrator becomes *de jure* or *de facto* unable to perform its functions or delays the procedure without justifiable reason.[225]

The Arbitration Law does not contain any provision on immunity of the arbitrators, whereas Rule 13 of the JCAA Rules contains an express grant of immunity in favor of the arbitrators, the JCAA, and its officers and staff, for any acts or omissions in connection with the arbitration, unless such acts or omissions constitute willful or gross negligence. The Arbitration Law, on the other hand, specifically provides strict criminal penalties for corruption of arbitrators (including bribery).[226]

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

There are no provisions in the Arbitration Law on representation in arbitral proceedings. For a long period of time, the JCAA and the Japanese Federation of Bar Associations interpreted Article 72 of the Lawyers Act (*Bengoshi Hou*, Law No. 205 of 1949) to prohibit all foreign lawyers to represent parties in arbitration proceedings.[227]

Recently, however, it has been acknowledged that foreign lawyers registered in Japan as a "foreign lawyer admitted to practice in Japan" ("G*aikokuhou Jimu Bengoshi*," often referred to as "*Gaiben*") may represent parties in arbitration proceedings in Japan.[228]

Furthermore, it has also been accepted that foreign lawyers (not registered in Japan as *Gaiben*), who are practicing outside Japan, may represent clients in Japan in an arbitration proceeding, provided that their appointment takes place outside Japan.[229]

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223 Ibid, Art. 21(1)(iii).
224 Ibid, Art. 19.
225 Ibid, Art. 20. *See also* Rule 29 JCAA Rules.
226 Chapter X Japanese Arbitration Law 2003.
227 Osamu Inoue and Tatsuya Nakamura *supra* n.1, p.702.
228 Peter Godwin, *supra* n.7, p.4.
229 Ibid.

8.11 When and under what conditions can courts intervene in arbitration?

The district court will not intervene in an arbitral proceeding except as provided in the Arbitration Law,[230] which specifically defines circumstances where the district court may get involved, and establishes the supportive and assisting role the district court plays in arbitration.

According to the Arbitration Law, the district court may intervene in arbitration proceedings, *inter alia*, in the following cases:

- Service of notice (Art. 12(2));
- Appointment of an arbitrator (Art. 17(3));
- Challenge of an arbitrator (Art. 19(4));
- Removal of an arbitrator (Art. 20);
- Determination on the jurisdiction of the arbitral tribunal (Art. 23(5));
- Taking of evidence (Art. 35);
- Setting aside of an arbitral award (Art. 44); and
- Enforcement of an arbitral award (Art. 46(1)).

The district court may dismiss an action brought before it if a respondent/defendant so requests. However, this does not apply in the event that an arbitration agreement becomes null or invalid, or when the arbitration proceedings cannot be commenced based on the arbitration agreement of the parties, or when the request is made by a respondent at a later stage of the proceedings (e.g. after presentation of its statement in the oral hearing). In order to prevent any possible deliberate delay by either party, the arbitral tribunal may commence or continue its proceeding and make an arbitral award while the action is pending in the district court.[231]

Regardless of the arbitration agreement of the parties, a party may directly request the district court to grant injunctive relief, before or during arbitral proceedings, as an interim measure of protection in connection with the subject matter of the dispute brought to the arbitration.[232]

8.12 What are the formal requirements for arbitral awards?

The formal requirements of the arbitral award are set out under Article 39 of the Arbitration Law.[233] The arbitral award is made in writing and is signed by the arbitrators who issued it. If the arbitral tribunal has more than one arbitrator, the signature of the majority of them on the arbitral award is sufficient, provided that the reason for the

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230 Article 4 Japanese Arbitration Law 2003.
231 Article 14(2) Japanese Arbitration Law 2003.
232 Ibid, Art. 15. *See also* Article 37(5) Japanese Civil Provisional Remedies Law (Law No. 91 of 1989).
233 *See also* Rule 54 JCAA Rules.

omission of signatures of other arbitrators is stated. The arbitral award must state the reason upon which it was based, unless otherwise agreed by the parties. The arbitral award must further stipulate the effective date and the place of arbitration.[234] The JCAA Rules state that once the arbitral tribunal considers the proceeding to be mature enough to render an arbitral award, they will render it within five calendar weeks (the timeframe may be extended up to a maximum of eight calendar weeks).[235] According to the Expedited Procedures, the arbitral award must be made within three calendar months after establishment of the arbitral tribunal.[236]

The arbitral tribunal must notify each party by sending them a copy of the arbitral award signed by the arbitrators. According to the Arbitration Law, depositing the arbitral award with the district court is no longer necessary in order to make the award effective,[237] although, if the parties opt for the JCAA Rules, a copy of the award must be lodged within the JCAA.[238]

According to Article 45 of the Arbitration Law, an arbitral award (irrespective if the place of arbitration was Japan) generally has the same effect in Japan as a final and conclusive district court judgment, and therefore is not subject to appeal.[239] Under the Arbitration Law, settlements reached during arbitration procedures are subject to the same formal requirements and have an effect equivalent to arbitral awards.[240] Rule 54.6 of the JCAA Rules states that any arbitral award shall be final and binding upon the parties.

8.13 On what conditions can arbitral awards be appealed or rescinded?

Article 44 of the Arbitration Law sets forth the requirements to rescind an arbitral award, stating that a party may ask a district court to set aside the arbitral award when any of the specific events occur as stipulated therein (e.g. the arbitration agreement is not valid; the party making the application was not given notice during the proceeding to appoint arbitrators, or such party was not able to present its case in the proceeding).[241] The application to a court to rescind the arbitral award must be made within three calendar months after receipt of the notification of the award (or its correction) and an immediate appeal can be filed by the other party against such application to rescind the award.[242]

Furthermore, Article 41 of the Arbitration Law provides for the correction of errors (e.g. in computation, clerical or typographical mistakes) in the arbitral award.[243] Such corrections may be done by the arbitral tribunal at its own discretion or by a party's

234 Article 39 Japanese Arbitration Law 2003.
235 Rule 53 JCAA Rules.
236 Rule 65 JCAA Rules. Expedited Procedures apply only to disputes having an economic value lower than twenty million Japanese yen.
237 Osamu Inoue and Tatsuya Nakamura, *supra* n.1, p.705.
238 Rule 55(1) JCAA Rules.
239 For a list of cases where the arbitral award will not be recognized, *see* Article 45(2) Japanese Arbitration Law 2003.
240 Article 38(2) Japanese Arbitration Law 2003.
241 Article 44(1)(i.)-(vii.) Japanese Arbitration Law 2003. Requirements are based on Article 34 of the Model Law.
242 Article 44(2) Japanese Arbitration Law 2003.
243 *See also* Rule 56 JCAA Rules.

request.[244] Unless otherwise agreed upon by the parties, the request for such correction should be made within thirty calendar days from the receipt of the notice of the arbitral award, together with issuing an advance or simultaneous notice to the other party stating the content of the request. The arbitral tribunal will then make a ruling with respect to the request for correction of the arbitral award within thirty calendar days of such request; this time frame may be extended if necessary.

8.14 What procedures exist for the enforcement of foreign and domestic arbitral awards?

The recognition and enforcement of arbitral awards granted for disputes between Japanese parties, irrespective of whether they are made in Japan, is stipulated in the Arbitration Law.[245] A party seeking enforcement of an arbitral award in Japan may ask a district court for the issuance of an enforcement order.[246] The documents to be provided in such action are:

- A copy of the arbitral award;
- A document certifying that the content of said copy is identical to the arbitral award;
- A Japanese translation of such award, if the award is not written in Japanese.

A copy of the arbitration agreement is not necessary.

The enforcement of arbitral awards in Japan rendered in foreign treaty countries is furthermore stipulated, as well as the enforcement abroad of arbitral awards made in Japan, by the multilateral treaties to which Japan is a party.[247] The most relevant is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, which was adopted by Japan on June 20, 1961.[248]

Japan has additionally signed and ratified several bilateral treaties containing provisions on reciprocal recognition and enforcement of arbitral awards. To date, there has been no case where any Japanese district court refused to approve or enforce a foreign arbitral award.[249]

8.15 Can a successful party in an arbitration recover its costs?

The arbitral tribunal may order the parties to make an advance payment to cover the estimated costs of the arbitration procedure, and the failure to make such advance

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244 Article 41 Japanese Arbitration Law 2003.
245 Ibid, Chapter VIII.
246 Ibid, Art. 46.
247 *See* The Japan Commercial Arbitration Association, 'Japan as the Place of Arbitration,' http://jcaa.or.jp/e/arbitration-e/kaiketsu-e/venue.html. Japan has such treaties with 14 countries.
248 For a complete list of signatory countries to the Convention, *see* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html
249 ' Japan as the Place of Arbitration,' *supra* n.77.

payment may prompt the arbitral tribunal to suspend or terminate the arbitral proceeding.[250]

Article 47 of the Arbitration Law additionally provides that the remuneration of the arbitrators will be paid in accordance with the agreement of the parties; failing such an agreement, the arbitral tribunal will determine a reasonable and appropriate remuneration for the arbitrators.[251]

Under Article 49 of the Arbitration Law, the costs of the arbitral proceeding shall be apportioned between the parties in accordance with their agreement; therefore, the parties may provide that the successful party shall recover its costs, or determine that the costs of the arbitral proceeding shall be equally shared regardless of the result of the proceeding. Failing an agreement, each party shall bear its own costs related to the arbitration proceeding.[252]

There is no special provision for the costs of legal representation and assistance in the Arbitration Law. However, if the parties so agree, such expenses will be included in the arbitration costs.[253] Rule 72 of the JCAA Rules follows this interpretation by expressly stating that, unless otherwise agreed by the parties, the arbitral tribunal may include, as part of the costs of arbitration, all or part of the legal representation fees and expenses incurred by the parties while pursuing the proceeding.

The JCAA Rules aim to make arbitration costs transparent and foreseeable by stating that administrative fees are based on the economic value of the claim, and the arbitrator's remuneration is calculated on an hourly basis fixed by the JCAA at the outset of the arbitration process, subject to a certain cap depending on the economic value of the dispute.[254] The request fee shall be borne by the claimant, whereas the administrative fees and necessary expenses incurred during the proceeding shall be allocated by the arbitral tribunal, as set forth in the arbitral award.[255] The remuneration for arbitrators shall be borne equally by the parties, unless the arbitral tribunal allocates such costs in any other manner under special circumstances.[256]

The JCAA updated its fee regulations on March 1, 2004.[257] According to the updated fee schedule of the JCAA, the request fee is 52,500 Japanese yen (JPY), irrespective of the economic value of the claim. The administrative fees vary depending on the economic value of the claim as set forth in the table below:

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250 Article 48 Japanese Arbitration Law 2003.
251 Ibid, Art. 47(2).
252 Ibid, Art. 49(2).
253 Osamu Inoue and Tatsuya Nakamura, *supra* n.1, p.704.
254 *See* JCAA Brochure, p. 6, < http://jcaa.or.jp/e/pdf/brochure.pdf> accessed May 2009. According to the JCAA, the average hourly rate is between 40,000 – 50,000 JPY for a domestic arbitrator, and 60,000 – 70,000 for a foreign arbitrator.
255 Rule 69 JCAA Rules.
256 Ibid, Rule 70.
257 JCAA News and Topics, 'Summary of Amendments,' http://jcaa.or.jp/e/arbitration-e/news-e/gaiyou.html.

Economic Value of the Claim (JPY)	JCAA Administrative Fee (JPY)
claim value < 5,000,000	210,000
5,000,000 < claim value < 10,000,000	210,000 plus 3.15% of excess over 5,000,000
10,000,000 < claim value < 20,000,000	367,500 plus 1.575% of excess over 10,000,000
20,000,000 < claim value < 100,000,000	525,000 plus 1.05% of excess over 20,000,000
100,000,000 < claim value < 1,000,000,000	1,365,000 plus 1.315% of excess over 100,000,000
1,000,000,000 < claim value < 5,000,000,000	4,200,000 plus 0.2625% of excess over 1,000,000,000
claim value > 5,000,000,000	14,700,000
Value difficult to calculate	1,050,000 per claim

8.16 Are there any statistics available on arbitration proceedings in Japan?

During its fifty years of existence, the JCAA has administered the arbitration proceedings of both national and international cases. However, there are a remarkably small number of arbitration cases brought to the JCAA, compared with the arbitration institutions of other major industrialized nations.[258] In general, however, it is difficult to analyze the empirical data on arbitration due to the private nature of the arbitration process.

From 1998 to 2007, the JCAA, the International Chamber of Commerce (Paris) (ICC), and the American Arbitration Association (AAA) received the following number of international arbitration cases:[259]

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
JCAA	14	12	10	17	9	14	21	11	11	15
ICC	466	529	541	566*	593*	580*	561*	521*	593*	N/A
AAA	387	453	510	649	672	646	614	580	N/A	N/A

* Statistics include domestic as well as international arbitrations

The JCAA has concluded cooperative agreements with over forty major international arbitration institutions, and also belongs to the International Federation of Commercial Arbitration Institutions, a global federation of commercial arbitration institutions.[260]

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258 Gerald Paul McAlinn, 'Facilitating Arbitration in Japan: Making the JCAA a Regional Center for ADR,' JCAA Newsletter No. 20, July 2008, p. 8, http://www.jcaa.or.jp/e/arbitration-e/syuppan-e/newslet/news20.pdf.

259 Ibid.

260 JCAA Brochure, p. 11, http://jcaa.or.jp/e/pdf/brochure.pdf.

In order to promote the JCAA in China, the JCAA Rules have recently been translated into Chinese.[261]

8.17 Are there any recent noteworthy developments regarding arbitration in Japan?

Although Japan updated its Arbitration Law in 2004, and the JCAA has accordingly adopted its Rules to make arbitration more accessible, the use of arbitration proceedings in Japan has yet to reach levels similar to those of other developed countries with arbitration systems. Numerous experts have espoused various theories as to why this is so.[262] As already outlined, one of the reasons seems to be that Japanese people prefer opting for dispute settlement methods that do not involve third parties (including courts). With the updated Arbitration Law, the JCAA Rules and the subsequent shift in the legal community towards a more user-friendly arbitration system, it remains to be seen whether the number of arbitration proceedings, including those for which Japan would be a neutral venue, rises or not.

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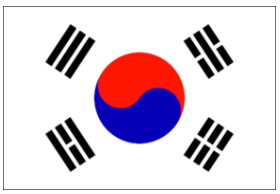
261 The JCAA Rules in Chinese are available at http://jcaa.or.jp/arbitration-j/pdf/pamph-c.pdf.

262 *See* Tony Cole, 'Commercial Arbitration in Japan: Contributions to the Debate on Japanese Non-Litigiousness' for a survey of these various theories. N.Y.U.J. Int'l L. & Pol. 39-113 (Fall 2007).



9. KOREA

9.1 Which law(s) apply to arbitration in the Republic of Korea?

The Arbitration Act, the Arbitration Rules and the KCAB International Arbitration Rules apply to arbitration in the Republic of Korea. The Arbitration Act is a general law concerning arbitration in Korea. The Arbitration Rules are especially made for domestic arbitration procedures while the KCAB International Arbitration Rules aim for international arbitrations. The parties are free to choose the rules which shall be applicable to their arbitration procedure. Therefore in a purely domestic arbitration the parties may agree that the KCAB International Arbitration Rules shall apply while in an international arbitration the parties may agree that the Arbitration Rules shall apply – yet the latter is not advisable since the Arbitration Rules are merely a lighter version of the international rules which are based on the UNCITRAL model law since the revision in 1999.

Apart from that the parties may choose the rules of law of another country or state or even create their own arbitration rules and agree that those shall govern their particular arbitration (cf. Art. 29 (1) Arbitration Act).

9.2 Has the Republic of Korea acceded to the New York Convention?

Yes, the Republic of Korea is a member of the New York Convention since February 8, 1973 and the Korean Commercial Arbitration Board (KCAB) has signed more than 30 international arbitration agreements and cooperation agreements with similar organizations throughout the world.

9.3 Can Parties agree on foreign arbitration institutions (i) if both parties are domiciled in the Republic of Korea, (ii) if one party is domiciled in the Republic of Korea and the other party abroad?

Yes, in both cases the parties are free to agree on either a domestic or a foreign arbitration institution.

9.4 Does the national law contain substantive requirements for the arbitration procedure to be followed?

Although there is a procedural requirement which is provided in the relevant laws and regulations (the parties shall be treated equally in the arbitral proceedings, each party shall be given a full opportunity of presenting their case), the parties are free to agree on any procedure (Art. 20 (1) Arbitration Act).

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

Yes, if the respondent raises the plea that the arbitration clause exists and if it proves to be valid, the court will dismiss the action unless it finds that the agreement is inoperative or incapable of being performed (Art. 9 (1) Arbitration Act). If the respondent does not raise such plea even a valid arbitration clause will not bar access to state courts.

9.6 Main arbitration institutions

The main arbitration institution in Korea is the **Korean Commercial Arbitration Board**. It was established in 1966 and is an internationally recognized arbitration board. The KCAB Panel of Arbitrators includes 1,156 arbitrators of 31 nationalities from legal, academic, business and other backgrounds. 104 arbitrators are non-residents of Korea.

Although other forums exist we strongly recommend the use of the Korean Commercial Arbitration Board over all others because procedures are conducted fast and according to the principles of a lawful state, in case of international disputes an international chairman can be requested and it is the most respected arbitration institution in Korea.

The main office of the **Korean Commercial Arbitration Board** is located at:

43rd Fl., Trade Tower (Korea World Trade Center) 159, Samsung-dong, Gangnam-gu, Seoul 135-729, Republic of Korea.
Telephone: +82-2-551-2000/19
Fax: +82-2-551-2020/2113

The Pusan office is located in Rm.1306, Korea Express Bldg., #1211-1, Choryang-dong, Dong-gu, Busan 601-714, Republic of Korea.
Telephone: +82-51-441-7036/8
Fax: +82-51-441-7039

On the website of the Korean Commercial Arbitration Board http://www.kcab.or.kr you may find the Arbitration Act, the Arbitration Rules and the KCAB International Arbitration Rules under the link Law/Rules.

9.7 Model clause of the institution

Even though the KCAB does not provide an extensive list of model clauses, it recommends the following standard arbitral clause:

"All disputes, controversies, or differences which may arise between the parties, out of or in relation to or in connection with this contract, or for the breach thereof, shall be finally settled by arbitration in Seoul, Korea, in accordance with Arbitration Rules of the Korean Commercial Arbitration Board and under the

Laws of Korea. The award rendered by the arbitrator shall be final and binding upon both parties concerned."

9.8 How many arbitrators are usually appointed?

Under Art. 11 Arbitration Act the parties are free to agree on the number of arbitrators. Without any agreement the dispute shall be decided by three arbitrators. No nationality shall be excluded from acting as an arbitrator unless the parties have agreed otherwise (Art. 12 (1) Arbitration Act).

If the parties have agreed that the Arbitration Rules shall be applicable but have not agreed about a certain number of arbitrators the secretariat shall, according to Art. 23 Arbitration Rules, determine between one or three arbitrators as appropriate.
If the parties have agreed that the KCAB International Arbitration Rules shall be applicable they can decide about either three or one arbitrator(s). Without any agreement concerning the number of arbitrators the dispute shall be decided by one arbitrator (Art. 11 KCAB International Arbitration Rules).

Under all three regulations the parties are free to appoint the arbitrators or decide upon a procedure of appointment. However, if there is no agreement to be reached the decision shall be made by the secretariat. In doing so the secretariat shall, if the parties are of different nationalities or domiciles, upon the request of a party, appoint as sole arbitrator or as chairman of arbitrators such person, who is of different nationality and domicile as the parties.

9.9 Under which condition can the appointment of an arbitrator be challenged?

Parties may challenge an arbitrator when either his independence, impartiality or qualification is doubtful. If the challenging party has participated in the appointment of the arbitrator it may challenge him only for a reason which the party became aware of after the arbitrator was appointed. (Art. 13 Arbitration Act; Art. 13 Nr. 1 KCAB International Arbitration Rules).

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

The parties may be represented by any counsel or other person whom they grant power of attorney (Art. 7 Arbitration Rules; Art. 7 KCAB International Arbitration Rules). There are no restrictions as to nationalities; foreign lawyers / law firms are allowed to appear as party representatives in arbitration proceedings without being joined by local counsel. Under Art. 7 Arbitration Rules the tribunal has the right to reject a representative if it deems him improper.

9.11 When and under what conditions can courts intervene in arbitration?

Courts can intervene in arbitration only by setting aside the arbitration award if the court finds on its own initiative that the subject-matter of the dispute is not capable of settlement by arbitration under the law of the Republic of Korea or the recognition and enforcement of the award is in conflict with the good morals or other public policy of the Republic of Korea (Art. 36 (2) Nr. 2 Arbitration Act).

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

Yes, they do.

According to Art. 41 Arbitration Rules the tribunal may, at the application of any party, issue to other parties such orders as may be deemed necessary to safeguard the property which is the subject matter of the dispute without prejudice to the rights of the parties or to the final determination of the dispute.

According to Art. 28 Nr. 1 KCAB International Arbitration Rules the arbitral tribunal may at the request of a party order any interim or conservatory measure it deems appropriate as soon as the file has been transmitted to it, unless the parties have agreed otherwise. The tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party.

