



DELOS GUIDE TO ARBITRATION PLACES (GAP)

1ST EDITION

PROFESSOR DAVID D CARON & PROFESSOR MAXI SCHERER
CHAIRS

THOMAS GRANIER & HAFEZ R VIRJEE
GENERAL EDITORS

DELOS
dispute resolution

DELOS DISPUTE RESOLUTION

Palais Brongniart, 16 place de la Bourse, 75002 Paris, France
www.delosdr.org . safeseats@delosdr.org

#ACTIVATINGARBITRATION

This first edition was published on 18 June 2018. Every effort has since been made to maintain the GAP up-to-date of key developments in all of the jurisdictions covered. Please note, however, that the GAP does not constitute legal advice and the chapter authors, the contributing law firms and Delos Dispute Resolution decline all responsibility in this regard. Furthermore, the views expressed and the statements made in the jurisdiction chapters of the GAP are those of their stated authors and may not be construed as creating any duty, liability or obligation on the part of Delos Dispute Resolution.

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FOREWORD

It is a great pleasure to write the foreword to the DELOS Guide to Arbitration Places (GAP). The GAP is a comprehensive, comparative study on arbitration places around the globe: developed as a user-friendly guide providing in-house counsel, corporate lawyers, and arbitration practitioners with practical and effective insight into selecting arbitral seats and conducting arbitral proceedings.

Each of the 54 chapters in the GAP provides an in-depth analysis into a different jurisdiction, including all major arbitral seats throughout the world. The analytical framework for this ambitious study, which is described in more detail in the [methodology section](#), consists of two steps. First, leading law firms in the various jurisdictions dedicated their time to researching and drafting chapters on their respective jurisdictions. Second, after the initial drafting process, “experienced young practitioners” (EYPs) provided editorial review of the chapters to ensure the accuracy of the material reported, and also a neutral and objective outlook on the assessment provided.

Each chapter is divided into three sections which familiarize different GAP users with the legal framework of each jurisdiction. The first section presents in-house and corporate counsel with key features of the jurisdiction, including: applicable confidentiality standards, local counsel requirements, attitudes toward present party employee witness testimony, key venues, and costs. The second and third sections are directed towards arbitration practitioners. The second section summarizes the idiosyncrasies of the jurisdiction, providing practitioners with insight into crucial features such as: existence of specialized courts, availability of *ex parte* pre-arbitration interim measures, and the local courts’ attitude towards fundamental arbitral principles. The third section provides in-depth analyses on key issues affecting the arbitration regime of the jurisdiction, including the relevant arbitration law and recent developments.

The GAP also advances the innovative concept of a “DELOS safe seat.” The goal of the safe seat designation is to assist corporate counsel and arbitration practitioners in selecting fair, efficient, and cost-effective places of arbitration. Whether a jurisdiction qualifies as a safe seat is based on six criteria including its (i) domestic legislation, (ii) judiciary, (iii) legal expertise, (iv) rights of representation, (v) accessibility and safety, and (vi) ethics. In a carefully designed process that is detailed in the [methodology section](#), the participating law firms and EYPs designated traffic lights to each criterion. A “green” traffic light represents a positive review and a “yellow” traffic light indicates caution, while a “red” traffic light denotes an area with major difficulties. These designations highlighting each jurisdiction’s advantages and disadvantages, along with the GAP’s list of safe seats, serve as a practical and useful reference for users of arbitration.

The GAP was produced to further the overall objective of DELOS to create a more time and cost effective international arbitration community and to provide arbitration practitioners, in-house counsel, and corporate lawyers with further insight into the practice of arbitration.

In seeing the GAP published, I would also like to express my deep gratitude to the late David D. Caron with whom I had the honor to co-chair this guide. His thought leadership, innovative ideas, and second-to-none knowledge in the field have shaped the GAP in many important ways.

Maxi Scherer
June 2018

ABOUT THE CHAIRS

The GAP initiative has been chaired by the late Professor David D Caron and by Professor Maxi Scherer, both members of the Delos Board of Advisors. Their support since the inception of this project and guidance throughout has been key to its success.

Professor David D Caron served as a Member of the Iran-United States Claims Tribunal, until his passing in February 2018. He was previously the Dean of the Dickson Poon School of Law of King's College London and, until his passing, was a member of the faculty. Professor Caron was also a member of the London Court of International Arbitration (LCIA), the Institut de Droit International and the Board of Editors of the American Journal of International Law. He was further a member of Chambers at 20 Essex Street and a Bencher of Inner Temple. He was formerly the C. William Maxeiner Distinguished Professor of Law at the University of California, at Berkeley, and had served as the President of the American Society of International Law from 2010 to 2012. Professor Caron received his Doctorate in Law from the University of Leiden.

Professor Maxi Scherer is Special Counsel at Wilmer Cutler Pickering Hale and Dorr LLP, holds the Chair for International Arbitration, Dispute Resolution and Energy Law at Queen Mary, University of London, and is the General Editor of the Kluwer Journal of International Arbitration. She is also Queen Mary's Director of the Centre for Commercial Law Studies in Paris and of the LLM in Paris programme. Professor Scherer was previously Global Professor of Law at NYU Law School, Visiting Professor at SciencesPo Law School Paris and Adjunct Professor at the Georgetown Centre of Transnational Legal Studies. Professor Scherer received her Doctorate in Law from University Paris 1 – Panthéon-Sorbonne.

Professors Caron and Scherer are the authors of numerous articles and books in the field of international arbitration and dispute resolution, including for Professor Caron: *Practising Virtue: Inside International Arbitration* (co-editor), OUP 2015, *The UNCITRAL Arbitration Rules: A Commentary* (co-author), OUP 2nd ed., 2013, and *The Iran-United States Claims Tribunal: Its Contribution to the Process of International Claims Resolution* (co-editor), Transnational Publishers, 2000; and, for Professor Scherer: *International Arbitration in the Energy Sector*, Oxford, 2018; *Transparency in International Investment Arbitration, A Guide to the UNCITRAL Standard on Transparency in Treaty-Based Investor-State Arbitration* (co-editor), Cambridge University Press, 2015; *Arbitrating under the 2014 LCIA Rules* (co-author), Wolters Kluwer, 2015, and *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (co-author), C. H. Beck München & Hart Publishing Oxford, 2012.

ABOUT THE GENERAL EDITORS

The GAP General Editors are Thomas Granier and Hafez R Virjee, who have been managing this initiative since its inception. They can be reached for any enquiry at safeseats@delosdr.org.

Thomas Granier is a co-founder of Delos and a member of the Delos Arbitration Consultative Committee. Mr Granier acts as counsel and arbitrator in a wide array of disputes relating in particular to new technologies, IT, energy, M&A, joint-ventures, construction and distribution. Mr Granier has acted in a number of commercial and investment arbitrations, both *ad hoc* and under the rules of leading institutions, including the HKIAC, the ICC, the LCIA, and ICSID. Before joining McDermott Will & Emery, Mr Granier served as counsel for the Europe, Middle-East and Africa Team at the ICC International Court of Arbitration in Paris, after having acted as deputy counsel for the Germany, Switzerland, and Austria Team. At the ICC, Mr Granier supervised more than 300 arbitrations and reviewed a number of arbitration awards. Mr Granier holds degrees from the Université Paris I – Panthéon-Sorbonne (Master 2), the Ludwig-Maximilians Universität in Munich (LL.M.) and the Université Paris II – Panthéon-Assas (Maîtrise). Mr Granier is listed among the Future Leaders of Arbitration by *Who's Who Legal*.

Hafez R Virjee is the President and a co-Founder of Delos. Mr Virjee acts as counsel, arbitrator and mediator, with experience of the major rules of arbitration. He advises on international dispute resolution and legal risk management. In his role as counsel, Mr Virjee specialises in international commercial arbitration and his clients span the range of private equity firms, tech start-ups, industrial concerns, listed companies, State entities and treaty organisations. Mr Virjee has acted in disputes across a wide range of sectors and relationships, including shareholder agreements, joint-ventures, agency, M&A, telecommunications, tech, energy, pharmaceutical, construction and military. Mr Virjee practises as a solicitor of England & Wales with Dechert out of Paris (with a secondment to Dubai in 2015). He was previously at Freshfields Bruckhaus Deringer in London. He holds degrees from the University of Cambridge (M.A.), the Université Paris II – Panthéon-Assas (Maîtrise) and the University of California – Berkeley (LL.M.). He is listed among the Future Leaders of Arbitration by *Who's Who Legal*.

ABOUT THE EXPERIENCED YOUNG PRACTITIONERS

Delos has been privileged to benefit from the energy and talent of an international group of experienced young practitioners (“EYPS”) who, together, performed the editorial review of the GAP chapters. Their role is more fully explained in the Methodology section below.

The EYPs are as follows. Please note that the first column indicates their countries of nationality, the second column states their first name and LAST NAME and is linked to their LinkedIn profiles, where available, and the third column indicates the name of their firm or other professional organisation (save for independent practitioners) and is linked to their firm bio or equivalent should you wish to contact them via their professional e-mail address.

<i>Albania</i>	Jola GJUZI	Kalo & Associates
<i>Australia</i>	Diana BOWMAN	VINCI Energies
<i>Austria</i>	Markus SCHIFFERL	Zeiler Partners
<i>Belgium</i>	Maxime BERLINGIN	Fieldfisher
<i>Bolivia</i>	Marcelo FERNANDEZ	Independent
<i>Bosnia and Herzegovina</i>	Nevena JEVREMOVIC	Association ARBITRI
<i>Brazil</i>	Maria Claudia PROCOPIAK	Dechert LLP
<i>Burkina Faso</i>	Amanda DAKOURE	African Development Bank (ADB)
<i>Canada</i>	Myriam SEERS	Torys LLP
<i>China for the mainland</i>	Arthur MA	DaHui
<i>China for Hong Kong</i>	Stella HU	Herbert Smith Freehills LLP
<i>Colombia</i>	Juan Felipe MERIZALDE	Dechert LLP
<i>Costa Rica</i>	Mónica FERNANDEZ FONSECA	Independent
<i>Croatia</i>	Patricia ZIVKOVIC	NSoft Company
<i>Cyprus</i>	Alexia SOLOMOU	International Court of Justice (ICJ)

<i>Czech Republic</i>	Vladimir POLACH	Squire Patton Boggs
<i>Denmark</i>	Jawad AHMAD	Mayer Brown
<i>Dominican Republic</i>	José Ricardo FERIS	Squire Patton Boggs
<i>El Salvador</i>	Mónica GARAY	Dechert LLP
<i>Ethiopia</i>	Tsegaye LAURENDEAU	Shearman & Sterling LLP
<i>Finland</i>	Hanna ROOS	Latham & Watkins LLP
<i>France</i>	Maxime DESPLATS	DLA Piper
<i>Germany</i>	Gustav FLECKE-GIAMMARCO	Seven Summits Arbitration
<i>Ghana</i>	Esine OKUDZETO	Sam Okudzeto & Associates
<i>Greece</i>	Marily PARALIKA	White & Case LLP
<i>Guatemala</i>	Mariele COULET-DIAZ	White & Case LLP
<i>Hungary</i>	David KOHEGYI	DLA Piper
<i>Ireland</i>	Louise REILLY	Barrister
<i>Israel</i>	Issar BIRGER	Meitar
<i>Italy</i>	Giulio PALERMO	Archipel
<i>Japan</i>	Shinichiro MORI	Momo-o, Matsuo & Namba
<i>Jordan</i>	Aseel BARGHUTHI	Eversheds Sutherland
<i>Kenya</i>	Nikhil DESAI	JMiles & Co
<i>Kosovo</i>	Anjezë GOJANI	Legal Advisor/Consultant
<i>Kuwait</i>	Dalal AL HOUTI	Al Tamimi & Company
<i>Latvia</i>	Galina ZUKOVA	Bélot Malan & Associés
<i>Lebanon & France</i>	Sara KOLEILAT-ARANJO	Al Tamimi & Company
<i>Lithuania</i>	Paulius DOCKA	PRIMUS, Attorneys at law
<i>Mauritius</i>	Wendy BOUCROT	Eversheds Sutherland
<i>Mexico</i>	Victor RUIZ	Ruiz – Silva Abogados, S.C.
<i>Moldova</i>	Nicolina BORDIAN	Lutgen + Associés
<i>Mongolia</i>	Nominchimeg ODSUREN	Avinex Partners LLP
<i>Netherlands</i>	Alexandra VAN DER MEULEN	Freshfields Bruckhaus Deringer LLP
<i>Nigeria</i>	Tolu OBAMUROH	White & Case LLP
<i>Norway</i>	Una WÆRP	Haavind

<i>Pakistan</i>	Samar ABBAS	39 Essex Chambers
<i>Paraguay</i>	Francisca PERONI	Fiorio Cardozo & Alvarado
<i>Poland</i>	Filip BALCERZAK	SSW Pragmatic Solutions
<i>Portugal</i>	Filipa CANSADO CARVALHO	PLMJ
<i>Peru & Chile</i>	Luis Miguel VELARDE SAFFER	Dechert LLP
<i>Romania</i>	Lucian ILIE	Reed Smith
<i>Russia</i>	Alexey YADYKIN	Freshfields Bruckhaus Deringer LLP
<i>Singapore</i>	Jonathan LIM	WilmerHale
<i>Slovakia</i>	Maria POLAKOVA	Squire Patton Boggs
<i>Spain</i>	Elena GUTIERREZ GARCIA DE CORTAZAR	Independent
<i>Sweden</i>	Helena BRÄNNVALL	Vinge
<i>Switzerland</i>	Nhu-Hoang TRAN THANG	Lalive
<i>Switzerland</i>	Olivier MOSIMANN	Kellerhals Carrard
<i>Turkey</i>	Aksel DORUK	SELARL Favarel & Associés
<i>Ukraine</i>	Yelena STASYK	Curtis, Mallet-Prevost, Colt & Mosle LLP
<i>USA</i>	Michael DALY	The George Washington University
<i>USA</i>	Sonia FARBER	KLUK Farber Law
<i>Uruguay</i>	Nicolas COSTABILE	WilmerHale
<i>Uzbekistan</i>	Diora ZIYAEVA	Dentons
<i>Venezuela</i>	Bingen AMEZAGA	Dechert LLP

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Anna Senno / [UNDENI](#) advised on the design and artwork, and designed the main cover page.

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OVERVIEW & METHODOLOGY

DELOS GUIDE TO ARBITRATION PLACES (GAP)

OVERVIEW: A STUDY OF SAFE SEATS

METHODOLOGY

GAP TRAFFIC LIGHTS FOR ALL JURISDICTIONS

OVERVIEW: A STUDY OF SAFE SEATS

The GAP has been designed to serve multiple purposes, among which five stand out:

- to make available a reliable and maintained arbitration practitioner-friendly guide to places of arbitration globally;
- to provide user-friendly up-to-date guidance for in-house and corporate counsel, notably so that they may reach an informed view of the seats they select for their arbitration agreements;
- to develop and further the notion of ‘safe seats’ and expand the list thereof for the purposes of the Delos model arbitration clause and the efficient practice of arbitration generally;
- to promote certain lesser-known seats through an objective, comparative study; and
- to highlight the diversity of the international arbitration community through the composition of the GAP working group.

The developments that follow explain (1) the notion of ‘safe seats’ and the traffic light system that has been used in the GAP, in order (2) to establish the Delos list of safe seats referenced in the Delos model arbitration clause. The next section explains the methodology used in preparing the GAP and keeping it current. A final section summarises in a table the traffic lights for all jurisdictions covered in the GAP.

1. ‘Safe seats’: a Delos perspective

The notion of a ‘safe seat’ is necessary to distinguish between places of arbitration “*where the legal framework and practice of the courts support recourse to arbitration as a fair, just and cost-effective binding dispute resolution mechanism*”¹ and those “*that materially increases the cost of arbitrating disputes in that place, whether such cost is borne by the parties directly [...] or indirectly by requiring arbitrators, who might otherwise have been inclined towards greater engagement, to temper their efficiency inclination with more or less significant measures of due process conservatism [...] and inefficient adjustments*”.²

A ‘safe seat’ may accordingly be defined on the basis of six criteria, as follows:³

1. Law

A clear effective, modern international arbitration law that recognises and respects the parties’ choice of arbitration as the method for settlement of their disputes:

- by providing the necessary framework for facilitating fair and just resolution of disputes through the arbitration process, notably the ready recognition and enforcement of orders and awards made at the seat, including where proceedings are conducted outside of the seat;
- through adherence to international treaties and agreements governing and impacting the ready recognition and enforcement of foreign arbitration agreements;

¹ Hafez R Virjee, “Activating Arbitration: Four Delos Principles to Achieve Fair and Efficient International Arbitration” (“**Activating Arbitration**”) (Delos, 2017), p. 25; a Spanish translation is available [here](#).

² *Id.*

³ Activating Arbitration, pp. 25-27. The criteria were presented in the article as a mark-up of the CI Arb Centenary Principles, to underline the difference between the Delos focus on the immediate needs of users and practitioners of international commercial arbitration and the CI Arb policy statement to support ‘countries, arbitral institutions, professional bodies and legal sectors’ in “*respond[ing] to the challenge of providing effective and safe arbitration facilities for the 21st century and beyond.*” (CI Arb London Centenary Principles 2015: Introduction)

- (c) by limiting court intervention in disputes that parties have agreed to resolve by arbitration; and
- (d) by providing a clear right to arbitrator immunity from civil liability for anything done or omitted to be done by the arbitrator in good faith in his or her capacity as an arbitrator.

2. Judiciary

An independent judiciary, competent, efficient, with expertise in international commercial arbitration and respectful of the parties' choice of arbitration as their method for settlement of their disputes.

3. Legal Expertise

An independent competent legal profession with expertise in international arbitration and international dispute resolution providing significant choice for parties who seek representation in the courts of the seat.

4. Right of Representation

A clear right for parties to be represented at arbitration by party representatives (including but not limited to legal counsel) of their choice whether from inside or outside the seat.

5. Accessibility and Safety

Easy accessibility to the seat, free from unreasonable constraints on entry, work and exit for parties, witnesses, counsel and arbitrators in international arbitration, adequate safety and protection of the participants, their documentation and information.

6. Ethics

Professional and other norms which embrace a diversity of legal and cultural traditions, and the developing norms of international ethical principles governing the behaviour of arbitrators and counsel.

For each jurisdiction covered in the GAP, traffic lights were assigned for all of the above criteria and sub-criteria.⁴

The purpose of these traffic lights is not to cast judgement but to flag for the reader areas that require greater attention: a 'green' traffic light indicates a positive assessment of the jurisdiction on the given criterion; a 'yellow' traffic light signals the need to exercise caution; and a 'red' traffic light underlines an area of potentially significant difficulty.

Jurisdictions that have received all-green traffic lights may qualify as Delos safe seats. Taking into account their track record history, Delos has updated below its list of safe seats referenced for the purposes of its model arbitration clause and identified three emerging safe seats, which will be confirmed through successive annual reviews of the GAP traffic lights across all jurisdictions.

The list of safe seats also includes jurisdictions not yet covered in the GAP, which are understood to meet all of the above criteria. The list will be reviewed and updated on an annual basis.

As will be apparent from the list, a seat may be 'Delos safe' even if it does not have all of the hallmarks of today's most popular arbitration seats. This is because Delos has "*strip[ped] down the notion of a 'safe seat' to its core, legal function divorced from economic considerations*".⁵ Put differently, Delos makes a clear distinction

⁴ See also the *Methodology* section below.

⁵ *Activating Arbitration*, p. 29.

between the legal place of arbitration and the physical or virtual place from where arbitrations may be conducted.

Regarding the legal place of arbitration, particular care should be given when negotiating an arbitration agreement to selecting a Delos safe seat as the seat of arbitration.⁶

As for the physical place of arbitration, it may be distinct from the legal place of arbitration. The primary considerations in selecting a physical place of arbitration are its convenience, accessibility and the facilities available in light of the needs of the case. In this manner, *“a given place of arbitration may be competitive in the international arbitration market in spite of the fact that it does not meet the criteria for being ‘safe’.”*⁷ Certain jurisdictions may thus seek to leverage their geographic situation to reap the economic benefits of hosting arbitration hearings, meetings and conferences, without necessarily also achieving ‘safe seat’ status. The second edition of the GAP will address this question in greater detail.

2. Delos list of safe seats

As of 1 July 2018, the Delos list of safe seats is as follows:

Amsterdam (The Netherlands)	Munich (Germany)
Auckland (New Zealand)	New York (USA)
Berlin (Germany)	Oslo (Norway)
Calgary (Canada)	Ottawa (Canada)
Copenhagen (Denmark)	Paris (France)
Frankfurt (Germany)	Port Louis (Mauritius)
Geneva (Switzerland)	Porto (Portugal)
The Hague (The Netherlands)	Rotterdam (The Netherlands)
Hamburg (Germany)	Seoul (South Korea)
Helsinki (Finland)	Singapore (Singapore)
Hong Kong (PRC)	Stockholm (Sweden)
Lisbon (Portugal)	Sydney (Australia)
London (UK)	Toronto (Canada)
Madrid (Spain)	Vancouver (Canada)
Miami (USA)	Vienna (Austria)
Montreal (Canada)	Zurich (Switzerland)

In addition, Delos has also identified the following emerging safe seats: Bucharest (Romania), Road Town (BVI) and Valetta (Malta).

⁶ See, further, *Activating Arbitration*, pp. 23-25.

⁷ *Activating Arbitration*, p; 28.

METHODOLOGY

Particular care has been taken in the preparation of the GAP to ensure its usefulness for practitioners.

As an initial step, a detailed analytical framework was developed by the GAP Chairs and General Editors. This served as a basis for participating law firms to research and draft their respective chapters, which were then subjected to critical review by experienced young practitioners (“EYPs”).⁸ None of the EYPs were nationals of the jurisdictions they reviewed or members of the law firm whose chapter they were reviewing and, in many instances, the EYPs had no connection to the jurisdiction in question. The final step in the preparation of each chapter consisted in a traffic light assessment of the jurisdiction.

The analytical framework, EYP review process and traffic light assessment process are presented in turn below. It is intended that the GAP chapters will be maintained and reviewed on a regular basis so that their contents remain up-to-date of key developments, and the final section below addresses the question of version control for the reader. Should there be any difficulties or errors, we would be grateful if you could draw these to the attention of the General Editors at safeseats@delosdr.org and/or the authors from the participating law firm, so that these may be addressed as necessary. We also welcome comments more generally and any suggestions to improve the GAP and make it even more relevant and useful to its users. You can either write to us at the above address or fill out the [GAP Comments Form](#).

1. GAP analytical framework

Each chapter comprises three sections, as developed below:

- a 1-2-page summary of key features for in-house and corporate counsel;
- a 1-2-page checklist and summary of idiosyncrasies for arbitration practitioners; and
- about 10 pages of detailed analysis on key issues at the jurisdiction, for arbitration practitioners.

1.1 Summary sections

The summary sections each follow a standard format. They are frequently introduced by a short paragraph followed by checklist tables, as follows:

In-house and corporate counsel section	Arbitration practitioners' summary
Key places of arbitration in the jurisdiction	Date of arbitration law?
Civil law / Common law environment?	UNCITRAL Model Law? If so, any key changes thereto?
Confidentiality of arbitrations?	Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?
Requirement to retain (local) counsel?	Availability of <i>ex parte</i> pre-arbitration interim measures?

⁸ The list of participating EYPs may be found above, under *Acknowledgements*.

In-house and corporate counsel section	Arbitration practitioners' summary
Ability to present party employee witness testimony?	Courts' attitude towards the competence-competence principle?
Ability to hold meetings and/or hearings outside of the seat?	Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?
Availability of interest as a remedy?	Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?
Ability to claim for reasonable costs incurred for the arbitration?	Other key points to note?
Restrictions regarding contingency fee arrangements and/or third-party funding?	
Party to the New York Convention?	
Other key points to note	
WJP Civil Justice score (2017-2018) [if available]	

1.2 Detailed analysis section

While the summaries are designed for quick-reference purposes, the detailed analysis section allows the reader to become more familiar with the arbitration law of the jurisdiction, stay up-to-date of key developments and gain further insights into the practice of arbitration at the jurisdiction. Where appropriate, sources have been indicated and referenced using short form citations,⁹ and hyperlinked to publicly available materials.