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

According to Art. 32 Arbitration Act the arbitral award shall be written and signed by the arbitrators. It shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms. It shall further state its date and place of arbitration.
The duly authenticated award made and signed as mentioned above shall be delivered to each party and the original award shall be sent to and deposited with the competent court, accompanied by a document verifying such delivery.

Art. 48 (1) Arbitration Rules states that unless parties have otherwise agreed or it is so specified by law, the award shall be rendered not later than 30 days from the date of the close of the hearings. According to Art. 49 (1) Arbitration Rules it shall be written and signed by the arbitrators. It shall include full personal or corporate names of the parties and their addresses, the full name and address of the representative if a party was represented, the place of arbitration, the date of the award and the conclusion, however, the reasons for the award my be omitted if the parties have so agreed or the award is the result of a settlement.

According to Art. 33 KCAB International Arbitration Rules the arbitral tribunal shall make the award within 45 days from the date on which the final submissions are made or

the hearings are closed whichever comes later, unless the parties have agreed otherwise. The secretariat may extent this time limit on reasonable grounds.
The award shall be written and shall give the reasons upon which the award was based. It shall contain the place of the arbitration, the date of the award and be signed by the arbitrators (Art. 31 KCAB International Arbitration Rules).

9.14 Under what conditions can arbitral awards be (i) appealed or (ii) rescinded?

Arbitral awards cannot be appealed or rescinded. They are treated as verdicts in the last instance and therefore have a final and binding character (Art. 35 Arbitration Act; Art. 31 Nr. 3 KCAB International Arbitration Rules). Recourse against an arbitral award may be made only by an application for setting aside to a court (Art. 36 (1) Arbitration Act). Such action has to be applied for within three months of the date on which the applying party has received the duly authenticated award, or the duly authenticated copy of a correction or interpretation or an additional award respectively (Art. 36 (3) Arbitration Act), and will be carried out only if a reason from the list in Art. 36 (2) Arbitration Act can be found, e.g. a party to the arbitration agreement was under some incapacity under the applicable law or the composition of the arbitral tribunal or the arbitral procedure were not in accordance with the agreement of the parties. (For the complete list please see Art. 36 (2) Arbitration Act.)

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

Enforcement of an arbitral award shall be granted by the judgment of a court (Art. 37 (1) Arbitration Act). The party applying for the recognition or enforcement of an award has to submit the duly authenticated award or a duly certified copy thereof and the original arbitration agreement or a duly certified copy thereof accompanied by a duly certified translation thereof into the Korean language if the award or the arbitration agreement is not made in the Korean language (Art. 37 (2) Arbitration Act).

An arbitral award made in the territory of the Republic of Korea shall be recognized or enforced, unless any ground from the list in Art. 36 (2) Arbitration Act (please see Nr. 9. 14 above) can be found (Art. 38 Arbitration Act).

A foreign arbitral award to which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 applies shall be granted recognition or enforcement in accordance with this Convention (Art. 39 (1) Arbitration Act).

To the recognition or enforcement of all foreign arbitral awards to which this Convention does not apply the provisions of Art. 217 of the Civil Procedure Act, Art. 26 (1) and Art. 27 of the Civil Execution Act shall apply mutatis mutandis (Art. 39 (2) Arbitration Act). As a result it is most difficult if not impossible to recognize or enforce any of such awards.

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

According to Art. 61 (2) Arbitration Rules the costs of arbitration shall be borne by the parties in accordance with the apportionment fixed in the award. However, they shall be borne equally by the parties unless the award assesses such costs of arbitration or any part thereof against any party specified in the award. Art. 52 (2) Arbitration Rules states that the arbitral tribunal shall make a decision concerning the costs.

Art. 40 Nr.1 1 KCAB International Arbitration Rules takes the opposite approach. Here the arbitration costs including administrative fees shall in principle be borne by the unsuccessful party and are therefore recoverable by the successful party. However, the arbitral tribunal, taking into account the circumstances of the case, may, at its discretion, apportion each of such cost items between the parties.

In conclusion it can be said that a successful party can recover its costs under both the national and the international rules.

9.17 Are there any statistics available on arbitration proceedings in the Republic of Korea?

From 1967 to 2008, the KCAB as the main arbitration board in Korea for over 40 years has processed a total of 3,683 arbitration cases. In 2008, the organization received 262 requests for arbitration, and the number of cases continues to rise each year by over 10 %. Approximately 50 international cases are submitted to the KCAB annually.
Among the cases received by the KCAB between 2006 and 2008, construction and real estate-related cases comprised the largest percentage at 37 %, followed by trade at 18 %, technology and information communication at 7 %, and maritime affairs at 6 %.
The average claim amount under dispute for the cases received by the KCAB during the same three-year period was USD 650,000. Cases exceeding USD 1 million in claims numbered 27 in 2006, 44 in 2007 and 36 in 2008, comprising 13 % of the total number of cases received. The largest percentage of cases received by the KCAB during the three-year period was from the Asian region, at 51 %, followed by 20 % from North America and 15 % from Europe. Among the countries involved, the United States comprised 20 % of the total, followed by China (18 %), Japan (9 %), Germany (5 %), Indonesia (5 %), and Hong Kong (3 %).

The KCAB received and processed a total of 17,733 mediation cases between 1967 and 2008. The busiest year was 2008, with 785 mediation cases received by the board.

These latest statistics for arbitration cases in the KCAB will be published the KCAB in a newsletter that will be sent to international law firms in summer 2009. Other people interested can receive these figures from the KCAB upon request.

9.18 Are there any recent noteworthy developments regarding arbitration in the Republic of Korea (new laws, new arbitration institutions,

significant court judgments affecting arbitration etc)?

The KCAB is intending to make changes in the International Arbitration Rules. These are likely to come into effect some time during 2010, after all input from Korean lawyers concerned with arbitration has been evaluated.

Fairly recent changes in the Korean Law require all Korean lawyers to undergo training in arbitration. The KCAB offers such trainings twice a year and has so far successfully held three such training sessions, two in 2008 and one in the beginning of 2009. The next training is likely to be offered in September 2009.

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10. MALAYSIA

10.1 Which law(s) apply to arbitration in Malaysia?

There are, at the moment, two Acts prevailing in Malaysia, namely the Arbitration Act 1952 (1952 Act) which is based on the English Arbitration Act of 1889 and the 2005 Arbitration Act (2005 Act) which is largely based on the Model Law and the New Zealand Arbitration Act of 1969, which came into force on the 15th of March 2006. The 1952 Act applies to arbitrations commenced prior to the 15th of March 2006. The 2005 Act applies to arbitrations commenced after the 15th of March 2006. The 1952 Act was amended on the 1st of February 1980, to incorporate a new Section 34, whereby the jurisdiction of the Malaysian Courts was excluded in respect of arbitrations held under the Convention of the Settlement Disputes between States of Nationals and other States 1965 (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL) and the Rules of Arbitration for the Kuala Lumpur Regional Centre for Arbitration (KLRCA Rules).

Section 34 has been interpreted by the Malaysian Courts as excluding interim relief such as security for costs[263]despite the wording of Article 26.3 of the KLRCA Rules which provides for interim measures. The position has been clarified by the Court of Appeal in *Thye Hin Enterprises Sdn Bhd v. Daimlerchrysler Malaysia Sdn Bhd*[264] where the court stated that interim relief can be granted despite Section 34. The provisions of Section 34, was to cater for international arbitrations. However, the Malaysian Courts have interpreted the Section to apply to domestic arbitrations as well.

The 2005 Act applies to both domestic and international arbitrations. The Act is divided into four parts. Part 1 contains the definition section, including important definitions of international arbitration and domestic arbitration. Parts 1, 2 and 4 apply to all arbitrations. Part 3, which contains the provisions for appeals from arbitration awards on points of law, applies only to domestic arbitrations unless the parties opt out. It does not apply to international arbitrations unless the parties opt in.

Section 3 of the 2005 Act makes the main distinction between international and domestic arbitrations and sets out the territorial limits and scope of the 2005 Act. This section incorporates the provision for opting-in and opting-out of Parts 1, 2 and 4 of the Act in respect of domestic and international arbitrations where the seat of the arbitration is in Malaysia. However, Section 3 does not deal with the situation where the seat of arbitration is not in Malaysia. The inclusion of a provision equivalent to Article 1(2) of the Model Law would have clarified the situation, but was omitted in the 2005 Act.

There is no equivalent provision to Section 3 of the 2005 Act in the 1952 Act. The 1952 Act applies both to domestic and international arbitrations.

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263 *Klockner Industries-Analagen GmbH v. Kien Tat Sdn Bhd* (1990) 3 MLJ page 183 at 185.

264 (2004) 3 CLJ page 591

The Malaysian Legal System

Malaysia has a democratic system of government which is based on the Westminster Model. It has a written constitution which is the supreme law. Malaysia practices separation of powers namely the executive, the legislature and the judiciary. The Malaysian judicial system consists of the Federal Court, which is the apex appellate court, the Court of Appeal, the High Court and the Subordinate Courts. The Federal Court only hears appeals by way of leave. The Court of Appeal hears appeals from the High Court. The High Court has unlimited jurisdiction in civil matters and arbitration applications and proceedings are made to it.

10.2 Has Malaysia acceded to the New York Convention?

Malaysia is a signatory to the New York Convention. The Convention has been given effect to by the Recognition and Enforcement of Foreign Arbitral Awards 1985 which was enacted on the 3rd of February 1986 (New York Convention Act). The 2005 Act repealed the New York Convention Act but has replaced it in Sections 38 and 39.

Malaysia is also a signatory to the Convention on the Settlement of Investment Disputes and has enacted the Convention on Settlement of Investment Disputes Act 1966 to give effect to the Convention.

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

The 1952 and 2005 Acts apply only when there is a written agreement. There are important differences in the definition of the phrase "written agreement" in the two Acts.

The 1952 Act in Section 2, stipulates that a written agreement is required to submit present and future disputes to arbitration, whether an arbitrator is named or not. The two Acts do not provide a specific form of arbitration clause. The writing requirement is satisfied where the document recognizes, incorporates or confirms the existence of an agreement to arbitrate. [265] It may be gathered from a series of documents as well.

Section 9 of the 2005 Act defines an arbitration agreement to mean an agreement in writing to submit to arbitration all or certain disputes which have arisen or which may arise between parties in respect of a defined legal relationship whether contractual or not. This Section is based on Article 7 of the Model Law. Sections 9.2 to 9.5 of the Act illustrate what constitutes an agreement to arbitrate. The Sections provide for an agreement to be in writing where there is an exchange of letters, telexes, facsimile or other forms of electronic communication. An exchange of pleadings in which the existence of an arbitration agreement is acknowledged, can also constitute an arbitration clause. There is also a provision for an arbitration clause to be incorporated by reference

[265] *Bauer (M) Sdn Bhd v. Daewoo Corp.* (1999) 4 MLJ 545 at 565.

in another document, for instance, a bill of lading may, by specific reference, incorporate an arbitration clause in a charter party.

Parties normally insert an arbitration clause in their contractual arrangements. However, standard form contracts incorporating an arbitration clause are the norm in commercial contracts.

The Malaysian Courts will follow the common law principal that the termination of the principal contract does not by itself put an end to the arbitration clause contained in the principal contract. The position it takes is that the arbitration clause is separable from the principal agreement and it is not affected by termination. However, if the principal contract is void *ab initio*, then the arbitration clause will not survive.

10.4 How many arbitrators are usually appointed?

The 1952 Act and 2005 Act recognize the principle of party autonomy. Usually, one or three arbitrators are appointed.

10.4.1 Appointment of Arbitrators

The 1952 Act

The 1952 Act enables the parties to agree on the qualifications of the arbitrators. The arbitration agreement will normally specify the number of arbitrators.

When the parties are unable to agree on the appointment of an arbitrator, they resort to the High Court to appoint an arbitrator pursuant to Section 12 of the 1952 Act. The selection of an arbitrator is left to the discretion of the High Court judge. The general practice is for both parties to file an affidavit suggesting names of suitable arbitrators or alternatively, to bring to the attention of the court the nature of the dispute so that a suitable and appropriate arbitrator can be appointed.

The 2005 Act

The procedure for appointment of arbitrators under the 2005 Act is set out in Section 13 of the 2005 Act. It corresponds with Article 11 of the Model Law and adopts a two level approach to grant the parties autonomy in determining the procedure for appointment of arbitrators followed by any default mechanism if none has been agreed. The 2005 Act does not impose limits on who may be appointed as arbitrator. The parties are free to choose their arbitral tribunal. Where the arbitration agreement or parties do not stipulate the number of arbitrators, a single arbitrator will constitute a tribunal.

The 2005 Act in Section 12 provides that in the case of international arbitrations, there shall be three arbitrators and in the case of domestic arbitration, there should be a single arbitrator, in the event the parties fail to determine the number of arbitrators. In

practice, parties normally designate an uneven number of arbitrators. The parties are also free to agree on a procedure for appointing the presiding arbitrator.

The parties are also generally given a free hand to agree on the procedure for the appointment of arbitrator or arbitrators and this is provided for in Section 13.2 of the 2005 Act. Where the parties fail to make provision for the appointment of procedure in the arbitration agreement or if there is disagreement or if they refuse to exercise their rights to appoint a member of the arbitral tribunal, then the Director of the KLRCA is given the power to appoint the arbitrator and the Director has to do so within 30 days, failing which the parties can apply to court for the appointment. There is statutory guidance in Section 13.8 as to how the Director should exercise his discretion in making any appointment. There is no right of appeal from the decision of the Director.

10.4.2 Qualifications of Arbitrators

There are no special qualifications required of arbitrators under both Acts. Section 13 of the 2005 Act provides that no person shall be precluded by reason of nationality from acting as an arbitrator unless there is agreement to the contrary. Arbitrators also do not need legal training. Parties may contractually agree that arbitrators shall have specific qualifications.

10.4.3 Impartiality and Independence of the Arbitrator

It is axiomatic that an arbitrator must be independent and impartial. The impartiality and independence of the arbitrator comes into prominence in circumstances where the arbitrator has an interest in the outcome of the dispute.

The 1952 Act

The 1952 Act does not have a specific requirement for disclosure but it is advisable for arbitrators acting under the 1952 Act to disclose circumstances that may bring their impartiality or independence into question. The Court may exercise its statutory authority to remove an arbitrator under Section 25 of the 1952 Act if the arbitrator is impartial.

The 2005 Act

Section 14 of the 2005 Act provides that an arbitrator must be independent and impartial. Circumstances which will raise issues as to impartiality and independence include a personal, business or professional relationship with one party to a dispute or an interest in the outcome of the dispute.

Section 14.1 of the 2005 Act requires an arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality. This is a continuing duty from the time of appointment to the rendering of the award. The position under the 1952 Act,

though not a statutory requirement, was that it is advisable for arbitrators acting under that Act also to disclose such circumstances.

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

Where the impartiality or independence of an arbitrator is challenged or brought into question, the procedures for doing so are stated under Section 15 of the 2005 Act. There is no equivalent provision in the 1952 Act. The procedures for challenge would normally also be drafted in the rules under which the parties have agreed to arbitrate. A party should exhaust those procedures before challenging the appointment of an arbitrator on grounds of the arbitrator's impartiality or independence in court. The normal grounds on which challenges are mounted are usually bias and conflict of interest. The test for bias is "real danger of bias."

10.6 What mandatory requirements are there under Malaysian arbitration legislation that must be followed?

The parties to an arbitration are free to agree on the applicable procedures in an arbitration. They may choose institutional arbitration rules or an ad-hoc arbitration.

Section 2 of the Evidence Act 1950 stipulates that it does not apply to arbitration proceedings. The arbitral tribunal normally decides issues of relevancy, admissibility and the weight to be attached to the evidence tendered at the hearing.

10.6.1 Procedure

The 1952 Act

The 1952 Act is silent on the issue of who should determine the procedures to be applied in arbitration. The principle of party autonomy dictates the procedures. Nevertheless, it is advisable for the parties to follow well-recognized arbitration rules.

The 2005 Act

Arbitration procedure is provided for in Sections 20 to 29 of the 2005 Act.

The procedures are largely a matter for the arbitrator to decide, subject to any agreements that have been reached by the parties as provided for in Section 21. Section 25 of the 2005 Act which corresponds with Article 23 of the Model Law, sets out the procedure for identifying the issues in dispute in a formal manner. There is provision for each party to state the facts supporting its claim or defence and also to submit

documents and other references to the evidence relied upon. There are also provisions for the parties to amend their pleadings. In practice, arbitrators in Malaysia tend to follow the provisions of Section 25 for parties to file Points of Claim followed by Points of Defence and Counterclaim and other written pleadings.

The arbitrator by Section 19 of the 2005 Act, is given the power to order interim measures. Arbitrators have the power to order discovery of documents within the possession and control of the parties. The arbitral tribunal also has various powers to ensure the proper conduct and regulation of the arbitral process. It is often expressly conferred with powers to make orders or give directions regarding security for costs, the taking of evidence by affidavit, and preservation and interim measures to ensure that the award eventually handed down by the arbitral tribunal is not rendered ineffectual by the dissipation of assets. The arbitral tribunal has the power to order interim injunctions and other interim measures of relief. It is open to the parties to seek the assistance of the court in the course of the arbitration, to have the court issue subpoenas to witnesses. Normally, hearings are held orally in respect of arbitrations unless parties agree to a documents-only arbitration. However in the case of an arbitration under the 2005 Act as provided for in Section 26, the tribunal has a discretion to hold an oral hearing or conduct the arbitration on the basis of documents. The tribunal must hold an oral hearing if required by a party. The tribunal under the 2005 Act can terminate proceedings if a claimant, without sufficient cause, fails to deliver its pleading within the time agreed to by the parties or determined by the tribunal. However, if the respondent fails to deliver a defence or if a party fails to appear at the hearing or produce documents, the tribunal may proceed with the arbitration and hand down an Award.

10.6.2 Jurisdiction

The arbitral tribunal pursuant to Section 18 of the 2005 Act has the power to determine its own jurisdiction. This encompasses Article 16 of the Model Law. There is no equivalent provision in the 1952 Act.

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

In *Zublin Muhibbah Joint Ventures Sdn Bhd v Government of Malaysia,* [266] the Malaysian High Court held that arbitration proceedings do not come within the purview of the Legal Profession Act 1976 and therefore, the parties can be represented by foreign lawyers who need not be members of the Malaysian Bar Council. There is also no requirement that the parties need to be represented by legally qualified persons.

[266] (1990) 3 MLJ 125

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

The 1952 Act

The 1952 Act does not define an award. Section 15 gives statutory recognition to two types of awards namely final award and interim awards.

An award has been defined in *Jeuro Development Sdn Bhd v Teo Teck Huat (M) Sdn* Bhd[267]as a decision made by an arbitrator on a controversy submitted to him. Since the award must be on the controversy submitted for arbitration, the decision must be one that decides on all the issues involved in the controversy.

Mr Justice K C Vohrah in *MCIS Insurance Bhd v Associated Cover Sdn Bhd*[268] stated: "Under the Act, there is nothing, which prohibits an interim award from being made by an arbitrator unless a contrary intention is expressed in the arbitration agreement. The expression 'interim award' appearing in Section 15 is not defined anywhere in the Act. Nor is the expression 'award' defined. Whatever the expression used, whether 'award', 'final award', 'interim award' or 'temporary award' in the context of our law on arbitration, what is important to ascertain is whether it amounts to a decision on the questions referred for determination by the arbitrator; any form of words amounting to a decision of the questions referred to will be good as an award."

The 2005 Act

Section 33 of the Act defines an award as a decision of the arbitral tribunal on the substance of the dispute and includes interim, additional, agreed and final award. The reference to interlocutory awards in the definition must necessarily mean that it includes interlocutory awards, which protect the interest of the parties or regulate the proper conduct of the arbitration prior to the determination of the merits of the dispute. Therefore, interlocutory orders which do not include the merits such as security for costs and discovery made by the tribunal in the course of arbitration can be enforced with leave of the Court.

10.8.1 Form of the Award

The 1952 Act

Under the 1952 Act, there is no prescribed form for an award. It need not even be in writing but if it is not written, it gives rise to problems of enforcement. Generally arbitral awards even under the 1952 Act are in writing but they need not contain reasons unless the parties have agreed that the arbitrator is to hand down a reasoned award. A

[267] (1998) 6 MLJ 545
[268] (2001) 2 MLJ page 561 at 567

Court will only order the arbitrator to provide reasons if it was one of the terms of his appointment that a reasoned award is required. The award should be dated and should state the place of arbitration.

The 2005 Act

Section 33(1) of the 2005 Act, requires that the award should be in writing and signed by the arbitrator or arbitrator(s). Where there are three arbitrators, the signature of the majority of the members of the arbitral tribunal would suffice provided the reason for any omitted signature is stated. The award should state the reasons for the award unless the parties have stated otherwise or if the award is made on agreed terms. The award should also be dated and state the place of arbitration.

10.8.2 Contents of the Award

The award should, apart from the substantive relief, which should be spelled out in the award, deal with all matters in dispute. The award should also be unambiguous and certain.

10.8.3 Award by Consent

If during the arbitral proceedings, the parties settle the dispute the arbitral tribunal may record a settlement and hand it down as an arbitral award on agreed terms. The award has the same status and effect as an arbitral award on the merits.