Each chapter has been prepared on the basis of the questions below, which cover the following topics: (i) the legal framework of the jurisdiction, (ii) the arbitration agreement, (iii) intervention of domestic courts, (iv) the conduct of the proceedings, (v) the award, (vi) funding arrangements and (vii) future reform. Certain chapters also include an additional section setting out references for further reading.

Finally, law firms were given full discretion as to how to address the questions, both in terms of the level of detail given to each topic as in terms of the presentation and structure of the analysis. This was designed to avoid the form distracting from an effective discussion of the substance.

1. The legal framework of the jurisdiction

1.1. Is the arbitration law based on the UNCITRAL Model Law?

1.1.1. If yes, what key modifications if any have been made to it?

⁹ Given the nature of the GAP as a practitioner's guide rather than an academic publication, it was made clear that not every point needed to be footnoted.

- 1.1.2. If no, what form does the arbitration law take?
- 1.2. When was the arbitration law last revised?
- 2. The arbitration agreement
 - 2.1. How do the courts in the jurisdiction determine the law governing the arbitration agreement?
 - 2.2. Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?
 - 2.3. What are the formal requirements (if any) for an enforceable arbitration agreement?
 - 2.4. To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?
 - 2.5. Are there restrictions to arbitrability? In the affirmative:
 - 2.5.1. Do these restrictions relate to specific domains (such as IP, corporate law etc.)?
 - 2.5.2. Do these restrictions relate to specific persons (*i.e.*, State entities, consumers etc.)?
- 3. Intervention of domestic courts
 - 3.1. Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?
 - 3.1.1. If the place of the arbitration is inside of the jurisdiction?
 - 3.1.2. If the place of the arbitration is outside of the jurisdiction?
 - 3.2. How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?
 - 3.3. On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)
- 4. The conduct of the proceedings
 - 4.1. Can parties retain outside counsel or be self-represented?
 - 4.2. How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?
 - 4.3. On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of ad hoc arbitration)?
 - 4.4. Do courts have the power to issue interim measures in connection with arbitrations? If so, are they willing to consider ex parte requests?
 - 4.5. Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?
 - 4.5.1. Does it provide for the confidentiality of arbitration proceedings?
 - 4.5.2. Does it regulate the length of arbitration proceedings?
 - 4.5.3. Does it regulate the place where hearings and/or meetings may be held?
 - 4.5.4. Does it allow for arbitrators to issue interim measures? In the affirmative, under what conditions?
 - 4.5.5. Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?
 - 4.5.6. Does it make it mandatory to hold a hearing?

- 4.5.7. Does it prescribe principles governing the awarding of interest?
- 4.5.8. Does it prescribe principles governing the allocation of arbitration costs?
- 4.6. Liability
 - 4.6.1. Do arbitrators benefit from immunity to civil liability?
 - 4.6.2. Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?
- 5. The award
 - 5.1. Can parties waive the requirement for an award to provide reasons?
 - 5.2. Can parties waive the right to seek the annulment of the award? If yes, under what conditions?
 - 5.3. What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?
 - 5.4. Is it possible to appeal an award (as opposed to seeking its annulment)? If yes, what are the grounds for appeal?
 - 5.5. What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?
 - 5.6. Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?
 - 5.7. When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?
 - 5.8. Are foreign awards readily enforceable in practice?
- 6. Funding arrangements
 - 6.1. Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction? If so, what is the practical and/or legal impact of such restrictions?
- 7. Is there likely to be any significant reform of the arbitration law in the near future?

2. EYP review process

Each chapter has been reviewed by 2-3 EYPs to ensure that it is as clear and neutral as possible to the unfamiliar practitioner. The overriding test put to the EYPs was as follows: *“if you were to look up the text before you as part of your everyday work, are there any changes you would suggest to make it of even greater assistance to you?”*

In answering this question, EYPs were asked to consider the following:

- whether the text could stand alone as it was, or whether it raised questions that fell properly within the scope of the GAP, bearing in mind the page-limit and focus on practitioner’s insights rather than academic exhaustivity;
- the organisation of information between the summaries and detailed analysis; and
- whether they were able to relate the legal authorities cited to the text, or otherwise needed clarification. In this regard, the EYPs were encouraged to reach out to the contributing law firm if they needed help with understanding particular points or locating additional materials they believed could be necessary.

3. Traffic light assessment

The final step in the preparation of each chapter was to assign traffic lights across six pre-defined criteria, namely 1/ 'law' (which in turn comprised four sub-criteria), 2/ 'judiciary', 3/ 'legal expertise', 4/ 'rights of representation', 5/ 'accessibility and safety' and 6/ 'ethics'. Together, these criteria make up the definition of a Delos 'safe seat', as discussed in greater detail above, in the *Overview* section.

A 'green' traffic light indicates a positive assessment of the jurisdiction on the given criterion; a 'yellow' traffic light signals the need to exercise caution; and a 'red' traffic light underlines an area of potentially significant difficulty. In exceptional cases, the law firm and/or the EYPs considered it preferable to assign a dual traffic light on a given criterion, *i.e.* yellow and green or yellow and red. Depending on the reader's level of sophistication and/or familiarity with the jurisdiction in question, it may be advisable to lean towards the more conservative of the two traffic lights.

It bears recalling here that the purpose of the traffic lights is not to cast judgement but to flag for the reader areas that require greater attention.

In terms of process for assigning the traffic lights, the EYPs made a proposal for the first two criteria and their sub-criteria (*i.e.*, criteria 1, 1(a), 1(b), 1(c), 1(d) and 2), based on their review of the chapter. The law firms made proposals for the same as well as for criteria 3-6.

Once everyone had assigned their traffic lights, the law firm and the EYPs discussed the criteria over which they differed. This typically allowed everyone to resolve the questions underlying the differences and come to a common conclusion.

In the limited instances where a common position could not be reached, if the EYPs had taken a unanimous view, then their assessment prevailed on the basis that the EYPs' perspective would be reflective of the expectations and perception of a lawyer foreign to the jurisdiction in question. This has been signalled with the following symbol: * . If the EYPs diverged, however, then the views of the law firm prevailed. This has been signalled with the following symbol: + .

Delos is keen to make the traffic lights an increasingly sophisticated and valuable tool. Delos will be developing detailed guidelines to accompany the criteria in order to facilitate user understanding of the traffic lights, and promote consistency and predictability in the definition and assignment of the traffic lights. Delos also invites users and practitioners of international arbitration to share their views of the criteria and experience of the jurisdictions covered in the GAP through the [GAP Comments Form](#).

In this manner, it is anticipated that the traffic lights will be reviewed on an ongoing basis, and an updated consolidated table of traffic lights will be published on an annual basis.

4. Keeping the GAP current and version control

Following publication on 18 June 2018, the chapters of the GAP are kept current of key developments by the participating law firms. Minor edits are reflected directly whereas more substantial changes may undergo the EYP review process, notably in case of change to the arbitration law.

To facilitate the use of the GAP, the following version control annotations have been implemented (i) for individual chapters, (ii) for the combined traffic lights table, (iii) for the combined summaries for in-house and corporate counsel, and for arbitration practitioners and (iv) for the GAP as a whole.

4.1 Version control for individual chapters

The cover page of each chapter contains various indications to help the reader determine how recently and to what extent it has been reviewed and updated.

If only a date is indicated, this is the date when the chapter was finalised for the purposes of publication of the first edition of the GAP on 18 June 2018. For a chapter that was finalised on 9 May 2018, the cover page

will thus state: *"Version: 9 May 2018"*. (For the avoidance of doubt, the applicable edition of the GAP is stated in the footer on every page.)

For all subsequent edits, the cover page will state the following information: the date when the chapter was last updated or reviewed; and *"(VV.RRR)"*, where 'VV' indicates the number of substantial versions of the chapter that have been published, and 'RRR' stands for the number of minor revisions based on the latest version.

In the example of the chapter finalised on 9 May 2018, if it received minor edits on four occasions subsequently, the most recent being 20 October 2018, the cover page will state *"Version: 20 October 2018 (v01.004)"*. If a year later a major change is made to the chapter, for instance due to an important court decision, and the updated chapter is finalised on 20 April 2019, the cover page will state: *"Version: 20 April 2019 (v02.000)"*. Finally, if the chapter is reviewed as of 30 June 2019 and no changes are made thereto, the cover page will state: *"Version: 30 June 2019 (v02.000)"*.

4.2 Version control for the combined traffic lights table

The footer of the table states in the bottom right-hand corner the month and year in which the table was last updated. If more than one update takes place in a given month, a bracket will be added to signal the relevant version. For example, if the table is updated twice in October 2018, the footer will state: *"October 2018 (v2)"*.

4.3 Version control for the combined summaries for in-house and corporate counsel, and for arbitration practitioners

On the cover page, following the main title, the latest version is indicated using the following format: YYYYMMDD-VV.RRR, where 'YYYYMMDD' stands for the date when the latest change was published or review performed, 'VV' indicates the number of substantial versions of the combined summaries and 'RRR' the revision number based on the latest version.

To illustrate, if light changes to one or more summaries are published on 3 August 2018 and a second set of light changes to the same or other summaries are published on 2 September 2018, the annotation will be as follows: *"v20180902-01.002"*. If subsequently, for instance on 10 October 2018, a substantial change is published for one or more summaries, the reference will be updated to *"v 20181010-02.000"*. Finally, if one or more summaries are reviewed as of 2 April 2019 and no changes are made thereto, the reference will be updated to *"v 20190402-02.000"*.

4.4 Version control for the GAP as a whole

On the inside cover page, following the main title, the latest version is indicated using the following format: YYYYMMDD-VVV.RRR, where 'YYYYMMDD' stands for the date when the latest change was published or review performed, 'VVV' indicates the number of substantial changes that have been made to the GAP and 'RRR' shows the revision number based on the latest version.

To illustrate, if light changes are made to one or more GAP chapters on 3 August 2018 and a second set of light changes to the same or other chapters are published on 2 September 2018, the annotation will be as follows: *"v20180902-001.002"*. If subsequently, for instance on 10 October 2018, a substantial change is published for one or more of the chapters and/or the combined traffic lights table is updated, the reference will be changed to *"v20181010-002.000"*. Finally, if one or more GAP chapters are reviewed as of 30 June 2019 and no changes are made thereto, the reference will be updated to *"v 20190630-02.000"*.

Lastly, the version control system for the full GAP will also take into account changes made to the other sections of the GAP, such as the overview and methodology section or the appendix with the Delos model clauses.

GAP TRAFFIC LIGHTS FOR ALL JURISDICTIONS

Jurisdictions	1. Law	(a) Framework	(b) Adherence to international treaties	(c) Limited court intervention	(d) Arbitrator immunity from civil liability	2. Judiciary	3. Legal expertise	4. Rights of representation	5. Accessibility and safety	6. Ethics
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Please note: a 'green' traffic light indicates a positive assessment; a 'yellow' traffic light signals the need to exercise caution; and a 'red' traffic light underlines an area of potentially significant difficulty. The traffic lights were assigned by the law firms for all 6 criteria and the EYPs for criteria 1-2; where they could not agree, † indicates that the unanimous views of the EYPs prevailed, and + indicates that the EYPs differed and the law firm views prevailed.

Delos is keen to make the traffic lights an increasingly sophisticated and valuable tool. Delos invites users and practitioners of international arbitration to share their experience of the jurisdictions covered in the GAP through the [GAP Comments Form](#). The traffic lights will be reviewed on an ongoing basis, and an updated consolidated table of traffic lights will be published annually.

Albania	●	●	●	●	●	●	●	●	●	●
Algeria †	●	●	●	●	●	●	●	●	●	●
Argentina †	●	●	●	●	●	●	●	●	●	●
Austria	●	●	●	●	●	●	●	●	●	●
Bahrain	●	●	●	●	●	●	●	●	●	●
Brazil	●	●	●	●	●	●	●	●	●	●
British Virgin Islands	●	●	●	●	●	●	●	●	●	●
Bulgaria	●	●	●	●	●	●	●	●	●	●
Canada	●	●	●	●	●	●	●	●	●	●
China (Mainland) †	●	●	●	●	●	●	●	●	●	●
Czech Republic	●	●	●	●	●	●	●	●	●	●
Denmark	●	●	●	●	●	●	●	●	●	●
Dominican Republic	●	●	●	●	●	●	●	●	●	●
Egypt †	●	●	●	●	●	●	●	●	●	●
England & Wales (UK)	●	●	●	●	●	●	●	●	●	●
Finland	●	●	●	●	●	●	●	●	●	●
France	●	●	●	●	●	●	●	●	●	●
Gambia, The	●	●	●	●	●	●	●	●	●	●
Germany	●	●	●	●	●	●	●	●	●	●
Ghana	●	●	●	●	●	●	●	●	●	●
Guinea	●	●	●	●	●	●	●	●	●	●
Iceland	●	●	●	●	●	●	●	●	●	●
Indonesia †	●	●	●	●	●	●	●	●	●	●
Iran	●	●	●	●	●	●	●	●	●	●
Italy	●	●	●	●	●	●	●	●	●	●
Japan	●	●	●	●	●	●	●	●	●	●
Latvia	●	●	●	●	●	●	●	●	●	●
Lebanon †	●	●	●	●	●	●	●	●	●	●
Lithuania	●	●	●	●	●	●	●	●	●	●
Luxembourg †	●	●	●	●	●	●	●	●	●	●
Malta	●	●	●	●	●	●	●	●	●	●
Mauritius	●	●	●	●	●	●	●	●	●	●

Jurisdictions

- 1. Law**
- (a) Framework
- (b) Adherence to international treaties
- (c) Limited court intervention
- (d) Arbitrator immunity from civil liability
- 2. Judiciary**
- 3. Legal expertise**
- 4. Rights of representation**
- 5. Accessibility and safety**
- 6. Ethics**

Please note: a 'green' traffic light indicates a positive assessment; a 'yellow' traffic light signals the need to exercise caution; and a 'red' traffic light underlines an area of potentially significant difficulty. The traffic lights were assigned by the law firms for all 6 criteria and the EYPs for criteria 1-2; where they could not agree, † indicates that the unanimous views of the EYPs prevailed, and + indicates that the EYPs differed and the law firm views prevailed.

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Jurisdiction	1. Law	(a) Framework	(b) Adherence to international treaties	(c) Limited court intervention	(d) Arbitrator immunity from civil liability	2. Judiciary	3. Legal expertise	4. Rights of representation	5. Accessibility and safety	6. Ethics
Netherlands, The	●	●	●	●	●	●	●	●	●	●
Nigeria	●	●	●	●	●	●	●	●	●	●
Norway	●	●	●	●	●	●	●	●	●	●
Pakistan	●	●	●	●	●	●	●	●	●	●
Paraguay +	●	●	●	●	●	●	●	●	●	●
Peru	●	●	●	●	●	●	●	●	●	●
Philippines, The	●	●	●	●	●	●	●	●	●	●
Poland	●	●	●	●	●	●	●	●	●	●
Portugal	●	●	●	●	●	●	●	●	●	●
Romania	●	●	●	●	●	●	●	●	●	●
Russia	●	●	●	●	●	●	●	●	●	●
Serbia	●	●	●	●	●	●	●	●	●	●
Singapore	●	●	●	●	●	●	●	●	●	●
Slovakia	●	●	●	●	●	●	●	●	●	●
Spain	●	●	●	●	●	●	●	●	●	●
Sweden	●	●	●	●	●	●	●	●	●	●
Switzerland	●	●	●	●	●	●	●	●	●	●
Togo	●	●	●	●	●	●	●	●	●	●
Ukraine †	●	●	●	●	●	●	●	●	●	●
United Arab Emirates (UAE) +	●	●	●	●	●	●	●	●	●	●
United States of America (USA)	●	●	●	●	●	●	●	●	●	●
- California	●	●	●	●	●	●	●	●	●	●
- Florida	●	●	●	●	●	●	●	●	●	●
- New York	●	●	●	●	●	●	●	●	●	●
- Washington D.C.	●	●	●	●	●	●	●	●	●	●
Zambia	●	●	●	●	●	●	●	●	●	●

JURISDICTION ANALYSIS

DELOS GUIDE TO ARBITRATION PLACES (GAP)

ALBANIA
ALGERIA
ARGENTINA
AUSTRIA
BAHRAIN
BRAZIL
BRITISH VIRGIN
ISLANDS (BVI)
BULGARIA
CANADA
CHINA (MAINLAND)
CZECH REPUBLIC
DENMARK
DOMINICAN REP.
EGYPT

ENGLAND & WALES
FINLAND
FRANCE
GAMBIA, THE
GERMANY
GHANA
GUINEA
ICELAND
INDONESIA
IRAN
ITALY
JAPAN
LATVIA
LEBANON
LITHUANIA

LUXEMBOURG
MALTA
MAURITIUS
NETHERLANDS, THE
NIGERIA
NORWAY
PAKISTAN
PARAGUAY
PERU
PHILIPPINES
POLAND
PORTUGAL
ROMANIA
RUSSIA
SERBIA

SINGAPORE
SLOVAKIA
SPAIN
SWEDEN
SWITZERLAND
TOGO
UKRAINE
UNITED ARAB
EMIRATES (UAE)
UNITED STATES OF
AMERICA (USA):
CALIFORNIA, FLORIDA,
NEW YORK,
WASHINGTON D.C.
ZAMBIA

ALBANIA

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

ANDI MEMI AND SELENA YMERI
OF HOXHA, MEMI & HOXHA

HM&H

FOR FURTHER INFORMATION

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[GAP COMBINED SUMMARIES FOR IN-HOUSE AND CORPORATE COUNSEL](#)

[GAP COMBINED SUMMARIES FOR ARBITRATION PRACTITIONERS](#)

[EN DELOS MODEL CLAUSES & LIST OF SAFE SEATS](#)

[ES DELOS CLÁUSULAS MODELO & LISTA DE SEDES SEGURAS](#)

[FR DELOS CLAUSES TYPES & LISTE DE SIÈGES SÛRS](#)

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JURISDICTION INDICATIVE TRAFFIC LIGHTS ⁺

- | | |
|---|---|
| 1. Law | ● |
| a. Framework | ● |
| b. Adherence to international treaties | ● |
| c. Limited court intervention | ● |
| d. Arbitrator immunity from civil liability | ● |
| 2. Judiciary | ● |
| 3. Legal expertise | ● |
| 4. Rights of representation | ● |
| 5. Accessibility and safety | ● |
| 6. Ethics | ● |

VERSION: 12 MARCH 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Albania is a civil law country which has transitioned, during these last 20 years, from a centrally planned to a market-oriented economy. Albania has received EU candidate status in June 2014. Foreign investments play a key role for the integration and economic development of Albania but then foreign investors need also an attractive legal environment, especially in terms of legal certainty, fair treatment and dispute resolution mechanism.

Although arbitration is considered as the most important and advantageous dispute resolution mechanism for commercial disputes, Albania does not currently have a domestic arbitral institution and as it shall be further detailed below, since year 2013 the Albanian Parliament is expected to approve a law regulating domestic and international arbitration procedures. Actually, the only domestic law provisions related to arbitration that are in force in Albania concern the recognition and enforcement of international arbitration awards. Albania being also a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the only possibility offered to parties willing to submit disputes to arbitration, is to opt for foreign arbitration and thereafter have the foreign arbitration award recognised in Albania.

Lacking an arbitration law, this arbitration guide for Albania shall focus mostly on the issue of recognition of international arbitration awards in Albania.

Key places of arbitration in the jurisdiction	Tirana
Civil law / Common law environment?	Civil law
Confidentiality of arbitrations?	ϕ
Requirement to retain (local) counsel?	ϕ
Ability to present party employee witness testimony?	ϕ
Ability to hold meetings and/or hearings outside of the seat?	ϕ
Availability of interest as a remedy?	ϕ
Ability to claim for reasonable costs incurred for the arbitration?	ϕ
Restrictions regarding contingency fee arrangements and/or third-party funding?	ϕ
Party to the New York Convention?	Yes
Other key points to note	ϕ
WJP Civil Justice score (2018)	0.45

ARBITRATION PRACTITIONER SUMMARY

Chapter IX, Title III of the Second Part of the Albanian Civil Procedure Code (the “ACPC”),¹ Articles 393 to 399 contain the provisions relating to the recognition and enforcement of foreign judgements. These are also applicable to international arbitration awards.

Under Article 394 of the ACPC, foreign judgements are not recognized and enforced in the Republic of Albania, if:

- (a) according to Albanian law, the foreign court was not competent for the matter; or
- (b) the claim and the claim notice has not been properly and timely notified to the defaulting defendant, to allow it to organise its defense; or
- (c) the Albanian courts have already issued a diverging decision between the same parties in relation to the same matter and scope;
- (d) a claim is pending before Albanian courts and has been filed prior to the date on which the foreign judgement became final; or
- (e) the foreign judgement became final contrary to the law of the jurisdiction in which it has been taken; or
- (f) the foreign judgement is contrary to the fundamental principles of the Albanian legislation (i.e. public policy).

Pursuant to Article 399 of the ACPC, the provisions of Article 394 of the ACPC shall apply *mutatis mutandis* to international arbitration awards.

The ACPC further provides that if specific agreements exist between the Republic of Albania and foreign countries, then the terms of the international agreement shall apply regarding the recognition and enforcement of judgements of that country.

As a matter of fact, under Article 122 of the Albanian Constitution,² any international agreement ratified by law becomes part of the domestic legislation upon its publication on the Official Gazette of the Republic of Albania. Article 122 of the Albanian Constitution further provides that in case of conflicts between the provisions of the domestic laws, and those of ratified international agreements, the provisions of the latter shall prevail.

As the Republic of Albania ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, self-executing provisions of the New York Convention are part of the domestic legislation in Albania. Moreover, in compliance with the Albanian Constitution³ and the ACPC, in case of conflict, provisions of the New York Convention shall prevail.

Under the New York Convention, Albania has undertaken to accomplish, *inter alia*, the following obligations: recognize and enforce foreign arbitral awards and recognize agreements to submit disputes to international arbitration.

Date of arbitration law?	ϕ
UNCITRAL model law? If so, any key changes thereto?	ϕ

¹ Available at: <http://qbz.gov.al/botime/kodi%20i%20procedures%20civile.html>.

² Available at: <https://www.parlament.al/wp-content/uploads/2015/10/kushtetuta-perditesuar-1.pdf>.

³ Under Article 122 of the Albanian Constitution, any international agreement ratified by law becomes part of the domestic legislation upon its publication on the Official Gazette of the Republic of Albania.

Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	ϕ
Availability of <i>ex parte</i> pre-arbitration interim measures?	ϕ
Courts' attitude towards the competence-competence principle?	ϕ
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	<p>Under Article 394 of the ACPC, foreign judgements are not recognized and enforced in the Republic of Albania, if:</p> <ul style="list-style-type: none"> (a) according to Albanian law, the foreign court was not competent for the matter; or (b) the claim and the claim notice has not been properly and timely notified to the defaulting defendant, to allow it to organise its defense; or (c) the Albanian courts have already issued a diverging decision between the same parties in relation to the same matter and scope; (d) a claim is pending before Albanian courts and has been filed prior to the date on which the foreign judgement became final; or (e) the foreign judgement became final contrary to the law of the jurisdiction in which it has been taken; or (f) the foreign judgement is contrary to the fundamental principles of the Albanian legislation (<i>i.e.</i>, public policy). <p>Pursuant to Article 399 of the ACPC, the provisions of Article 394 of the ACPC shall apply <i>mutatis mutandis</i> to international arbitration awards.</p>
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	ϕ
Other key points to note?	ϕ

JURISDICTION DETAILED ANALYSIS

1. Legislative evolution in Albania in the field of arbitration

The ACPC used to regulate both domestic and international arbitration procedures. However, Law 8812 dated 17 May 2001⁴ repealed the provisions governing international arbitration and projected that such provisions be contained in a separate law.

In 2013, the Parliament approved a Law 122/2013,⁵ aimed at reforming part of the ACPC. According to Articles 30 and 49 of the law, the ACPC provisions governing domestic arbitration were to be repealed as of the date of approval of a new law on arbitration. Article 49 of the same law tasked the Albanian Council of Ministers with the mission to draft the law governing domestic and international arbitration. Pursuant to this Article, a draft was to be submitted to the Parliament for approval within three months from the entry into force of Law 122/2013.

However, with Law 160/2013,⁶ the Albanian Parliament amended the text of transitory provisions of the above-mentioned Article 49 of Law 122/2013. The new text of this Article does not contain references to the term for the submission and approval of the draft law on domestic and international arbitration. Thus, it implicitly renders Article 30 of Law 122/2013 which repeals ACPC provisions on domestic arbitration immediately applicable.

Following the approval of Law 122/2013, the Albanian Ministry of Justice has circulated with the legal community a draft law on domestic and international arbitration. The draft law was based on UNCITRAL Model Law.

Nevertheless, to this date, the Albanian Parliament has not approved a law governing international and/or domestic arbitration.

2. Procedure of enforcement of foreign arbitral awards in Albania

As above mentioned, Article 399 of the ACPC provides that the procedure for recognition and enforcement of foreign judgments shall also apply for the recognition and enforcement of international arbitration awards.

Foreign arbitral awards can be enforced in Albania provided that they are “recognised” in Albania pursuant to the provisions of the ACPC. According to the ACPC, recognition of a foreign arbitral award is granted by the competent court of appeal⁷ upon request of the interested party. Once recognised, foreign arbitral awards have the same effects as domestic judgements.

The procedure for recognition of an international arbitral award is initiated by submitting a lawsuit in front of the competent court of appeal. Even though formally such proceedings are considered as of a declarative nature (gracious process), the court of appeal shall demand that the other party (the aggrieved party) is duly summoned to attend the hearings.

According to Article 396 of the ACPC, the request for recognition of an international arbitration award filed with the competent court of appeal should be accompanied from the following documents:

- (a) certified and legalised copy of the arbitration award duly translated into Albanian language;
- (b) copy of a certification/statement issued from the arbitral institution that has issued the award, that the award is final;

⁴ Available at: <http://80.78.70.231/pls/kuv/f?p=201:Ligj:8812:17.05.2001>.

⁵ Available at: <http://80.78.70.231/pls/kuv/f?p=201:Ligj:122/2013:18.04.2013>.

⁶ Available at: <http://80.78.70.231/pls/kuv/f?p=201:Ligj:160/2013:17.10.2013>.

⁷ The court of appeal of the place of residence of the applicant.

(c) power of attorney, if the application is filed by a representative of the interested party.

The ACPC does not require the submission of the arbitration agreement, as a condition to the recognition of the foreign award in Albania. Such provisions depart from the provisions of Article 4 of the New York Convention, which requires that the application for enforcement of an award should be accompanied by the arbitration agreement.

The conflict has been identified by the Albanian High Court, which has ruled, in a decision N° 00-2014-1350 dated 24 April 2014 that the original arbitration agreement or a duly certified copy thereof must also be submitted to the court of appeal when applying for recognition of a foreign arbitral award, even if it is not specifically required by the ACPC.

It should be mentioned that in general, court proceedings for recognition of an international arbitration award are performed smoothly and promptly and are completed in one single court session.

Nevertheless, some problematic issues, to be further defined below, still subsist and should be eventually addressed by the new arbitration law that should be approved hopefully in the near future in Albania.

2.1 Enforceability of Interim Arbitral Awards

As mentioned above, based on the ACPC, one of the documents that should be filed with the court of appeal for recognition of a foreign arbitral award is a certification issued by the arbitral institution that has rendered the award, that the award is “final”. The refusal of recognition of interim decisions refers in fact to interim decisions that are rendered by a foreign judicial court. Indeed, the provisions of Article 396 of the ACPC regulate the procedure of recognition of foreign judgments in Albania, and apply, based on the provisions of Article 399 of the ACPC, *mutatis mutandis*, also to the recognition and enforcement of foreign arbitral awards.

A strict literal interpretation of the above provisions implies that interim arbitral awards may not be recognised and enforced in Albania.

This interpretation has been adopted by Albanian courts at least in regard to foreign judgments. For instance, in the case *Sky Petroleum INC vs. the Republic of Albania*, Sky Petroleum INC had submitted with the Tirana Court of Appeal a request for recognition of a decision of the Court of Texas (USA) for an interim order of security. By decision N° 32/1010 dated 1 March 2012 the Tirana Court of Appeal has refused to recognise the foreign interim decision on the basis of Article 396 of the ACPC. The court stated that the request for recognition of a foreign judgment in Albania must be accompanied by a statement issued from the foreign court that the decision has become final.

The above interpretation, however, appears to be inconsistent with the provisions of the New York Convention which does not exclude *a priori* the recognition and enforceability of interim or partial arbitral awards. According to the relevant doctrine and the judicial practice, in these the substantial content and the effects of the interim award should be taken into consideration in order to determine the award's final status.

2.2 Payment of court tax

Under Albanian law, a claimant that files a lawsuit for examination of the merits of a dispute with Albanian courts is required to pay a court tax equal to 1% of the claim. Although the procedure for recognition of an international arbitral award is not contentious, and no court tax should apply, there have been cases in practice where courts of appeal have refused recognition of the award on the grounds that the applicant had failed to pay the 1% court tax.

For instance, in the decision N° 82 dated 7 September 2007 *I.C.M.A., AGRI.BEN SAS vs. Republic of Albania*, the Tirana Court of Appeal refused recognition of an ICC award (case 12112/ACS Geneva), based, *inter alia*, on the reason that the applicants had not paid the 1% court tax over the claim granted by the arbitral award.

In the decision No 6 dated 1 June 2011, the High Court overruled the above decision of the Tirana Court of Appeal. Unfortunately, the grounds for this decision were not related to the request for payment of the court fee.

To this date, no unifying court decision has been rendered on the matter in Albania. Although in the vast majority of cases, the payment of the court fee is not required, the issue still remains unclear.

2.3 The grounds for refusal of enforcement of a foreign arbitral award under Albanian law

As mentioned above, under Article 394 of the ACPC, the Court of Appeal shall recognise and declare an international arbitration award enforceable, unless the court assesses that:

- (a) according to Albanian law, the foreign court (of arbitration) was not competent for the matter; or
- (b) the claim and the claim notice has not been properly and timely notified to the absent defendant, to allow it properly to present its defense; or
- (c) the Albanian courts have already issued a diverging decision between the same parties in relation to the same matter and scope;
- (d) the Albanian courts are hearing a claim which has been filed prior to the date upon which the foreign judgement (arbitral award) became final; or
- (e) the foreign judgement (arbitral award) became final contrary to the law of the jurisdiction in which it has been taken; or
- (f) the foreign judgement is not compliant with the fundamental principles of the Albanian legislation (the public policy principle).

Further, in a unifying decision⁸ N° 6 dated 1 June 2011, the Albanian High Court stated that in cases related to the recognition of international arbitration awards, the court should also and always consider the requirements of Article 5 of the New York Convention.

The above “obstacles” to the recognition of foreign arbitral awards, as set out under the ACPC, may seem redundant and not fully in accordance with the provisions of the New York Convention.

For instance, the provisions of Article 394 (paragraphs a. and d.) of the ACPC seem to contradict the obligations imposed by the New York Convention, specifically with the obligation to exclude the jurisdiction of a national court when it is seized of an action in a matter in respect of which the parties concluded an arbitration agreement.

They also reopen the issue of verification of the jurisdiction of the arbitration tribunal. Based on the above provision of the ACPC, Albanian courts are granted such power given that they must refuse recognition of an award where the dispute concerned by the award might not be in the competence of the court of arbitration that has issued the award.

Further, the refusal of enforcement of an arbitral award due to the submission of a lawsuit with an Albanian court, before the date the arbitral award has become final, may be used intentionally as an artificial barrier to the enforcement of an award by the party against whom it is invoked. The party may file a lawsuit with an Albanian court deliberately and use this as ground to object to the enforcement of the foreign arbitral award issued over the dispute.

As an example, in the decision N° 122 dated 14 December 2010, the Tirana Court of Appeal assessed the issue of the existence of a parallel lawsuit pending before Albanian courts. The case concerned the recognition in the Republic of Albania of the ICC award N° 14869/A VH/JEM/GZ between *Rohde Nielsen A/S* and *the Ministry of Transport and Telecommunication of the Republic of Albania* dated 19 September 2009. The Court of Appeal found that “*there does not exist any pending process between these parties in an Albanian Court,*

⁸ Decisions of the Albanian High Court that unify court practice.

and the claimant has proved by a certification, issued by the Court of Tirana No 6115/1 dated 15.11.2010, which confirms that there is no pending civil lawsuit concerning Rohde Nielsen A/S.”.

Such verification implies that the Court of Appeal would have refused to recognise the arbitral award if the defendant had filed a lawsuit in front of Albanian courts against Rohde Nielsen A/S. This would be contrary to the spirit of the New York Convention which aims to facilitate the conditions for recognition and enforcement of foreign arbitral awards.

2.4 The concept of “public policy” under Albanian law

Regarding the last obstacle, set out under Article 394 (paragraph f.), it is important to note that the Albanian legislation does not provide a statutory definition of “public policy”. Taking into account that the provisions refers to “*the fundamental principles of the Albanian legislation*”, Albanian courts are not required to take into consideration “*international*” or “*transnational*” public policy, unless such public policies are part of binding international law provisions according to the Albanian Constitution.⁹

The general approach that Albanian courts have with respect to the term “*the fundamental principles of the Albanian legislation*” is that the “*orders contained in a decision of a court of a foreign jurisdiction must not conflict with the laws of the Republic of Albania. The rules applied by the foreign court under the foreign law are not relevant. What is relevant is that the effects of the recognition and enforcement of the foreign decision must not conflict not only with the basic principles, such as jurisdiction, competence, court independence, equality in front of the law, access to justice, adversarial proceedings etc., but also with other principles of the Albanian material law, which would be relevant for the case*”.¹⁰

The concrete manifestations of public policy exception that we have encountered, mostly refer to adoption matters.¹¹ This is mostly due to different migration waves, which Albania has faced in the last 20 years and to the economic situation of Albania, which causes that the substantial majority of cases of recognition and enforcement of foreign judgments relate to family matters. Moreover, the number of cases of recognition and enforcement of foreign judgements is still higher than the number of cases of recognition and enforcement of international arbitration awards.

With respect to business transactions, we have encountered very few cases where the public policy exception has been raised by Albanian courts. One such concrete manifestation of the public policy exception referred to a case related to the recognition of an international arbitral award dated 1993. In the case Iliria Srl against the Council of Ministers of Albania, the public policy argument used by the court in this case was that when the dispute arose, the Albanian legislation did not recognize the resolution of disputes through international arbitration, but only through Albanian courts. The case was finally dismissed on procedural grounds.

Another such manifestation of the public policy exception concerned the enforcement of an arbitral award relating the liquidation of a joint venture company. In its decision No. 82 dated 7 September 2007 between I.C.M.A. s.r.l. AGRI. BEN S.A.S. and the Albanian Ministry of Agriculture, the Tirana Court of Appeal refused recognition and enforcement of an arbitral award, *inter alia*, on public policy grounds. The court considered that disputes related to liquidation procedures of an Albanian company were to be settled by the Albanian courts under the Albanian company law. Despite this *obiter dictum/ratio decidendi*, a careful analysis of the case shows that the dispute did not relate to actual liquidation procedures of the company (I.C.M.A. s.r.l.), but instead to the breach of shareholders’ duties, which thereafter caused financial losses and going concern issues.

⁹ International agreements ratified by law become part of the internal legislation.

¹⁰ Decision N° 342 dated 27.10.2009 of the Albanian Supreme Court.

¹¹ Under Albanian law, adoption is only available for underage persons. As such, Albanian courts have developed a constant approach that any foreign court decision providing for adoption of a person that is 18 years or older should not be recognized and enforced in Albania, as its effects would conflict with the principles of Albanian material law relevant for the case, which should be the Family Code.

In its decision No. 6 dated 1 June 2011, the Supreme Court overruled the Court of Appeal decision refusing to recognize the arbitral award on procedural grounds. The Supreme Court did not discuss the public policy exception argument for this case. The matter was then returned to the Court of Appeal which finally refused to recognise the arbitral award on other procedural grounds.

It must be noted that in both of the above discussed cases, the defendant was a body of the Albanian government. Hence, the possibility that the public policy exception was improperly used by the courts to protect the interest of the State should not be excluded.

2.5 The burden of proof

The ACPC does not provide which of the parties has the burden of proof regarding the grounds for refusal, mentioned above. In fact, Article 397 of the ACPC provides that *"the Court of Appeal examines whether the present award applied for enforcement does not contain provisions that conflict with Article 394"*. Based on a literal interpretation of this provision, the Court of Appeal may examine the existence of the grounds of refusal *ex officio*, *i.e.*, without the request of the interested party.

The New York Convention, on the other hand, is very clear on this point. Article V provides that it is up to *"the party against whom the award is invoked"*: first, to make a request for refusal of the arbitral award applied for enforcement and second, to submit evidences to the competent authority to prove the grounds of refusal.

3. Conclusion

The provisions of Albanian law regulating the issue of recognition and enforcement of foreign arbitral awards show some inconsistencies with the New York Convention that need to be addressed in an upcoming reform. More urgently, a law reform is necessary to regulate both domestic and international arbitration proceedings. The prompt adoption of such regulations has become a necessity in the present conditions of the Albanian economy of continuous increase of international trade relations.

ALGERIA

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

MOURAD SEGHIR AND MOHAMED DEBBOUCHE
OF **BENNANI & ASSOCIÉS LLP**

BENNANI & ASSOCIÉS LLP
Conseil Juridique, Contentieux & Fiscal

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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS †

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 - a. Framework ●
 - b. Adherence to international treaties ●
 - c. Limited court intervention ●
 - d. Arbitrator immunity from civil liability ●
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3. Legal expertise ●
4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

VERSION: 25 MAY 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Disputes in Algeria may be resolved through arbitration and litigants are free to choose an arbitral institution and arbitrators at their sole discretion.

Key places of arbitration in the jurisdiction	Arbitrations in Algeria are generally in Algiers. In practice, for disputes relating to international contracts, parties often choose Paris or Geneva as the seat.
Civil law / Common law environment?	Civil law
Confidentiality of arbitrations?	The confidentiality of arbitration is a fundamental principle guaranteed by Algerian law.
Requirement to retain (local) counsel?	Algerian arbitration law does not require that parties to an arbitration be represented by external counsel. Parties can be self-represented should they so wish.
Ability to present party employee witness testimony?	A party may present witness testimony from employees which, under certain circumstances, is made under oath.
Ability to hold meetings and/or hearings outside of the seat?	Parties are free to choose the seat of arbitration as well as the venue for hearings and meetings.
Availability of interest as a remedy?	Yes.
Ability to claim for reasonable costs incurred for the arbitration?	It is possible for the winning party to claim the reimbursement of reasonable costs incurred for the arbitration.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Contingency fee arrangements and/or third-party funding are possible under Algerian regulation.
Party to the New York Convention?	Algeria ratified the New York Convention on 7 February 1989.
Other key points to note	<ul style="list-style-type: none"> • Matters related to Public Order and/or status and legal capacity of persons cannot be resolved via arbitration nor mediation. • The State and its organs are authorized to have recourse to local and international arbitration only if arbitration is provided for by an international treaty or in a procurement contract. • State-owned companies are authorized to have recourse to international arbitration in their international commercial relationships.
WJP Civil Justice score (2018)	φ

ARBITRATION PRACTITIONER SUMMARY

Arbitration procedures are governed by the Algerian Civil and Administrative Procedures Code, in which most of the general rules applicable to litigation proceedings are provided. This includes the principle of equal treatment between parties, the right of the parties to a fair trial, due process and an adversarial hearing, along with the adoption of the relevant characteristics of arbitration procedures such as the exclusion of the right to appeal arbitral awards and confidentiality and privacy in arbitration.

Date of arbitration law?	The Algerian Civil and Administrative Procedures Code, which entered into force on 25 February 2008, exclusively regulates arbitration procedures.
UNCITRAL Model Law? If so, any key changes thereto?	Arbitration procedures are not based on the UNCITRAL Model law.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Algerian courts and judges are not specialised in arbitration-related matters. Arbitration-related matters are usually handled by commercial judges and chairmen of first instance and appellate courts.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Unless otherwise agreed in the arbitration agreement, a diligent party may have recourse to pre-arbitration interim measures enforceable by Algerian courts.
Courts' attitude towards the competence-competence principle?	A court cannot claim jurisdiction over the subject-matter of a dispute already pending before an arbitral tribunal or subject to an arbitration pursuant to a valid arbitration agreement.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The enforcement of an arbitral award may be rejected if the party resisting enforcement of a foreign arbitral award in Algeria requests from the Algerian court a stay of enforcement until annulment proceedings are complete, or if the award is contrary to the international public order.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	A party resisting enforcement of a foreign arbitral award in Algeria may request from the Algerian court a stay of enforcement until annulment proceedings have been concluded. If the award is eventually annulled by the courts of the seat, the party who has obtained the annulment of the award seek to enforce in Algeria the foreign judgment which has annulled the award in order to preclude attempt at enforcing the annulled award, pursuant to article 605 of the CAPC.
Other key points to note?	∅

JURISDICTION DETAILED ANALYSIS

1. Legislative evolution in Algeria in the field of arbitration

The ACPC used to regulate both domestic and international arbitration procedures. However, Law 8812 dated 17 May 2001¹ repealed the provisions governing international arbitration and projected that such provisions be contained in a separate law.

2. The legal framework of Algerian jurisdiction: Algerian arbitration law and the UNCITRAL Model law

Arbitration procedures are exclusively and mainly regulated by Law n°08-09 of 25 February 2008, related to civil and administrative procedures, (hereinafter referred to as “Civil and Administrative Procedures Code” or “CAPC”). The CAPC mirrors the principles and approach of civil jurisdictions.²

Although Algeria did not adopt the UNCITRAL Model law on International Commercial Arbitration, the CAPC largely reflects the principles of international treaties relating to arbitration that Algeria has ratified, such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”)³ and the New York Convention.⁴

Since its entry into force, the CAPC has not been revised.

3. The arbitration agreement

3.1 Determination of the governing law

In both local and international arbitration, and as a general rule, the law governing the arbitration agreement is determined by the express intent of the parties as set out in the arbitration agreement itself. If the parties have not expressed any such intent, the law governing the arbitration agreement may be determined to be that governing the dispute, or that chosen by the arbitral tribunal.⁵ The chosen governing law must have a connection with the parties or the contract.⁶

3.2 The arbitration agreement and the nullity of the initial contract

Pursuant to article 1008 of the CAPC, the arbitration agreement entered into before a dispute has arisen must be formally included into the principal agreement/contract or in any other document to which the arbitration agreement refers. This inclusion does not, however, render the arbitration agreement dependent on the validity of the underlying contract.⁷

The parties may also decide to submit their dispute to arbitration by entering into an arbitration agreement after the dispute has arisen.

In any event, pursuant to article 1040 of the CAPC, the parties cannot challenge the validity of an arbitration agreement on the ground that the principal contract is void and without effect.

¹ Available at: <http://80.78.70.231/pls/kuv/f?p=201:Ligj:8812:17.05.2001.>

² Ali FILALI, Introduction to Law p.165 (2005).

³ Available at: [https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx.](https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx)

⁴ Available at: [http://www.newyorkconvention.org/countries.](http://www.newyorkconvention.org/countries)

⁵ Civil and Administrative Procedures Code. art. 1040.

⁶ Articles 1050 of the CAPC and 18 of the Algerian Civil Code.

⁷ Allouch Kerboua MEZIANI NAIMA, *L'Arbitrage Commercial International en Algérie*, p.25-26 (2010).

3.3 Formal requirements to have the arbitration agreement enforceable

Pursuant to articles 1008, 1012, and 1040 of the CAPC, an arbitration agreement must be formally entered into in writing or by any other physical or electronic means of communication.⁸ In addition, arbitration agreements relating to local arbitrations only must designate the arbitrators or the modalities of their designation.

3.4 Third parties to the principal contract

If Algerian law is governing the arbitration agreement, a third party to the principal containing the arbitration agreement cannot be bound by the arbitration agreement. While the contract cannot create obligations vis-à-vis third parties,⁹ it can however create rights for their benefit.

3.5 Restrictions to arbitrability

Notable restrictions to arbitrability are as follows:

- a. Matters related to public policy and/or status and legal capacity of persons cannot be resolved via arbitration. Parties must turn to the courts having jurisdiction.
- b. The State and its subdivisions can have recourse to arbitration if (i) recourse to arbitration is provided by an international treaty; or (ii) a procurement contract.¹⁰
- c. State-owned companies can have recourse to international arbitration in their international commercial relationships.

4. Intervention of domestic courts

4.1 Algerian courts declining jurisdiction

Algerian courts will decline jurisdiction if they are invited to do so by a party and if they are satisfied that: (i) the dispute is already pending before an arbitral tribunal; and/or (ii) a valid arbitration agreement covering that dispute, regardless of the seat of the arbitration, has conferred jurisdiction to an arbitral tribunal.¹¹

Algerian courts are very supportive of anti-suit injunctions.

4.2 Intervention of Algerian courts in arbitrations seated outside Algeria

Algerian courts do not intervene in the procedural aspects of arbitrations seated outside their jurisdiction.

However, they may intervene in a foreign arbitration if their assistance is required in relation to (i) the gathering of evidence (ii) the validation of procedural acts, or (iii) for any other matter required by the arbitral tribunal.¹² For instance, the arbitral tribunal may seek the assistance of the Algerian judge in case a party does not comply with a provisional measure it ordered.¹³

5. The conduct of proceedings

5.1 Representation of the parties

Pursuant to article 14 of the CAPC, in commercial and civil matters before Algerian courts, representation by external counsel is not mandatory. Unless otherwise agreed in the arbitration agreement, the same applies to proceedings before an arbitral tribunal. Therefore, parties can be self-represented should they so wish.

⁸ Barbara Abd ARRAHMANE, Comments on the Civil and Administrative Procedures Code, p. 551 (2009).

⁹ Article 113 of the Algerian Civil Code.

¹⁰ Civil and Administrative Procedures Code, Art. 800, 975 and 1006.

¹¹ Civil and Administrative Procedures Code, Art. 1045.

¹² Civil and Administrative Procedures Code, Art. 1048.

¹³ Civil and Administrative Procedures Code, Art. 1046.

5.2 Control of the arbitrators' independency and impartiality

If the arbitration rules applicable to the arbitration do not prescribe the procedure for making a challenge against an arbitrator for an alleged lack of independence and/or impartiality (and, in the case of a foreign arbitration, the issue has not been determined by the courts of the seat), an Algerian judge may rule on it, provided that the dispute is governed by Algerian law. Pursuant to article 1016 of CAPC, the claimant must prove the direct or indirect existence of interests, and/or economic or familial ties with a party to the arbitral proceedings.

5.3 Intervention of Algerian courts in the constitution of the arbitral tribunal

Pursuant to articles 1009 and 1041 of CAPC, the courts may intervene in the constitution of the arbitral tribunal to solve issues arising in relation to the constitution of the AT.

In international arbitrations, the said intervention must be triggered through an application filed before (i) the President of the court of the seat (for arbitrations taking place in Algeria), or (ii) the President of the court of Algiers (for arbitrations taking place outside Algeria but seated in Algeria). In the case of local arbitrations, an application must be filed before the President of the court that has jurisdiction over the territory in which the contract was executed.

5.4 Algerian courts' power to issue interim measures

The courts have power to grant interim measures in connection with arbitrations, upon the request of the arbitral tribunal and/or of a party authorized by the arbitral tribunal to do so.

With regard to *ex parte* requests, pursuant to article 1048 of the CAPC, a party may request judicial assistance from a competent judge, subject to prior authorisation from the arbitral tribunal. As arbitral tribunals generally have to comply with the adversarial principle, it is rare that such authorisation is granted *ex parte*. In practice, it is therefore difficult to contemplate an *ex parte* request in the framework of article 1048 of the CAPC. It remains, however, to be seen whether the parties may validly insert a clause entitling them to obtain interim measures from Algerian courts on *ex parte* basis in their arbitration agreement.

5.5 Control of the arbitrators' conduct

In addition to the duty to be independent and impartial, the arbitrators must possess the qualifications agreed by the parties in the arbitration agreement.¹⁴ We note that the parties are entitled to insert into the arbitration agreement any and all grounds of challenge to the appointment of an arbitrator.