10.8.4 Correction and Interpretation of Awards

Pursuant to Section 35 of the 2005 Act, a party may within 30 days of the receipt of the award, request that the arbitrator correct any errors in computation, clerical or typographical errors or any errors of a similar nature. The arbitrator can correct such errors on its own initiative. Under the 1952 Act, the arbitrator only has the power to correct clerical mistakes and errors arising from an accidental slip or omission, pursuant to Section 18.

The 2005 Act also gives the arbitral tribunal authority at the request of a party made within 30 days of the receipt of the award, to interpret the award on a specific point or part of the award and such interpretation forming part of the award.

There is no equivalent provision empowering interpretations of awards by the arbitrator under the 1952 Act.

10.9 Recourse against awards made in Malaysia

The 2005 Act

Section 41 of the 2005 Act gives power for the determination of a point of law. This appears to be an attempt to replace the old statement of case procedure in Section 22 of the 1952 Act. Section 41, however, requires the consent of the parties or the arbitral tribunal.

Section 42 of the 2005 Act also enables the court to refer questions of law. This section has also no equivalent in the Model Law.

The above sections are optional and they apply to domestic arbitrations unless the parties opt out. In the case of international arbitrations, these sections would only apply if the parties specifically opt in.

There is no appeals procedure against an award made in Malaysia under the 2005 Act. The only recourse is to set aside the award. The application to set aside an award has to be made within three months of the receipt of the award. The grounds for setting aside such an award are set out in Section 37 of the Act and include, inter-alia that the award is contrary to the public policy of Malaysia, fraud or a breach of the rules of natural justice.

The 1952 Act

There is no procedure for an appeal of an award. The award may be set aside pursuant to Section 24(2) of the 1952 Act on grounds that there has been misconduct on the part of the arbitrator. The court, if satisfied that there was misconduct, may set aside or remit the award.

Misconduct is not defined under the 1952 Act. It normally involves objections of actual or possible unfairness. It is not misconduct for an arbitrator to arrive at an erroneous decision whether his error is one of fact or law. In *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority*,[269] Judge Raja Azlan Shah applied the following tests:

(1) whether there exist grounds from which a reasonable person would think that there was a real likelihood that the arbitrator could not or would not fairly determine the issue; and

(2) whether the arbitrator's conduct was such as to destroy the confidence of the parties, or either of them, in his ability to come to a fair and just conclusion. This case was cited with approval by the Court of Appeal in *Hartela Contractors Ltd. v Hartecon JV Sdn Bhd*.[270]

The award may also be set aside when there is some defect or error on the face of the award - for instance, not considering all the issues that have arisen, or a mistake has been

269 [1971] 2 MLJ 210
270 [1999] 2 MLJ 481

corrected, or new evidence is available, which could not with reasonable diligence, have been discovered, or if the dispute has not been fully adjudicated and where the arbitrator has exceeded his jurisdiction.

10.10 What procedures exist for enforcement of foreign and domestic awards in Malaysia?

The 1952 Act

Arbitral awards may with the leave of the High Court be enforced as a judgment of the High Court pursuant to Section 27. The 1952 Act does not set out grounds for refusing enforcement. However, the grounds for refusing enforcement would include grounds such as misconduct on the part of the arbitrator, ambiguity and uncertainty of the award incompleteness and where the arbitrator has exceeded his/her jurisdiction. Moreover, when a party is not able to resort to summary procedure under Section 27, the party may enforce it by way of an action on the award.

The 2005 Act

Sections 38 and 39 deal with recognition and enforcement of foreign arbitral awards and the grounds for refusing recognition or enforcement. These sections apply to awards sought to be enforced in Malaysia both in respect of domestic and foreign awards.

Section 38 sets out the procedure to enforce a foreign award. Section 38, while corresponding with Section 35 of the Model Law also differs significantly. The Model Law provides for recognition of arbitral awards irrespective of the country in which they were made. The Malaysian section however provides for recognition of arbitral awards made in respect of domestic arbitration or an award from a foreign state. It is therefore clear that the 2005 Act has not accepted the principle of giving recognition to all foreign awards by limiting the term "foreign state" to "convention countries". Therefore, an arbitral award made in an international arbitration where the seat is Malaysia would not be covered. This is an oversight of the draftsman and steps are being taken to amend the section. For example, an ICC arbitration held in Kuala Lumpur between a Malaysian party and a foreign party cannot be enforced under the provisions of Section 38.

There was a hiccup with regard to the enforcement of foreign arbitral awards as a consequence of the Court of Appeal decision of *Sri Lanka Cricket v World Sport Nimbus Pte Ltd* [271]. The court decided that gazette notification under section 2(2) of the New York Convention Act was a compulsory requirement for enforcement of a Convention award under that Act[272].

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271 (2006) 3 AMR 750

272 The Act omitted to gazette the convention countries. This Convention award handed down in Singapore was not enforced.

Section 39 deals with grounds for refusing recognition or enforcement and it corresponds with Article 36 of the Model Law. The grounds for refusal for recognition are exhaustive and if none of these grounds are present, the award must be recognized. The area in which a dispute may arise is the question of public policy. The issue would be whether the Malaysian courts would apply a narrow or wide interpretation of the concept of public policy.

10.11 Stay of arbitration proceedings

The 1952 Act

Section 6 of the 1952 Act gives the court power to stay civil proceedings pending arbitration. This power is discretionary. There has been some controversy over whether a conditional appearance or an unconditional appearance is required for stay. The Court of Appeal in the case of *Interscope Versicherung Sdn Bhd v Sime Axa Assurance Sdn Bhd,*[273] did decide that Section 6 of the 1952 Act differed fundamentally from the equipollent English Arbitration Act 1956, namely Section 4(2) in the English provision because its language expressly excludes the entry of an appearance as amounting to a step in the proceedings. It must be noted that under Section 6 of the 1952 Act, it is a requirement that the party applying for a stay has not taken a step in the proceedings. The Court of Appeal further decided that Section 6 of the Act makes no such qualification. In September 2000, the Federal Court, without giving written reasons, reversed the decision of the Court of Appeal.

The Court of Appeal in *Trans Resources Corp Sdn Bhd v Sanwell Corp,*[274] presumably unaware of the decision by the Federal Court, affirmed and followed its own decision in the *Interscope Versicherung* case. This decision must be considered as "per incuriam." The Federal Court subsequently in *Sanwell Corporation vTrans Resources Corporation Sdn Bhd* [275] finally resolved the controversy with regard to the status of an unconditional appearance by determining that the filing of an unconditional appearance did not amount to a step in the proceedings.

If the requirements of Section 6 of the 1952 Act are satisfied, then the burden would "shift" to the party who filed the action in court to convince the court with reasons why the actions should be allowed to remain in court. The Federal Court in the case of *Seloga Jaya Sdn Bhd v Pembinaan Keng Ting (Sabah) Sdn Bhd*[276] stated:

"It is well known that if a party can satisfy the court that the conditions for the grant of stay under section 6 of the Act are satisfied, it does not ipso facto follow that he will be entitled, as of right to a stay, for the court still retains a discretion to refuse it. But generally, as the judge rightly recognized, the approach of the court will be that those

273 (1999) 2 MLJ 529
274 (2001) 1 MLJ 380
275 (2002) 2 AMR 2257
276 (1994) 2 MLJ 97

who make a contract to arbitrate their disputes, should be held to their bargain for, in the oft-quoted words of Martin B in *Wickham v Hending*, 'A bargain is a bargain; and the parties ought to abide by it, unless a clear reason applies for their not doing so."

The current approach by the Malaysian courts is basically to give effect to the consensual dispute resolution procedure pre-agreed unless there exist strong reasons to the contrary. Examples of what would amount to strong reasons have been identified in the case of *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat*[277] namely "those involving fraud or where there is, on a proper construction of the arbitration clause, no dispute that falls within its purview or where third party procedure under the rules of court will most probably be resorted to."

The 2005 Act

There are 2 principal methods by which the Malaysian court may give effect to an agreement to arbitrate – namely, to stay an action or to refer the dispute to arbitration pursuant to Section 10 of the Act. The Act provides that an application must be made before taking any steps in the action to stay the action. The courts must give effect to the mandatory requirements of Section 10 - namely that they have no discretion in the matter when it is an application for stay involving an international element. However, if the agreement is null and void, inoperative or incapable of being performed, then a stay may be obtained. The court may impose conditions when it grants stay such as providing security.

10.11.1 Court Support in the Conduct of Arbitrations

The 1952 Act

There is doubt as to whether the High Court has inherent power[278] to supervise the conduct of an arbitration[279] by the arbitrator. The High Court in Section 13(4) to (6) has the following powers, namely, security for costs, discovery of documents and interrogatories, the giving of evidence by affidavit, examination on oath of any witness, the preservation, interim custody or sale of any goods which are the subject matter of the reference, securing the amount in dispute in the reference, the detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein, and authorizing for any of the purposes aforesaid any persons to enter upon or into any land or building in the possession of any party to the reference or authorizing any samples to be taken or any observation to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence and interim injunctions and the appointment of a receiver.

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277 (1995) 3 MLJ 273

278 Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd (1998) 2 MLJ page 20 at 25

279 Bina Jati Sdn Bhd v Sum Projects Bros Sdn Bhd (2002) 2 MLJ page 71

The High Court has also the jurisdiction pursuant to Section 22, to order an arbitrator to state a special case on any question of law arising in the course of the defence. This power may also be exercised by the arbitrator on his own motion or at the request of a party.

The High Court may also, pursuant to Section 23 of the Act, remit an award to the arbitrator for reconsideration.

The 2005 Act

The basic tenet of the 2005 Act is that of non-interference by the court, unless there are express provisions for allowing it to do so.

The High Court, pursuant to Section 11, has the power to grant interim measures in respect of security for costs, discovery of documents and interrogatories, giving of evidence by affidavit, securing the amount in dispute, preservation, interim custody and sale of any property which is the subject matter of a dispute and ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets and interim injunctions. The arbitral tribunal is also given almost similar powers in Section 19 save that there is no power to grant an injunction or appoint receivers. The reason for this could be that with regard to the grant of injunctions and in particular Mareva injunctions, the power of the court is required for purposes of enforcement. Therefore the rationale appears to be to provide the parties with a choice in view of the concurrent nature of the powers set out in Sections 11 and 19. It is doubtful if a court has the power to also grant a Mareva injunction in respect of an international arbitration held elsewhere, where there are assets located in Malaysia.

There is power in Section 40 for the court to order consolidation and concurrent hearings of arbitral proceedings. This would be exercised in the case of multi-party disputes where there is agreement among the parties.

10.12 Amendments to the 2005 Act

The Act has been in force since 14 March 2005. However, there are some omissions in the Act. The arbitral community, including the Bar Council and the Attorney-General's Chambers, have collaborated in ensuring these omissions are rectified by way of amendments to the Act.

The principle amendments being considered are to Sections 10 and 11 of the Arbitration Act, giving the Court jurisdiction to order security for satisfaction of any award given in arbitration in respect of admiralty arbitration. Sections 37, 38 and 39 are also being amended, together with a new Section 52, to resolve anomalies with regard to enforcement of New York Convention awards and the *Nimbus* decision (op cit). There has also been conflicting decisions[280] of the Malaysian Courts as to which Act to apply in

[280] Putrajaya Holdings Sdn Bhd v Digital Green Sdn Bhd [2008]7 MLJ 757

respect of arbitrations commenced after 14 March 2005. This is one of the issues that have to be addressed in the amendments to the 2005 Act.

10.13 Practical Information

A Visit Pass (Professional) (Professional Pass) is required for foreign lawyers or arbitrators who wish to enter Malaysia on a professional visit. The application for Professional Pass (the Application) usually takes about one month to be processed by the Immigration Department and requires the submission of the following documents for consideration:

(a) the prescribed (Immigration) Form Imm 12 and Personal Bond (to be duly stamped);
(b) a cover letter from the sponsoring company (the sponsor) in respect of the application;
(c) two passport-size photographs of the applicant;
(d) a photostat copy of the applicant's passport/travel document;
(e) the applicant's proposed itinerary in Malaysia and
(f) the sponsor's statutory documents (for example, Memorandum and Articles of Association and Forms 9, 24 and 49 where the sponsor is a company limited by shares).

10.14 Tax Aspects

Foreign arbitrators or lawyers, so long as the individuals are not tax-paying residents in Malaysia, are exempted from paying Malaysian income tax on their income. The exemption requires that the individuals do not exercise employment in Malaysia for longer than 60 days in a calendar year. It also applies where the continuous period not exceeding 60 days in Malaysia overlaps two successive years or if that continuous period overlapping two successive years plus other periods does not exceed 60 days.

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Hiap-Taih Welding & Construction Sdn Bhd v Boustead Pelita Tinjar Sdn Bhd (formerly known as Loagan Bunut Plantations Sdn Bhd) [2008] 8 MLJ 471; Segamat Parking Services Sdn Bhd v Majlis Daerah Segamat Utara & Another Case [2009] 1 CLJ 942; Total Safe Sdn Bhd v Tenaga Nasional Berhad & Anor (2009) unreported to date

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11. PHILIPPINES

11.1 Which law(s) apply to arbitration in the Philippines?

The Philippines adopts a dual-system approach to arbitration with one law dealing with domestic arbitration and another law dealing with international arbitration. Republic Act 876 was enacted on 19 June 1953 and deals with domestic arbitration proceedings in the Philippines, i.e., arbitration between two Philippine entities or individuals with a seat of arbitration in the Philippines. This law provides who may be parties to an arbitration, what matters may be subject to arbitration, when and how arbitration proceedings may be commenced. The law also provides the procedure for appointment of arbitrators, the qualifications of arbitrators, and the conduct of the arbitration proceedings. Finally, the law also provides the procedure and grounds to set aside, modify or correct an arbitral award. The law has been amended in part by Republic Act 9285 which governs international arbitration proceedings.

Republic Act 9285 or the "Alternative Dispute Resolution Act of 2004," enacted on 13 April 2004, deals with international commercial arbitration. The Philippines adopted with this law the UNCITRAL Model Law on International Commercial Arbitration.[281] Republic Act 9285 amends to a certain extent the provision of Republic Act 876 on domestic arbitration, by providing that certain provisions of the UNCITRAL Model Law applies to domestic arbitration. These provisions include the enforcement of the arbitration agreement (Article 8), number and procedure of appointment and challenge of arbitrators (Articles 10-14), the arbitration procedure and making of the award (Articles 18-19, 29-32). Thus, to the extent indicated, the provisions of Republic Act 876 on domestic arbitration are modified and adopt the provisions of the UNCITRAL Model Law. Republic Act 9285 further provides that Sections 22 to 31 therein applies to domestic arbitration. These Sections refer to legal representation in arbitration proceedings, confidentiality, designation of appointing authority, grant of interim measures of protection, place and language of the arbitration.

Republic Act 9285 also provides the procedure for ad hoc mediation[282] in the Philippines.

Arbitration of disputes arising from construction contracts in the Philippines are governed by Executive Order 1008 or the Construction Industry Arbitration Law. The law created a body known as the Construction Industry Arbitration Commission (CIAC) which will have original and exclusive jurisdiction over disputes arising from, or connected with contracts entered into by parties involved in construction in the Philippines, whether the dispute arises before or after the completion of the contract, or after the abandonment or breach thereof. These disputes may involve government or private contracts. For the CIAC to acquire jurisdiction, the parties to a dispute must

281 Section 19, R.A. 9285. The Philippines has not adopted the 2006 amendments to the UNCITRAL Model Law.
282 Administrative issuances of the Supreme Court govern court annexed mediation.

agree to submit the same to voluntary arbitration.[283] Section 35 of Republic Act 9285 provides that construction disputes which fall within the original and exclusive jurisdiction of the CIAC shall include those between or among parties to, or who are otherwise bound by, an arbitration agreement, directly or by reference whether such parties are project owner, contractor, subcontractor, fabricator, project manager, design professional, consultant, quantity surveyor, bondsman or issuer of an insurance policy in a construction project. Further, the CIAC shall continue to exercise original and exclusive jurisdiction over construction disputes although the arbitration is "commercial" pursuant to the provisions of Republic Act 9285.

11.2 Have the Philippines acceded to the New York Convention?

The Philippines acceded to the New York Convention on 6 July 1967 and entered into force in the Philippines on 4 October 1967.[284] While the Philippines was one of the first countries in Asia to accede to the New York Convention, it was only in 2004 under the provisions of Republic Act 9285 that enabling legislation on the Convention was enacted. Section 42 of Republic Act 9285 states the procedure for enforcing an award under the Convention.

The procedure for enforcement of arbitral awards that are not covered by the Convention shall be governed by the rules of procedure enacted by the Supreme Court of the Philippines. The Court may, on grounds of comity and reciprocity, recognize and enforce a non-Convention award as a Convention award.[285]

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

Both Republic Act 876 (for domestic arbitration) and Republic Act 9285 (for international arbitration) do not prohibit parties from designating a foreign arbitration institution to administer the arbitration proceedings. Thus, where either or both parties are domiciled in the Philippines, the parties may designate a foreign arbitration institution to administer the arbitration proceedings.

The rule is different however, with respect to construction disputes or disputes arising from, or connected with contracts entered into by parties involved in construction in the Philippines.[286] Where parties in a construction contract in the Philippines have agreed to submit their disputes to arbitration, the arbitration shall be conducted under the auspices of the Construction Industry Arbitration Commission (CIAC), without reference to any

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283 Section 4, Executive Order 1008 dated 4 February 1985.

284 The Philippines adopted reservations on applying the Convention only to awards rendered in contracting States and that the Philippines will only apply the Convention to differences arising out of legal relationships, whether contractual or not, that are considered commercial under national law.

285 Section 43, Republic Act 9285.

286 Section 4, Executive Order 1008 or the Construction Industry Arbitration Law.

foreign arbitration institution that may be specified in the arbitration agreement.[287] Thus, where parties, whether one or both is domiciled in the Philippines, agree in a contract involving a construction project in the Philippines to submit their dispute to arbitration, the CIAC shall have jurisdiction over the dispute regardless of any reference to a foreign arbitration institution in the contract.[288]

11.4 Does the national law contain substantive requirements for the arbitration procedures to be followed?

For international arbitration proceedings, apart from the requirement that the arbitration agreement must be in writing, there are no mandatory substantive requirements for the arbitration procedures, following the provisions of the UNCITRAL Model Law.

For domestic arbitration, Republic Act 876 as amended, also requires that the arbitration agreement be in writing and subscribed by the party sought to be charged, or by his lawful agent.[289] In the institution of arbitration proceedings arising from contracts to arbitrate future controversies, the arbitration shall be instituted by service by either party upon the other of a demand for arbitration in accordance with the contract. Such demand shall be set forth the nature of the controversy, the amount involved, if any, and the relief sought, together with a true copy of the contract providing for arbitration. The demand shall be served upon any party either in person or by registered mail.[290] In case of a submission agreement, the arbitration shall be instituted by the filing with the Clerk of the Regional Trial Court having jurisdiction, of the submission agreement, setting forth the nature of the controversy, and the amount involved, if any. Such submission may be filed by any party and shall be duly executed by both parties.[291] In domestic arbitration proceedings, arbitrators are required to be sworn, by any officer authorized by law to administer an oath, to faithfully and fairly hear and examine the matters in controversy and to make a just award according to the best of their ability and understanding.[292]

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

For both domestic and international arbitration proceedings, the existence of a valid arbitration clause bars access to the courts for the resolution *on the merits* of a dispute that

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287 This is a result of the new Rules of Procedure Governing Construction Arbitration issued by the Construction Industry Arbitration Commission and as interpreted by the Philippine Supreme Court in China *Chang Jiang Energy Corporation (Philippines) v. Rosal Infrastructure Builders et al.* (GR No. 125706, September 30, 1996); *National Irrigation Administration v. Court of Appeals* (318 SCRA 255, November 17, 1999) and *LM Power Engineering Corporation vs. Capitol Industrial Construction Groups, Inc.* (G.R. No. 141833, March 26, 2003).

288 The writers believe that in light of Republic Act 9285, there is good reason to revisit the rule.

289 Section 4, Republic Act 876 as amended.

290 Section 5(a), Republic Act 876 as amended.

291 Section 5(c), Republic Act 876 as amended.

292 Section 13, Republic Act 876 as amended.

is within the scope of the arbitration agreement.[293] However, parties to an arbitration may invoke the court's supervisory powers over arbitration proceedings under Republic Act 876 as amended (for domestic proceedings) and Republic Act 9285 (for international proceedings). These include the power of the courts to (1) enforce the arbitration agreement, (2) act in the event of the failure of the Appointing Authority designated by law or agreement to act, (3) grant interim measures of protection and (4) set aside, vacate, modify or correct arbitration awards.

11.6 What are the main arbitration institutions in the Philippines?

The main arbitration institution in the Philippines is the Philippine Dispute Resolution Center, Inc. (PDRCI). It is a non-stock, non-profit organization incorporated in 1996 out of the Arbitration Committee of the Philippine Chamber of Commerce and Industry. It has for its purpose the promotion of arbitration as an alternative mode of settling commercial disputes and providing dispute resolution services to the business community. These services include the administration of arbitration proceedings, whether domestic or international, under its own rules of procedure and the appointment of arbitrators when designated by the parties as an appointing authority.