5.6 Confidentiality

Pursuant to article 1025 of the CAPC, the deliberations of the arbitrators are confidential. The parties are also allowed to specify the same in the arbitration agreement.¹⁵

5.7 Length of arbitration proceedings

An arbitration agreement is valid even if it does not set a timeframe within which the arbitrators must fulfil their mandate. In such a hypothesis, the arbitrators have to fulfil their mandate within four (4) months from the date of their designation or from the date when the parties notified/submitted the dispute to arbitral tribunal.¹⁶ The four-month deadline may be extended either by the parties in the arbitration agreement (by reference to the applicable arbitration rules) or by the territorially competent tribunal.

¹⁴ Civil and Administrative Procedures Code, Art. 1016.

¹⁵ Civil and Administrative Procedures Code, Art. 1043.

¹⁶ Civil and Administrative Procedures Code, Art. 1018.

5.8 Place of arbitrations' hearings and meetings

As the CAPC is silent on provisions relating to the venue where hearings and/or meetings may be held, the parties are free to choose their venue(s).

5.9 Arbitrators' power to grant interim measures

Pursuant to article 1046 of the CAPC, arbitrators may grant interim measures, provided that:

- a. the arbitration agreement does not state otherwise; and
- b. the interim measure is requested by one of the parties to the arbitration (*i.e.* the arbitral tribunal cannot issue interim measures on its own motion).

Should the party against which an interim measure has been ordered not comply with the same, the arbitrators may seek the judicial assistance of the Courts of the seat to enforce such measure.¹⁷

5.10 Arbitrators' right to admit and exclude evidence

Pursuant to articles 1020, 1023 and 1047 of the CAPC, the arbitral tribunal decides on its own motion which evidence will be admitted/excluded. Therefore, it may admit and exclude evidence at its sole discretion as long as it does not contradict the applicable arbitration rules or the law of the seat.

A party may present employee witness testimony. If Algerian law governs the arbitration, such testimony is made under oath.

5.11 Holding hearings

Pursuant to article 1019 of the CAPC, unless otherwise agreed between the parties, deadlines and forms applicable to court proceedings are also applicable to arbitral proceedings seated in Algeria. Thus, arbitral tribunals hand down their decisions following exchanges of briefs and hearings.

5.12 Allocation of arbitration costs

Algerian arbitration law does not deal with the allocation of arbitration costs or the award of interest: this is left to the applicable arbitration rules or to the arbitration agreement or, in the absence of any rule governing this issue, to the discretion of the arbitral tribunal.

5.13 Liability

Arbitrators do not benefit from immunity to civil liability under the CAPC.

If forged documents are submitted or if a criminal issue arises during the course of arbitration (domestic arbitration and international arbitrations seated in Algeria), the arbitral tribunal must refer the parties to the competent penal court. The arbitral proceedings are suspended until the penal court rules on the matter.¹⁸

6. The award

6.1 Awards must provide reasons

Arbitral awards in both domestic and international arbitral proceedings must provide reasons.¹⁹ It is on the basis of such reasons that the Algerian judge shall decide whether the award should be converted into a court order for enforcement.

¹⁷ Civil and Administrative Procedures Code, Art. 1048.

¹⁸ Civil and Administrative Procedures Code, Art. 1021.

¹⁹ Civil and Administrative Procedures Code, Art. 1027.

6.2 Annulment of awards

Pursuant to article 1031 of the CAPC, arbitral awards rendered in Algeria that rule on the subject matter of the dispute are *res judicata* the moment they are handed down. However, arbitral awards rendered in Algeria in relation to international arbitration may be subject to annulment in compliance with article 1058 of the CAPC. The parties may waive their right to seek annulment of the award.

Applications for annulment must be submitted before the Court of Appeal in the jurisdiction where the award was rendered within a period of one (1) month from the date of notification of the court's order for enforcement.

Local arbitration awards may be subject to an appeal unless agreed otherwise by the parties.

6.3 Requirements for the validity of arbitral awards rendered in Algeria

The validity of an award rendered by an arbitral tribunal seated in Algeria is subject, *inter alia*, to the requirements of articles 1025 to 1030 of the CAPC, as follows:

- compliance with the confidentiality of the deliberations;
- approval of the award by the majority of the arbitral tribunal;
- signature by all arbitrators;
- a summary of the parties' submissions and reasons for the award, as well as:
 - (i) the full name of the arbitrator(s);
 - (ii) the date of issuance;
 - (iii) full names and addresses of the parties (whether natural or legal persons); and
 - (iv) full names of the parties' counsel or their representatives, as the case may be.²⁰

6.4 Procedures of recognition, enforcement and appealing awards

a. Local arbitral awards rendered inside Algeria

Pursuant to article 1031 of the CAPC, arbitral awards rendered in Algeria that rule on the subject matter of the dispute are *res judicata* as soon as they are handed down.

The local arbitration award is enforced by an order issued by the president of the court of the place where the arbitration tribunal was seated.

A court order refusing enforcement can be appealed within 15 days following its issuance pursuant to article 1035 of the CAPC.

Unless otherwise agreed in the arbitration clause, a domestic arbitral award can be appealed by a party within a period of one (1) month after the issuance of the award. The appeal must be submitted to the Court of Appeal where the arbitral tribunal was seated. The decisions of the Court of Appeal (whether relating to the appeal of the award or to the enforcement order) may be challenged before the Supreme Court.²¹

b. International arbitral awards rendered inside and/or outside Algeria:

Pursuant to articles 1051, 1056 and 1057 of the CAPC, the party seeking recognition²² and enforcement of an international arbitral award must submit an application to this effect

²⁰ It must be highlighted that in the event an arbitrator refuses to sign an arbitral award, the arbitrators signing the award and representing the majority of the arbitral tribunal shall make reference to said refusal in the award. This refusal does not affect the formal validity of the award as it is deemed being signed by the totality of the arbitral tribunal.

²¹ Civil and Administrative Procedures Code, Art. 1033 and 1034.

²² The recognition is granted when a diligent party provides an original copy of the award and the arbitration agreement. The recognition must not be contrary to international public order.

(i) before the President of the court where the international arbitral award was issued (for international arbitrations taking place inside Algeria), or

(ii) before the court where the enforcement is sought (for international arbitrations taking place outside Algeria). The President will declare the award enforceable unless it breaches international public policy.

Decisions rejecting the enforcement or execution of the arbitral award may be subject to appeal.

Decisions on enforcement can be appealed by parties before the competent Court of Appeal within a period of one (1) month starting from the formal notification of the first instance court's decision.

The grounds of appeal are:

- the arbitral tribunal has issued an award after the expiry of the term of the arbitration agreement/clause or issued an award based on an invalid arbitration agreement/clause or without one at all;
- the constitution of the tribunal and appointment of the arbitrators was contrary to the applicable law;
- the arbitrators determined the dispute in a manner contrary to the mandate attributed to them;
- the principle of due process (adversarial principle) was not complied with;
- the arbitrators did not give reasons for the award or gave contradictory reasonings; and/or
- the award is in violation of the international public order.

6.5 Suspensive character of award annulment and appeal proceedings

Pursuant to article 1060 of the CAPC, annulment and appeal proceedings are automatically suspensive of the enforcement of the award.

6.6 Enforceability of foreign awards annulled at their seat

If an award is annulled by the Courts of the seat, enforcement of that annulment should be sought pursuant to article 605 of the CAPC. In practice, this works as follows:

- As the recognition and enforcement of a foreign award is an *ex-parte* procedure, once the recognition and enforcement of the foreign award is granted, it must be notified to the losing party. The losing party has then one month to appeal the decision.
- During the appeal, the losing will bring the annulment decision to the attention of the Algerian Court. If the annulment decision has already been converted into an order of the Courts of Algeria, the Algerian judge will quash the decision granting the *exequatur*. Otherwise, the losing party will rely on the annulment to demonstrate that the award breaches one of the requirements for validity set forth above.

A party resisting enforcement of a foreign arbitral award in Algeria may request from the Algerian court a stay of enforcement until annulment proceedings are complete.

6.7 Difficulties with enforceability of foreign awards

Arbitral awards are readily enforceable provided that the enforcing party fulfils the provisions of the CAPC relating to the recognition and enforcement of arbitral awards.

However, in practice, difficulties may arise in enforcing an international arbitral award rendered outside Algeria due to the lack of expertise of some Algerian Courts in this area. For example, in the case of decision n° 543309²³ of the Algerian Supreme Court (*Cour de cassation*) dated 18 March 2010, an arbitral award was issued by the Refined Sugar Association of London on 27 May 1999 ordering the Respondent to pay to the

²³ *A.S entity (Appellant) vs Miltman Andicogy corporation (Respondent)*.

Appellant the amount of 281 253,94 US dollars. The difficulties that the parties experienced in respect of enforcement related mainly to misinterpretations by the lower courts of the provisions of the CAPC as to which court had jurisdiction to decide upon the enforceability of the foreign award. In the end, it took ten years and a decision of the Supreme Court to determine which court in fact had jurisdiction.

7. Funding arrangements: contingency, alternative fee arrangements and third-party funding

Contingency fee arrangements and/or third-party funding are possible under Algerian law.

8. Future reforms

At the moment, we are not aware of any potential project of law modifying and amending the CAPC.

ARGENTINA

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

JULIO CÉSAR RIVERA AND JULIO CÉSAR RIVERA (H)
OF RIVERA & ASOCIADOS



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JURISDICTION INDICATIVE TRAFFIC LIGHTS +

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VERSION: 18 JUNE 2018 (v02.000)

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Law No. 27.449 regarding international commercial arbitration was passed on 25 July 2018 and published in the official bulletin on 26 July 2018. It since governs any and all questions regarding international commercial arbitration under Argentinian law as of its publications and implements substantial changes in this regard. This GAP Chapter on Argentina is currently being updated to incorporate the provisions and implications of the new law and will be published shortly.

Argentine arbitration law is composed of two different regulations: (i) a chapter on the Arbitration Agreement contained in the Civil and Commercial Code enacted by the National Congress and applicable nation-wide; (ii) regulations of the procedural aspects of the arbitration contained in the Civil and Commercial procedural Codes (enacted by each province) and in the National Civil and Commercial Procedural Code respectively applicable in each province and in the federal jurisdiction. These procedural codes provide for the recourses available after an award has been rendered (such as annulment and clarification requests) and the terms, grounds, and conditions for their filing.

Key places of arbitration in the jurisdiction	Buenos Aires.
Civil law / Common law environment?	Civil law jurisdiction.
Confidentiality of arbitrations?	Not explicitly stated but parties may agree on it.
Requirement to retain (local) counsel?	Not necessary.
Ability to present party employee witness testimony?	Not forbidden.
Ability to hold meetings and/or hearings outside of the seat?	Yes.
Availability of interest as a remedy?	This matter is regarded as a part of substantive law.
Ability to claim for reasonable costs incurred for the arbitration?	The National Civil and Commercial Procedural Code provide that arbitrators must allocate costs to the losing party unless they find that the circumstances of the case do not justify it. Parties may agree on a different cost allocation (either directly or through the adoption of institutional rules).
Restrictions regarding contingency fee arrangements and/or third-party funding?	Local bar rules allow lawyers to agree on contingency fees for up to 30% of the value of the awarded amount. There is no provision on third-party funding.
Party to the New York Convention?	Yes, with reservations with regard to reciprocity and commercial disputes.
Other key points to note	ϕ
WJP Civil Justice score (2018)	0.57

ARBITRATION PRACTITIONER SUMMARY

Law No. 27.449 regarding international commercial arbitration was passed on 25 July 2018 and published in the official bulletin on 26 July 2018. It since governs any and all questions regarding international commercial arbitration under Argentinian law as of its publications and implements substantial changes in this regard. This GAP Chapter on Argentina is currently being updated to incorporate the provisions and implications of the new law and will be published shortly.

The new Civil and Commercial Code, which has been in force since August 1st, 2015, contains a chapter on the arbitration agreement, which applies to both international and domestic arbitration. It does not apply to arbitrations to which the State or the Provinces are parties.

This chapter includes provisions on the: definition, form, content and effects of the arbitration agreement; types of disputes that may not be subject to arbitration; interim measures; appointment of arbitrators and challenging their appointment; and duties and compensation of arbitrators.

The National Civil and Commercial Code's chapter on the arbitration agreement does not regulate the procedural aspects of the arbitration. So, the chapter on the arbitration agreement is complemented with the existence of procedural regulations of arbitration in provincial procedural codes and in the National Civil and Commercial Procedural Code (1968), respectively applicable in each province and in the federal jurisdiction. These procedural codes provide for the recourses available after an award has been made (such as appeal, annulment and clarification requests) and the terms, grounds, and conditions for their filing.

The recognition and enforcement of foreign arbitral awards is primarily governed by the treaties signed and ratified by Argentina, notably the New York Convention, the OAS Inter-American Convention on International Commercial Arbitration 1975 (Panama Convention) and the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards 1979.

Date of arbitration law?	The new Civil and Commercial Code, which has been in force since August 1 st , 2015.
UNCITRAL Model Law? If so, any key changes thereto?	Currently the Executive Power has drafted a bill based on the Model Law that would apply exclusively to international commercial arbitrations. It has been approved by the Senate and is currently being analyzed by the House of Representatives.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	There are no specialized courts or judges for arbitration-related matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	A tribunal may adopt <i>ex parte</i> interim measures (Article 1655 of the National Civil and Commercial Code) that are expressly allowed in domestic proceedings. In this regard, the power of judges to grant interim measures is very broad since the National Civil and Commercial Procedural Code expressly authorizes to grant any measure that may be necessary to provisionally ensure the enforcement of the final judgment under the circumstances (Section 230 of the NCCPC).

	<p>However, the arbitrators' duty to ensure the equal treatment of the parties (Article 1662, Civil and Commercial Code) may be interpreted as imposing some limitations on their ability to adopt <i>ex parte</i> interim measures and arbitrators may decide to hear both parties before adopting any measure. That is why, in practice, Argentine lawyers prefer to request interim measures before domestic courts.</p>
<p>Courts' attitude towards the competence-competence principle?</p>	<p>Unless otherwise stated in the arbitration agreement, the arbitrators have the power to decide on their own jurisdiction, which includes the power to rule on the existence or the validity of the arbitration agreement (Article 1654, Civil and Commercial Code).</p> <p>Article 1656 of the Code recognizes the concept of <i>Kompetenz-Kompetenz</i>. It states that courts must refuse jurisdiction if the dispute is brought before them, unless the arbitral tribunal has not been constituted yet and the arbitration agreement is manifestly void or inapplicable. In <i>Francisco Ctibor SACI v. Walmart</i> (2016) the Commercial Court of Appeal held that, according to this article 1656, the courts' intervention prior to the constitution of the arbitral tribunal is limited to cases in which the nullity of the arbitration agreement is evident and clear.</p>
<p>Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?</p>	<p>According to Articles 760 and 761 of the National Civil and Commercial Procedural Code, an award issued in an arbitration at law may be annulled on the following grounds:</p> <ul style="list-style-type: none"> • Essential procedural errors: Courts may only annul an award based on the existence of procedural flaws that affect due process but may not review the merits of the case. It is similar to Article V.1.b) of the New York Convention. • Award rendered after the term to do so has elapsed. • Award decides issues not submitted to the Arbitral Tribunal. It is similar to Article V.1.c) of the New York Convention. • Award is inconsistent or contains contradictory decisions. This ground is limited to the dispositive part of the award. <p>Apart from these statutory grounds, in cases where a State entity is a party to the arbitration, the Argentine Supreme Court has held that an award may also be annulled if it is contrary to public policy or it is illegal, unreasonable or unconstitutional (<i>Cartellone. c. Hidroeléctrica Norpatagónica S.A.</i>, 2004). The 2015 reform has not affected the existence of this non-statutory ground.</p> <p>Concerning arbitration in equity (<i>amiable compositeur</i>), the award may not be appealed and it may be annulled if it was rendered after the time limit or if it decides issues not submitted to the arbitral tribunal (Section 771 of the National Civil and Commercial Procedural Code). Argentine commentators</p>

	<p>consider that the existence of essential procedural errors constitutes a non-statutory ground of annulment.</p>
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>There are no precedents from Argentine Courts interpreting the New York Convention on this issue.</p>
<p>Other key points to note?</p>	<ul style="list-style-type: none"> • Argentine Commercial courts, in general, do not interfere with arbitration proceedings between private parties and have consistently refused to review the merits of awards. There are some isolated precedents in which the Commercial Court reviewed the interpretation of the contract made by the arbitral tribunal (<i>EDF International v. Endesa Internacional</i>, 2009) on the ground that the award had disregarded the applicable Argentine Law. However, no similar decision has been issued since. In disputes involving the Argentine State or other State parties, the risk of unreasonable domestic court intervention is significantly higher. • The existence of multiple – and sometimes contradictory – sources of law (Civil and Commercial Code and Civil and Commercial Procedural Codes in each province) hinders the existence of a modern arbitration law. The recent Arbitration Bill sent to Congress based on the UNCITRAL Model Law would provide a uniform regulation of international arbitration (for disputes primarily based on private law) thus limiting the scope of the Civil and Commercial Code and of all the provincial procedural codes to domestic arbitration. • Argentina still lacks a regulatory framework for the arbitration of disputes not primarily governed by private law –such as disputes concerning State parties based on public law– since the current Civil and Commercial Code does not apply to this type of dispute. It would be desirable to have a predictable legal framework for arbitration with state-owned companies or with the Argentine State.

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law?

The current Argentine arbitration regulation is not based on the Model Law.

According to Section 75.12 of the Argentine Constitution, the National Congress has the power to enact the Criminal, Civil, Commercial and Labor codes, which are applicable nation-wide. In light of this provision, Congress can regulate all matters related to contract law. Against this background, the new Civil and Commercial Code in force since 2015 contains a chapter on the arbitration agreement that includes provisions on the definition, form, content, effects of the arbitration agreement, the types of disputes that may not be subject to arbitration, the issuance of interim measures the appointment and challenge of arbitrators and their duties and compensation. This regulation does not apply to controversies in which the State or any Province is a party (Article 1651).

The National Civil and Commercial Code's chapter on the arbitration agreement does not regulate the procedural aspects of arbitration. Thus, the National Civil and Commercial Code chapter is complemented with the existence of procedural regulations of arbitration in provincial and national procedural codes, respectively applicable in each province and in the federal jurisdiction. These procedural codes set forth the recourses available against an award (appeal, annulment, clarification request) and the terms, grounds and conditions to file such a motion.

The recognition and enforcement of foreign arbitral awards is primarily governed by the treaties signed and ratified by Argentina, such as the:

- UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).
- OAS Inter-American Convention on International Commercial Arbitration 1975 (Panama Convention).
- Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards 1979.

Finally, it should be pointed out that, currently, the Executive Power has drafted a bill based on the Model Law that would apply exclusively to international commercial arbitrations and which has been submitted to the Congress.

1.2 When was the arbitration law last revised?

In 2015, with the enactment of the new national Civil and Commercial Code.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

There are no precedents concerning this issue, but Argentine courts will likely base their decision on Article V.1.a) of the New York Convention ("*the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made*").

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Article 1653 of the Civil and Commercial Code provides that the arbitration agreement is independent from the main contract to which it is related. Article 1653 also states that the validity of the arbitration agreement

is not affected even if the main contract is declared null and void. Therefore, arbitrators maintain their jurisdiction to decide on each party's claims even if the main contract is not valid.

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

Article 1650 of the Civil and Commercial Code provides that the agreement must be in writing. However, since it does not provide any definition of this requirement, the general rules of contract law apply so that private documents (signed or not) suffice (Article 28). Like for contracts in general, *consent* to the arbitration agreement may be proven by any conduct that shows its acceptance (Article 979).

Article 1651 of the Civil and Commercial Code establishes that disputes related to adhesion contracts may not be subject to arbitration. However, this is a formal requirement of the arbitration agreement disguised as a non-arbitrability provision.

Article 1651 establishes that an arbitration agreement may be included in a contract, in an independent agreement, in the by-laws of a company or in a certain set of rules (*reglamentos* in Spanish). It can also arise from a reference made within a contract to another document, as long as the contract is in writing and if the reference is sufficiently clear as to the fact that the arbitration clause is part of it.

2.4 To what extent if at all can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

There is no specific regulation on this issue. However, since any conduct that shows acceptance may be used to prove consent to the arbitration agreement, it could be possible –depending on the circumstances– to extend it to a non-signatory party that has been actively involved in the negotiation, performance and termination of the main contract.

Additionally –pursuant to Article 54 of the Argentine Companies Act– the arbitration clause could be extended to a corporation or its shareholders when the corporate form is used to commit fraud or other illegal acts.

2.5 Are there restrictions to arbitrability?

The general principle is that matters that cannot be subject to compromise or settlement cannot not be submitted to arbitration (Article 737, National Civil and Commercial Procedural Code), *i.e.*, a criminal matter arising from an unlawful act.

2.5.1 Do these restrictions relate to specific domains (such as IP, corporate law etc.)?

Article 1651 of the Civil and Commercial Code adds that disputes related with the civil status of capacity of a person, with family matters, adhesion contracts, consumer disputes and labour disputes may not be subject to arbitration. The parties may not agree to arbitrate disputes that put the public order at stake (Article 1649). However, Argentine Courts have held that a dispute governed by public policy rules can be submitted to arbitration if it only concerns the parties' monetary rights.

2.5.2 Do these restrictions relate to specific persons (i.e. State entities, consumers etc.)?

Article 1651 of the Civil and Commercial Code provides that consumer disputes may not be decided by arbitration and arbitration clauses in these circumstances would be declared null. However, the National System of Consumer Arbitration created by Decree 276/98 is still in place, which indicates that consumer disputes may indeed be arbitrated. The essential features of the system are:

- a) pre-dispute arbitration agreements are not valid;
- b) after a specific dispute has arisen, a consumer may voluntarily decide to submit it to arbitration.

The state or an instrumentality of the state may enter into an arbitration agreement if they are authorized by statute (See e.g. *Techint Compañía Técnica Internacional S.A.C.E. e I. v. Empresa Nuclear Argentina de Centrales Eléctricas en liquidación S.A. e I. y Nucleoeléctrica Argentina S.A.*, Supreme Court, 2007).

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

3.1.1 If the place of the arbitration is inside of the jurisdiction?

Yes, courts regularly stay litigation if there is a valid arbitration agreement and any of the parties objects to the Court's jurisdiction pursuant to Article 347.1 of the National Civil and Commercial Procedural Code.

The general rules –as set forth in Article 1654 of the Civil and Commercial Code– is that arbitrators are competent to decide on their own jurisdiction, including motions regarding the validity of the arbitration agreement in an attempt to prevent the consideration and resolution of the merits of the dispute through arbitration, and any such attempts shall be resolved by the arbitrators

3.1.2 If the place of the arbitration is outside of the jurisdiction?

Yes, the place of the arbitration is irrelevant. Local courts are unlikely to grant an injunction to restrain proceedings started overseas since it would be in breach of an arbitration agreement.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

Courts would likely reject any injunction issued by an arbitral tribunal because anti-suit injunctions are not in principle admissible under Argentine law.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction?

In principle, Courts may not intervene in arbitrations seated outside their jurisdiction.

However, Argentine courts once issued an anti-suit injunction against an arbitral tribunal seated in Washington DC. (*Procuración del Tesoro v. Cámara de Comercio Internacional*, 2007).

An Argentine tribunal also requested that an arbitral tribunal seated in Dallas decline its jurisdiction (See *Compañía General de Combustibles*, 1999). However, the arbitral tribunal did not follow suit and the award was later enforced in Argentina.

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

Yes, parties may retain outside counsel and they do not need to be a member of the Bar in Argentina (at least for international cases).

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

Article 1663 of the Civil and Commercial Code provides that arbitrators may be challenged on the same grounds as judges. Article 1662 of the Civil and Commercial Code sets forth the arbitrators' ongoing duty to disclose any circumstance that may affect their independence or impartiality.

In practice, Courts rarely control arbitrators' independence and impartiality during the arbitration proceedings.