The arbitration rules of the PDRCI are available for purchase at their office.

Philippine Dispute Resolution Center, Inc.
Office of the General Counsel
12/F Allied Bank Center
6754 Ayala Ave., Makati City
0716 Philippines
Phone: +63 2 986-5171
Fax: +63 2 817-6928
Email: secretariat@pdrci.org
info.pdrci@gmail.com
Website: www.pdrci.org

11.7 Model clause of the institution

The model clause of the PDRCI as published in their website is as follows:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the Philippine Dispute Resolution Center, Inc. (PDRCI) Arbitration Rules as at present in force."

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[293] Under Section 24 of Republic Act 9285, if one party disregards the arbitration agreement and commences an action in court, and the other party does not object by the end of the pre-trial conference, the court action shall continue unless both parties thereafter request that the dispute be referred to arbitration.

(a) The appointing authority shall be...(name of institution or person)
(b) The number of arbitrators shall be...(one or three)
(c) The place of arbitration shall be...(city or country)
(d) The language(s) to be used in the arbitral proceedings shall be...(language")

11.8 How many arbitrators are usually appointed?

In view of the modification of certain provisions in Republic Act 876 (for domestic arbitration), in both domestic and international arbitration, the parties are free to agree on the number of arbitrators.[294] If parties fail to agree on the number of arbitrators, there shall be three.

For both domestic and international arbitration proceedings, the law provides that the appointing authority for administered arbitration proceedings or arbitration pursuant to institutional rules shall be the appointing authority designated in such rules. For ad hoc arbitration, the default appointing authority shall be the National President of the Integrated Bar of the Philippines or his duly authorized representative.[295] In the event that the Appointing Authority fails or refuses to act within 30 days from receipt of the request, the parties may apply to the courts.[296]

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

Following the UNCITRAL Model Law, an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made. These grounds for challenge apply to both domestic and international arbitration proceedings.

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

Republic Act 9285 provides that in international arbitration conducted in the Philippines, a party may be represented by any person of his choice, including foreign lawyers or foreign law firms. However, foreign lawyers, unless admitted to the practice of law in the

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294 Article 11, UNCITRAL Model Law, Appendix A to Republic Act 9285 and is applicable to domestic arbitration proceedings by virtue of Section 33 of Republic Act 9285.

295 Section 26, Republic Act 9285 and is applicable to domestic proceedings by virtue of Section 33 of Republic Act 9285.

296 Section 27, Republic Act 9285 and is applicable to domestic proceedings by virtue of Section 33 of Republic Act 9285.

Philippines, shall not be authorized to appear as counsel in any Philippine court, or any other quasi-judicial body whether or not such appearance is in relation to the arbitration in which he appears.[297] Thus, local counsel will have to be engaged with respect to proceedings before Philippine courts even if related to international arbitration proceedings. Republic Act 9285 makes this provision applicable to domestic arbitration proceedings.

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

For international arbitration proceedings with seat of arbitration in the Philippines, Philippine courts may intervene or provide judicial support in arbitration proceedings in the following instances:

11.10.2 Protective orders to preserve confidentiality[298]

The court where an action or appeal is pending in relation to international arbitration proceedings may issue a protective order to prevent or prohibit disclosure of documents or information containing secret processes, developments, research and other information where it is shown that the applicant shall be materially prejudiced by an authorized disclosure thereof.

11.10.3 Failure or refusal to act by the Appointing Authority[299]

Where the Appointing Authority fails or refuses to act in any of the instances provided under Articles 11(3), 11(4), 13(3) or 14(1) of the UNCITRAL Model Law within 30 days from receipt of a request, party may renew its application before the appropriate Philippine court.

11.10.4 Ruling on a Jurisdictional Issue as a Preliminary Question[300]

Where the arbitral tribunal rules as a preliminary question that it has jurisdiction under the provisions of Article 16(2) of the UNCITRAL Model Law, the aggrieved party may request, within 30 days from the receipt of the ruling, the appropriate Regional Trial Court to decide the matter.

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297 Section 22, Republic Act 9285.
298 Section 24, Republic Act 9285.
299 Section 27, Republic Act 9285.
300 Article 16(3), UNCITRAL Model Law in relation to Article 6, UNCITRAL Model Law and Section 3(k), Republic Act 9285.

11.10.5 Issuance and Enforcement of Interim Measures of Protection[301]

Before the constitution of the arbitral tribunal, a party may request from a Court an interim measure of protection. Provisional relief may be granted against the adverse party (i) to prevent irreparable loss or injury; (ii) to provide security for the performance of any obligation; (iii) to produce or preserve any evidence; or (iv) to compel any other appropriate act or omission. The order granting provisional relief may be conditioned upon the provision of security or any act or omission specified in the order. Further, to the extent that the arbitral tribunal, after the constitution of the tribunal and during the course of the proceedings, has no power to act or is unable to act effectively, the request for interim relief may be made with the Court.

Interim or provisional relief is requested by written application transmitted by reasonable means to the Court and the party against whom the relief is sought, describing in appropriate detail the precise relief, the party against whom the relief is requested, the grounds for the relief, and the evidence supporting the request.

A party who does not comply with the order shall be liable for all damages resulting from noncompliance, including all expenses, and reasonable attorney's fees, paid in obtaining the order's judicial enforcement.

Further, either party may apply with the Court for assistance in implementing or enforcing an interim measure ordered by an arbitral tribunal.

11.10.6 Assistance in Taking Evidence[302]

The arbitral tribunal or a party with the approval of the arbitral tribunal may request the assistance of the courts in taking evidence. The court may execute the request within its competence and in accordance with the applicable Rules of Court on taking evidence.

11.10.7 Setting Aside, Enforcement and Recognition of Arbitral Awards and Recognition and Enforcement of Foreign Arbitral Awards

The appropriate Regional Trial Court shall have the power to set aside arbitral awards issued under international arbitration proceedings with a seat of arbitration in the Philippines.[303] The recognition and enforcement of an award in an international commercial arbitration shall be governed by Article 35 of the UNCITRAL Model Law.[304]

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301 Sections 28 and 29, Republic Act 9285.
302 Article 27, UNCITRAL Model Law
303 Article 34, UNCITRAL Model Law in relation to Section 3(k), Republic Act 9285.
304 Section 40, Republic Act 9285.

The recognition and enforcement of foreign arbitral awards, i.e., awards issued pursuant to arbitration proceedings with a seat in a country other than the Philippines, shall be filed with the Regional Trial Court and governed by the rules of procedure issued by the Supreme Court.[305]

It should be noted that proceedings for recognition and enforcement of an arbitration agreement or for vacation, setting aside, correction or modification of an arbitral award, and any application with a court for arbitration assistance and supervision shall be deemed as special proceedings and shall be filed with the Regional Trial Court (i) where arbitration proceedings are conducted; (ii) where the asset to be attached or levied upon, or the act to be enjoined is located; (iii) where any of the parties to the dispute resides or has his place of business; or (iv) in the National Judicial Capital Region, at the option of the applicant.[306]

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

For both domestic and international arbitration proceedings, arbitrators have the power to issue interim measures of protection under the same circumstances as the courts described above. After constitution of the arbitral tribunal and during arbitral proceedings, a request for an interim measure of protection, or modification thereof, may be made with the arbitral tribunal. Interim relief may be granted (i) to prevent irreparable loss or injury; (ii) to provide security for the performance of any obligation; (iii) to produce or preserve any evidence; or (iv) to compel any other appropriate act or omission. The order granting provisional relief may be conditioned upon the provision of security or any act or omission specified in the order.[307]

Interim or provisional relief is requested by written application transmitted by reasonable means to the arbitral tribunal and the party against whom the relief is sought, describing in appropriate detail the precise relief, the party against whom the relief is requested, the grounds for the relief, and the evidence supporting the request.[308]

The order issued by the tribunal shall be binding upon the parties. A party who does not comply with the order shall be liable for all damages resulting from noncompliance, including all expenses, and reasonable attorney's fees, paid in obtaining the order's judicial enforcement.[309]

Further, unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute following the rules stated above. Such interim measures may include but shall not be limited to

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305 Section 42, Republic Act 9285.
306 Section 47, Republic Act 9285.
307 Section 28, Republic Act 9285.
308 Section 28, Republic Act 9285.
309 Section 28, Republic Act 9285.

preliminary injunction directed against a party, appointment of receivers or detention, preservation, inspection of property that is the subject of the dispute in arbitration.[310]

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

Both domestic and international arbitration proceedings follow the requirements of the UNCITRAL Model Law with regard to the form and contents of an arbitral award. The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated. The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under Article 30 of the UNCITRAL Model Law. The award shall state its date and the place of arbitration. After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

There is no deadline or time limit for the issuance of arbitral awards under international arbitration proceedings. However, in domestic arbitration, Republic Act 876 requires that in the absence of an agreement between the parties, the award shall be rendered within 30 days after close of the hearings or if oral hearings have been waived, within 30 days after the arbitrators shall have declared the proceedings in lieu of hearing closed. This period may be extended by mutual consent of the parties.[311]

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

A decision of the Regional Trial Court confirming, vacating, setting aside, modifying or correcting an arbitral award, in both international and domestic arbitration proceedings, may be appealed to the Philippine Court of Appeals in accordance with the rules of procedure to be promulgated by the Supreme Court.

An arbitral award in international arbitration proceedings may be set aside under the grounds set forth in Article 34 of the UNCITRAL Model Law. Thus, an arbitral award may be set aside where the party making the application furnishes proof that:

(i) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the Philippines;

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

310 Section 29, Republic Act 9285.
311 Section 19, Republic Act 876.

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

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

(v) the court finds that the subject-matter of the dispute is not capable of settlement by arbitration under Philippine law or the award is in conflict with Philippine public policy.

In domestic arbitration proceedings, an award may be vacated upon the petition of any party to the controversy when such party proves affirmatively that in the arbitration proceedings:[312]

(i) The award was procured by corruption, fraud, or other undue means; or

(ii) That there was evident partiality or corruption in the arbitrators or any of them; or

(iii) That the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; that one or more of the arbitrators was disqualified to act as such under section nine hereof, and willfully refrained from disclosing such disqualifications or of any other misbehavior by which the rights of any party have been materially prejudiced; or

(iv) That the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject matter submitted to them was not made.

Where an award in a domestic arbitration is vacated, the court, in its discretion, may direct a new hearing either before the same arbitrators or before a new arbitrator or arbitrators to be chosen in the manner provided in the submission or contract for the selection of the original arbitrator or arbitrators, and any provision limiting the time in which the arbitrators may make a decision shall be deemed applicable to the new arbitration and to commence from the date of the court's order.

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312 Section 24, Republic Act 876.

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

The recognition and enforcement of foreign arbitral awards rendered in a New York Convention country shall be governed by the said Convention.[313] The recognition and enforcement of such arbitral awards shall be filed with the Regional Trial Court in accordance with the rules of procedure to be promulgated by the Supreme Court. Republic Act 9285 states that the said procedural rules shall provide that the party relying on the award or applying for its enforcement shall file with the court the original or authenticated copy of the award and the arbitration agreement. If the award or agreement is not made in any of the official languages, the party shall supply a duly certified translation thereof into any of such languages. The applicant shall also establish that the country in which foreign arbitration award was made is a party to the New York Convention.

If the application for rejection or suspension of enforcement of an award has been made, the Regional Trial Court may, if it considers it proper, vacate its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the party to provide appropriate security.

For arbitral awards issued in countries that are not signatories to the New York Convention, the recognition and enforcement of such awards shall be done in accordance with procedural rules to be promulgated by the Supreme Court. The Court may, on grounds of comity and reciprocity, recognize and enforce a non-convention award as a convention award.[314]

Republic Act 9285 states that a foreign arbitral award when confirmed by a court of a foreign country, shall be recognized and enforced as a foreign arbitral award and not as a judgment of a foreign court.[315] Further, a foreign arbitral award, when confirmed by the Regional Trial Court, shall be enforced in the same manner as final and executory decisions of courts of law of the Philippines.[316]

A party to the foreign arbitration proceeding may oppose an application for recognition and enforcement of the foreign arbitral award in accordance with the procedural rules to be promulgated by the Supreme Court only on those grounds enumerated under Article V of the New York Convention. Any other ground raised shall be disregarded by the Regional Trial Court.[317]

The recognition and enforcement of an award in an international commercial arbitration shall be governed by Article 35 of the UNCITRAL Model Law.[318]

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313 Section 42, Republic Act 9285.
314 Section 43, Republic Act 9285.
315 Section 44, Republic Act 9285.
316 Section 44, Republic Act 9285.
317 Section 45, Republic Act 9285.
318 Section 40, Republic Act 9285.

For domestic arbitration proceedings, a party may, at any time within one month after the award is made, apply to the court having jurisdiction, for an order confirming the award; and thereupon the court must grant such order unless the award is vacated, modified or corrected, as prescribed herein.[319] Notice of such motion must be served upon the adverse party or his attorney as prescribed by law for the service of such notice upon an attorney in action in the same court. A domestic arbitral award when confirmed shall be enforced in the same manner as final and executory decisions of the Regional Trial Court.[320]

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

There is no provision in Republic Act 9285 on the recovery of costs in an arbitration proceeding nor has there been a case decided by the Supreme Court dealing with this issue.[321] It is still uncertain on how the Philippine courts will react to a recovery of costs in an arbitration proceeding and whether an award of this nature will be enforced by Philippine courts. In Asset Privatization Trust v. Court of Appeals (300 SCRA 579), the arbitration panel in a domestic proceeding awarded damages and costs to a party, but on review, the Supreme Court vacated the award.

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

The statistics available are from the records of the Secretariat of the Philippine Dispute Resolution Center, Inc. (PDRCI) and relate to cases that are administered by or use the facilities of the PDRCI. The statistics provided by the PDRCI are from 2004 to 2008 only. Since 2004 there have been a total of 15 arbitration cases (domestic and international) under the auspices of the PDRCI. Out of these 15 cases, only one case was for use of facilities of PDRCI (room hire, transcription, secretarial services) and the remaining 14 cases were administered arbitration proceedings under PDRCI Rules. The majority of the cases are domestic arbitration proceedings. Only two out of the 15 cases are international arbitration proceedings.

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

There are at least two notable recent decisions by the Supreme Court of the Philippines on international arbitration. In *Korea Technologies Co., Ltd. vs. Lerma, et al.* (G.R. No.

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319 Section 23, Republic Act 876 in relation to Section 40, Republic Act 9285.

320 Section 40, Republic Act 9285.

321 There has been a Court of Appeals decision on the award of costs in arbitration which was struck down by the court as being "contrary to public policy." Unfortunately, no definitive ruling on the matter was given by the Supreme Court as the parties to that case settled amicably and jointly withdrew the appeal before the Supreme Court.

143581, 7 January 2008) the Supreme Court affirmed the validity of a clause in a contract providing for arbitration of disputes in Seoul, Korea before the Korean Commercial Arbitration Board. The Supreme Court rejected the archaic notion that resolution of disputes through arbitration, particularly international arbitration, deprived local courts of jurisdiction and is contrary to public policy. The Supreme Court stated that in a long line of cases, the Court has consistently affirmed the validity of arbitration clauses. Further, this case also affirmed that the UNCITRAL Model Law is incorporated in Republic Act 9285 or the ADR Act of 2004 which primarily deals with international arbitration.

In *Equitable PCI Banking Corporation, et. al. vs. RCBC Capital Corporation* (G.R. No. 182248, 18 December 2008), a Petition for Review was filed by Equitable PCI Banking against an order of the Regional Trial Court confirming the Partial Award dated 27 September 2007 in an arbitration between the parties, both domestic corporations, rendered by a panel of arbitrators pursuant to the arbitration rules of the International Chamber of Commerce-International Court of Arbitration. The Supreme Court reiterated that the proper mode of review from decisions of the Regional Trial Court confirming, vacating, setting aside, modifying or correcting an arbitral award is by an appeal to the Court of Appeals. Pursuant to Republic Act 9285, a decision of the Regional Trial Court confirming, vacating, setting aside, modifying or correcting an arbitral award may be appealed to the Court of Appeals in accordance with the rules and procedure to be promulgated by the Supreme Court. A party has no direct remedy to the Supreme Court and must first file an appeal before the Court of Appeals before going to the Supreme Court through a Petition for Review under Rule 45 of the Rules of Court. The procedural misstep by the petitioner would suffice for the dismissal of the petition. However, the Supreme Court stated that even if the petition was to be entertained, it found no basis to reverse the decision of the Regional Trial Court.

On the issue of whether there were grounds to reject the confirmation of the award, the Supreme Court confirmed that:

"… [e]rrors in law and fact would not generally justify the reversal of an arbitral award. A party asking for the vacation of an arbitral award must show that any of the grounds for vacating, rescinding, or modifying an award are present or that the arbitral award was made in manifest disregard of the law. Otherwise, the Court is duty-bound to uphold an arbitral award."

The Court clarified that "to justify the vacation of an arbitral award on account of "manifest disregard of the law," the arbitrator's findings must clearly and unequivocally violate an established legal precedent." Unfortunately, it is unclear from the decision whether the arbitration was foreign, i.e., having a seat outside of the Philippines or domestic. The arbitration clause was not quoted in the decision and hence the seat of arbitration was not identified. The authors were, however, advised by counsel to one of the parties in the *Equitable PCI Bank* case that the arbitration proceedings were domestic, i.e., having a seat of arbitration in the Philippines. As both parties to the arbitration are Philippine companies, the dispute may be classified as a purely domestic arbitration and the rules on vacating an arbitral award in domestic arbitration proceedings may be applied.

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12. SINGAPORE

12.1 Which law(s) apply to arbitration in Singapore?

Singapore currently has two arbitration regimes and two different sets of arbitration laws, i.e the International Arbitration Act ("IAA") and the Arbitration Act ("AA"). As the name suggests, the International Arbitration Act is geared towards international arbitrations, whereas the Arbitration Act is regulating domestic arbitration matters. The International Arbitration Act applies, provided there is a "foreign" element in it, which is for instance present, if at least one of the parties to an arbitration agreement, at the time of the conclusion of the agreement, has its place of business in any State other than Singapore; or one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; or (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected or the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country

The International Arbitration Act applies the Model Law, while the Arbitration Act is also drafted with a view to the Model Law but contains also certain elements of the English Arbitration Act. The IAA introduced several additional provisions aimed at facilitating the conduct of international commercial arbitrations in Singapore. These include provisions for the confidentiality of court proceedings in connection with arbitrations; conciliation proceedings prior to arbitration; immunity of arbitrators; invoking the assistance of the court to enforce interim orders and directions; and allowance for taxation of arbitration costs by the Registrar of the SIAC.

The main distinction between the two IAA and the AA lies primarily in the degree of possible court intervention in the arbitral process and respect for party autonomy. Under the IAA, court intervention is restricted to instances expressly provided by law. Under the AA, a party may appeal an award on a question of law arising out of the award by agreement of the parties or by leave of court. Further, the AA allows the parties to apply to the court to determine any question of law arising in the course of the arbitration proceedings which substantially affects the rights of the parties

SIAC Rule 32 makes an explicit reference to the IAA, provided that the seat of the arbitration is Singapore.

12.2 Has Singapore acceded to the New York Convention?

Singapore has ratified the New York Convention in 1986. As the New York Convention has been incorporated into Singapore's International Arbitration Act, Convention awards can be enforced in Singapore, subject only to the reciprocity reservations and the standards exceptions in Art 5.

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

There are no restrictions.

According to an interesting recent Court of Appeal judgment [Insigma Technology Co Ltd v Alstom Technology Ltd[2009] SGCA 24] an arbitration clause whereby the ICC Rules should be administered by another arbitral institution, i.e. the SIAC, is valid and enforceable.

12.4 Does the national law contain substantive requirements for the arbitration procedures to be followed?

The guiding principle is that the parties are free to structure their arbitration proceedings as they deem fit. There are no mandatory requirements under the IAA and AA that the parties should follow. In case the parties do not make any arrangements in this respect then the minimal formal requirements of the IAA and AA apply.

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

Both under the IAA and the AA arbitration agreements can be enforced by making an application to the courts for a stay of the proceedings. Under the IAA the court must grant a stay if the conditions provided under the IAA are fulfilled and the court then has to direct the parties to proceed to arbitration unless the arbitration agreement is null and void, inoperative or incapable of being performed.

After the court has ordered a stay of the proceedings, the court has the right to issue orders in relation to the property subject to the dispute for the purpose of preserving the rights of the parties. Under the IAA and the AA, the court has also the power to discontinue proceedings in respect of which no further step has been taken for at least two years after a stay order was made.

12.6 Main arbitration institutions

The main arbitration institution is the "Singapore International Arbitration Centre (SIAC)" whose current address is as follows:

Singapore International Arbitration Centre
City Hall
3 St Andrew's Road
Singapore 178958
Tel: +65 6334 1277

Fax: + 65 6334 2924 (Case Management); +65 6883 0823 (Corporate Affairs, China Desk)
Email: sinarb@siac.org.sg
Website: www.siac.org.sg

It should be noted that the SIAC will move to new premises later in 2009.

The SIAC Rules in English, Chinese and German can be found at http://www.siac.org.sg/rules.htm .

In 2006 the International Division of the American Arbitration Association set up a Joint Venture with the Singapore International Arbitration Centre under the name of the "International Centre for Dispute Resolution—Singapore". This is the ICDR's fourth global office, joining centers in New York, Dublin and Mexico City.