In institutional arbitration, Article 1663 of the National Civil and Commercial Code provides that the challenge may be decided according to the institutional rules and the courts would not give right to any request to disqualify an arbitrator before the award is rendered.

There are some isolated precedents in which domestic courts considered they had the power to review the decision taken by an arbitral institution concerning a challenge during the arbitration proceedings (See *Entidad Binacional Yacyretá v. Eriday*, 2004 and *Procuración del Tesoro v. Cámara de Comercio Internacional*, 2007). With the enactment of the new Civil and Commercial Code, this doctrine cannot be applied to arbitrations in which the new Code applies.

If the institution does not have any rules in this regard, the challenge shall be decided by domestic courts (Article 1663 of the Civil and Commercial Code).

In *ad hoc* arbitration, the parties may agree that the challenge be decided by the other arbitrators (Article 1663 of the Civil and Commercial Code). Otherwise, the courts should not, in principle, give right to any request to disqualify an arbitrator before the the award is rendered.

It is only if nothing has been agreed by the parties that the challenge shall be decided by domestic courts according to the procedure set forth in Article 747 of the National Civil and Commercial Procedural Code.

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

Article 1659 of the Civil and Commercial Code provides the arbitral tribunal must be composed of one or more arbitrators (always an odd number) and the parties can agree on the appointment procedure.

If the parties have not agreed on the number of arbitrators, the default number is three. Each party appoints one of them and the third arbitrator is appointed by the other two arbitrators. If one of the parties does not appoint its arbitrator or if the other two arbitrators cannot agree on a third arbitrator, the appointment will be made by the entity administering the arbitration or by the competent domestic court in the case of *ad hoc* arbitrations.

In case of a sole arbitrator, if the parties do not reach an agreement, the arbitrator will be appointed by the entity administering the arbitration or by the competent domestic court in the case of *ad hoc* arbitrations.

If a dispute involves more than two parties and they cannot reach an agreement as to the constitution of the arbitral tribunal, the entity administering the arbitration or the competent domestic court will appoint the arbitrators in the case of *ad hoc* arbitrations.

4.4 Do courts have the power to issue interim measures in connection with arbitrations?

Article 1655 of the National Civil and Commercial Code authorizes courts to adopt interim measures in connection with arbitrations. A party's request does not entail a violation of the arbitral agreement nor a waiver of the arbitrators' jurisdiction.

A tribunal may adopt the *ex parte* interim measures that are expressly allowed in domestic proceedings. In this regard, the power of judges to grant interim measures is very broad since the National Civil and Commercial Procedural Code expressly authorizes to grant any measure that may be necessary to provisionally ensure the enforcement of the final judgment (Section 230 of the NCCPC).

However, the arbitrators' duty to ensure the equal treatment of the parties (Article 1662, Civil and Commercial Code) may be interpreted as imposing some limitations on their ability to adopt *ex parte* measures and arbitrators may decide to hear both parties before adopting any measure. That is why, in practice, Argentine lawyers prefer to request interim measures before domestic courts.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

Parties may agree on the confidentiality of the arbitration (Article 1658 of the Civil and Commercial Code). This agreement may be express (by inserting a confidentiality clause in the arbitration agreement) or implicit (by selecting certain institutional rules that provide for the confidentiality of arbitration proceedings under those rules).

When confidentiality is agreed by the parties, pursuant to Article 1662 (c) of the Civil and Commercial Code, arbitrators have a duty to respect the confidentiality of the arbitration proceedings.

4.5.2 Does it regulate the length of arbitration proceedings?

The length of the proceedings is within the scope of party autonomy. When there is no agreement by the parties concerning the term in which the award must be issued, the rules of the administering institution shall apply (Article 1658 of the National Civil and Commercial Code) or the term according to the seat of the arbitration as set forth in Article 1658.

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

There are no provisions in this regard.

4.5.4 Does it allow for arbitrators to issue interim measures?

According to Article 1655 of the Civil and Commercial Code, arbitral tribunals have the power to grant interim measures, unless otherwise stated in the arbitration agreement. The enforcement of interim measures depends on domestic courts, which have the power to refuse the enforcement if the measure is unreasonable or entails a violation of constitutional rights (Article 1655 of the National Civil and Commercial Code). Commercial courts have not yet interpreted this provision, but it clearly provides courts with broad powers to review interim measures.

The scope of the relief granted by the Courts will depend on the facts of the case. The general standards applicable to interim and preliminary measures in domestic litigation are applicable to arbitration proceedings to the extent that the parties did not agree otherwise (either directly or indirectly through the agreement to arbitrate under specific institutional rules which may set forth different standards). With respect to interim measures, an applicant will have to show a likelihood of irreparable harm unless the measure is granted (*periculum in mora*) and a substantial likelihood of success on the merits (*fumus boni juris*). In the case of preliminary measures, an applicant needs to show that the production of the evidence requested would be impossible or very difficult at the evidence stage in the arbitration.

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence?

There is no specific provision concerning this issue. Article 1658 of the National Civil and Commercial Code provides that if the parties did not agree on the applicable rules of procedure, the arbitrators have discretionary powers regarding the conduct of the arbitration proceeding.

However, the Civil and Commercial Procedural Code provides that the arbitrators must apply the procedural rules of domestic proceedings, if there is no agreement between the parties and no institutional rules applies. It is our view that the solution of the Civil and Commercial Code should now prevail.

For example, are there any restrictions to the presentation of testimony by a party employee?

Not in arbitration proceedings.

4.5.6 Does it make it mandatory to hold a hearing?

No, there is no mandatory hearing requirement. The parties have the power to determine the procedural rules of the arbitration and if the parties did not agree on the applicable rules of procedure, the arbitrators may conduct the arbitration in the way they consider appropriate (Article 1658, Civil and Commercial Code).

4.5.7 Does it prescribe principles governing the awarding of interest?

The answer depends on the law applicable to the merits. Under Argentine law, a Court (or an arbitral tribunal) has the power to award interest but it cannot award punitive damages, which are expressly limited to consumer actions (Article 52bis of Law 24.240).

4.5.7 Does it prescribe principles governing the allocation of arbitration costs?

There is absolute freedom regarding the parties' autonomy on cost allocation as set forth in article 1658.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

No, Argentine law does not have any specific provision concerning arbitrators' immunities. On the contrary, Article 1662 of the Civil and Commercial Code and Article 745 of the National Civil and Commercial Procedural Code on the duties of arbitrators provides that arbitrators are liable for any breach of their duties that causes damages to the parties.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

No, unless parties or arbitrators disobey a court's order (Article 239 of the National Criminal Code).

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Awards rendered in both arbitration at law and in equity shall provide reasons. Awards rendered in an arbitration in equity are not required to apply the law, but must nonetheless must provide reasons (Article 1662 regarding arbitrators' duties).

5.2 Can parties waive the right to seek the annulment of the award?

Pursuant to Article 760 of the National Civil and Commercial Procedural Code, the parties cannot waive either the option to seek annulment or the option to request clarification.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

There are no atypical mandatory requirements.

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

Arbitral awards issued in arbitration in law can be appealed as first instance court final decisions (Section 758 of the National Civil and Commercial Procedural Code (NCCPC)). If parties have waived the right to appeal, they can only file for annulment against the award or a request for clarification under section 760 of the NCCPC.

In case of an appeal, there are no specific grounds since it allows for a full review of the merits of the case.

With respect to annulment, Articles 760 and 761 of the NCCPC provide that an award can be annulled on one or more of the following grounds:

- Essential procedural errors: courts can only annul an award based on the existence of formal flaws that affect the due process but cannot review the justice or injustice of the case.
- If the award is rendered after the term for making the award has elapsed.
- If the award decides issues not submitted to the arbitral tribunal.
- If the award is inconsistent or contains contradictory decisions. It is limited to the dispositive part of the award.

Apart from these statutory grounds, the Argentine Supreme Court has held that an award may also be annulled if it is contrary to public policy or if it is illegal, unreasonable or unconstitutional (*Cartellone. c. Hidroeléctrica Norpatagónica S.A.*, 2004). The notion that public policy is a non-statutory ground of annulment survives the 2015 reform since the Civil and Commercial Code does not regulate the procedural aspects of the arbitration (such as the grounds of annulment).

The annulment request must be filed before the arbitral tribunal within five working days from receiving notice of the award (Article 759, National Civil and Commercial Procedural Code). If the request is formally admissible, the arbitral tribunal will send it, together with the whole case record to the Court of Appeals (in the case of arbitration in law) or to the First Instance Court (in the case of arbitration in equity). If the arbitral tribunal considers that the request is formally inadmissible, the applicant can file its annulment request directly before the Commercial Court of Appeals within five working days. The Court has the power to overrule the arbitral tribunal's decision and declare the formal admissibility of the annulment request

Concerning arbitration in equity (*amiable compositeur*), the award is not subject to appeal and it may be annulled if it was rendered after the time limit or if it decides issues not submitted to the arbitral tribunal (Article 771 of the National Civil and Commercial Procedural Code). Argentine commentators consider that the existence of essential procedural errors also constitutes a non-statutory ground of annulment. The request for annulment must be filed before the First Instance Court within five working days since the party receives formal notice of the award.

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

A domestic award may be enforced in the same way as any domestic court's final decision (in summary enforcement proceedings).

The recognition and enforcement of foreign arbitral awards is primarily governed by the following treaties signed and ratified by Argentina:

- New York Convention. Argentina declared that it will apply the Convention to only:
 - the recognition and enforcement of foreign arbitral awards made in the territory of another Contracting State.
 - differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national laws.
- Panama Convention.
- OAS Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments 1984

The recognition and enforcement of foreign arbitral awards outside the scope of the treaties is governed by sections 517 and 519 bis of the National Civil and Commercial Procedural Code.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

Yes.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

There are no precedents from Argentine Courts interpreting the New York Convention on this issue.

5.8 Are foreign awards readily enforceable in practice?

In principle, Argentine Courts enforce foreign arbitral awards without any review of the merits of the case (*Armada Holland BV Schiedman Denmark c/ Inter Fruit S.A.*, Supreme Court, 2011). In some exceptional cases against state entities, the enforcement has been rejected on public policy grounds (*Milantic v. Astillero Santiago*, Supreme Court of the Province of Buenos Aires, 2016).

6. Funding arrangements: Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

Argentine law does not contain any specific legal or ethical rule regarding third party funding.

7. Is there likely to be any significant reform of the arbitration law in the near future?

The Executive Power has drafted a bill based on the Model Law would apply exclusively to international commercial arbitrations and it is currently being analysed by the Congress

AUSTRIA

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

HON.-PROF. DR. IRENE WELSER, DR. BERNHARD WYCHERA AND
MAG. GREGOR A. KLAMMER OF CERHA HEMPEL SPIEGELFELD HLAWATI
RECHTSANWÄLTE GMBH (CHSH)

CHSH
Cerha Hempel Spiegelfeld Hlawati
Rechtsanwälte GmbH

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

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 - c. Limited court intervention ●
 - d. Arbitrator immunity from civil liability ●
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3. Legal expertise ●
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5. Accessibility and safety ●
6. Ethics ●

VERSION: 7 MAY 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Vienna offers an excellent environment for arbitration proceedings: Supported by arbitration-friendly and reliable state courts and its central, easy-accessible, cost-efficient location in the heart of Europe, Vienna managed to steadily increase its importance as an arbitration hub, in particular for the CEE region.

Key places of arbitration in the jurisdiction	The key place of arbitration in Austria is Vienna.
Civil law / Common law environment?	Civil law.
Confidentiality of arbitrations?	Not expressly provided.
Requirement to retain (local) counsel?	It is not required to engage a (local) counsel.
Ability to present party employee witness testimony?	It is possible to present a party employee as witness.
Ability to hold meetings and/or hearings outside of the seat?	It is possible to hold meetings and/or hearings outside the seat.
Availability of interest as a remedy?	Interest is generally available as a remedy (as a matter of substantive law).
Ability to claim for reasonable costs incurred for the arbitration?	It is possible to claim reasonable costs incurred for purposes of the arbitration.
Restrictions regarding contingency fee arrangements and/or third-party funding?	There are certain restrictions regarding contingency fee arrangements. Third-party funding is not restricted. Strict consumer protection and labour law provisions.
Party to the New York Convention?	Austria is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").
Other key points to note	<ul style="list-style-type: none"> – Austrian arbitration law closely follows the UNCITRAL Model Law on International Commercial Arbitration ("Model law"). – The procedure for challenging an arbitral award has recently been reformed: The Supreme Court now decides on a challenge as the first and last instance. – The Supreme Court is known for its high-quality judgments and reliably upholds the rule of law in respect to arbitration.
WJP Civil Justice score (2017-2018)	0.81

ARBITRATION PRACTITIONER SUMMARY

The Austrian Arbitration Act offers high flexibility in respect to arbitration proceedings: There are few mandatory provisions, which particularly ensure the fair and equal treatment of the parties and provide for minimal state supervision. Generally, the state courts have proven to be reluctant to intervene in arbitration proceedings or to reverse decisions of arbitral tribunals. Jointly with the reliability and effectiveness of Austrian state courts, the legal and procedural framework in Austria offers strong arguments in favour of conducting arbitration proceedings in Austria.

Date of arbitration law?	The Austrian Arbitration Act setting out the current framework for arbitration entered into force on 1 July 2006.
UNCITRAL Model Law? If so, any key changes thereto?	The Model Law has mostly been implemented. Key differences are consumer and employee protection provisions, which practically make it impossible for sellers and employers to pursue claims against consumers or employees in arbitration.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	At the lower courts, there are no specialized arbitration judges. However, the Supreme Court has a specialized department and serves as the first and final instance for the adjudication of challenges to an award.
Availability of <i>ex parte</i> pre-arbitration interim measures?	<i>Ex parte</i> interim measures cannot be issued by an arbitral tribunal.
Courts' attitude towards the competence-competence principle?	State courts are generally arbitration-friendly and fully recognize the principle of competence-competence. The decision of the arbitral tribunal on its own competence is only subject to review in case of a challenge of the award.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	There are no additional grounds of annulment compared to the New York Convention.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	State courts generally do not recognize or enforce foreign awards that have been annulled at the seat of arbitration; if the ground for annulment have been a lack of arbitrability or a violation of <i>ordre public</i> , the state courts decide themselves if these grounds are also established under Austrian arbitration law.
Other key points to note?	Austrian arbitration law offers high flexibility in respect to the conduct of arbitration proceedings.

JURISDICTION DETAILED ANALYSIS

1. Legal Framework

Arbitration has a well-developed tradition in Austria, with the origins of its legal development dating back over 120 years. The first codification of arbitration law entered into force in 1895. This old framework has been revised and amended until it was entirely replaced by the Austrian Arbitration Act, which entered into force on 1 July 2006. The current arbitration law is incorporated into the Austrian Code of Civil Procedure (“ACCP”), Sections 577 to 618.¹

The Austrian Arbitration Act introduced a modern arbitration law built upon the Model Law of 1985. Since the Austrian Arbitration Act was drafted before the amendment of the Model Law in 2006, the new Articles 17a *et seq* of the Model Law have not been implemented into the ACCP.

The current legal framework implements all principal legal features of the Model Law. As a key distinction from the Model Law, the ACCP implements particularly strict provisions regarding consumer rights and labour law disputes.² Furthermore, Austrian arbitration law - contrary to the Model Law - does not differentiate between domestic and international, or commercial and non-commercial arbitration. All rules apply equally to the respective form of arbitration, except for where specifically provided otherwise.

In the course of the latest revision of the arbitration law in 2013, the Supreme Court was designated as the first and final instance for proceedings concerning the constitution of arbitral tribunals, challenges of arbitral awards and claims regarding a declaration of the existence or non-existence of an arbitral award. Notably, in matters related to consumers or labour law, the former three instances (district court – regional court – Supreme Court) remain in place. This revision was crucial for increasing the speed of arbitration proceedings, and serves as proof that the Austrian legislator is eager to promote Austria as a place for arbitration and make Austrian arbitration proceedings as effective, streamlined and expedient as possible.

2. Arbitration Agreement

The provisions of the Austrian arbitration law regarding arbitration agreements as set out in Sec 581 ACCP are fairly comparable to the provisions set out in Art 7 Model Law.

2.1 Law governing the arbitration agreement

Austrian arbitration law does not set out any rules regarding which law would be applicable to arbitration agreements. Furthermore, arbitration agreements do not fall within the scope of the Rome I regulation as the general rule on conflict of law;³ as a result there are no express legal provisions under Austrian law that would apply to the question of which law is applicable to an arbitration agreement.

Thus, Austrian courts have developed their own rules on this matter, as recently summarized in a decision of the Supreme Court:⁴

- First, the law agreed upon by the parties is applicable;
- In absence of a choice of law, the law of the seat of the arbitration is applicable.

As an important side note, the law applicable to the main agreement is not necessarily the law applicable to an embedded arbitration clause. This is a legal consequence of the application of the doctrine of separability: The arbitration clause and the main agreement do not necessarily share the same legal fate. While the

¹ The VIAC publishes a regularly updated English translation of Secs. 517 to 618 ACCP on its webpage ([link](#)).

² Sec 617 and 618 ACCP; discussed below.

³ Express exception Art I para 2 lit e Rome I Regulation (EC) No 592/2008 ([link](#)).

⁴ Supreme Court, June 23, 2005, docket no. 18 OCg 1/15v (Austria) ([link](#)).

doctrine of separability is not explicitly set out in the ACCP (interestingly, the second sentence and the third sentence of Article 16(1) Model Law are omitted), the Supreme Court has accepted this doctrine on the basis of the principle of party autonomy as the following decisions illustrate:

- Decision dated 10 October 1962:⁵ This case concerned the rescission of an agreement due to error. The Supreme Court ruled that an arbitration agreement does not necessarily share the legal fate of the main agreement and it is therefore possible that, while the main agreement is rescinded due to error, the arbitration agreement remains intact.
- Decision dated 23 June 2015:⁶ In this recent case, the Supreme Court came to the conclusion that while the main agreement was governed by German law, the arbitration clause was governed by Austrian law, because the seat of arbitration was set in Austria. There was no choice of law clause in the agreement. In this decision, the Supreme Court reaffirmed its position that based on the parties' intent the legal fate of an arbitration clause may deviate from the legal fate of the main agreement.

2.2 Formal requirements to arbitration agreements

As mentioned, the Austrian arbitration law is modelled after Art 7(2) Model Law; accordingly, a written agreement is required. In detail, an arbitration agreement can be validly agreed upon:⁷

- In the form of a written document signed by the parties; or
- Through the exchange of letters, emails, facsimiles or other means of communication that record an agreement.

If a contract satisfies one of these two bullet points and refers to another document as part of the agreement (e.g., to a general terms and conditions sheet) that contains an arbitration clause, such arbitration clause also constitutes a valid arbitration agreement between the parties.⁸

A formal defect is retroactively cured after the commencement of arbitral proceedings as soon as the other party makes a submission on the merits without objecting to the arbitration agreement or the arbitrator's authority at the time of the submission.⁹

Special rules apply to arbitration agreements with a consumer and within the scope of labour law (as set out below).

2.3 Extension of the arbitration agreement to third parties

Generally speaking, compared to other jurisdictions Austrian arbitration law is less open to the idea of including non-signatories to an arbitration proceeding that they have not expressly agreed to enter into. As an example, the group-of-companies-doctrine is viewed rather critically in Austria.¹⁰ Some authors even suggest that the application of this doctrine may in certain cases violate Austrian *ordre public*.¹¹

⁵ Supreme Court, Oct 10, 1962, docket no. 1 Ob 215/62 (Austria) ([link](#)).

⁶ Supreme Court; June 23, 2015, docket no. 18 OCg 1/15v (Austria) ([link](#)).

⁷ Sec 583(1) ACCP.

⁸ Sec 583(2) ACCP.

⁹ Sec 583(3) ACCP.

¹⁰ As observed by Gerold Zeiler, *Schiedsverfahren*, § 581 p. 104 (2nd edition 2014).

¹¹ Christian Hausmaninger in Fasching/Konecny, *ZPO*, § 581 p. 204 (2nd edition 2007).

In particular, Austrian legal literature firmly rejects the liberal approach of a decision made by the Higher Regional Court Munich stating that the directors of a company involved in the conclusion of an arbitration agreement on behalf of their company would be subject to the arbitration clause as well.¹²

Nonetheless, both Austrian case law and legal literature extend arbitration agreements to non-signatories under certain (rather narrow) circumstances. Austrian case law mostly focusses on the implied intent of the parties and extends arbitration agreements where it deems that such extension reflects the parties' common intent.¹³ This is especially the case for an assignor, direct beneficiary or obligor under the main agreement.¹⁴

Finally, Austrian arbitration law is, in principle, also familiar with the extension of arbitration agreement by virtue of "piercing the corporate veil" ("*Durchgriffshaftung*"), even though this is more the exception than the rule. In order to "pierce the corporate veil" in the context of arbitration agreements, it is required by Austrian case law that the person in question abuses the corporate form itself. Means of such abuse could be, by way of example, depriving a company of its valuable assets or abusing other legal means peculiarly to corporate legal forms.¹⁵

2.4 Objective Arbitrability

Unlike the Model Law, Austrian arbitration law contains a provision on objective arbitrability: any pecuniary claim that is subject to the jurisdiction of the civil courts is arbitrable.¹⁶ The term "pecuniary" is generally interpreted broadly. In particular, claims that fall within the jurisdiction of administrative governmental authorities or the criminal courts are not arbitrable.

Claims that are non-pecuniary are arbitrable as far as the parties can enter into a settlement agreement regarding the respective claim. Claims within the scope of the Austrian Tenancy Act or the Non-Profit Housing act as well as family matters are generally not arbitrable.¹⁷

In summary, the Austrian arbitration law takes a fairly liberal approach regarding the objective arbitrability and generously allows the parties to settle their matter by arbitration, as long as public matters are not concerned.

2.4.1 Consumer and Labour Law Protection

The possibility to enter into an arbitration agreement with a consumer has been made nearly impossible under the Austrian Arbitration Act 2006, and thus barely has any practical application. In short, the following restrictions apply:

- Subject matter can only be disputes that already exist;¹⁸
- The arbitration agreement has to be printed on a separate document; thus, an arbitration clause set out in the main agreement is not valid;¹⁹
- The document must be signed by the consumer himself; it is not possible to conclude the arbitration agreement via e-mail, facsimile or similar means of communication;²⁰

¹² OLG München, Feb 13, 1997, docket no. 29 U 4891/96 in NJW-RR 1998, 198 (Germany); Hausmaninger *supra*, § 581 p. 220.

¹³ Supreme Court, Mar 30, 2009, docket no 7 Ob 266/08f (Austria) ([link](#)).

¹⁴ Hausmaninger, *supra*, § 581 ZPO, p. 210 and 220.

¹⁵ Christian Koller in Liebscher/Oberhammer/Rechberger, *Schiedsverfahrensrecht I*, p. 3/314 (2012); legal holding of the Supreme Court no. RS0009098 ([link](#)).

¹⁶ Sec 582 ACCP.

¹⁷ Sec 582 ACCP.

¹⁸ Sec 617(1) ACCP.

¹⁹ Sec 617(2) ACCP.

²⁰ Sec 617(2) ACCP.

- If the other party is an entrepreneur, special obligations to inform the consumer apply;²¹
- Further restrictions on the place of arbitration and the place where oral hearings are held apply;²²
- Consumers can also rely on additional reasons for the setting aside of an award.²³

The same restrictions apply to subject matters concerning labour law.²⁴ These provisions are not based on the Model Law and are an Austrian peculiarity.

3. Intervention of Domestic Courts

As a general rule, Sec 578 ACCP provides that state courts must refrain from intervening in arbitration proceedings, except where the ACCP expressly provides for the power of a state court to do so. Thus, anti-suit injunctions against members of the arbitral tribunal or against parties to the arbitration proceedings as well as witnesses generally may not be obtained.

If a valid arbitration agreement is in a place that establishes the exclusive jurisdiction of an arbitral tribunal, the court will terminate court proceedings on the same matter, provided that the respondent objects to the court proceedings in time (before submitting a pleading on the merits or pleading orally).²⁵ If no party objects, the right to arbitration is considered to have been waived. This applies regardless of the seat of arbitration (*i.e.*, also if the seat of arbitration is in a foreign jurisdiction). Only if the arbitration agreement is null and void or inoperable or incapable of being performed, state courts will continue the proceedings even if the respondent objected in time.²⁶

Overall, Austrian courts are very “arbitration-friendly” and reliably dismiss cases when an arbitration agreement is in place. It is not necessary to apply for an anti-litigation injunction.

The concept of competence-competence is set out in Secs 584 and 592 ACCP. The arbitral tribunal is free to decide on its own jurisdiction.²⁷ This decision is only subject to a review by the state courts in case of a challenge of the award. Once a claim has been made in arbitration, all state courts have to dismiss any motion brought to it regarding that claim.²⁸ In practice, state courts reliably dismiss claims that are already subject of pending arbitration proceedings. All this applies regardless of the seat of arbitration (also if the seat of arbitration is in a foreign jurisdiction).

A negative decision of an arbitral tribunal on its own competence is binding upon the state courts: If an arbitral tribunal denies that it has jurisdiction on the matter of a dispute because the arbitration agreement is null and void or inoperable or incapable of being performed, a state court must not reject an action on the matter on the grounds that an arbitral tribunal has jurisdiction for the matter.²⁹

Notably, state courts may issue interim measures even during pending arbitration proceedings. This will be discussed below.

²¹ Sec 617(3) ACCP.

²² Sec 617(4) and (5) ACCP.

²³ Sec 617(6) and (7) ACCP.

²⁴ Sec 618 ACCP.

²⁵ Sec 584(1) ACCP.

²⁶ Sec 584(1) ACCP.

²⁷ Sec 592(1) ACCP.

²⁸ Sec 584(3) ACCP.

²⁹ Sec 584(2) ACCP.

4. Conduct of the Proceedings

Austrian arbitration law is highly flexible in respect of the conduct of the proceedings. Generally, the parties are free to decide on the conduct of the proceedings as they see fit. The few mandatory provisions ensure, *inter alia*, the right to be heard,³⁰ the right to fair proceedings,³¹ the right for interim relief at the state courts,³² the possibility to set aside an award³³ and the protection of consumers and employees.³⁴

4.1 Representation

Each party has the right to be represented and counselled. This right cannot be waived or limited.³⁵ Restrictions regarding the qualifications or citizenship of the counsel do not apply to the representation during the arbitration proceedings.

4.2 Independence and Impartiality of the Arbitrators

Each arbitrator is required to be independent and impartial; the parties cannot waive this requirement.³⁶ The independence and impartiality of the arbitrators is strictly enforced by the state courts.

Recently, the Supreme Court had to decide on two cases concerning the impartiality of an arbitrator.³⁷ These two cases are particularly interesting, since they also include a number of general remarks that provide an insight into how the Supreme Court would handle questions regarding the independence and impartiality of arbitrators. In its reasoning, the Supreme Court often referred to the German and Swiss Supreme Court as well as to the IBA Guidelines on the Conflict of Rules. This allows the conclusion that the Supreme Court generally adopts and accepts the international standards on the independence and impartiality of arbitrators. Thus, an arbitrator has the duty to fully disclose all facts that may give rise to doubts regarding his independence and impartiality. In the present cases, the fact that one of the counsels was a former university assistant of one of the arbitrators was not a valid reason in and of itself to justifiably question the impartiality of the arbitrator.

An arbitrator may be challenged in case of justifiable doubts regarding his impartiality or independence, or if the arbitrator does not have the qualifications that the parties had agreed on.³⁸ This right cannot be waived by the parties. The procedure of a challenge can generally be agreed upon by the parties. Under the Vienna Rules, the VIAC Board decides on challenges brought by a party.³⁹ Absent any agreement, the procedure set out in Sec 589(2) ACCP applies.⁴⁰ In any case, each party has the right to apply to the state court for a final decision on the challenge. This right cannot be waived by the parties.

The state court may upon a party's request also terminate an arbitrator's mandate if he or she fails to exercise his or her function in due time and:

- does not resign;
- no agreement between the parties can be reached on this issue; or

³⁰ Sec 594(2) ACCP.

³¹ Sec 594(2) ACCP.

³² Sec 585 ACCP.

³³ Sec 611 ACCP.

³⁴ Secs 617 and 618 ACCP.

³⁵ Sec 593(3) ACCP.

³⁶ Sec 588 ACCP.

³⁷ Supreme Court, Aug 8, 2014, docket no. 18ONc1/14p (Austria) ([link](#)); Supreme Court, Aug 5, 2014, docket no. 18ONc2/14k (Austria) ([link](#)).

³⁸ Sec 588 ACCP, comparable to Art 12 Model Law.

³⁹ Art 20(3) Vienna Rules 2013 ([link](#)).

⁴⁰ Comparable to Art 13(2) Model Law.

- the procedure that the parties agreed upon does not terminate the arbitrator's mandate.⁴¹

4.3 Interim Measures

The state courts have the power to issue interim measures in connection with pending arbitration proceedings; the arbitration agreement does not exclude the right of each party to seek interim relief from the state courts.⁴²

The arbitrators may also issue interim measures if the enforcement of a claim would otherwise be frustrated or, alternatively, if otherwise one of the parties would suffer irretrievable damage. As mentioned previously, the amendment of Art 17a *et seq* Model Law has not been implemented into the ACCP yet, since the Austrian Arbitration Act was drafted prior to the publication of the Model Law 2006. Nonetheless, the provisions of Art 17a *et seq* Model Law are similar to the requirements for the issuance of interim measures.

A tribunal does not have the power to issue *ex parte* interim measures under Austrian arbitration law. The tribunal may only issue interim measures after hearing both sides. This does not apply to state courts. However, if an interim measure only makes sense with a "surprise effect" to the opposing party, one has to apply for the interim measure at the competent state court.⁴³

4.4 Conduct of the Arbitration Proceedings

The arbitrators generally have a broad discretion in leading the arbitration proceedings. Most questions such as the length of the arbitration proceedings are not regulated and highly depend on the style of the arbitrators.

Arbitration proceedings are in principle private. Third parties as well as the press are generally not allowed to attend hearings. This may not be set out expressly in the ACCP; however, the principle of the privacy of arbitration proceedings is a recognized feature in Austria.⁴⁴ Due to these circumstances, the arbitration awards usually remain private and are not available to the public. Thus, most awards are only publically available if they are challenged at the Supreme Court and thereafter published in an anonymous version. The parties may of course agree otherwise and may jointly invite the public to participate in the arbitration proceedings.

There is no legal provision in the ACCP requiring the parties to keep the proceedings and its documentation confidential. Thus, it may be advisable to conclude a confidentiality agreement with the other party when signing the arbitration agreement, if sensitive information is concerned.

The actual place of the hearings or meetings is not regulated. The arbitral tribunal is free to choose the place as it deems appropriate, subject to the parties' agreement.⁴⁵ It is not mandatory to hold a hearing; both parties, however, must be able to present their case. The parties are of course free to agree that the proceedings shall be conducted in writing only or that one or several hearings shall be mandatory.

The rules on the taking of evidence in the ACCP are generally in line with the Model Law.⁴⁶ The arbitrators have the right to decide on the admissibility of evidence. Subject to the general principles of arbitration and the parties' agreement, they may exclude evidence if they deem it to be inappropriate or irrelevant.⁴⁷ The arbitrators are free to evaluate the evidence taken; they do not have to follow strict rules on the taking and evaluating of evidence. In practice, evidence is usually taken, even if it is clearly biased (*e.g.* the testimony of

⁴¹ Sec 590(2) ACCP.

⁴² Sec 585 ACCP; the same is set out in Art 33(5) Vienna Rules 2013.

⁴³ Christian Konrad & Philipp Peters, in *The International Arbitration Review*, 94 (6th edition 2015).

⁴⁴ Veit Öhlberger in Austrian Yearbook on International Arbitration 2011, 65.

⁴⁵ Sec 598 ACCP.

⁴⁶ Sec 19(2) and 24 (2) to (3) Model Law.

⁴⁷ Sec 599(1) ACCP.

an employee or of a person that has an economic interest). The arbitrators then evaluate each testimony under the consideration of possible conflicts of interests and biases.

The arbitral tribunal may seek assistance from state courts for the taking of evidence or the performance of judicial acts it is not authorized to do.⁴⁸ In practice, this may be important if legal assistance by a foreign court or by another authority is required. If evidence is taken by a state court, the parties as well as the arbitrators have the right to participate in the proceedings.⁴⁹

4.5 Interest and Arbitration Costs

The arbitral tribunal has the power to decide on the costs according to its own discretion,⁵⁰ subject to the agreement of the parties. However, in practice, arbitral tribunals almost always apply the costs-follow-the-event principle. The losing party has to bear all costs of the arbitration proceedings and has to reimburse the winning party its reasonable costs of legal representation.

Additionally, the winning party may require the payment of interest in case of a delay of payment. This is, however, a matter of the substantive law applicable to the main agreement.

4.6 Liability of the Arbitrators

Arbitrators can be held liable both civilly and criminally for their actions during arbitration proceedings.⁵¹ They can also be held liable for damages incurred as a result from a resignation from office without reason. There are no provisions that would grant the arbitrators immunity from civil or criminal liability.

Under Austrian case law, arbitrators can only be held civilly liable in respect of an erroneous award if the award has been effectively set aside.⁵²

5. Award

5.1 Content of the Award

The award has to be made in writing and has to be signed by the arbitrators.⁵³ Unless otherwise agreed, the signatures of the majority of the arbitrators suffice, provided that the chairman or another arbitrator records on the award the reason for any omitted signature.⁵⁴ There is no need to set out a dissenting opinion, which in practice rarely happens.

The award has to state the date on which it was issued and the seat of arbitration.⁵⁵ The award has to state the reasons upon which it is based, unless the parties agree otherwise.⁵⁶ There are no atypical requirements that would apply to the rendering of a valid award. The award is then sent to the parties.⁵⁷ As party, it is advisable to request a hard copy with an original signature from each arbitrator.

⁴⁸ Sec 602 ACCP.

⁴⁹ Sec 602 ACCP.

⁵⁰ Sec 609(1) ACCP.

⁵¹ Sec 594(2) ACCP.

⁵² Supreme Court, Feb 17, 2014, docket no. 40b197/13v (Austria) ([link](#)).

⁵³ Sec 606(1) ACCP.

⁵⁴ Sec 606(1) ACCP.

⁵⁵ Sec 606(3) ACCP.

⁵⁶ Sec 606(2) ACCP.

⁵⁷ Sec 606(4) ACCP.

5.2 Appeal against an Award

It is only possible to appeal against an award if the parties have agreed to this. The reasons for appeal are generally set out in the parties' agreement or have to be determined by way of contract interpretation. It is, however, very unusual that the parties agree on the possibility to appeal.

5.3 Setting Aside of an Award

Within three months of receipt of an award, each party may apply to set aside the award to the competent state court (generally the Supreme Court).⁵⁸ The reasons for setting aside an award are set out in Sec 611 ACCP and follow Art 34 Model Law. In general, state courts are very restrictive in setting aside awards.

The parties cannot waive the right to seek the annulment of the award. The annulment of the award is seen as the cornerstone of ensuring the fairness of the proceedings. It provides the necessary minimum of state control over arbitration.

It is also possible to obtain a declaration from a state court that an award exists or does not exist. For this, a legal interest is required.⁵⁹ This application is not subject to any statute of limitation.

5.4 Foreign Awards

Austria is a signatory to the New York Convention. In general, foreign awards are enforced without any problems in Austria. State courts have recognized the importance of a universal application of New York Convention and tend to adhere to international arbitration principles in matters of enforcement.

Comparable to domestic awards, foreign awards are enforced within Austria on the basis of the Austrian Enforcement Act.⁶⁰ In order to successfully enforce an award in Austria, the arbitration agreement has to be valid both under the jurisdiction under which the award was issued and under Austrian arbitration law, as set out under Sec 583 ACCP.⁶¹ Since Sec 583 ACCP corresponds with the Model Law, most formal requirements for arbitration agreements will be comparable to Sec 583 ACCP.

The requirement to present the original arbitration agreement according to Art 4 (1)(b) New York Convention only has to be met if specifically requested by the state court.⁶² This provision reflects the general attitude of the Austrian arbitration law to make the enforcement of foreign awards as easy as possible.

Deriving from the European Convention on International Commercial Arbitration 1961, the fact that a foreign award has been set aside in its jurisdiction does not hinder the enforcement of the foreign award in Austria, if the foreign award has been set aside on the ground of lack of arbitrability or due to a violation of public policy.⁶³ Both issues are reviewed independently by the competent state court in Austria.

6. Funding Arrangements

Austrian civil law contains a rather peculiar provision which forbids any lawyer from entering into an agreement under which the client assigns claims to the lawyer regarding which the lawyer is representing his or her client (prohibition of *quota litis*).⁶⁴ This rule applies if a client-counsel relationship is subject to Austrian law.

⁵⁸ Sec 611(4) ACCP; Sec 615 ACCP.

⁵⁹ Jenny Power, *The Austrian Arbitration Act*, 118 (2006).

⁶⁰ Sec 614 ACCP; Power, *supra*, 121.

⁶¹ Sec 614(1) ACCP.

⁶² Sec 614(2) ACCP.

⁶³ Christian Konrad & Philipp Peters in *The International Arbitration Review*, 94 (6th edition 2015).

⁶⁴ Sec 879(2) no. 2 Austrian General Civil Code (AGCC).

Furthermore, under the professional rules of the regional Austrian bar associations, excessive bonuses cannot be validly agreed upon. This restriction applies if the counsel is subject to one of the Austrian bar associations.

There are no specific restrictions to the use of third party funding in arbitration.

7. Future Reforms

Vienna is continuously growing as an arbitration hub. The arbitration community in Austria is well-connected to the Austrian legislative power. In the past, the arbitration community has managed to successfully lobby for the implementation of much needed reforms. These reforms have undoubtedly made Austria a highly recommendable, reliable and cost-efficient place for arbitration. Currently, there are no major future reforms planned.

BAHRAIN

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

AAMAL AL ABBASI, AHMED ALFARDAN AND MARYAM AL SHAMLAN
OF NEWTON LEGAL GROUP

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 - b. Adherence to international treaties ●
 - c. Limited court intervention ●
 - d. Arbitrator immunity from civil liability ●
2. Judiciary ●
3. Legal expertise ●
4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

VERSION: 5 FEBRUARY 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

In its continuous effort to promote and improve arbitration in the country, Bahrain adopted the UNCITRAL Model Law on International Commercial Arbitration (1985) with its 2006 amendments (the “**Model Law**”) through Law 9 of 2015, promulgating the Arbitration Law (the “**Arbitration Law**”). This followed the issuance of the law establishing the Bahrain Chamber for Economic, Financial and Investment Dispute Resolution (the “**BCDR**”), which possesses mandatory jurisdiction over specific types of disputes. Bahrain also hosts the Gulf Cooperation Council Commercial Arbitration Centre.

Key places of arbitration in the jurisdiction	Manama.
Civil law / Common law environment?	Bahrain is a civil law country.
Confidentiality of arbitrations?	The Model Law does not contain an express provision stipulating the confidentiality of arbitrations. However, the procedural rules applicable to an arbitration may stipulate such a requirement. Furthermore, the parties to the arbitration can agree on its confidentiality.
Requirement to retain (local) counsel?	Non-Bahraini lawyers shall be authorized to represent the two parties to the dispute in case the international trade arbitration is held in the Kingdom of Bahrain. ¹
Ability to present party employee witness testimony?	There is no express restriction on the ability to present party employee witness statements under the Model Law.
Ability to hold meetings and/or hearings outside of the seat?	The arbitral tribunal has the discretion to convene, hear the witnesses, experts and parties, and examine goods, properties or documents, in any location it deems appropriate. ²
Availability of interest as a remedy?	A tribunal has the discretion to award interest as a remedy, to the extent that it remains in compliance with the law governing the dispute.
Ability to claim for reasonable costs incurred for the arbitration?	Taking into consideration the applicable procedural rules and the agreement between the parties, a tribunal may have the discretion to award costs. ³
Restrictions regarding contingency fee arrangements and/or third-party funding?	The Bahraini Advocacy Law prohibits contingency fee arrangements.
Party to the New York Convention?	Yes.
Other key points to note	∅
WJP Civil Justice score (2017-2018)	∅

¹ Arbitration Law, Article 6.

² Model Law, Article 20.

³ Except for Article 17 (G) of the Model Law which address the responsibility of costs in interim measures, there is no express provision governing the award of costs in an arbitration.

ARBITRATION PRACTITIONER SUMMARY

Bahrain adopted the UNCITRAL Model Law on International Commercial Arbitration (1985) with its 2006 amendments (the “**Model Law**”) through Law 9 of 2015, promulgating the Arbitration Law (the “**Arbitration Law**”). Contrary to the UNCITRAL Model Law, Bahrain extended the Model Law’s scope of application to include all types of arbitrations, as opposed to limiting its application to international commercial disputes.

Date of arbitration law?	9 August 2015.
UNCITRAL Model Law? If so, any key changes thereto?	Bahrain adopted the Model Law verbatim. However, the Arbitration Law applies to all arbitrations and is not limited to international commercial disputes.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Not available.
Availability of <i>ex parte</i> pre-arbitration interim measures?	No, the court would require the presence of all relevant parties before hearing a pre-arbitration request for interim measures. However, the court may proceed to hear a request if the duly notified defendant fails to attend. ⁴
Courts’ attitude towards the competence-competence principle?	An arbitral tribunal may decide on its own jurisdiction and the validity and existence of an arbitration agreement. ⁵
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The grounds for refusing recognition or enforcement of an arbitral award under the Model Law are similar to those stipulated in the New York Convention.
Courts’ attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	∅

⁴ Article 49 of the Civil and Commercial Procedures Law.

⁵ Article 16 (1) of the Model Law.

<p>Other key points to note?</p>	<ul style="list-style-type: none"> - Arbitrators are liable for any act or omission made in bad faith or resulting from gross mistake.⁶ - Any dispute exceeding BHD 500,000 and ordinarily within the jurisdiction of the courts of Bahrain shall be referred to the BCDR if: <ul style="list-style-type: none"> (a) it is an international commercial dispute; or (b) it is a dispute where one or more of the parties is a licensed financial institution,⁷ pursuant to the Central Bank of Bahrain (“CBB”) Law.⁸ <p>Any dispute that does not meet the above requirements falls within the jurisdiction of the Courts of Bahrain, unless agreed otherwise.</p>
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⁶ Article 7 of the Arbitration Law.

⁷ Please refer to Regulation 1 of 2007 Regarding the Services Regulated by the CBB and its later amendments for the list of financial institutions licenced pursuant to the CBB Law.

⁸ Article 9 of Decree Law 39 of 2009 Regarding the BCDR.

JURISDICTION DETAILED ANALYSIS

1. Legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law? If yes, what key modification if any have been made to it?

Bahrain adopted the UNCITRAL Model Law on International Commercial Arbitration (1985) with its 2006 amendments (the **"Model Law"**) verbatim through Law 9 of 2015, promulgating the Arbitration Law (the **"Arbitration Law"**). Notwithstanding the foregoing, the Arbitration Law expanded the applicability of the Model Law to include all types of arbitrations, as opposed to limiting its application to international commercial disputes.⁹

In addition to the above, the Arbitration Law addresses the arbitrator's liability for its acts and omissions,¹⁰ and does not require the retention of local counsel in international commercial disputes seated in Bahrain.¹¹

1.2 When was the arbitration law last revised?

The Arbitration Law was promulgated in 2015 and is yet to be revised.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

In the absence of an agreement between the parties on the law governing the arbitration agreement, the courts will apply the Bahraini conflict of laws rules to determine the applicable law.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Yes, an arbitration clause is considered to be independent and separated from the other provisions of the contract in which it is set forth. As such, a tribunal's decision that a contract is null and void will not invalidate the arbitration clause contained in it.¹²

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

Pursuant to Article 4 of the Arbitration Law, option I of Article 7 of the Model Law was selected to define and stipulate the form of an arbitration agreement. Consequently, an arbitration agreement must be in writing,¹³ a condition that can be met if the agreement is documented through electronic communication.¹⁴

Furthermore, an arbitration agreement that has been agreed upon orally, in writing or by conduct will constitute a valid arbitration agreement, as long as its content is recorded in any form.¹⁵

In addition to the above, Article 7(6) of the Model Law states that: *"any reference in a contract to a document containing an arbitration clause constitutes a written arbitration agreement, provided that the reference is such as to make the clause part of the contract"*.

⁹ Articles 1 and 2 of the Arbitration Law.

¹⁰ Article 7 of the Arbitration Law.

¹¹ Article 6 of the Arbitration Law.

¹² Article 16 (1) of the Model Law

¹³ Article 7 (2) of the Model Law.

¹⁴ Article 7 (4) of the Model Law.

¹⁵ Article 7 (3) of the Model Law.

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

As a general principle under the Bahraini Civil Law, the effect of rights and obligations established pursuant to a contract are limited to its parties. The same principle applies with respect to a party's right to refer a dispute to arbitration.¹⁶

2.5 Are there restrictions to arbitrability? If yes, do these restrictions relate to specific domains (such as IP, corporate law etc.)? or do they relate to specific persons (i.e. State entities, consumers etc.)?

There are several Court of Cassation judgments prohibiting the arbitrability of disputes relating to public policy, such as disputes regarding Family Law or Criminal Law.¹⁷ Nonetheless, these judgments are based on Article 233 of the Commercial Procedures Law, which was repealed by the Arbitration Law. The Arbitration Law does not address any restriction on arbitrability.

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute? Does this stance differ if the seat of the arbitration is outside the jurisdiction?

If a dispute raised before a court is governed by an arbitration agreement, the court will refer the dispute to arbitration pursuant to a party's request, provided that the request is made before the party in question argues the merits of the case.¹⁸ No distinction is made under the Arbitration Law if the seat of the arbitration is outside Bahrain.

3.2 On what ground(s) can the courts intervene in an arbitration seated outside of the jurisdiction?

Article 1 of the Arbitration Law stipulates that it applies to arbitrations seated outside of Bahrain where agreed by the parties. Consequently, and pursuant to Article 3 of the Arbitration Law, the Bahraini High Civil Court may intervene in the circumstances referred to in Article 6 of the Model Law, in cases where the arbitration is seated outside of Bahrain.

3.3 Does the principle of staying civil proceedings until the conclusion of criminal proceedings apply to arbitrations?

Yes. The Bahraini Court of Cassation decided that an *"arbitral tribunal is compelled to apply the criminal [proceedings] staying civil [proceedings] principle if its conditions are met"*.¹⁹ A tribunal is compelled to stay arbitration proceedings if:

- (a) a case is raised before the Criminal Court before or during the arbitration;²⁰ and
- (b) liability in both cases is based on the same fact(s).²¹

¹⁶ Article 133 of the Civil Law.

¹⁷ Court of Cassation's judgment in Challenge 79 of 2005

¹⁸ Article 8 (1) of the Model Law.

¹⁹ [Court of Cassation's Judgment in Challenge 328 of 2005](#).

²⁰ Court of Cassation's Judgment in Challenge 161 of 2007.

²¹ Court of Cassation's Judgment in Challenge 66 of 2005.

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

Yes, provided it complies with the restriction included in Article 6 of the Arbitration Law, which only allows parties to retain foreign counsel in international commercial arbitration.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example, does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

Given that the Arbitration Law was recently issued, there is no case law addressing the court's position on the independence and impartiality of arbitrators.

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of an *ad hoc* arbitration)?

Where the Arbitration Law applies to an *ad hoc* arbitration, the court may intervene in the constitution of the arbitral tribunal in the following two scenarios:

- (a) In the absence of an agreement between the parties on the procedure of appointing an arbitrator, the High Civil Court would intervene to appoint one arbitrator upon request by a party to the arbitration:
 - I. In a three-member tribunal, where a party fails to appoint an arbitrator within 30 days of receiving a request from the other party or where the two arbitrators appointed by the parties fail to appoint a third arbitrator within 30 days of their appointment; or
 - II. In a one-member tribunal, where the parties fail to agree on an arbitrator.²²
- (b) Where the parties have agreed on the procedure regarding the appointment of the arbitrators and no other mechanism was agreed upon to ensure their appointment, the High Civil Court would only intervene if requested by a party where:
 - I. One of the parties fails to act as required by these procedures;
 - II. If the two parties or arbitrators fail to agree in accordance with these procedures; or
 - III. If a third party, including an arbitration center, fails to undertake the necessary duties referred to it pursuant to the procedures agreed upon by the parties.²³

4.4 Do courts have the power to issue interim measures in connection with arbitrations? If so, are they willing to consider *ex parte* requests?