International Centre for Dispute Resolution - Singapore
City Hall
32 Maxwell Road, #02-06
Singapore 069115
Tel: (65) 6883 0826 fax: (65) 6334 2942
Email: LeeM@adr.org
Website: www.icdr.org

The Permanent Court of Arbitration (PCA) has established a facility in Singapore in 2007 (the only PCA facility in Asia). The PCA provides arbitration, mediation, conciliation and fact-finding services in resolving international disputes for which at least one party is a State, State entity or intergovernmental organization.

12.7 Model clause of the institution

The SIAC recommends the use of the following model clause:

"In drawing up international contracts, we recommend that parties include the following arbitration clause:
Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause.
The Tribunal shall consist of _____ arbitrator(s) to be appointed by the Chairman of the SIAC.
The language of the arbitration shall be _____."

12.8 How many arbitrators are usually appointed?

Parties are free to determine how many arbitrators they wish to appoint. If the parties failed to agree on the number of arbitrators, as a general rule the appointment of a single arbitrator is presumed under the IAA (Sec. 9) and the AA (Sec. 12 (2)). Under the IAA, where the reference is to a panel of three arbitrators, and the parties have not agreed on an appointment procedure, each party shall appoint an arbitrator and the third arbitrator shall be appointed by agreement of the parties. If the parties cannot agree on the appointment of the third arbitrator, the appointment will be made (upon the request of a party) by the Deputy Chairman of the SIAC as the statutory appointing authority.

Under the SIAC Rules, an arbitration tribunal can have one or three arbitrators (Clause 5.1 SIAC Rules). According to Clause 5.1 SIAC Rules, if the parties have not addressed the issue of how many arbitrators shall be appointed, then a single arbitrator will be appointed. All appointments of arbitrators require the confirmation of the Chairman of the SIAC.

Where parties fail to agree on an appointing procedure or fail to jointly appoint a sole arbitrator, either party, in domestic or international arbitration, may apply to the Deputy Chairman of the SIAC for appointment. Where the SIAC Rules are applicable, the process and the appointment will be made by the Chairman of the SIAC unless an appointing authority is agreed.

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

According to Art. 10 (1) of the SIAC Rules *"any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."* The same rationale applies under the IAA (Sec. 3 in connection with the First Schedule, Art. 12.1) and also under the AA (Sec. 14.3). Such circumstances include a personal, business or professional relationship with the parties to the dispute (R. v. Bow Street Metropolitan Stipendiary Magistrate and Ors Ex parte Pinochet Ugarte (No. 2) [1999] 2 WLR 272) or an interest in the outcome of the dispute. The standard of bias or partiality that has been applied by the Singapore courts is whether a reasonable and fair-minded person sitting in court and knowing all the facts would have a reasonable suspicion that a fair trial for the applicant would not be possible (Turner (East Asia) Pte Ltd v. Business Federal (Hong Kong) Ltd & Another [1988] SLR 532).

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

In international as well as in domestic arbitration proceedings parties may be represented by counsel of their choice. There are no nationality restrictions and parties can choose to be represented by any counsel they deem fit including non-Singaporean counsel. Foreign counsel can work on arbitrations in Singapore on social visit passes and do not require work permits / employment passes. Parties may even appoint non-lawyers as their representatives.

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

The courts many intervene in arbitration proceedings in Singapore in the following cases subject to the consent of the parties and the tribunal: (i) with regard to removing an arbitrator if there is justifiable doubt regarding an arbitrator's impartiality or independence, (ii) with regard to hearing an appeal against a decision of the tribunal, (iii) with regard to determining a preliminary point of law. Also, the High Court has the power to compel the attendance of witnesses (Sec. 14 IAA).

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

The arbitrators have the power to grant interim and conservatory relief under the SIAC Rules (Art. 24; interim injunctions and other interim measures) and also under the IAA (Sec. 12 d, f and I; preservation and interim custody of property, interim injunctions and other interim measures) and also the AA (Sec. 28, preservation and interim custody of evidence and property).

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

Under the SIAC Rules (Art. 27.3) the award must comply with "the mandatory provisions of any applicable law relating to the making of the award" and must be rendered within 45 days from the date on which the Tribunal declares the proceedings closed (Art. 27.1 SIAC Rules).

The IAA regulates the form and contents in the First Schedule, Sec. 31. The award shall be made in writing and shall be signed by the arbitrator or arbitrators. The award shall state the reasons upon which it is based and state its date and the place of arbitration. The AA contains an almost identical regulation in Sec. 38.

Unlike the SIAC Rules, neither the IAA nor the AA contain a specific deadline when the award must be rendered.

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

An award from the SIAC is final and binding and cannot be appealed. Under the IAA, an award can only be set aside by the High Court if the making of the award was induced or affected by fraud or corruption or a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced (Sec. 24 IAA; First Schedule Art. 34). The grounds to set aside an award are exhaustive and the court hearing an application to set aside an award under the IAA has no power to investigate the merits of the dispute or to review any decision of law or fact made by the tribunal.

The award can also be set aside if:

- a party to the arbitration agreement was under some incapacity or the arbitration agreement is not valid,
- the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case,
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration,
- 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 law of this State; or
- the award is in conflict with Singapore public policy.

The AA contain an identical regulation (Sec. 48).

Under both the Arbitration Act and the IAA, the application to set aside an award must be made by originating motion within three months from the date of receipt of the award by the applicant.

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

According to Sec. 19 IAA an arbitral award may by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award.
Under Sec. 29 IAA a foreign arbitral award may be enforced in a Singapore court either by action or in the same manner as an award of an arbitrator made in Singapore. If a foreign award is rendered in any of the countries that have acceded to the New York Convention, such award can also be enforced in Singapore within six years of the making of the award, following the same enforcement procedures as a domestic award.

Also under the AA (Sec. 46) an award made by the arbitral tribunal pursuant to an arbitration agreement may, with leave of the Court, be enforced in the same manner as a judgment or order of the Court.

The procedure for the enforcement of foreign arbitral awards made in a New York Convention country other than Singapore – Singapore having made the reciprocity reservation set out in Art I(3) of the New York Convention – is set out in Part III of the IAA. These awards may be enforced in Singapore either by action or in the same manner as a judgment or order to the same effect, with the leave of the High Court. If leave is granted, judgment will be entered in terms of the award. Such awards are also recognized as binding for all purposes upon the persons between whom they were made, and may

accordingly be relied upon by any of those parties by way of defence, set-off or otherwise in any legal proceedings in Singapore.

A court hearing the application for enforcement of a foreign award cannot review the case on the merits. It may, however, refuse to grant enforcement of the award in Singapore if the grounds set out in Sect. 31(2) IAA are proven. These grounds are identical to those set out in Art. V of the New York Convention

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

As a general rule the prevailing party will get (at least) part of their costs paid by the losing party. What the percentage is will depend on the circumstances of the specific matter and will also be influenced whether the tribunal has a civil or common law background.

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

The SIAC is publishing the following statistics on its website (http://www.siac.org.sg/facts-statistics.htm):

NUMBER OF *INTERNATIONAL CASES ADMINISTERED* BY ARBITRAL INSTITUTIONS

Arbitral Institution	Yr 2000	Yr 2001	Yr 2002	Yr 2003	Yr 2004	Yr 2005	Yr 2006	Yr 2007	Yr 2008
ICC^	541	566	593	580	561	521	593	599	663
CIETAC (China)	543	562	468	422	461	427	442	429	548
LCIA (UK)	87	71	88	104	87	118	133	137	213
SCC (Sweden)	66	68	50	77	45	53	64	81	74
SIAC (Singapore)	**41**	**44**	**38**	**35**	**48**	**45**	**65**	**70**	**71**
BAC (China)	11	20	19	33	30	53	53	37	59
KCAB (South Korea)	40	65	47	38	46	53	47	59	47
JCAA (Japan)	8	16	8	14	15	9	11	15	12
KLRCA (Malaysia)	20	3	3	5	3	7	1	2	5
PDRC (Philippines)	0	1	2	0	0	0	1	1	0
AAA-ICDR (USA)	510	649	672	646	614	580	586	621	#
VIAC (Vietnam)	23	16	19	16	32	22	23	21	#
BCICAC (Canada)	3	4	4	4	4	2	5	3	#
HKIAC* (China)	NA	NA	NA	NA	NA	NA	NA	NA	#

^ The ICC International Court of Arbitration does not maintain separate statistics for international and French domestic cases administered by them.

 # The statistics from these institutions are not available yet.

** HKIAC does not distinguish cases administered by them and those that they only provide physical services for. For all cases involving HKIAC*

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

The SIAC announced the appointment of a new high powered Board of Directors with effect from 1 March 2009 raising once again the SIAC's profile as a first rate international arbitration centre. Also, the SIAC's will move into new facilities later in the year.

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13. TAIWAN

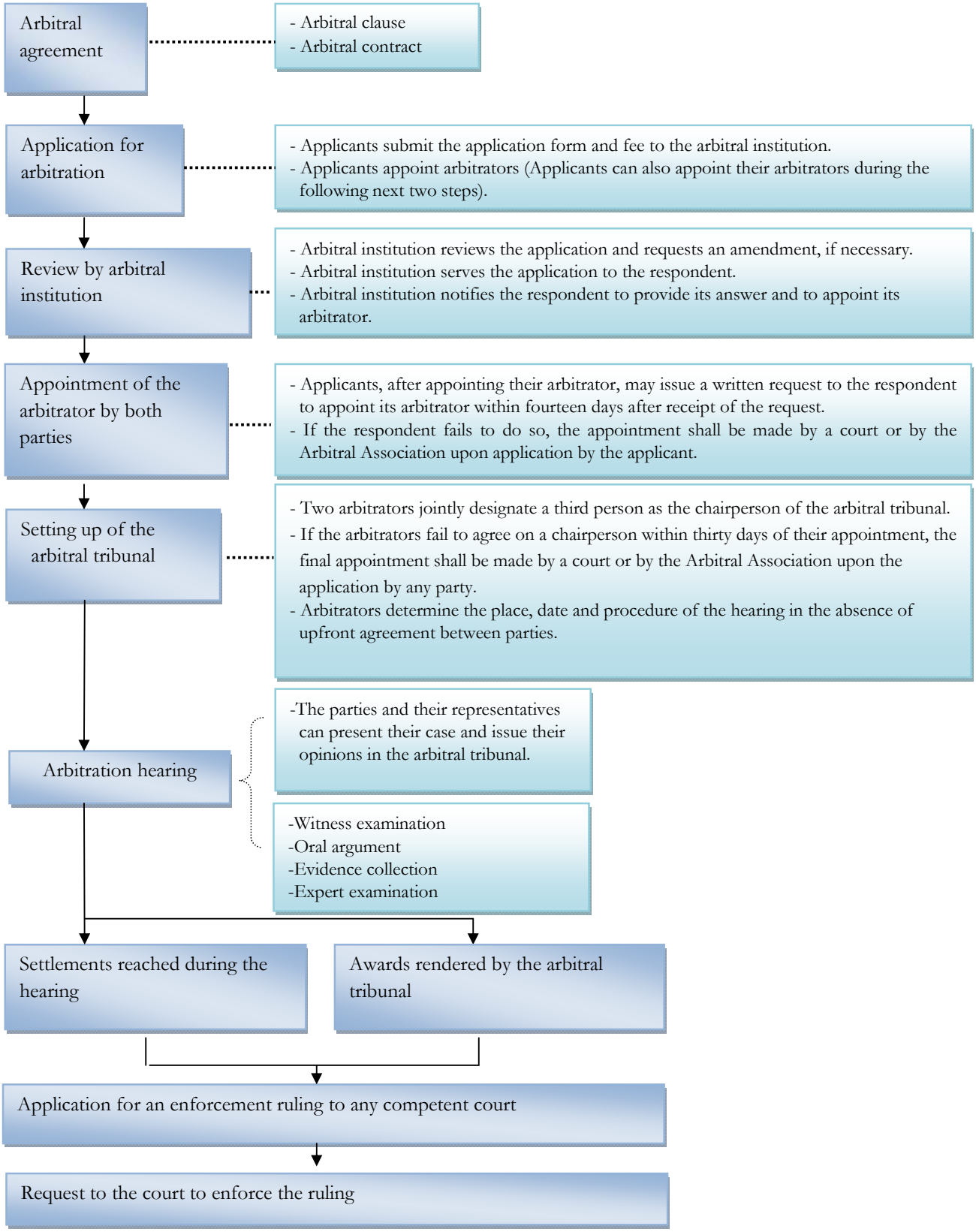
13.1 Which laws apply to arbitration in Taiwan?

In Taiwan, aside from litigation, civil disputes can also be resolved through mediation, settlement or arbitration. The legislature passed the current Arbitration Law of the Republic of China (R.O.C., hereinafter: Taiwan), amended from the earlier Statute for Commercial Arbitration, on 10 July, 2002 (hereinafter: Arbitration Law).

13.2 Is the Taiwanese Arbitration Law based on the UNCITRAL model law?

The Arbitration Law was drafted with reference to the UNCITRAL Model Law on International Commercial Arbitration, as well as a view to legislation in the U.S., U.K., Germany and Japan.

The following flow chart demonstrates the process of a common institutional arbitration:


Arbitral agreement
- Arbitral clause
- Arbitral contract
Application for arbitration
- Applicants submit the application form and fee to the arbitral institution.
- Applicants appoint arbitrators (Applicants can also appoint their arbitrators during the following next two steps).
Review by arbitral institution
- Arbitral institution reviews the application and requests an amendment, if necessary.
- Arbitral institution serves the application to the respondent.
- Arbitral institution notifies the respondent to provide its answer and to appoint its arbitrator.
Appointment of the arbitrator by both parties
- Applicants, after appointing their arbitrator, may issue a written request to the respondent to appoint its arbitrator within fourteen days after receipt of the request.
- If the respondent fails to do so, the appointment shall be made by a court or by the Arbitral Association upon application by the applicant.
Setting up of the arbitral tribunal
- Two arbitrators jointly designate a third person as the chairperson of the arbitral tribunal.
- If the arbitrators fail to agree on a chairperson within thirty days of their appointment, the final appointment shall be made by a court or by the Arbitral Association upon the application by any party.
- Arbitrators determine the place, date and procedure of the hearing in the absence of upfront agreement between parties.
Arbitration hearing
-The parties and their representatives can present their case and issue their opinions in the arbitral tribunal.
-Witness examination
-Oral argument
-Evidence collection
-Expert examination
Settlements reached during the hearing
Awards rendered by the arbitral tribunal
Application for an enforcement ruling to any competent court
Request to the court to enforce the ruling

13.3 What constitutes an arbitral agreement?

The Arbitration Law of the Republic of China ("Taiwan") does not contain a definition of what constitutes an arbitral agreement. Since the Arbitration Law was drafted with a view to the Model Law on International Commercial Arbitration Article 7, Paragraph 1, the latter's definition of arbitral agreements may provide some guidance[322]. Article 1 of the Arbitration Law allows disputing parties to enter into an arbitral agreement to submit the dispute to arbitration. The agreement could be a separate contract or an arbitration clause in the principal contract. The arbitral agreements can be made before or after the dispute arises.[323] Regardless of the form or wording adopted, a *prima facie* arbitral agreement shall be deemed to establish an arbitral agreement.[324] However, a valid arbitral agreement must be made in the written form.[325] In addition to these formal aspects, arbitration is applicable to disputes arising from certain legal relationships.[326] A legal relationship shall be "arbitrable" only if the parties have a right to make a compromise with regard to the subject matter in dispute. [327][328] For example, disputes concerning family law or inheritance issues shall not be subject to arbitration.

13.4 Separability of Arbitral Clauses

The issue of separability is also known as "the autonomy of the arbitral clause" or "the severability of the arbitral clause." When the arbitral agreement is presented as a clause enclosed in the principal contract, even if the contract is nullified, invalid, revoked, rescinded or terminated, the validity of an arbitral clause is determined separately, so as to facilitate arbitration.[329]

13.5 Force of Arbitral Agreement

The main force of an arbitral agreement is to suspend court proceedings when disputes can be referred to arbitration. If one of the parties to an arbitral agreement commences a legal action in conflict with the arbitral agreement, the court shall, upon petition by the adverse party, suspend the legal action and order the suing party to submit to arbitration within a specified time, unless the counter party has already proceeded to respond to the legal action. After the suspension, the legal action shall be deemed to have been withdrawn when an arbitral award is made. If the suing party fails to submit to arbitration

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322 *See* YANG,CHONG-SEN (楊崇森) ET AL., On Arbitration (仲裁法新論, pp. 56 (3rd ed. 2008).

323 *See* LIN,JYUN-YI (林俊益), The Practical Benefit of Arbitration Law (仲裁法之實用權益), pp. 61-62 (1st ed. 2001).

324 *See* Arbitration Law of R.O.C. Article 1, Paragraph 4.

325 *See* Arbitration Law of R.O.C. Article 1, Paragraph 3 and 4; the sorts of "writing form" include and not limited to written documents, documentary instruments, correspondence, facsimiles and telegrams. *See also* UNCITRAL Model Law on International Commercial Arbitration (hereinafter UNCITRAL Model Law) Article 7 (2) and 16 (1).

326 *See* Arbitration Law of R.O.C. Article 2.

327 *See* Arbitration Law of R.O.C. Article 1, Paragraph 2.

328 *See* Code of Civil Procedure of Japan, Article 786.

329 *See* Arbitration Law of R.O.C. Article 3 and UNCITRAL Model Law Article 16 (1).

within the specified time period ordered by the court, the court shall dismiss the legal action.[330]

13.6 Principle of Clarity and Definiteness and the Right of Procedural Choice

The clarity of the arbitral agreement may not only affect the validity of the agreement but also essentially influences the ensuing arbitral proceedings. For example, in the Taiwan Supreme Court Ruling Serial No. 87th Year Tai-Kang Tzu No. 88, an arbitral agreement stated that certain disputes "may," instead of "shall," be submitted to arbitration; the agreement was deemed valid by the Supreme Court. However, the ruling also dismissed the legal action brought by the plaintiff (who argued that the dispute should be arbitrated) because the court interpreted the arbitral agreement to be not binding. In other words, both parties have to agree to submit the dispute (after it arises) to arbitration.[331]

In addition to the specified dispute agreed to be submitted to arbitration, an arbitral agreement can also stipulate other procedural factors, including:

(1) **The place of arbitration**: Without an agreed place of arbitration specified in the agreement, it shall be determined by the arbitral tribunal.[332] The place of arbitration is important because it is the major, if not the only, factor in determining which country's procedural regulations are governing the arbitration process. In addition, whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced is also an influential factor in the arbitration process.[333]

(2) **The arbitrator(s) and arbitral institution**: In the absence of an appointment of an arbitrator or a method of appointment in an arbitral agreement, each party shall appoint an arbitrator for itself. The appointed arbitrators shall then jointly designate a third arbitrator to be the chairperson. However, if the parties have agreed that the arbitration shall be administered by an arbitral institution, the arbitrators shall be appointed by the arbitral institution.[334]

(3) **The language of the proceedings**: Parties to a trans-national dispute may designate a language or languages to be used to conduct the arbitral proceedings. However, interpreters shall be provided under the direction of the arbitral tribunal in the event that a party or an arbitrator is not familiar with Mandarin.[335] In addition, it is also

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330 *See* Arbitration Law of R.O.C. Article 4 and UNCITRAL Model Law Article 8 (1).
331 *See also* High Court Civil Ruling Serial No. 84th Year Kang Tzu No. 753.
332 *See* Arbitration Law of R.O.C. Article 20.
333 *See* UNCITRAL Notes on Organizing Arbitral Proceedings 1996 Article 22.
334 *See* Arbitration Law of R.O.C. Article 9, Paragraph 1 and 4.
335 *See* Arbitration Law of R.O.C. Article 25.

advisable to make an agreement beforehand that how the costs are to be split and paid by the parties along with the other arbitration costs.[336]

(4) **The arbitral proceeding rules**: In the absence of an agreement on the procedural rules governing the arbitration, the arbitral tribunal shall apply the Arbitration Law. Where the Arbitration Law is silent, the arbitral tribunal may apply the Code of Civil Procedure *mutatis mutandis* or such other procedural rules it deems proper.[337] In practice, parties may agree on certain arbitral rules or guidelines issued by arbitral institution or international organizations, such as The Arbitration Rules of the Chinese Arbitration Association (Taipei) or UNCITRAL Notes on Organizing Arbitral Proceedings.