The courts have the power to issue interim measures relating to an arbitration.²⁴ However, a court would not hear an *ex parte* request for interim measures.²⁵ Nevertheless, it may proceed to rule on such requests in the absence of a party, provided that such party has been properly notified of the hearing.²⁶

²² Article 11 (3) of the Model Law.

²³ Article 11 (4) of the Model Law.

²⁴ Article 17 (j) of the Model Law.

²⁵ Interim and precautionary measures can be pursued in accordance with the Articles 176 to 182 of the Civil and Commercial Procedures Law.

²⁶ Article 49 of the Procedural Law.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

There is no express provision regarding the confidentiality of arbitration proceedings under the Arbitration Law.

4.5.2 Does it regulate the length of arbitration proceedings?

The Arbitration Law does not regulate the length of arbitration proceedings.

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

The arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for or meetings.²⁷

4.5.4 Does it allow for arbitrators to issue interim measures? And if so, under what conditions?

Upon the request of one of the parties, the tribunal may grant interim measures, unless agreed otherwise. The tribunal may order an interim measure to:

- (a) Maintain or restore the status quo pending resolution of the dispute;
- (b) Take an action that would prevent, or refrain from taking an action that is likely to cause harm or prejudice to the arbitral process;
- (c) Provide means of preserving assets to satisfy a potential subsequent award; or
- (d) Preserve evidence that may be relevant and material to the resolution of the dispute²⁸.

The party requesting the interim measures in (a), (b) and (c) above must demonstrate to the tribunal that:

- (a) the requested measures cannot be remedied through a subsequent award of damages;
- (b) the harm that the requesting party will suffer if the measures are not awarded far outweighs the harm that the party at which the interim measures are directed will suffer; and
- (c) the requesting party has a reasonable chance of succeeding based on the merits of its claim.

With respect to the interim measure in (d) above, the tribunal has the discretion to decide which of the above conditions must be met.²⁹

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?

Unless agreed otherwise by the parties, the tribunal has the discretion to decide on the admissibility, relevance, materiality and weight of any evidence.³⁰

4.5.6 Does it make it mandatory to hold a hearing?

A tribunal must hold hearings for oral arguments, unless the parties agreed otherwise.³¹

²⁷ Article 20 of the Model Law.

²⁸ Article 17 of the Model Law.

²⁹ Article 17 (A) of the Model Law.

³⁰ Article 19 (2) of the Model Law.

4.5.7 Does it prescribe principles governing the awarding of interest?

There are no express statutory provisions governing interest in arbitration awards.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

There are no express statutory provisions regarding the allocation of arbitration costs, except for Article 17(G) of the Model Law, which addresses the costs in interim measures and preliminary orders.

Article 17(G) allows the tribunal to order the party that requested the measure or order to bear all the costs of the measure or order at any stage of the proceedings, if it determines at a later stage of the proceedings that the request should have been denied.

4.6 Do arbitrators benefit from immunity to civil liability?

Arbitrators are liable for any act or omission made in bad faith or resulting from gross mistake. This rule also applies to individuals who work for an arbitrator, and to those to which an arbitrator delegates some of his duties.³²

4.7 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

There are no specific provisions regarding the criminal liability of arbitrators under Bahraini law.

5. The award**5.1 Can parties waive the requirement for an award to provide reasons?**

The parties to an arbitration agreement can agree to exclude the requirement to provide reasons for a tribunal's award.³³

5.2 Can parties waive the right to seek the annulment of the award?

No.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

There are no unusual requirements in respect of the validity of arbitration awards. An award must be in writing, signed by the arbitrators,³⁴ reasoned unless agreed otherwise between the parties, and it must include the date and the seat of the arbitration. Furthermore, a signed copy of the award must be delivered to each party.³⁵

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

No.

³¹ Article 24 (1) of the Model Law.

³² Article (7) of the Arbitration Law

³³ Article 31 (2) of the Model Law

³⁴ Where the tribunal is composed of more than one member, the award can be signed by a majority of the arbitrators provided that the award details the reasons behind the absence of the arbitrator(s) signature(s).

³⁵ Article 31 of the Model Law.

5.5 What procedures exist for the recognition and enforcement of award, what time-limits apply and is there a distinction to be made between local and foreign awards?

5.5.1 Executing arbitration awards in general

The same procedures that apply to the execution of court judgments apply to arbitration awards. A party seeking to enforce an award must submit a request to the Court of Execution containing:

- (a) The name of the requesting party, its capacity and address of residence;
- (b) The name of the party against which the judgment was rendered and his address of residence;
- (c) A summary of the request to execute;
- (d) A summary of the award and the body that issued the award;
- (e) A statement detailing the other party's assets the requesting party wishes to seize (if possible); and
- (f) A copy of the award.³⁶

Furthermore, the requesting party must submit a request for each party against which it wishes to execute the award, in addition to paying the necessary fees.

There is no specific time limit under Bahraini Law in respect of executing awards.

5.5.2 Foreign arbitration awards

Bahrain is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**")³⁷ The New York Convention requires any party seeking to enforce a foreign arbitral award to provide an original copy of the award and the agreement to arbitrate or a duly certified copy thereof. Moreover, foreign awards, if not made in Arabic, must be translated.³⁸

Foreign awards is subject to the same procedures applied for executing awards made in Bahrain in that country. The application to execute a foreign award must be submitted to the High Civil Court.³⁹

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

No. However, the party seeking to set aside the award may request the court to suspend its enforcement.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

The courts of Bahrain may refuse to recognize and enforce an award at the request of the party against which the award has been rendered, if it can show that the award has been "*set aside or suspended by a court of the country in which, or under the law of which, the award was made*".⁴⁰

5.8 Are foreign awards readily enforceable in practice?

Yes, Bahrain is a signatory to several conventions, including the New York Convention and the Riyadh Arab Agreement for Judicial Cooperation.⁴¹

³⁶ Article 262 of the Procedures Law.

³⁷ Law Decree 4 of 1988 Regarding Bahrain's Agreement to Join the New York Convention Regarding the Recognition and Execution of Foreign Arbitration Awards with Reservations.

³⁸ Article 4 of the New York Convention.

³⁹ Article 252 and 253 of the Procedural Law.

⁴⁰ Article 36 (1) (a) (v) of the Model Law.

6. Funding arrangements

6.1 Are there restrictions to the use of contingency or alternative fee arrangement at the jurisdiction?

The Bahraini Advocacy Law prohibits contingency fee arrangements.⁴²

7. Is there likely to be any significant reform of the arbitration law in the near future?

The Arbitration Law was issued recently. As far as we are aware, no reform of the law is upcoming.

⁴¹ Law Decree 41 of 1999 Ratifying the Riyadh Arab Agreement for Judicial Cooperation (1983).

⁴² Advocacy Law, Article 31.

BRAZIL

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

FERNANDO EDUARDO SEREC AND
GUILHERME CARNEIRO MONTEIRO NITSCHKE
OF TOZZINFREIRE ADVOGADOS

TOZZINFREIRE
ADVOCADOS

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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS

1. Law ●
 - a. Framework ●
 - b. Adherence to international treaties ●
 - c. Limited court intervention ●
 - d. Arbitrator immunity from civil liability ●
2. Judiciary ●
3. Legal expertise ●
4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

VERSION: 25 MAY 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Arbitration is a consolidated dispute resolution mechanism in Brazil. The Brazilian Arbitration Law (“BAL”) is well developed and has been recently modified to adapt it to some important demands,¹ such as interim measures (Arts. 22-A and 22-B) and arbitrations with the public administration (Art. 1 §1), which were already accepted by the local case law.

Key places of arbitration in the jurisdiction	The key places in Brazil for arbitration are the cities of São Paulo (State of São Paulo), Rio de Janeiro (State of Rio de Janeiro), Porto Alegre (State of Rio Grande do Sul), Curitiba (State of Paraná) and Belo Horizonte (State of Minas Gerais).
Civil law / Common law environment?	Civil Law
Confidentiality of arbitrations?	Although there is no general legal provision dealing with the topic, confidentiality can be agreed by the parties. The BAL eliminates confidentiality in cases in which public administration parties are involved, imposing the publicity of the procedure (Art. 2 § 3).
Requirement to retain (local) counsel?	There is no restriction for foreign counsel to act as a party representative in domestic arbitral procedures. It differs from litigation in national courts, where an official registration of the counsel and the local law firm before the Brazilian Bar Association (“ <i>Ordem dos Advogados do Brasil</i> ”) is required.
Ability to present party employee witness testimony?	There is no restriction to present party employee witness testimony under the BAL.
Ability to hold meetings and/or hearings outside of the seat?	The BAL does not limit arbitral tribunals’ powers or parties’ choice to hold meetings and hearings outside of the seat. Parties can agree to different places in which the arbitral proceedings can occur (Art. 11, I, BAL) and these places can even be different from the seat. ²
Availability of interest as a remedy?	It is possible to recover interest as a remedy in Brazil (Brazilian Civil Code, Art. 407; Brazilian Supreme Court jurisprudence). ³
Ability to claim for reasonable costs incurred for the arbitration?	The Arbitral Tribunal can freely decide on the costs allocation in its decision (Art. 27, BAL).

¹ See the translated version of the Brazilian Arbitration Law at: <http://cbar.org.br/site/legislacao-nacional/lei-9-30796-em-ingles/>.

² Carlos Alberto CARMONA, *Arbitragem e Processo*. 3 ed. São Paulo: Atlas, 2009, p. 208.
Entry n° 254 of the Prevailing Case Law (“*Súmula da Jurisprudência Dominante*”). There is a huge list of precedents confirming such entry: Extraordinary Appeal n° 162890 ED, Justice Ilmar Galvão, 1st Section, date: 03/06/1997; Extraordinary Appeal n° 115123, Justice Sydney Sanches, 1st Section, date: 12/02/1988; Extraordinary Appeal n° 109462, Justice Rafael Mayer, 1st Section, date: 24/06/1986. This is also the understanding of the Brazilian High Court of Justice (“*Superior Tribunal de Justiça*”); See, also, Appeal n° 1133023/PE, Justice Og Fernandes, 6th Section, date: 17/09/2009; Appeal n° 979708/PE, Justice Og Fernandes, 6th Section, date: 02/09/2008; Special Appeal n° 464.234/PR, Justice João Otávio de Noronha, 2nd Section, date: 03/08/2006. Available at: <http://www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=254.NUME.%20NAO%20S.FLSV.&base=baseSumulas>.

Restrictions regarding contingency fee arrangements and/or third-party funding?	Brazilian Law is silent on agreements regarding contingency fees or third-party funding. Moreover, there is no ethical or legal barrier to the funding arrangements. ⁴ The dominant opinion supports the possibility to make these arrangements. Accordingly, they are an option worth being considered. ⁵
Party to the New York Convention?	Brazil is a party to the New York Convention since 2002. ⁶
Other key points to note	<p>It is possible for an arbitrator to be criminally liable in Brazil. Arbitrators are treated as public officers when it comes to criminal liability (Art. 17 of the BAL). Arbitral awards rendered by an arbitrator who has been proven to be corrupt in a criminal procedure can be annulled on the grounds of the BAL (Art. 32, VI). When it comes to civil liability, arbitrators can also be condemned to pay damages as a consequence of the criminal offence.⁷</p> <p>Courts in Brazil are friendly to arbitration. Brazil is one of the leading countries in Latin America to facilitate the development of arbitration.⁸</p> <p>The duration of annulment proceedings may vary depending on whether a party appeals the decision on the validity of the award. A number of appeals can be submitted in an annulment proceeding, since it follows the regular procedure for civil actions. There are two ordinary degrees of jurisdiction in Brazil; thus, the decision in an annulment proceeding can be appealed. There are also extraordinary appeals, which can be made both to the High Court of Justice (“<i>Superior Tribunal de Justiça</i>”) and to the Supreme Court (“<i>Supremo Tribunal Federal</i>”), when there are violations of federal legislation or to the Federal Constitution respectively.</p> <p>As a general rule, annulment proceedings do not suspend the enforcement of awards, except if the State judge understands that the annulment application is likely to succeed and that there is a risk that the enforcement causes irreparable or serious injury, according to the standards set forth by the Brazilian Code of Civil Procedure (Art. 294 <i>et seq.</i>). The annulment can also be required by the defendant in an enforcement proceeding by way of a mean of defense (BAL, Art. 33 §3).</p>
WJP Civil Justice score (2018)	0.53

⁴ Arnaldo WALD, Some positive and negative aspects of arbitration financing, *Revista de Arbitragem e Mediação*, vol. 49/2016, pp. 33-41.

⁵ Arnaldo WALD, Some positive and negative aspects of arbitration financing, *Revista de Arbitragem e Mediação*, vol. 49/2016, pp. 33-41.

⁶ Available at: http://www.planalto.gov.br/ccivil_03/decreto/2002/d4311.htm.

⁷ BAL Art. 14: “Individuals somehow linked to the parties or to the submitted dispute, by any of the relationships that characterize the impediment or suspicion of judges, are prevented from serving as arbitrators and become subject, as the case may be and to the applicable extent, to the same duties and responsibilities incurred by court judges, as set up in the Code of Civil Procedure”.

⁸ Eleonora COELHO PITOMBO, Arbitragem e o Poder Judiciário: aspectos relevantes, in Luiz Fernando do Vale de ALMEIDA GUILHERME, *Aspectos Práticos da Arbitragem*, São Paulo, Editora Quartier Latin, 2006, p. 122.

ARBITRATION PRACTITIONER SUMMARY

Arbitration is a consolidated dispute resolution method in Brazil. Courts and scholars are informed on the subject, leading to uniform and safe decisions. High Courts and District Courts located in the key seats are friendly to arbitration.

Date of arbitration law?	23 September 1996, with its constitutionality declared by the Brazilian Supreme Court (" <i>Supremo Tribunal Federal</i> ") in 2001 ⁹ and lastly reviewed in 2015 (Law 13,129/2015).
UNCITRAL Model Law? If so, any key changes thereto?	The BAL's working group got inspiration from UNCITRAL Model Law, the 1988 Spanish Arbitration Law, the 1958 New York Convention and the 1975 Panama Convention, without literally adopting their terms. While the UNCITRAL Model Law is one of the basis for the BAL, Brazil did not officially adhere to it and is not part of the official list of Model Law countries.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	All the Brazilian key seats have arbitration-specialized first instance courts, ¹⁰ and São Paulo has a specialized business section at the appellate level to judge arbitration-related matters. ¹¹
Availability of <i>ex parte</i> pre-arbitration interim measures?	Parties to a future arbitration seek interim measures from courts, such as a pre-arbitral procedure (Art. 22-A BAL), which can be granted <i>ex parte</i> when the legislative requirements are fulfilled (Art. 300 §2, Code of Civil Procedure). The requirements are the likelihood of success of the claim on the merits and the risk of irreparable or serious injury, if the measure sought is not granted (Art. 300, Code of Civil Procedure).
Courts' attitude towards the competence-competence principle?	The BAL (Art. 20) and Brazilian Courts recognize the competence-competence principle, giving preference to arbitral tribunals over national courts to decide on objections to the jurisdiction of the arbitral tribunal. ¹²
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Art. 32 of the BAL provides for additional and more general grounds for the annulment of awards. These are the following: the nullity of the arbitral agreement (section I); an award rendered by a person that had not right to serve as an arbitrator (section II); an award without the formal requirements set forth by Art. 26 of the BAL (summary of the case, legal grounds, decision, date and place) (section III); an award that exceeds the limits of the

⁹ Supreme Court, Recognition Procedure n.º 5.206, Justice Sepúlveda Pertence, date: 12/12/2001. Available at: <http://stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=%28SE%24%2ESCLA%2E+E+5206%2ENUME%2E%29+OU+%28SE%2EACMS%2E+ADJ2+5206%2EACMS%2E%29&base=baseAcordaos&url=http://tinyurl.com/c7wyaxt>.

¹⁰ In 2015, the National Council of Justice ("*Conselho Nacional de Justiça*", "*CNJ*", the public entity that supervises the judiciary in Brazil) made available a list of specialized Brazilian Courts in almost every state capitals: <http://www.cnj.jus.br/noticias/cnj/80374-corregedoria-divulga-lista-de-varas-especializadas-em-arbitragem>.

¹¹ Creation of the Reserved Section for Business Law ("*Câmara Reservada de Direito Empresarial*") for arbitration-related matters: <https://api.tjsp.jus.br/Handlers/Handler/FileFetch.ashx?codigo=31267>.

¹² See, for instance, High Court of Justice, Competence Conflict n.º 139519/RJ, Justice Regina Helena Costa, date: 11/10/2017. Available at: <http://www.stj.jus.br/SCON/jurisprudencia/toc.jsp?livre=%22compet%EAncia-compet%EAncia%22&b=ACOR&thesaurus=JURIDICO&p=true>.

	<p>arbitration agreement (section IV); the substantiated proof of unfaithfulness, extortion or corruption of the arbitrator (section VI); an award rendered after the time limit has expired (section VII); and an award that violates the principles set forth by Art. 21 §2 of the BAL (adversarial, equality, impartiality and free conviction principles) (section VIII).</p> <p>As far as the enforcement of foreign awards is concerned, Art. 38 of the BAL contains similar provisions to those of the New York Convention.</p>
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>According to Art. 38, VI, of the BAL, an award which has been annulled at the seat of arbitration cannot be recognized or enforced in Brazil. The High Court rendered a leading case on this matter in 2015, denying enforcement to an award that had been rendered and annulled in Argentina.¹³</p>
<p>Other key points to note?</p>	<p>According to Art. 33 of the BAL, the 90-day time limit for the party to seek annulment of the final or partial award is triggered with the notification of the award. This time limit will start to run also for the annulment of partial awards. When there is a request for clarifications of the award, the time limit runs from the decision on the clarifications is notified to the parties.</p> <p>Partial and interim awards are enforceable according to Art. 23, §1 of the BAL.</p>

¹³ High Court of Justice, Special Section, Recognition Procedure n° 5782, date: 02/12/2015. Available at: https://ww2.stj.jus.br/processo/revista/inteiroteor/?num_registro=201101290847&dt_publicacao=16/12/2015.

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

The BAL's working group got inspiration from the UNCITRAL Model Law, the 1988 Spanish Arbitration Law, the 1958 New York Convention and the 1975 Panama Convention, without literally adopting their terms. It contains several provisions which are not set forth in those instruments, such as: validity of arbitral agreements inserted in adhesion contracts only if highlighted and specifically signed by the adhering party (Art. 4 §2); court intervention to solve pathological arbitration agreements (Art. 7); the standard of impartiality for arbitrators, applying the criteria set by the Brazilian Code of Civil Procedure (Art. 14); a time limit for rendering the award, unless otherwise agreed by the parties, which is six months from the commencement of the arbitration (Art. 23); or a shorter time-limit of 5 days for the request for correction of the award to be presented (Art. 30).

The field for arbitration in Brazil was prepared through the works of professionals and scholars in what was called "Arbiter Operation", which was conceived by Professor Carlos Alberto Carmona, Professor Selma Lemes and Professor Pedro Batista Martins.¹⁴ The BAL became effective in 1996, so it is now more than 20 years old. It was last revised on 26 May 2015. In this reform, alterations were made on the arbitrability of public administration issues, strengthening its possibility and imposing the non-confidentiality of its proceedings (Art. 1 §§1 and 2; Art. 2 §3);¹⁵ on the possibility to render partial awards (Art. 23 §1); on the interim measures provisions, allowing requests before and after the arbitral tribunal is constituted (Art. 22-A and 22-B); on the relations between arbitration and judiciary when a judge to enforce an arbitral order is necessary (Art. 22-C); among other modifications.

2. The arbitration agreement

According to Art. 2 §1 of the BAL, parties are free to agree on the law applicable to the merits of the dispute and to the arbitration agreement.

In international arbitral proceedings,¹⁶ if the parties have chosen a specific legislation to govern the underlying contract, the arbitral tribunal will not determine the substantive law. However, if the Parties have not done so, the arbitral tribunal has the power to fill the contractual gap taking into account any implicit choice of law that may arise from a group of circumstances to be assessed (e.g. parties nationality, place in which the contract was executed, nature of the transaction, sporadic references in the contract to legislation or soft law, the general conflict of law rule set forth by the Introductory Law to the Brazilian Legal System if applicable,¹⁷ among others).

¹⁴ Arnaldo WALD, *Arbitragem: Passado, Presente e Futuro*, *Revista de Arbitragem e Mediação*, vol. 50/2016, p. 59-78.

¹⁵ The ability of the public administration to be a party to an arbitral procedure was acknowledged by a series of judicial precedents at least since the case *State of Minas Gerais vs Américo Werneck*, of 1915. Also, before the BAL's 2015 review, a significant number of sparse laws was published allowing State entities to choose arbitration as the dispute resolution method, for instance: Law No. 8.987/95 (law regarding concessions and permissions of public services); Law No. 9.472/97 (National Telecommunications Agency – "ANATEL"), Law No. 9.478/97 (National Petroleum Agency – "ANP"), Law No. 10.233/2001 (National Roadway Transportation Agency – "ANTT"); Law No. 12.154/2009 (National Superintendence for Private Security – "PREVIC"). It is also worth mentioning that the State of Rio de Janeiro enacted a Decree (no. 46,245/2018) allowing local State entities to participate in arbitral proceedings, but only if some requirements are complied with, e.g.: institutional arbitration only, the city of Rio de Janeiro as the seat, Brazilian law as the applicable one, Portuguese as the chosen language.

¹⁶ Although the BAL does not establish any differentiation between domestic and international arbitration, Brazilian doctrine deems *international* the arbitral procedure that contains any foreign connecting elements, such as foreign parties, foreign law or a seat in a foreign country. A domestic procedure would be the one having only *national* connecting elements. The sole difference between domestic and international arbitration established by the BAL relates to the nationality of the award: any awards issued outside the Brazilian territory are considered foreign awards, needing recognition by the High Court of Justice to become enforceable in Brazil (BAL Art. 34, Sole Paragraph).

¹⁷ The law which governs the contract will be the one of the place where the obligation was signed (Article 9, "*Lei de Introdução às Normas do Direito Brasileiro*", available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/Dei4657.htm).

On the other hand, there is no legal provision in Brazil that determines which law should govern the interpretation of arbitral agreements when parties have not expressly agreed to one. There is also no consensus among Brazilian authorities on what criteria shall be followed by arbitrators when filling this gap. Some of them point to the law of the seat¹⁸ following Art. 38, II, of the BAL,¹⁹ while others invoke the governing law of the underlying contract as the criterion to be considered.²⁰ One of the most paradigmatic disputes involving a Brazilian party relating to governing law was the *Jirau case*, in which parties to an insurance contract disagreed on the law that should apply to the arbitral agreement. While one party argued before a Brazilian State Court the nullity of the arbitral agreement based on Art. 4 §2 of the BAL,²¹ the other filed an anti-suit injunction before an English court arguing that the law of the seat should apply, which was English law because the place of arbitration was London. The Brazilian court deemed applicable the law of the underlying contract, while the English judiciary declared the law of the seat as applicable to interpret the arbitral agreement.²²

The underlying issue relates to the autonomy of the arbitration agreement from the contract in which it is set forth, as stated by Art. 8 of the BAL. As a matter of procedure, Art. 8 grants the arbitrator the power to decide *ex officio* or upon parties' request the issues relating to the existence, validity and effectiveness of the arbitration agreement (Art. 8, Sole Paragraph). As a matter of substantive law, this provision preserves the arbitration agreement from any nullity affecting the contract in which it is inserted. However, a contract's nullity may also affect the arbitral agreement in an independent way (e.g. when both the underlying contract and the arbitral agreement were concluded under coercion). According to the principle of competence-competence, the tribunal will also decide this issue (Art. 8, Sole Paragraph, and 20 of the BAL). Exceptions to such principle are the compulsory arbitral clauses inserted in consumer contracts, which are null and void according to Art. 51, VII, of the Brazilian Code of Consumer Defence and Protection (Law No. 8.078 of September 11, 1990).²³ This provision enables the parties to circumvent the competence-competence principle and go straight to the Judiciary.