(5) **The enforcement of an arbitral award:** An award may not be enforceable unless a competent court has granted an enforcement order. However, the arbitral award may be enforced without having an enforcement order granted by a competent court if the contending parties so agree in writing and the arbitral award concerns any of the following subject-matters: (a) Payment of a specified sum of money or certain amount of tangible things or valuable securities; (b) Delivery of a specified movable property.[338]

(6) **The confidentiality of arbitration:** Compared with other dispute-resolving mechanisms, the confidentiality of arbitration stands out. Arbitrators have to uphold the principle of confidentiality in conducting the arbitration[339] and the arbitral proceedings cannot be made public unless agreed upon by both parties.[340] There is, however, no clear rule regarding the extent to which the parties in an arbitration are under the duty to keep information relating to the dispute secret. Therefore, UNCITRAL advises disputing parties to make an agreement on the duty of confidentiality which might cover the following matters: the material or information that is to be kept confidential; measures for maintaining confidentiality of such information and hearings; whether any special procedures should be employed for maintaining the confidentiality of information transmitted by electronic means; circumstances in which confidential information may be disclosed in part or in whole.[341]

13.7 What are the main arbitration institutions in Taiwan?

Currently there are four registered arbitral institutions in Taiwan, including:

(1) **The Arbitration Association of the R.O.C.** (also known as the "Chinese Arbitration Association, Taipei") , is the arbitral body which administers disputes ranging from construction, maritime, securities, international trade, intellectual

336 *See* UNCITRAL Notes on Organizing Arbitral Proceedings 1996 Article 20.
337 *See* Arbitration Law of R.O.C. Article 19.
338 *See* Arbitration Law of R.O.C. Article 37, Paragraph 2.
339 Arbitration Law of R.O.C. Article 15.
340 Arbitration Law of R.O.C. Article 23, Paragraph 2.
341 *See* UNCITRAL Notes on Organizing Arbitral Proceedings 1996 Article 32.

property rights, insurance, cross-Strait , information technology, etc.[342] Currently, most arbitral cases are referred to the Arbitration Association of the R.O.C.

(2) The **Taiwan Construction Arbitration Association**, which specializes in construction disputes.

(3) The **Chinese Construction Industry Arbitration Association**, which also specializes in construction disputes.

(4) The **Association of Labour Dispute Construction Arbitration, R.O.C.,** which specializes in labour disputes.

13.8 How many arbitrators are usually appointed?

An arbitral tribunal should be constituted by an arbitral agreement designating a single arbitrator or an odd number of arbitrators to settle disputes. However, in the absence of an appointment of an arbitrator or a method of appointment in an arbitral agreement, each party shall appoint an arbitrator for itself. The appointed arbitrators shall then jointly designate a third arbitrator to be the chair of the arbitral tribunal. The arbitral tribunal shall notify the parties, in writing, of the final appointment[343].

If the parties have agreed that the arbitration shall be administered by an arbitral institution and do not appoint natural persons as arbitrators, the arbitrators shall be appointed by the arbitral institution.[344] When any non-arbitral organization is appointed as the arbitrator, it shall be deemed that no arbitrator has been appointed and each party shall appoint an arbitrator for itself.[345] If the parties agreed to appoint an arbitral institution as an arbitrator, however, the law is not clear about its validity. But it is believed that an arbitral institution shall not be deemed as an arbitrator either. Therefore, Arbitration Law Article 5, Paragraph 2 needs to be amended.[346]

In the aforementioned institutional arbitration, parties that have agreed the arbitration shall be administered by an arbitral institution. The arbitrators shall be appointed by the agreed arbitral institution and constitute an arbitral tribunal. The institution shall notify in writing both parties as well as the appointed arbitrators.[347] The process of appointing arbitrators and constituting arbitral tribunal is usually similar to the following:[348]

(1) A party that submits a dispute to arbitration chooses an arbitrator; the party notifies in writing the counter party as well as the appointed arbitrator.

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342 *See* http://www.arbitration.org.tw/english/index-1.html (last visited Apr. 24, 2009).
343 *See* Arbitration Law of R.O.C. Article 9, Paragraph 1.
344 *See* LIN,JYUN-YI (林俊益), *supra* note 2, pp. 114.
345 *See* Arbitration Law of R.O.C. Article 5, Paragraph 2.
346 *See* YANG,CHONG-SEN (楊崇森) ET AL., *supra* note 1, pp. 136.
347 *See* Arbitration Law of R.O.C. Article 9, Paragraph 4 and Article 10, Paragraph 1.
348 *See* HU,YUAN-JHEN (胡元禎),An Introduction to Arbitration. FT Law Review, Vol. 159, pp. 71.

(2) After the counter party chooses an arbitrator, it also notifies in writing the submitting party and the appointed arbitrator.

(3) The appointed arbitrators then jointly designate a third arbitrator to be the chair and the three arbitrators together constitute the arbitral tribunal, which shall notify in writing both parties of the final appointment.

Pursuant to Arbitration Law Article 14, except for those subject to withdrawal proceedings, the appointment of arbitrators by an arbitral institution or the court "shall not be challenged by the parties." Nevertheless, if the appointment falls into any of the listed circumstances in Article 40, a party may still petition the court to set aside the arbitral award.[349]

13.9 Qualifications of Arbitrators

By law, an arbitrator shall be a natural person who possesses legal or other professional knowledge or experience.[350] In addition, to act as an arbitrator, a person must have a reputation for integrity and impartiality and also possess any of the following qualifications:

(1) Serve as a judge or a prosecutor;
(2) Practice as a lawyer, accountant, architect, and mechanic or in any other commerce-related profession for more than five years;
(3) Act as an arbitrator of a domestic or foreign arbitral institution;
(4) Teach as an assistant professor or higher position in a domestic or foreign college certified or recognized by the Ministry of Education; and,
(5) Specialize in a particular field or profession and has practiced for more than five years.[351]

Any person with the qualifications stated above shall receive training and obtain a certificate before applying to an arbitral institution for being registered as an arbitrator.[352] Compared with items (3) and (4), there is no wording as "domestic or foreign" in item (1) and (2), which may be inferred that a foreign judge, prosecutor, lawyer, accountant, architect, mechanic, etc are not allowed to serve as an arbitration in Taiwan. In fact, there had been foreign lawyers registered as arbitrators with the Arbitration Association of the

349 *See* YANG,CHONG-SEN (楊崇森) ET AL., *supra* note 1, pp. 167.
350 *See* Arbitration Law of R.O.C. Article 5, Paragraph 1.
351 *See* Arbitration Law of R.O.C. Article 6.
352 However, according to Arbitration Law of R.O.C. Article 8, those who meet both mentioned qualifications and any of the following criterions would be allowed to apply with an arbitration institution for being registered as an arbitrator exempted from training: 1. Having served practically as a judge or prosecutor; 2. Having practiced as a lawyer for more than three years; 3. Having taught with the department of law or graduate school of law 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, while teaching the major legal courses for more than three years; and 4. Having been registered as an arbitrator in any arbitration institution prior to the effectiveness of amendment of this Law, and acted practically as an arbitrator in a dispute.

R.O.C.. In view of the globalization of business, foreign arbitrators should be considered as fulfilling the above criteria.[353]

13.10 Arbitrator's Independence and Impartiality

The independence and impartiality of arbitrators are the foundation of arbitration. The Arbitration Law takes several measures to assure that disputing parties have a just arbitration:

(1) **Duty of disclosure:** An arbitrator involved in any of the following circumstances shall disclose the details to the parties:[354] (a) the existence of any cause that would require judges to reject themselves from a judicial proceeding in accordance with Article 32 of the Code of Civil Procedure;[355] (b) an employment or agency relationship now or in the past between the arbitrator and a party; (c) an employment or agency relationship now or in the past between the arbitrator and an agent of a party or between the arbitrator and a key witness; and (d) the existence of any other circumstances which raise any justifiable doubts as to the impartiality or independence of the arbitrator.

(2) **Withdrawal of an arbitrator:** A party may apply for withdrawing an arbitrator, if the arbitrator does not meet the qualifications agreed by the parties, or if any of the aforementioned circumstances regarding disclosure obligations exist. However, a party shall not apply to withdraw an arbitrator whom it appointed unless the cause for the withdrawal arose or is known after the appointment[356] has been made. In the Arbitration Law, violations of disclosure obligations are causes for withdrawal. By contrast, the UNCITRAL Model Law uses "circumstances 'likely to' give rise to justifiable doubts as his independence and impartiality" as disclosure factor while uses "circumstances exist that give rise to justifiable doubts as his independence and impartiality" as withdrawal factor. It appears that the Arbitration Law has a wider range of causes for withdrawal.

(3) **Revocation of an arbitral award:** Unlike the duty of disclosure and the withdrawal of an arbitrator which protect the independence and impartiality before an arbitral award is made, the revocation of an arbitral award is a remedy for unjust arbitration.

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353 *See* YANG,CHONG-SEN (楊崇森) ET AL., *supra* note 1, pp. 136 note 4. *See also* UNCITRAL Model Law Article 11 (1).

354 *See* Arbitration Law of R.O.C. Article 15, Paragraph 2.

355 Code of Civil Procedure of R.O.C. Article 32 : "Any judge shall voluntarily disqualify himself/herself in the following circumstances: 1.When the judge, or the judge's spouse, former spouse, or fiancée is a party to the proceeding; 2.When the judge is or was either a blood relative within the eighth degree or a relative by marriage within the fifth degree, to a party to the proceeding; 3.When the judge, or the judge's spouse, former spouse, or fiancée is a co-obligee, co-obligor with, or an indemnitor to, a party to the proceeding; 4.When the judge is or was the statutory agent of a party to the proceeding, or the head or member of the party's household; 5.When the judge is acting or did act as the advocate or assistant of a party to the proceeding; 6.When the judge is likely to be a witness or expert witness in the proceeding; 7.When the judge participated in making either the prior court decision or the arbitration award regarding the same dispute in the proceeding."

356 *See* Arbitration Law of R.O.C. Article 16.

13.11 Does the Taiwanese arbitration law contain substantive requirements for the arbitration procedures to be followed?

The Arbitration Law Article 19 indicates that the parties can themselves determine the procedural rules governing the arbitration. Judicial guidance is required only if the parties' agreement is invalid or there is no agreement. Under Article 19, the arbitral tribunal shall conduct the arbitration pursuant to the Arbitration Law. If the Arbitration Law is silent, the arbitral tribunal can follow the procedural rules stipulated in the Code of Civil Procedure or other rules it deems proper. The respect for disputing parties' autonomy on procedural arrangements can also be seen in many other stipulations in the Arbitral Proceedings Chapter of the Arbitration Law. For instance:

(1) Article 18, Paragraph 2, on the commence date of the arbitral proceedings;
(2) Article 20, on the place of arbitration;
(3) Article 21, Paragraph 1: on the appointment of arbitrators;
(4) Article 23, Paragraph 2: on whether the proceeding shall be made public;
(5) Article 25, Paragraph 1: on the language used in the arbitral proceeding;
(6) Article 31: on whether the arbitral tribunal shall apply the rules of equity;
(7) Article 32, Paragraph 4: on the termination of arbitral proceedings;
(8) Article 33, Paragraph 2: on whether the relevant facts and reasons for the arbitral decision shall be recorded on the arbitral award; and
(9) Article 36: on whether to apply the Simplified Procedures prescribed in the Code of Civil Procedure to the arbitral proceedings.

Unless otherwise agreed upon by both parties, the arbitral proceedings for a dispute shall comply with the Arbitration Law.

Request for Arbitration: By law, one party shall provide the counter party with a written arbitration notification (specifying when the dispute is to be submitted to arbitration). The arbitral proceedings commence on the date specified on the written notice of arbitration received by the counter party.[357] In institutional arbitral practice, the applicant submits the written notice of arbitration and arbitrator appointment, as well as paying the arbitral fee,[358] to the arbitral institution. Then, the arbitral institution will send

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357 *See* Arbitration Law of R.O.C. Article 18, Paragraph 1 and 2.

358 The Rules on Arbitration Institution, Mediation Procedures and Fees Article 25, Paragraph 1: "For arbitration regarding property disputes, in addition to the TWD600 net cost for the forms and information for application, the arbitral fee shall be progressively escalated according to the amount or price of the subject matter pursuant to the following standard: 1. Where the amount or price of the subject matter is TWD60,000 or less, the arbitral fee shall be TWD3,000. 2. Where the amount or price of the subject matter is greater than TWD60,000 and up to TWD600,000, the arbitral fee for the amount exceeding TWD60,000 shall be 4%. 3. Where the amount or price of the subject matter is greater than TWD600,000 and up to TWD1,200,000, the arbitral fee for the amount exceeding TWD600,000 shall be 3%. 4. Where the amount or price of the subject matter is greater than TWD1,200,000 and up to TWD2,400,000, the arbitral fee for the amount exceeding TWD1,200,000 shall be 2%. 5. Where the amount or price of the subject matter is greater than TWD2,400,000 and up to TWD4,800,000, the arbitral fee for the amount exceeding TWD2,400,000 shall be 1.5%. 6. Where the amount or price of the subject matter is greater than TWD4,800,000 and up to TWD9,600,000, the arbitral fee for the amount exceeding TWD4,800,000 shall be 1%. 7. Where the amount or price of the subject matter is greater

out the written notice to the counter party and ask the counter party to appoint its arbitrator. In practice, however, arbitration-requesting parties shall make the advance payment on costs which are regulated by *the Rules on Arbitration Institution, Mediation Procedures and Fees*. Aside from arbitral fee, parties also shall submit the following documents:

(a) The Request for Arbitration and a sufficient number of copies of the Request for each of the arbitrators and the parties against whom a claim is being made. The Request for Arbitration shall contain a statement of claim, including the names and addresses of the parties; the relief or remedy sought; the facts and reasons supporting it; the arbitral institution to administrate the arbitration; the date of the Request for Arbitration; the names and addresses of the legal representatives or the authorized representatives for the arbitration, if any; the subject–matter of the arbitration; and the amount involved.
(b) The arbitral agreement or the contract containing an arbitral clause.
(c) The Power of Attorney for the authorized representative in the arbitration, if any.
(d) The Statement of Confirmation for appointing an arbitrator, in cases that the appointment has been made. The Statement should include the names and addresses of the appointed arbitrator and the circumstances the said arbitrator should disclose.[359]

On the other hand, the respondent may make a counterclaim pursuant to the submission of arbitration. The arbitral tribunal may consolidate the arbitral proceedings related to the claim and the counterclaim. Unless otherwise agreed upon by the parties, a counterclaim shall not fall outside of the scope of the agreement to arbitrate. In addition, the arbitral tribunal may not allow a counterclaim if it considers the counterclaim to be an attempt by the defendant to delay the arbitral proceedings.[360] During the arbitral proceedings, a party may amend or supplement its submissions as to the relevant parties, the subject matter of the arbitration and the relief or remedies sought, if the other party consents, or if such alteration will not unreasonably prejudice the defense of the other party or terminate the arbitration. However, the aforementioned restrictions shall not apply before the Respondent receives a copy of the Request for Arbitration. In addition, unless otherwise agreed upon by the parties, the arbitral tribunal shall not allow such amendment or supplement if it would fall outside the scope of the agreement to arbitrate.[361]

Place of Arbitration: Drafted with a view to the Model Law on International Commercial Arbitration Article 20 Paragraph 1, unless otherwise agreed upon by both parties, the arbitral tribunal shall determine the place of arbitration as well as the time and date for the hearing and notify both parties thereof within ten days upon receipt of notice of the final arbitral appointment.[362] Under best practice, parties shall agree on the place of arbitration on an arbitral institution and take arbitral fees, arbitrators' qualification and legal environment into consideration.

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than TWD9,600,000, the arbitral fee for the amount exceeding TWD9,600,000 shall be 0.5%." And Article 26, Paragraph 1: "For arbitration regarding non-property disputes, the arbitral fee shall be TWD9,000."

359 *See* CAA Arbitration Rules, Article 8 and 9.

360 *See* CAA Arbitration Rules, Article 15.

361 *See* CAA Arbitration Rules, Article 14.

362 *See* Arbitration Law of R.O.C. Article 20 and Article 21, Paragraph 1.

Principle of Confidentiality: Unless otherwise agreed upon by the parties, the arbitral proceedings shall not be made public.[363] This is one of the most important characters of arbitration and very different from the litigation process, which shall open the proceeding to the general public unless the law specifies otherwise.[364] In addition, institutional arbitral practice[365] and Arbitration Law Article 15 which impose certain obligations on arbitrators both protect the confidentiality of arbitration.

Full Opportunity of Presentation and Comprehension: The arbitral tribunal shall ensure that each party has a full opportunity to present its case and the arbitral tribunal shall conduct the necessary investigations of the claims by the parties. However, either party may appoint a representative in writing to appear before the arbitral tribunal to make statements for and on its behalf. If the arbitral tribunal fails to give a party an opportunity to present its case prior to the conclusion of the arbitral proceedings, or if any party is not lawfully represented in the arbitral proceedings, a party may apply to a court to set aside the arbitral award. International parties may designate a language or languages to be used to conduct the arbitral proceedings. However, the arbitral tribunal or a party may request that any documents relating to the arbitration be accompanied by a translation in another language. Interpreters shall be provided under the direction of the arbitral tribunal in the event that a party or an arbitrator is not familiar with Mandarin.[366] In practice, the arbitral tribunal makes inquiries into submissions during the hearing, which shall be held in camera unless the parties agree otherwise. During the hearing, each party has the burden of submitting statements in support of the facts and legal arguments addressing the subject of the dispute, and has the burden of proving the facts by producing relevant evidence. In addition, each party shall submit arguments addressing the facts and evidence presented by the other party. The arbitral tribunal may, at the request of a party or on its own motion, order witnesses or experts to testify at the hearing. The arbitral tribunal orders the parties to submit arguments addressing the inquiries requested by a party, and the tribunal arranges for their submissions to be recorded, unless the tribunal considers it unnecessary. The arbitral tribunal also orders the parties to submit arguments addressing the outcome of the aforementioned inquiries and to arrange for their submissions to be recorded. Normally there would be only one hearing. When the arbitral tribunal is satisfied that no future submission or argument shall be made by the parties, an arbitral award shall be made, and the arbitral tribunal shall declare the hearing closed. However, after the closure of the hearing, the arbitral tribunal may notify the parties that the hearing will be reopened before the arbitral award is made, if the tribunal considers it necessary.[367]

13.12 What are the formalities for arbitral awards?

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363 *See* Arbitration Law of R.O.C. Article 23, Paragraph 2.

364 *See* Court Organic Act of R.O.C. Article 86; exceptions include but not limited to Code of Civil Procedure of R.O.C. Article 195-1, Article 344 Paragraph 2, Article 350 Paragraph 2, Article 410 Paragraph 2, Article 574 Paragraph 4 and Article 600.

365 *See* CAA Arbitration Rules, Article 6.

366 *See* Arbitration Law of R.O.C., Article 23, Paragraph 1, Articles 24, 25, and 40, Paragraph 1, Item 3

367 *See* CAA Arbitration Rules, Article 23, 24, 25, 27, and 34

Time frame for rendering of the Arbitral Award: By law, the arbitral tribunal shall render an arbitral award within six months of commencement of the arbitration. However, the arbitral tribunal may extend the decision period an additional three months if the circumstances so require.[368] In other words, the length of the statutory decision period would not exceed nine months. However, if the arbitral tribunal fails to produce a decision within nine months, both parties may agree to resume the arbitration instead of commencing an action or filing a motion to litigate. In order to prevent the parties that agreed to extend the decision period from going to court against the agreement, it is advised that the agreement shall be executed in written form before the arbitral tribunal.[369] If the arbitral tribunal fails to produce a decision within the deadline, either party may commence an action or file a motion to litigate. Once a disputant has commenced an action or filed a motion to litigate, the arbitral proceeding are deemed terminated thereafter.[370]

13.13 On what conditions can arbitral awards be appealed or rescinded?

According to Arbitration Law, Article 29, Paragraph 1 (modeled after the Model Law on International Commercial Arbitration, Article 4) a party who knows or may know that the arbitral proceedings have derogated from the provisions of the Arbitration Law, or has not complied with the requirements of the arbitral agreement, yet proceeds with the arbitration without objecting to such non-compliance, shall be deemed to have waived the right to object. In addition, any objection raised shall be considered by the arbitral tribunal. The decisions made with respect thereto shall not be subject to appeal and the assertion and consideration of an objection shall not suspend the arbitral proceedings.[371]

Rescission of Arbitral Awards: After an arbitral decision has been handed down, a party seeking voidance of the arbitral decision may, under specified circumstances, file suit against the other party. However, it is noteworthy that the revocation of arbitral awards shall be deemed a correction of an arbitral procedural flaw rather than an additional substantive investigation process. A party may apply to a court to set aside the arbitral award in any of the following circumstances:

(i) The existence of any circumstances stated in Arbitration Law Article 38.
(ii) The arbitral agreement is nullified, invalid, or has yet to come into effect, or has become invalid prior to the conclusion of the arbitral proceedings; a party to the arbitral agreement was under some incapacity; or the arbitral agreement is not valid under the law to which the parties have subjected it; or failing any indication thereon, under the law of this state.[372]
(iii) The arbitral tribunal fails to give any party an opportunity to present its case prior to the conclusion of the arbitral proceedings, or if any party is not lawfully represented in the arbitral proceedings.

368 *See* Arbitration Law of R.O.C., Article 21, Paragraph 1
369 *See* YANG,CHONG-SEN (楊崇森) ET AL., *supra* note 1, pp. 212
370 *See* Arbitration Law of R.O.C., Article 21, Paragraph 3
371 *See* Arbitration Law of R.O.C., Article 29, Paragraph 2 and 3
372 *See* UNCITRAL Model Law, Article 34 (2) (a) (i)

(iv) The composition of the arbitral tribunal or the arbitral proceedings is contrary to the arbitral agreement or the law.
(v) An arbitrator fails to fulfill the duty of disclosure prescribed in Paragraph 2 of Article 15 of the Arbitration Law and appears to be partial or has been requested to withdraw, but continues to participate, provided that the request for withdrawal has not been dismissed by the court.
(vi) An arbitrator violates any duty in the entrusted arbitration and such violation carries criminal liability.
(vii) A party or any representative has committed a criminal offense in relation to the arbitration.
(viii) If any evidence or content of any translation upon which the arbitral award relies, has been forged or fraudulently altered or contains any other misrepresentations.
(xi) If a judgment of a criminal or civil matter, or an administrative ruling upon which the arbitral award relies, has been reversed or materially altered by a subsequent judgment or administrative ruling.

Items (vi) to (viii) above are limited to instances where a final conviction has been rendered, or the criminal proceedings may not be commenced, or continued for reasons other than insufficient evidence. Item (iv), concerning circumstances contravening the arbitral agreement, and items (v) to (xi), are limited to the extent that the circumstances in question are sufficient to affect the arbitral award.[373] However, a party filing such a suit may only cite procedural flaws in the arbitral process as grounds for action; a party may not file a lawsuit seeking voidance of the arbitral decision if its dispute has to do with factual matters, such as whether the reasons for the decision were correct, or whether the decision was contradictory.

Rescission Procedures: An application to revoke an arbitral award may be filed at the district court at the place of arbitration. The Arbitration Law adopted the wording "may" instead of "shall," which leaves room for parties' autonomy to choose other competent courts regulated by the Code of Civil Procedure of R.O.C.[374] An application to revoke an arbitral award shall be submitted to the court within the thirty-day statutory period after the arbitral award has been issued or delivered. However, if any cause in the above-mentioned items 6 to 9 exists, and if sufficient evidence is offered to show that the failure of a party to apply to the court to revoke an award before the end of the limitation period does not arise from any fault on the part of such party, then the thirty-day statutory period commences to run from the time when the party becomes aware of the cause for revocation. However, the application to revoke an arbitral award shall be barred in any event after five years have elapsed from the date on which the arbitral award was issued.[375] It is noteworthy that the above-mentioned application period is statutory and not subject to parties' autonomy. In addition, the court may grant an application to stay the enforcement of the arbitral award once the applicant has paid an appropriate and specific security to the court. When setting aside an arbitral award, the court shall, under the same authority, simultaneously revoke any enforcement order

373 *See* Arbitration Law of R.O.C., Article 40
374 *See* YANG,CHONG-SEN (楊崇森 ET AL., *supra* note 1, pp. 321
375 *See* Arbitration Law of R.O.C., Article 41

which has been issued with respect to the arbitral award.[376] Once an arbitral award has been revoked by a final judgment of a court, a party may bring the dispute to the court unless otherwise agreed by the parties.[377]

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

A court may assist with the following aspects of arbitral proceedings:

(1) **Investigation:** The arbitral tribunal, if necessary, may request assistance with the conduct of the arbitral proceedings from a court or other agencies. A court so requested may exercise its investigative powers in the same manner and to the same extent as permitted in a legal action.[378] In addition, the arbitral tribunal may summon witnesses or expert witnesses to appear for questioning. However, in the event that a witness fails to appear without sufficient reason, the arbitral tribunal may apply for a court order compelling the witness to appear.[379]

(2) **Replacement of an arbitrator:** an arbitrator appointed in an arbitral agreement may be replaced if such arbitrator becomes unable to perform as a result of death or any other cause, or refuses to conduct the arbitration, or unreasonably delays the performance of arbitration. In the event that the parties fail to agree upon a replacement, either party may apply to an arbitral institution or the court to appoint the replacement. Should any one of the circumstances mentioned occur with respect to an arbitrator(s), appointed by an arbitral institution or by the court, such arbitral institution or the court may appoint a replacement, or replacements, upon an application by any party or by its own volition.[380]

(3) **Record keeping:** a certified copy of an arbitral award, along with proof of delivery, shall be filed with a court registry at the place of arbitration for record-keeping.[381]

13.15 What are the formal requirements for arbitral awards?

(1) **Determination of the Arbitral Award***:* The deliberations of an arbitral award shall not be made public. If there is more than one arbitrator, the arbitral award shall be determined by a majority vote. When calculating an amount in dispute and none of the opinions of the arbitrators prevail, the highest figure in an opinion shall be averaged with the second highest figure in another opinion and so forth, until a majority consensus is obtained. In the event that a majority consensus of the arbitrators cannot be reached, the arbitral proceedings shall be deemed terminated, unless otherwise agreed by the parties, and the arbitral tribunal shall notify the parties

376 *See* Arbitration Law of R.O.C., Article 42
377 *See* Arbitration Law of R.O.C., Article 43
378 *See* Arbitration Law of R.O.C., Article 28
379 *See* Arbitration Law of R.O.C., Article 26
380 *See* Arbitration Law of R.O.C., Article 13, Paragraphs 1 and 4
381 *See* Arbitration Law of R.O.C., Article 34, Paragraph 2

of the reasons for failing to reach a majority consensus.[382]After notification, both parties may turn to other mechanisms for resolving the dispute.

(2) **Issuance of the Arbitral Award:** To the extent that a decision on the dispute may be satisfactorily obtained, the arbitral tribunal shall declare the conclusion of the hearing and, within ten days thereafter, issue an arbitral award addressing the claims and issues raised by the parties. An arbitral award shall contain the following items:

- Names and residence or domicile of the individual parties. For a party that is a corporate entity or another type of organization or institution, its name(s), administrative office(s), principal office(s) or business office(s) address;
- If any, names and domiciles or residences of the statutory agents or representatives of the parties;
- If any, names, nationalities and residences or domiciles of the interpreters;
- The main text of the decision, which shall include the arbitral decision on disputes submitted by parties, and the allocation of the arbitration fee[383];
- The relevant facts and reasons for the arbitral award, unless the parties have agreed that no reasons shall be stated. However, because the reasons for the arbitral award are crucial to the subsequent arbitral award enforcement and revocation, if any, it is advised to address relevant reasons in an arbitral award; and
- The date and place of the arbitral award.

The original copy of the award shall be signed by the arbitrator(s) who deliberated on the award. If an arbitrator refuses to or cannot sign the award for any reason, the arbitrator(s) who do sign the award shall state the reason for the missing signature(s).[384] The arbitral tribunal shall deliver a certified copy of the arbitral award to each party. The certified copy of the arbitral award, along with proof of delivery, shall be filed with a court registry at the place of arbitration for the record.[385] In addition, the arbitral tribunal may correct, on its own initiative or upon request, any clerical, computational, or typographic errors, or any other similar obvious mistakes in the award, and shall provide written notification of this correction to the parties as well as the court. The foregoing is likewise applicable to any discrepancy between a certified copy of the arbitral award and the original version thereof.[386]

(3) **Binding force of arbitral awards:** The award shall be binding on the parties and have the same force as the final judgment of a court.[387] However, the award binds not only both parties but also the following persons with respect to the arbitration:

(i) Successors of the parties after the commencement of the arbitration, or those who have taken possession of the contested property of a party or its successors.

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382 *See* Arbitration Law of R.O.C., Article 32
383 *See* The Rules on Arbitration Institution, Mediation Procedures and Fees, Article 34, Paragraph 1
384 *See* Arbitration Law of R.O.C., Article 33
385 *See* Arbitration Law of R.O.C., Article 34
386 *See* Arbitration Law of R.O.C., Article 35
387 *See* Arbitration Law of R.O.C., Article 37, Paragraph 1

(ii) Any entity, on whose behalf a party enters into an arbitral proceeding; the successors of said entity after the commencement of arbitration; and, those who have taken possession of the contested property of the said entity or its successors.[388]

13.16 What procedures exist for enforcement of foreign and domestic arbitral awards?

As Taiwan is not a signatory to the New York Convention, Arbitration Law must govern the recognition and enforcement of foreign arbitral awards. A "foreign" arbitral award is an arbitral award which is issued outside the territory of Taiwan or issued pursuant to foreign laws within the territory of the Taiwan. A foreign arbitral award may be enforceable only after an application for recognition has been granted by the court.[389] A party filing motion with a court for recognition of a foreign arbitral decision must submit the following documents:

(i) The original arbitral award or an authenticated copy thereof;
(ii) The original arbitral agreement or an authenticated copy thereof;
(iii) The full text of the foreign arbitration law and regulation, the rules of the foreign arbitral institution, or the rules of the international arbitral institution which applied to the foreign arbitral award.

If the above-mentioned documents are made in a foreign language, Chinese translations of the documents must also be submitted to the court. The word "authenticated" mentioned in items (i) and (ii) means the authentication made by the embassies, consulates, representative offices, liaison offices, or any other organizations authorized by the Taiwan government. Copies of the above-mentioned application shall be made, corresponding to the number of respondents, and submitted to the court which shall deliver those copies to the respondents.[390]

However, when an application is submitted by a party seeking recognition of a foreign arbitral decision, the court must issue a dismissal if such award contains one of the following elements:

(1) Where the content of the arbitral award is contrary to public order or good morals of Taiwan.
(2) Under the Taiwan laws, the matter in dispute cannot be arbitrated or settled through arbitration.

In addition, the court may also issue a dismissal order with respect to an application for recognition of a foreign arbitral award if the country where the arbitral award was made,

388 *See* Arbitration Law of R.O.C., Article 37, Paragraph 3
389 *See* Arbitration Law of R.O.C., Article 47
390 *See* Arbitration Law of R.O.C., Article 48

or whose laws govern the arbitral award, does not recognize the arbitral awards of Taiwan.[391]

However, apart from the fact that the court can deny recognition of the foreign award, the respondent may also request the court to dismiss the application within twenty days from the date of receipt of the notice of the application, if the counter party applies to the court for recognition of a foreign arbitral award that concerns any of the following circumstances:

(1) The arbitral agreement is invalid as a result of a party's incapacity according to the law chosen by the parties to govern the arbitral agreement.
(2) The arbitral agreement is null and void according to the law chosen to govern said agreement or, in the absence of a law of choice, the law of the country where the arbitral award was made.
(3) A party is not given proper notice of the appointment of an arbitrator, or of any other matter required in the arbitral proceedings, or any other situations that give rise to lack of due process.
(4) The arbitral award is not relevant to the subject of the dispute covered by the arbitral agreement, or exceeds the scope of the arbitral agreement, unless the offending portion can be severed from and shall not affect the remainder of the arbitral award.
(5) The composition of the arbitral tribunal or the arbitral procedure contravenes the arbitral agreement or, in the absence of an arbitral agreement, the law of the place of the arbitration.
(6) The arbitral award is not yet binding upon the parties or has been suspended or revoked by a competent court.[392]

(1) **Enforcement Order Application and Exception:** An award may not be enforced unless a competent court has granted an enforcement order on the application of a concerned party. It is noteworthy that to convert the award into a judgment or court order does not involve a factual investigation.[393] However, the arbitral award may be enforced without an enforcement order if both parties so agreed in writing and the arbitral award concerns only the following:

(i) Payment of a specified sum of money or a certain amount of fungibles or valuable securities;
(ii) Delivery of a specified movable property.[394]

(2.) **Rejection of Enforcement Order Application:** With the exception of the circumstances discussed above, an enforcement order is necessary for the enforcement of the award. The court shall reject an application for enforcement where:

391 *See* Arbitration Law of R.O.C., Article 49
392 *See* Arbitration Law of R.O.C., Article 50
393 *See also* Supreme Court Civil Ruling, Serial No. 87th Year, Tai Kang Tzu, No. 266
394 *See* Arbitration Law of R.O.C., Article 37, Paragraph 2

(i) The arbitral award concerns a dispute not contemplated by the terms of the arbitral agreement, or exceeds the scope of the arbitral agreement, unless the offending portion of the award may be severed and the severance will not affect the remainder of the award;
(ii) The reasons for the arbitral award were not stated, as required, unless the omission was corrected by the arbitral tribunal. It is noteworthy that the omission of the required reasons for the arbitral award is the only factor governing the rejection of an enforcement order application among other items which are required in the arbitral award; and
(iii) The arbitral award directs a party to act contrary to the law.[395]

13.17 Recognition and Enforcement of arbitral awards between China, Hong Kong and Taiwan

The legal frameworks of arbitral systems for the recognition and enforcement of foreign arbitral awards of China, Hong Kong, and Taiwan are either subject to or modeled on the New York Convention,[396] but with minor variations on implementation.

(1) **Between Taiwan and China:** An application for a ruling to recognize an arbitral award, civil ruling, or judgment, rendered in China, which is not contrary to the public order or good morals of Taiwan, may be filed with a court. An arbitral award of China may be enforceable after recognition has been granted by the court.[397] The word "may" used above does not compel a court in Taiwan to immediately recognize an award of China. Therefore, the Arbitration Law will still be applicable after notification of an application for recognition of an award of China, and the counter party should still be able to request the court to dismiss the application on the grounds listed in Article 50 of the Arbitration Law.[398]

However, in accordance with the same law, it shall not apply until any arbitral award rendered in Taiwan may be filed with a court in China and a ruling to recognize it or permit its enforceability in China is effected.[399] After the announcement on 16 May 1998 that the PRC Supreme People's Court had passed the "Regulation of the Supreme People's Court Regarding the People's Court Recognition of the Civil Judgments of Taiwan Courts," Taiwan restored its recognition of China's arbitral and judgment decisions. In other words, since 1998, both judicial bodies have recognized each other's judicial judgments and arbitral decisions.

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395 *See* Arbitration Law of R.O.C., Article 38
396 *See* Leyda, José Alejandro Carballo, A Uniform, Internationally Oriented Legal Framework for the Recognition and Enforcement of Foreign Arbitral Awards in Mainland China, Hong Kong and Taiwan? Chinese Journal of International Law, Vol. 6, Issue 2, pp. 345-361, 2007. Available at SSRN: http://ssrn.com/abstract=1154962 or DOI: jmm021, at Paragraph 64
397 *See* Act Governing Relations Between Peoples of the Taiwan Area and Mainland Area Article 74, Paragraph 1
398 *See* Leyda, José Alejandro Carballo, *supra* note 43, Paragraph 57
399 *See supra* note 44, Article 74, Paragraph 3

Nevertheless, although Article 19 of the "Regulation of the PRC Supreme People's Court Regarding the People's Court Recognition of the Civil Judgments of Taiwan Courts" extends the applicability of the regulation to arbitral awards rendered in Taiwan, any application for the enforcement of a recognized Taiwan arbitral award must still be submitted to a competent intermediate court in accordance with the provisions of the Civil Procedure Law of China. At the same time, Article 4 of the "Regulation of the PRC Supreme People's Court Regarding the People's Court Recognition of the Civil Judgments of Taiwan Courts" requires that the judgments of Taiwan courts "shall not violate the One-China principle," and since the grounds for the mutual recognition and enforcement of arbitral awards are based on unilateral legislation, such recognition and enforcement will still depend on cross-strait politics.[400]

(2) **Between Taiwan and Hong Kong:** According to "Act Governing Relations with Hong Kong and Macau," Article 30 through Article 34 of the Commercial Arbitration Act, instead of Article 47 through Article 51 of the Arbitration Law, shall apply to the validity, petition for court recognition, and suspension of execution proceedings in cases involving civil arbitral awards made in Hong Kong or Macau.[401] However, since the earlier Commercial Arbitration Act had been amended into the then re-named Arbitration Law, it is obvious that the Arbitration Law shall be applicable under this regulation.

Before 1997, Taiwan awards were summarily enforceable in Hong Kong. However, China resumed its sovereignty over Hong Kong on 1 July 1997, which resulted in a legal vacuum in the enforcement of arbitral awards from China and Taiwan until further amendments to the Arbitration Ordinance of Hong Kong took effect in 2000. These substantially restored the status quo ante.[402] Therefore, although the 1998 "Regulation of the PRC Supreme People's Court Regarding the People's Court Recognition of Civil Judgments of of Taiwan Courts" is not applicable for Hong Kong, Taiwan awards may still be enforced under the "universal" enforcement provision contained in the modified Section 2GG (2) of the Arbitration Ordinance of Hong Kong.[403]

13.18 Settlement Agreements

Parties to an arbitration dispute may explore settlement options to their dispute prior to the issuance of an arbitral award. If the parties reach a settlement before the conclusion of the arbitration, the arbitrator shall record the terms of settlement in a settlement agreement. A settlement agreement has the same force and effect as that of an arbitral award. However, the terms of the settlement agreement may be enforced only after the court has granted an application for enforcement and issued an enforcement order. The

400 *See* Leyda, José Alejandro Carballo, *supra* note 43, Paragraphs 59 and 60
401 *See* Act Governing Relations with Hong Kong and Macau, Article 42, Paragraph 2
402 *See* Morgan, Robert, Enforcement of Chinese Arbitral Awards Complete Once More, but with a Difference. Available at SSRN: http://ssrn.com/abstract=925211, p. 2
403 *See* Leyda, José Alejandro Carballo, *supra* note 43, Paragraph 62

provisions of Arbitration Law, Article 38 and Articles 40 to 43, shall apply mutatis mutandis to the settlement proceedings hereunder.[404]

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404 *See* Arbitration Law of R.O.C., Articles 44 and 46

14. THAILAND

14.1 Which law(s) apply to arbitration in Thailand?

In Thailand, the arbitration law is the Arbitration Act B.E. 2545 (2002), which came into force on 30 April 2002 ("Arbitration Act").

14.2 Is the Thai Arbitration Act based on the UNCITRAL model law?

The Arbitration Act is substantially based on the UNCITRAL Model Law with a few differences, such as:

- The arbitrators are not allowed to take any interim measures. The Arbitration Act requires a party to file an application for any provisional measures for the protection of the interests of the party before or during the arbitration proceedings with the competent Thai courts.

- The arbitrators are exempted from liability in performing their duties, except where they act intentionally or with gross negligence causing damages to any party. There are also criminal provisions where an arbitrator can be fined for up to one hundred thousand Baht and/or imprisoned for up to ten years for demanding or accepting bribes. (Sec. 23 Arbitration Act).

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

The Arbitration Act applies to both national and international arbitrations, as long as the parties agree on the application of the Thai arbitration law in the arbitration clause or in an arbitration agreement in writing.

14.4 Has Thailand acceded to the New York Convention?

Thailand acceded to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards New York on 21 December 1959 without reservation, and the Convention entered into force for Thailand on 20 March, 1960.

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

The Arbitration Act does not require any party domiciled in Thailand to select Thai arbitration institutions for the arbitration.

14.6 Does the Arbitration Act contain substantive requirements for the arbitration procedures to be followed?

The Arbitration Act generally allows the parties to agree on the specific rules to govern the arbitration, and provides the substitute provisions in case that the parties are unable to agree. However, there are some mandatory provisions that must be followed:

- The arbitration agreement must be in writing and signed by the parties (including the electronic signature, such as email).
- The arbitral tribunal must be composed of an uneven number of arbitrators.
- The arbitrators must be impartial and independent, and possess the qualifications prescribed by the arbitration agreement or the institution administering the arbitration.
- The arbitral award must be in writing and signed by all or a majority members of the arbitral tribunal.

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

14.7.1 Conflicts of jurisdiction between the courts and the arbitral tribunal: Proceedings started in Thailand

If litigation proceedings are started in court in Thailand in breach of an arbitration agreement, the opposing party may request that the court strike out the case so that the parties can proceed with arbitration. The request must be made no later than the date for filing the statement of defense. If the court considers that there are no grounds for rendering the arbitration agreement void and unenforceable, the court will issue the order to strike out the case.

However it should be noted that if one of the parties to a dispute files an action in the courts, and if the court determines that it has jurisdiction, then the court will not stay the proceedings merely because an arbitral tribunal has determined that is has jurisdiction over the same dispute. If one of the parties to a court case submits a petition objecting to the court's jurisdiction, and if the court agrees that the dispute should be decided by arbitration, then the court will dismiss the case.

Furthermore, concerning the jurisdiction of the arbitral tribune, it should be noted that according to the Arbitration Act, the arbitral tribunal can rule on its own jurisdiction, including:

- The existence or validity of the arbitration agreement.
- The validity of the appointment of the arbitral tribunal.
- The issues of dispute falling within the scope of its authority.

For this purpose an arbitration clause is considered to be a separate contract, so if the main contract is void, the arbitration clause can nevertheless survive.

The arbitral tribunal can rule on its jurisdiction as a preliminary question or in the award on the merits. However, if the arbitral tribunal rules as a preliminary question that it does have jurisdiction, and one party in the arbitration denies that the arbitral tribunal has jurisdiction to determine the dispute(s), this party may apply to the court to decide the matter within 30 days of receiving the ruling on the preliminary issue.

14.7.2 Proceedings started abroad

If the proceeding started overseas in breach of an arbitration agreement, the Thai court will not grant an injunction to restrain the proceedings started abroad.

The objecting party must apply to the overseas court to strike out the proceedings on the basis that they are in breach of the arbitration agreement. This is due to the fact that Thailand is not a party to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971, and foreign courts are unlikely to recognize and enforce the Thai court's order granting the injunction.

14.7.3 During Arbitration Proceedings

Regarding the arbitration proceedings, the local courts are not likely to actively intervene in arbitration proceedings. However, a majority of the arbitral tribunal (or a party with the consent of a majority) can request a court to issue a subpoena or an order for submission of any document or materials. If the court believes that this subpoena or court order could have been issued if the action was being conducted in the courts, then it will proceed with the application, applying all relevant provisions of the Civil Procedure Code.

In addition, any party to an arbitration agreement can file an application requesting that the court impose provisional measures to protect its interests either before or during the arbitral proceedings (Sec. 16, Arbitration Act). If the court believes that this provisional relief would have been available if the action was being conducted in the courts, then it will proceed as above. If the court orders provisional relief before the arbitral proceeding have started, then the application must begin the arbitration within 30 days of the date of the order (or such other period that is specified by the court), failing which the court order automatically expires.

14.8 Main arbitration institutions

The main arbitration institutions in Thailand are:

- **Thai Arbitration Institute of the Alternative Dispute Resolution Office**, Office of the Judiciary (TAI)
  Criminal Court Building 5th – 6tf Floor
  Rachadaphisaek Road,
  Bangkok 10900
  Tel: +66 2 541 2298/9
  Fax: +66 2 512 8432
  Website: http://www.judiciary.go.th/adro/sub/tai/en

- **Office of the Arbitration Tribunal Board of Trade Thailand**
  150/2 Rajbopit Road
  Bangkok 10200
  Tel: +66 2 622 1860-76, ext. 465-467, 518
  Fax: +66 2 226 4525
  Email: la@thaiechamber.com
  Website: http://www.thaiechamber.com

In addition to these two bodies, other organizations such as the Securities and Exchange Commission and the Department of Intellectual Property also operate industry-specific arbitration schemes. The Insurance Department of the Thai Ministry of Commerce has also its own arbitration rules and established an arbitration body.

14.9 Model clause of the institution

For the parties who wish to select The Thai Arbitration Institute (TAI) to be their arbitration institution, Rule 5 sets out the TAI's recommended arbitration clause as follows:

"Any dispute controversy or claim arising out of or relating to this contract or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Arbitration Rules of the Thai Arbitration Institute, Office of the judiciary applicable at the time of submission of the dispute to arbitration and the conduct of the arbitration thereof shall be under the auspices of the Thai Arbitration Institute."

14.10 How many arbitrators are usually appointed?

According to the Arbitration Act, unless otherwise agreed by the parties, the procedure for appointing the tribunal (and the procedure for appointing a chairman if the parties have agreed to an even number of arbitrators) is as follows:

- Where the tribunal consists of a sole arbitrator, and the parties are unable to agree on that arbitrator, then either party can apply to the court requesting it to appoint the arbitrator.

- Where the tribunal consists of multiple arbitrators, then each party must appoint an equal number of arbitrators, and those arbitrators jointly appoint an additional arbitrator (the chairman). If either party fails to appoint its arbitrator(s) within 30 days after notification from the other party, or if the party-appointed arbitrators are unable to agree on a chairman within 30 days from the date of their own appointment, then either party can apply to the court requesting it to appoint the arbitrator(s) or the chairman, as the case may be.

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

The arbitrators can be challenged if there are circumstances that give rise to "justifiable doubts" as to the arbitrator's impartiality and independence, or the lack of qualifications agreed by the parties. (Sec. 19 Arbitration Act)
The challenge of the appointment of an arbitrator shall, within 15 days after becoming aware of the appointment of the arbitrator or after becoming aware of circumstances that rise to justifiable doubts as to arbitrator's impartiality, independence or lack of agreed-on qualifications. (Sec. 20 Arbitration Act)

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

Whereas foreign nationals may act as arbitrators (subject to compliance with immigration and work permit laws), foreign lawyers may only represent parties to an arbitration:

(i) Where the dispute is not governed by Thai law, or

(ii) Irrespective of the governing law, where there is no need to apply for enforcement of the arbitral award in Thailand.

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

The arbitrators, or any party with the approval of the majority of the tribunal, may make an application for the court intervention, when they are of the opinion that a specific procedure can only be carried out by a court (such as summoning a witness or ordering production of a document). So long as the request is within its jurisdiction, the court shall accept the application.

In addition, any party to an arbitration agreement can file an application requesting that the court impose provisional measures to protect its interest either before or during the arbitral proceedings.

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

No, however the parties may file with a competent court an application for provisional measures for the protection of the interests of the party before or during arbitration proceedings. The court may grant such relief if the court believes that this provisional relief would have been available if the action was being conducted in the courts.

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

The award must be in writing and signed by the arbitral tribunal and state the reasons for the decision. The date and the place of arbitration shall also be stated in the award. If the arbitral tribunal consists of more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature shall also be stated. And the copies of the award must be sent to each party. (Sec. 37 Arbitration Act).

However, the Arbitration Act does not stipulate a time limit for delivery of the award.

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

An arbitral award is usually not allowed to be appealed. For one of the ultimate purposes for which the arbitration system was designed is to regulate and solve the disputes fast and final. However, the Arbitration Act allows the court to set aside the arbitral awards for certain specific procedural issues.

A party can apply to the court within 90 days of receipt of the award (or after a correction, interpretation or the making of an additional award, as stated in sec. 39 Arbitration Act) to set aside the award (sec. 40, Arbitration Act). The grounds for the arbitral awards to be set aside are essentially identical to Art.34 of the Model Law.

The Court will set aside the arbitral award if:

(i) a party who makes the application is able to prove that:

- **(a)** a party to the arbitration agreement lacks legal capacity under the law applicable to the party;
- **(b)** the arbitration agreement is not legally binding under the law to which the parties have agreed upon or, in case where there is no such agreement, the law of the Kingdom of Thailand;
- **(c)** a party who makes the application was not delivered advance notice of the appointment of the arbitral tribunal or the hearing of the arbitral tribunal, or was otherwise unable to present his or her case;
- **(d)** the award deals with a dispute not falling within the scope of the arbitration agreement or contains decisions on matters beyond the scope of the submission to arbitration. If the decisions on matters submitted to arbitration could be separated from those not so submitted, only the part of the award

which contains decisions on matters not submitted to arbitration may be set aside by the Court; or

(e) the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties or, in the case where there is no such agreement, was in accordance with Arbitration Act;

(ii) if it appears to the Court that:

(a) the award deals with the dispute which shall not be settled by arbitration by the law; or

(b) the recognition or enforcement of the award is contrary to public order or good morals (Sec. 40 Arbitration Act).

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

Domestic arbitration awards are expressly recognized as binding on the parties, and enforceable in the domestic courts on application by one of the parties. Regarding foreign arbitral awards, according to Sec. 41 of the Arbitration Act, foreign arbitral awards will be recognized and enforced if they are made in accordance with a treaty or international agreement where Thailand is a member and to the extent Thailand agrees to be bound.

While Thailand is a party to both the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention, no reservations were entered on accession) and the Geneva Protocol on Arbitration Clauses 1923 (Geneva Protocol), foreign arbitration awards given in countries that are signatories to the New York Convention or the Geneva Protocol are recognized and enforceable in Thailand. The procedure for enforcing a foreign award is the same as the procedure for enforcing a domestic award (Sec. 41 Arbitration Act). The grounds for denying enforcement for both domestic and foreign awards are also the same and are essentially like those set out in Art. V of the New York Convention.

The party seeking enforcement, according to Sec. 42 Arbitration Act, must file a petition within 3 years from the date the award first became enforceable. The party must submit the following documents:

- An original or certified copy of the arbitral award.
- An original or certified copy of the arbitration agreement.
- A certified Thai translation of the award and the arbitration agreement. (The translations of the arbitral award and the arbitration agreement in Thai language made by a translator who has sworn under oath before the Court or official or the person having power to accept the oath, or who has made an oath to, or represented by, the official authorized to certify the translation or by a diplomatic delegate or the Thai consul in the country in which the award or the arbitration agreement was made (Sec. 42(3) Arbitration Act)

The court can refuse the enforcement of an arbitral award according to Sec. 43, Arbitration Act, if the party against which the enforcement is sought can prove any of the following:

- Any of the grounds for the award to be set aside (see the grounds for appeal);
- That the arbitral award has not yet become binding;
- That the arbitral has been set aside or suspended by a competent court, or under the law of the country where it was issued.

An order or judgment of a Court under the Arbitration Act concerning the recognition and enforcement shall not be appealed, except where:

(1) The recognition or judgment of the award is contrary to public order or good morals;
(2) The order or judgment is contrary to the provisions of law relating to public order or morals;
(3) The order or judgment is not in accordance with the arbitral award;
(4) The judge who has tried the case gave a dissenting opinion in the judgment; or
(5) It is an order on provisional measure under Section 16.

An appeal against an order or judgment under the Arbitration Act shall be made to the Supreme Court or the Supreme Administrative Court, as the case may be. (Sec. 45 Arbitration Act)

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

The tribunal's award may include directions with respect to costs, including the tribunal's own charges. The fees and expenses of the arbitral proceedings, and the arbitrators' compensation will be paid according to the arbitral award. However, under the Arbitration Act, a party's legal fees and expenses are not recoverable unless otherwise agreed.

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

No.

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

Since the enforcement of the Arbitration Act in 2002, and the new rules from The Thai Arbitration Institute in 2003, there are no further new developments.

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15. VIETNAM

15.1 Which law(s) apply to arbitration in Vietnam?

The "Ordinance on Commercial Arbitration 2003 ("Ordinance")" is the applicable law.

The laws of Vietnam are applicable to the dispute if all parties are Vietnamese.

Any national laws selected by the parties shall be applicable if the dispute is "involving foreign elements". *(Art.49, clause 5 of the Ordinance on Commercial Arbitration 2003):*

"Disputes involving foreign elements are those arising from commercial activities with one participating party or all participating parties being foreigners, foreign legal persons, or those with the bases for establishing, changing or terminating disputed relationships arising abroad or with involved properties situated abroad." *(Clause 4 of Art.02 of the Ordinance on Commercial Arbitration 2003)*

It should be noted that wholly foreign owned or joint-venture companies in Vietnam are not considered as "foreign parties" under the Ordinance.

15.2 Is the Vietnamese arbitration law based on the UNCITRAL model law?

No, it is not.

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

Art. 7 of the Ordinance stipulates as follows:

"For disputes between Vietnamese parties, the Arbitration Councils shall apply Vietnamese laws to settle them.
For disputes involving foreign elements, the Arbitration Councils shall apply the laws selected by the involved parties. The selection and application of foreign laws must not contravene the fundamental principles of Vietnamese laws. Where the involved parties fail to select laws for settling their disputes, the Arbitration Councils shall make decision."

15.4 Has Vietnam acceded to the New York Convention?

Yes, Vietnam has ratified the New York Convention since 1995.

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

Yes, regardless of their domicile, as long as the dispute is "involving foreign elements", the parties can agree on a foreign arbitration institution.

However, as stated above, joint venture companies and wholly foreign owned companies in Vietnam, notwithstanding the real foreign interests in them, are not considered as "foreign parties".

15.6 What mandatory requirements are there under Vietnamese arbitration legislation that must be followed?

(i) The arbitration agreement must be made in writing. Arbitration agreements reached through mails, telegrams, telex, fax, electronic mails or other written forms clearly expressing the wills of the involved parties to settle their disputes through arbitration shall be regarded as written arbitration agreements. The arbitration agreement may be an arbitration clause in contracts or in a separate agreement.

(ii) The arbitration clause must specify clearly the disputed objects and the name of the arbitration institution competent to settle the dispute.

(iii) Statute of limitations for initiating dispute settlement through arbitration: in general, for disputes for which the statute of limitations is not prescribed by law, the statute of limitations for initiating the settlement thereof through arbitration shall be two years as from the date the disputes occurs, except for cases of force majeure events. *(Art.21 of the Ordinance on Commercial Arbitration 2003)*

Regarding the disputes with "involving foreign elements", the arbitration councils are entitled to apply any arbitration procedures other than the Rules of VIAC if the parties have had agreement on that issue. *(Art.49, clause 2 of the Ordinance on Commercial Arbitration 2003)*

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

Yes, it does. Then the Court has to refuse to accept the dispute:

"For cases of dispute where there is arbitration agreement, if one party initiates a lawsuit at a court, the court must refuse to handle them, unless such arbitration agreement is invalid" (Art. 05, Ordinance on Commercial Arbitration 2003)

15.8 What are the main arbitration institutions in Vietnam?

Vietnam International Arbitration Center (VIAC) at the Vietnam Chamber of Commerce and Industry)

9 Dao Duy Anh Street, Dong Da District, Hanoi, Vietnam
Telephone number: +84-4-35744001
Fax number: +84-4-35743001
Email: viac-vcci@hn.vnn.vn
Website: www.viac.org.vn

The arbitration rules are published on the VIAC's website as follows:

http://www.viac.org.vn/en-US/Home/quytactotungtrongtai.aspx

Also the Conciliation Rules are published on the VIAC website:

http://www.viac.org.vn/en-US/Home/mediation/2008/10/213.aspx

15.9 Model clause of the institution

The Vietnam International Arbitration Centre at the Vietnam Chamber of Commerce and Industry (the "VIAC") recommends that all parties wishing to make reference to VIAC arbitration in their contracts to use the following model clause:

"All disputes arising out of or in relation to this contract shall be finally settled by the Vietnam International Arbitration Centre at the Vietnam Chamber of Commerce and Industry in accordance with its Rules of Arbitration".

Additionally, the parties may add the following provisions to the arbitration clause:
(a) The number of arbitrators shall be ..... (one or three);
(b) The place of the arbitration shall be ..... ;

As to disputes involving a foreign element, the parties may also make additions:
(c) The applicable law shall be ..... ;
(d) The language of the arbitration shall be ..... .

15.10 How many arbitrators are usually appointed?

The parties may agree on setting up an Arbitration Council which includes three arbitrators or only one arbitrator. If there is no agreement on such matter, the Arbitration Council shall consist of three arbitrators. (*Art.04, Rules on Arbitration Proceedings of VIAC*)

- **Arbitration Council consisting of a sole arbitrator:**

The arbitrator shall be selected upon mutual agreement of the parties or the parties can request the president of the selected arbitration institution to appoint an arbitrator for their dispute settlement. (*Art. 26, Ordinance on Arbitration; Art.09, Rules on Arbitration Proceedings of VIAC*)

- **Arbitration Council consisting of three arbitrators:**

The claimant selects one arbitrator, the respondent selects one; then the two selected arbitrators shall select the third arbitrator, failing which the president (of the arbitration institution) shall appoint a third arbitrator from the list of arbitrators of the arbitration institution. (*Art. 25, Ordinance on Arbitration; Art.08, Rules on Arbitration Proceedings)*

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

There is a right to challenger arbitrators if the arbitrator is a relative or representative of either party, has an interest in the dispute, or where there are explicit grounds why the arbitrators would not be impartial and objective while performing their duties as arbitrators.

15.12 Restrictions as to parties' representation in arbitration proceedings?

With regard to the disputes that are "involving foreign elements", foreign lawyers can represent the parties in arbitration proceedings. As to local disputes, as the language to be used is Vietnamese, it can be understood that the party representatives should be Vietnamese.

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

Under no circumstances can courts take part in arbitrations except when the arbitration clause is invalid according to Art.10 of the Ordinance on Arbitration 2003. This does however not exclude "interim measures" that may be requested by the parties from local courts, i.e. to provide protection for evidence in the event that such evidence is in danger of being destroyed; to inventory disputed property; to prevent the transfer of disputed property; to prevent nay change in the condition of disputed property; to inventory and seal up property at its place of storage and to freeze bank accounts. (*Art. 33 of the Ordinance on Commercial Arbitration 2003*)

In addition, the Court may intervene by appointing arbitrators for the respondents as per the claimant's request in case the respondents fail to select arbitrators as agreed in the arbitration agreement. (*Art. 26 of the Ordinance on Commercial Arbitration 2003*)

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

No, such powers belong to the (provincial level) court (where the arbitration council is domiciled). (*Art. 34 of the Ordinance on Commercial Arbitration 2003*)

15.15 Formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

An arbitral award must contain the following principal contents:

a. The date and place of issuance of the arbitral award; for disputes settled by the Arbitration Centers, the arbitral awards must contain the names of the Arbitration Centers;
b. The names and addresses of the claimant and respondent;
c. The full names of arbitrators or the sole arbitrator;
d. Summary of the claim and disputed issues;
e. Bases for issuing the arbitral award;
f. Decision on the dispute; decision on the arbitration charge and other expenses;
g. The time limit for enforcement of the arbitral award;
h. Signatures of the arbitrators or the sole arbitrator.

In cases where an arbitrator refuses to sign the arbitral award, the chairman of the Arbitration Council must record such refusal in the arbitral award, clearly stating the reason for the refusal. (*Art. 44 of the Ordinance on Commercial Arbitration 2003*)

15.16 Deadlines for issuing arbitral awards?

The arbitral awards may be announced right at the final hearing or afterwards but no later than 60 days after the end of the final hearing. The full text of the arbitral award must be sent to the involved parties right after the date of their announcement.
(*Art. 45 of the Ordinance on Commercial Arbitration 2003*)

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

The arbitral awards cannot be appealed. The arbitral awards are final and binding on all parties, except where they are cancelled by the Court as mentioned below. (*Art.6 of the Ordinance on Commercial Arbitration 2003*)

The parties can request the provincial-level Court to cancel an arbitral award under the following circumstances:

(i) There is no arbitration agreement.

(ii) The arbitration agreement is invalid under the provisions of Article 10 of the Ordinance.

(iii) The Arbitration Council's composition and/or arbitral proceedings fail to comply with the involved parties' agreements.

(iv) The dispute does not fall under the jurisdiction of the Arbitration Council; if part of the arbitral award does not fall under the jurisdiction of the Arbitration Council, such part shall be cancelled.

(v) The requester is able to prove that during the process of settling the dispute an arbitrator(s) has breached the arbitrators' obligations specified in Clause 2, Article 13 of the Ordinance.

(vi) The arbitral award runs counter to the public interests of the Socialist Republic of Vietnam.

(*Art. 54 of the Ordinance on Commercial Arbitration 2003*)

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

15.18.1 Enforcement of domestic awards

The arbitral award is final and binding on all concerned parties. Therefore, the parties have to execute the award immediately without delay.

However, after 30 days from the end of the time limit for enforcement of the arbitral award, if any party fails to execute such award voluntarily or requests the cancellation thereof, the party in favor of whom the arbitral award is enforced may make a written request to the provincial-level enforcement agency where the party which is bound to execute the arbitral award is headquartered, resides or has its property, to enforce the arbitral award. (*Art.57 of the Ordinance on Commercial Arbitration*)

15.18.2 Enforcement of foreign awards

(i) Petition for recognition and enforcement sent to the Ministry of Justice

A foreign arbitral award must be formally recognized and held enforceable by a Vietnamese People's Court at provincial or equivalent level before it can be enforced in Vietnam (Art. 343 (4) Civil Procedure Code). To obtain an enforcement order, the party seeking the enforcement of the award must lodge a formal application for its recognition and enforcement to the Ministry of Justice. The Ministry of Justice shall then forward the entire dossier to the respective People's Court.

Petitions and attached documents in a foreign language must be accompanied with a duly notarized or certified Vietnamese translation.

(ii) Consideration of petition by the Court

Within seven days from the date of receipt of the a.m. documents, the Ministry of Justice shall transfer the file to the appropriate court.

Within two months, the court shall make decisions to suspend the consideration of the petition or commence a court meeting for consideration of the petition. This time-limit can be extended by two months.

At the court meeting, a council comprising three judges shall be set up for consideration of the petition.

The court meeting shall be conducted in the presence of the person against whom enforcement is sought, or his or her legal representative; where such person is absent from the trial for the first time with proper reasons, the meeting shall be adjourned. The consideration of the petition shall proceed in the absence of the person against whom enforcement is sought, or his or her legal representative if he or she so requests or if such person continues to be absent after being properly summoned twice.

Vietnamese courts can refuse to recognize and enforce foreign arbitral awards, if the enforcement would run "contrary to the basic principles of Vietnamese law". The "basic principles" of Vietnamese law can be interpreted broadly and may include a failure to comply with an administrative procedure that is not the subject matter of the dispute

The Court shall check whether the arbitral award is against the laws of Vietnam or relevant international treaties, then make a decision to recognize and enforce the arbitral award in Vietnam. The decision shall be sent immediately to the concerned parties by the court if the parties are domiciled in Vietnam or by the Ministry of Justice in case the parties are overseas.

Appeals

Within fifteen (15) days the concerned parties or their respective legal representatives shall be entitled to appeal against the decision.

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

Yes. The claimant must pay an advance of the arbitration charges and the losing party must pay the arbitration charges, unless otherwise agreed upon by the involved parties. (*Art.22 of the Ordinance on Commercial Arbitration 2003*)

15.20 Are there any statistics available on arbitration proceedings in the Vietnam?

No.

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

A draft Arbitration Law is slated for consideration and passage by the National Assembly at the end of 2009 and may take effects in late 2010 or in early 2011.

The draft law would make a major change over the Ordinance. While the Ordinance required that arbitrators be Vietnamese citizens, the draft law would allow foreign arbitrators to be admitted to panels of Vietnamese arbitration institutions.

The second important improvement is that the draft law would authorise an arbitral tribunal to issue interim relief orders on the application of any party.

Last but not least, not merely commercial disputes as stipulated by the Ordinance, the draft law would allow arbitration to be used as a dispute resolution mechanism for all civil and labour disputes, contractual and non-contractual (exemptions would certainly be disputes over administrative matters and individual rights).

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