There are some specific validity requirements for an arbitration agreement to be enforceable.

If the arbitration agreement is an arbitral clause in a contract ("*cláusula compromissória*"), the only requirement is that it must be stipulated in writing (Art. 4). If an arbitration clause is pathological, *i.e.*, there are no means for the initiation of the arbitral proceedings, the clause will not be considered void, since the BAL provides for a solution to this problem, referring the parties to state courts to complete/execute the arbitration agreement (Art. 7 of the BAL). An exception to this rule is the arbitral clause inserted in an adhesion contract, which will only be deemed valid if the adhering party takes the

¹⁸ Adriana BRAGHETTA, A importância da sede da arbitragem, in Selma Ferreira LEMES, Carlos Alberto CARMONA, Pedro Batista MARTINS (coords.), *Arbitragem. Estudos em homenagem ao Prof. Guido Fernando da Silva Soares*. In *Memórias*, São Paulo, Atlas, 2007, p. 25.

¹⁹ "Art. 38. Recognition or enforcement of the foreign arbitral award may be refused if the party against which it is invoked, furnishes proof that: [...] II. the arbitration agreement was not valid under the law to which the parties have subject it, or failing any indication thereon, under the law of the country where the award was made".

²⁰ Eduardo GREBLER, Artigo V (inciso 1 "A" e "B"). A recusa de reconhecimento à sentença arbitral estrangeira com base no artigo V, (1) alíneas "A" e "B" da Convenção de Nova Iorque, in WALD, Arnoldo; LEMES, Selma Ferreira (coords.). *Arbitragem Comercial Internacional. A Convenção de Nova Iorque e o direito brasileiro*, São Paulo, Saraiva, 2011, p. 198.

²¹ "§2. In adhesion contracts, an arbitration clause will only be valid if the adhering party takes the initiative to file an arbitration proceeding or if it expressly agrees with its initiation, as long as it is in an attached written document or in boldface type, with a signature or special approval for that clause".

²² State Court of São Paulo, 6th Section of Private Law, Appeal nº 3049794920118260000, date: 19.04.2012. Available at: <https://esaj.tjsp.jus.br/cjsg/getArquivo.do?cdAcordao=5841705&cdForo=0>; and London, High Court of Justice, Queen Bench's Division Commercial Court, Case No: 2011 FOLIO NP. 1519. [2012] EWHC 42 (Comm). The case had no final decision rendered because the parties have reached an agreement before that.

²³ "Art. 51. Any clauses that impose any of the following situations, among others, will be nullified: [...] VII - determine the compulsory use of arbitration". English unofficial version available at: http://www.procon.rj.gov.br/procon/assets/arquivos/arquivos/CDC_Novembro_2014_Ingles.pdf.

initiative to file the arbitration proceeding or if it expressly agrees with its initiation in writing (Art. 4 §2 of the BAL).

When it comes to a post-dispute agreement to arbitrate ("*compromisso arbitral*"), there are a few requirements which need to be complied with for the agreement to be valid. These are set forth in Art. 10 of the BAL: (i) the name, profession, civil status and address of the parties; (ii) the name, profession and address of the arbitrators, or the identification of the arbitration institution to whom the parties delegated their power of nomination; (iii) the matter of dispute that will be subject to arbitration; and (iv) the place of arbitration. If any of these requirements is not fulfilled, the arbitral tribunal may try to reach a supplemental agreement with the parties in order to fill the contractual gap (Art. 19 §1 of the BAL). Only as a last resort, the arbitration agreement will be deemed null and void. There is no need for a "*compromisso arbitral*" when there is already a binding "*cláusula compromissória*" inserted into the underlying contract.

There is no legal provision regulating the possibility that a third-party to a contract be bound by an arbitration agreement executed without its acceptance. However, according to the Brazilian jurisprudence, there are a few cases in which an extension of the arbitration agreement to non-signatories is admitted. For instance, in a case of a set of contracts, it was decided that the arbitration agreement in one of the contracts could be extended in order to bind the parties to all contracts, unless there was a specific restriction in one of the agreements.²⁴ There are, however, cases deciding the contrary.²⁵

In Brazil, there are some restrictions as to which disputes can be settled by arbitration. These restrictions provide for limitations not only as to certain subject-matters but also as to specific persons. Art. 1 of the BAL reads: "*Those who are capable of entering into contracts may make use of arbitration to resolve conflicts regarding freely transferable property rights*". The expression "transferable property right" is considered to exclude: as a matter of specific domains, disputes relating to personal rights, family law, inheritance law, tax law, criminal law and bankruptcy procedures; as a matter of specific persons, disputes relating to consumers, employees and adhesion contracts not in compliance with Art. 4 §2 requirements. When relating to specific subject-matters such as bankruptcy, it is argued that the patrimonial effects of those procedures can be submitted to arbitration. Recently, the labour law has been amended to allow arbitration in specific cases. Moreover, there have been discussions about the arbitrability of tax disputes.²⁶

3. Intervention of domestic courts

State courts give protection to the principle of competence-competence and to the negative effect of the arbitration agreement by staying litigation and referring parties to arbitration. The existence of an arbitration agreement is cause for extinction of the legal process before state courts, either if the seat of arbitration is outside or inside the jurisdiction of courts (Art. 485, VII, Code of Civil Procedure). However, an arbitration agreement will be deemed to be waived if parties do not object to court proceedings before they present their argument on the merits (Art. 337, § 6, Code of Civil Procedure).

There is no express provision in Brazilian Law on the stay of court proceedings as a result of an injunction granted by an arbitrator, except when a competence matter is under its analysis. In such situations, it is implied from Art. 20 of the BAL that an arbitrator could grant an injunction to suspend the court proceeding until the decision is rendered.

²⁴ High Court of Justice, Special Section, Recognition Procedure n° 1, j. 19/10/2011. Available at: https://ww2.stj.jus.br/processo/revista/inteiroteor/?num_registro=200701569795&dt_publicacao=01/02/2012

²⁵ State Court of São Paulo, 10th Section of Private Law, Appeal n° 03698571720108260000, date: 22/03/2011. Available at: <https://esaj.tjsp.jus.br/cjsg/getArquivo.do?cdAcordao=5039128&cdForo=0>

²⁶ Grupo de Estudos em Arbitragem Tributária do CBAr. Arbitragem tributária é um caminho a ser explorado. Available at: <https://www.conjur.com.br/2017-jul-11/opiniao-arbitragem-tributaria-caminho-explorado>

Case law registers rare anti-arbitration injunctions being used to stay arbitral proceedings with also rare acceptance by the judiciary, since Brazilian doctrine and case law are almost unanimous on its inadmissibility.²⁷ For this reason, it is rare for a State court to issue an anti-arbitration injunction.

4. The conduct of the proceedings

There is no restriction under the BAL when it comes to party representation. Lawyer representation is not even necessary (Art. 21 §3, BAL) and there is no need for a lawyer to be registered before the local bar to act as a party representative in an arbitral procedure.²⁸ On the contrary, registration of lawyers and Brazilian law firms is mandatory when it comes to court representation (Art. 1, I, Law No. 8.906/94).

The BAL differs from the UNCITRAL Model Law on the impartiality and independence criteria of arbitrators. Instead of providing for the “justifiable doubts” standard, the BAL demands fulfilment of the same requirements set forth for the removal of national judges (Art. 14, BAL). The standard for disclosure is, however, identical to the one provided by the UNCITRAL Model Law. In this respect, a district court has held that non-disclosure *per se* is not a sufficient ground for removal,²⁹ since the object of disclosure must provide for grounds for partiality of the challenged arbitrator.

Articles 144 and 145 of the Brazilian Code of Civil Procedure provide for concrete standards of impartiality and independence,³⁰ some of which can be encountered in soft law, like the IBA Guidelines on Conflict of

²⁷ Rafael Francisco ALVES, *A Inadmissibilidade das Medidas Antiarbitragem*, São Paulo, Atlas, 2009, p. 252; Eduardo TALAMINI, Competência-competência e as medidas antiarbitrais pretendidas pela administração pública, *Revista de Arbitragem e Mediação*, São Paulo, RT, 2016, v. 50, p. 127 et seq. The High Court of Justice (“*Superior Tribunal de Justiça*”) most recent decisions are the following: Special Appeal n° 1.569.422, Justice Marco Bellizze, date: 26.04.2016, available at: https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=1490302&num_registro=201501776949&data=20160520&formato=PDF; Recognition Procedure n° 854, Justice Sidnei Benetti, date: 16/10/2013, available at: https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=670286&num_registro=200501238031&data=20131107&formato=PDF, Special Appeal n° 1.327.619, Justice Isabel Galotti, date: 20/08/2013, available at: https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=1255895&num_registro=201201146709&data=20130828&formato=PDF.

²⁸ Carlos Alberto CARMONA, *Arbitragem e Processo*, 3. ed. São Paulo, Atlas, 2009, p. 301.

²⁹ State Court of Goiás, 3rd Section of Civil Law, Request for Clarifications n° 65345-40.2014.8.09.0051, date: 23/08/2016. Available at: http://ino.tjgo.jus.br/tamino/SGE/NXML_SGE/nXML/ACOR_653454020148090051_23082016_917CC4A041.PDF

³⁰ “Art. 144. A judge is disqualified, and therefore prevented from hearing a case: I – in which he or she intervened as an agent of the party, acted as an expert witness, worked as a member of the Public Prosecutor’s Office or testified as a witness; II – that he or she heard at another instance of jurisdiction, having rendered a decision; III – when the judge’s spouse or civil partner, or any other relative, by blood or affinity, in direct line of descent or collateral, to the third degree, inclusive, is acting in the case as a public defender, lawyer or member of the Public Prosecutor’s Office; IV – when the judge, his or her spouse or civil partner, or any other relative, by blood or affinity, in direct line of descent or collateral, to the third degree, inclusive, is a party to the proceedings; V – when the judge is a member, officer or manager of a legal entity that is a party to the proceedings; VI – when the judge is the presumptive heir, donee or employer of any of the parties; VII – in which an educational institution with which the judge has an employment relationship or one arising from a services agreement is a party; VIII – in which one of the parties is a client of the law firm belonging to the judge’s spouse, civil partner or relative, by blood or affinity, in direct line of descent or collateral, to the third degree, inclusive, even if represented by a lawyer from another law firm; IX – when the judge files an action against the party or the latter’s lawyer. § 1 In the case presented in item III, the disqualification only occurs when the public defender, lawyer or member of the Public Prosecutor’s office was already part of the proceedings before the start of the judge’s judicial activity. § 2 The creation of a supervening fact that aims to characterise the disqualification of the judge is forbidden. § 3 The disqualification provided in item III also occurs in the case of agency granted to a member of a law firm that has on its staff a lawyer who individually fits the conditions set forth, even if said lawyer does not directly intervene in the proceedings. Art. 145. There is disqualification of a judge: I – who is a close friend or enemy of any of the parties or their lawyers; II – who receives gifts from people who have an interest in the action, either before or after the start of the proceedings, who advises any of the parties regarding the subject matter of the action or who provides the means to cover the expenses of the lawsuit; III – when any of the parties is a creditor or debtor of the judge, the judge’s spouse or civil partner, or their respective relatives, in direct line of descent to the third degree, inclusive; IV – who has an interest in the adjudication of the action in favour of any of the parties. § 1 A judge may recuse him or herself for reasons of conscience, without having to state said reasons. § 2 The allegation of disqualification shall be inadmissible when: I – when it was provoked

Interest (such as the need for removal of an arbitrator when the arbitrator is or was a party representative). There are, however, other provisions set in Articles 144 and 145 of the Brazilian Code of Civil Procedure which could be waived by the parties, as stated by respected doctrine.³¹ Such a waiver would not lead to the annulment of the award or the removal of the arbitrator. This leads to the conclusion that Brazilian standards of impartiality and independence are potentially more flexible than the IBA Guidelines on Conflict of Interest, given that some of the circumstances that, under the IBA Guidelines, fall under the Non-Waivable Red List are waivable under Brazilian law. On top of that, parties are free to combine the standards set by the Code of Civil Procedure with any other established by arbitral institutions or soft law instruments, such as the IBA Guidelines.

Other than partiality issues, the constitution of an arbitral tribunal may lead to various disputes, such as whether the arbitration is *ad hoc* or not. If the arbitration agreement does not provide for means to constitute the arbitral tribunal, the clause is considered blank and incapable of being performed, but not void.³² Under the BAL, these gaps can be filled by state courts if parties do not reach an agreement (Art. 7). In any case, even after a party files a lawsuit aiming at constituting the arbitral tribunal, the courts only interfere if the parties cannot reach an agreement on the terms of the arbitration. The court's authority is broad in order to preserve the initial intention to arbitrate the dispute, having the power to determine how the tribunal shall be constituted as well as to make any necessary appointments itself, always taking into consideration what the parties had already agreed on.³³

Also under the umbrella of the court intervention, the BAL grants the possibility of judicial pre-arbitral measures (Art. 22-A, BAL) if the requirements of likelihood of success and risk of irreparable or serious injury previously mentioned. These measures can be granted *ex parte* (Article 300 §2, Code of Civil Procedure). After an arbitral tribunal is constituted, interim measures can only be filed before the arbitrators themselves, making it inadmissible to resort to state court injunctions (Art. 22-A, BAL). Arbitrators have the power to issue interim measures (Art. 22-B, BAL), which may be enforced by the state courts if necessary by means of an "arbitral letter" ("*carta arbitral*", Art. 22-C, BAL).

Although there is no general legal provision dealing with the topic, confidentiality can be agreed on by the parties. The BAL eliminates confidentiality in cases in which the public administration is involved, imposing the publicity of the procedure (Art. 2 §3). Some authors tend to temper this duty of publicity by restraining its application only to disputes in which an interested third-party asks for access to the case files, subject to the secrecy as a general rule in order to preserve parties' strategic information made available during the procedure.³⁴ Until now, there is no consensus among Brazilian authors on the range of this duty. Confidentiality is extended to court measures that are required by the arbitrator (Art. 22-C, Sole Paragraph, BAL).

The BAL contains several other procedural regulations. Most of them, however, are not mandatory and can be derogated by parties' agreement.

by the one who alleges it; II – the party who makes the allegation has performed an act that implies the express acceptance of the accused".

³¹ Carlos Alberto CARMONA, *Arbitragem e Processo*, 3. ed. São Paulo, Atlas, 2009, p. 253.

³² Luis Fernando GUERRERO, *Convenção de Arbitragem e Processo Arbitral*, São Paulo: Atlas, 2009, p. 117.

³³ Mateus AIMORÉ CARRETEIRO et al., *International Arbitration in Brazil: An Introductory Practitioner's Guide*, The Hague, Kluwer Law International, 2016, §3.02.

³⁴ Lauro GAMA, Sinal Verde para a Arbitragem nas Parcerias Público-Privadas (A Construção de um Novo Paradigma para os Contratos entre o Estado e o Investidor Privado), *Revista Brasileira de Arbitragem*, São Paulo, Comitê Brasileiro de Arbitragem CBAr & IOB, 2005, v. 2, issue 8, p. 35; José Emilio NUNES PINTO, A arbitralidade de controvérsias nos contratos com o Estado e empresas estatais, *Revista Brasileira de Arbitragem*, São Paulo, Comitê Brasileiro de Arbitragem CBAr & IOB, 2005, v. 1, issue 1, 2004, pp. 9-26; José Emilio NUNES PINTO, Confidencialidade na Arbitragem, *Revista de Arbitragem e Mediação*, São Paulo, RT, 2005, v. 6, pp. 25-36; Thiago Luís SOMBRA, Mitos, crenças e a mudança de paradigma da arbitragem com a administração pública, *Revista Brasileira de Arbitragem*, Comitê Brasileiro de Arbitragem CBAr & IOB; Kluwer Law International, 2017, v. 14, issue 54, p. 66.

When it comes to evidence, the BAL provides for a broad authority of the arbitrator to admit, exclude and order evidence production (Art. 22, BAL). There are no specific restrictions to the presentation of evidence. The exclusion of any evidence requested by the parties is possible and will not be a reason to annul the award if it is properly reasoned.³⁵ The BAL establishes that the Code of Civil Procedure applies to evidence issues in respect of which the former is silent. Evidence production rules in Brazil leaves limited possibilities to request document production, because a party cannot be compelled to produce evidence against its own interests.³⁶

The BAL does not contain any specific provision on the hearings, so the parties are free to regulate this issue (Art. 21, BAL). As opposed to Brazilian Court proceedings, in which direct witness examination and cross-examination are precluded, these kinds of witness examination procedures have become a practice in arbitral proceedings in Brazil.³⁷

Cost allocation is also not specifically regulated by the BAL, which provides for the Arbitral Tribunal's power to allocate the costs in the award in the manner that it considers reasonable (Art. 27 BAL). On the other hand, it may be decided in arbitration that the losing party pays the costs, adopting the "costs follow the event" rule. As it is provided by the Brazilian Code of Civil Procedure for court proceedings, the rule of defeat lawyers' fees (which is similar to the costs follow the event rule) may also apply in arbitration.³⁸

Although there is no express provision in the BAL allowing or restraining the claim, interests are deemed to be a public policy matter under Brazilian substantive law (Civil Code, Art. 407).³⁹ The Supreme Court ("*Supremo Tribunal Federal*") already ruled the following: "*Interest for late payment is included in liquidation, even if there is no claim thereof or order for payment thereof in the judgment*".⁴⁰

Another important aspect to refer is the possible liability of the arbitrators. They are equalized to public officers when it comes to criminal liability (Art. 17, BAL). As an analogy with national judges, arbitrators can be liable for damages only if they incur in fraud or intentionally omit or delay any measures that must be taken by them (Art. 143, Code of Civil Procedure).⁴¹

³⁵ High Court of Justice, 3rd Section, Special Appeal n° 1.500.667, Justice João Otávio de Noronha, date: 09/08/2016. Available at: https://ww2.stj.jus.br/processo/revista/documento/mediado?componente=ITA&sequencial=1528345&num_registro=201302297455&data=20160819&formato=PDF.

³⁶ Fernando SEREC, *Evidence Production in Arbitration in Brazil: What to Expect*. Kluwer Arbitration Blog, 2008. Available at: <http://arbitrationblog.kluwerarbitration.com/2010/12/08/evidence-production-in-arbitration-in-brazil-what-to-expect/>.

³⁷ Fernando SEREC, *Evidence Production in Arbitration in Brazil: What to Expect*. Kluwer Arbitration Blog, 2008. Available at: <http://arbitrationblog.kluwerarbitration.com/2010/12/08/evidence-production-in-arbitration-in-brazil-what-to-expect/>.

³⁸ Defeat lawyer's fees are established when the arbitral tribunal orders the losing party to pay fees for the lawyer of the winning party. State Court of São Paulo, 13th Section of Public Law, Appeal n° 1005627-81.2015.8.26.0053, date: 17/02/2016. Available at: <https://esaj.tjsp.jus.br/cjsg/getArquivo.do?cdAcordao=9184386&cdForo=0>.

³⁹ "Art. 407. *Even if no losses are claimed, the debtor is required to pay interest for late payment which will be computed on money owed or performance of other nature, once its pecuniary value is established by judgment, arbitration, or agreement between the parties*".

⁴⁰ Entry n° 254 of the Prevailing Case Law ("*Súmula da Jurisprudência Dominante*"). There is a huge list of precedents confirming such entry: Extraordinary Appeal n° 162890 ED, Justice Ilmar Galvão, 1st Section, date: 03/06/1997; Extraordinary Appeal n° 115123, Justice Sydney Sanches, 1st Section, date: 12/02/1988; Extraordinary Appeal n° 109462, Justice Rafael Mayer, 1st Section, date: 24/06/1986. This is also the understanding of the Brazilian High Court of Justice ("*Superior Tribunal de Justiça*"). For instance: Appeal n° 1133023/PE, Justice Og Fernandes, 6th Section, date: 17/09/2009; Appeal n° 979708/PE, Justice Og Fernandes, 6th Section, date: 02/09/2008; Special Appeal n° 464.234/PR, Justice João Otávio de Noronha, 2nd Section, date: 03/08/2006. Available at: <http://www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=254.NUME.%20NAO%20S.FLSV.&base=baseSulmulas>.

⁴¹ State Court of São Paulo, 3rd Section of Private Law, Appeal n° 1018710-47.2014.8.26.0071, date: 29/11/2016. Available at: <https://esaj.tjsp.jus.br/cjsg/getArquivo.do?cdAcordao=10021606&cdForo=0>.

5. The award

When it comes to the award, the BAL regulates certain aspects which cannot be modified by the parties. For instance, parties cannot waive the requirement for an award to provide reasons. According to Art. 26, reasons are a mandatory requirement of the award, the lack thereof being a valid ground for its annulment.⁴² Other mandatory requirements are the summary of the facts, the ruling and the date and place the award was rendered.

The arbitral award is final and cannot be submitted to any appeal (Art. 18, BAL). The only way to disregard an award is through an annulment proceeding, under the strict grounds set forth on Art. 32 of the BAL.

For the annulment of an award there is a specific time-limit, which is 90 days after the award is notified to the parties. This time limit also applies to partial awards. When there is a request for clarifications, the time limit is initiated with the notification to the parties of the decision rendered. If the parties do not respect this time frame, the consequence is the impossibility of the court to rule on the merits of the annulment proceedings.

The duration of annulment proceedings may vary depending on whether a party appeals the decisions on the validity of the award. A number of appeals can be submitted in an annulment proceeding, since it follows the regular procedure for civil actions. There are two ordinary degrees of jurisdiction in Brazil. Thus, the decision in an annulment proceeding can be appealed. There are also extraordinary appeals, which can be made both to the High Court of Justice and to the Supreme Court, when there are violations to federal legislation or to the Federal Constitution respectively.

In a case of 2015, for example, the final judgment by the Supreme Court was made four years after the annulment proceeding was initiated.⁴³ This is the average duration of annulment proceedings in Brazil, although it may vary from case to case. These proceedings can or cannot suspend the effects on the enforcement of the award, depending on the decision of the court and the defences submitted by the parties. A party defending itself in the enforcement proceedings can ask for the suspension of the enforcement proceedings (Art. 525 §6, Code of Civil Procedure) and, if the requirements are complied with (*i.e.* the provision of a guarantee, reasonable chance of success and risk of serious or irreparable harm), the judge will suspend it.

The defending party can also rely on the nullity of the award and provide a security and then ask for the suspension of the enforcement proceedings (Art. 525 §6 Brazilian Code of Civil Procedure). If deemed necessary according to the criteria to grant interim measures provided in the Brazilian Code of Civil Procedure, the judge will suspend it.

As soon as an award is rendered, the winning party may start enforcement proceedings before the competent local court. A foreign award,⁴⁴ however, must be recognized by the High Court of Justice, which has exclusive jurisdiction to grant *exequatur* to the award after a preliminary analysis (Art. 35, BAL).⁴⁵ The duration of these proceedings may also vary from case to case, but the average time is between one to two years. Thus, local awards may be promptly executed, whereas foreign awards must be recognized ("*homologados*") by the High Court of Justice first. The High Court of Justice may not, however, analyze the

⁴² State Court of São Paulo, 3rd Section of Private Law, Appeal nº 1125099-32.2015.8.26.0100, date: 03/10/2017. Available at: <https://esaj.tjsp.jus.br/cjsg/getArquivo.do?cdAcordao=10852071&cdForo=0>.

⁴³ High Court of Justice, Special Appeal nº 1519041, Justice Marco Aurélio Belizze, date: 11.09.2015. Available at: https://ww2.stj.jus.br/processo/revista/inteiroteor/?num_registro=201500144429&dt_publicacao=11/09/2015.

⁴⁴ Under Brazilian law, any awards issued outside the Brazilian territory are considered foreign awards (BAL Art. 34, Sole Paragraph).

⁴⁵ Leonardo de Campos MELO, *Recognition and Enforcement of Foreign Arbitral Awards in Brazil: A Practitioner's Guide*, The Hague, Kluwer Law International, 2015, p. 23.

merits of the dispute, as it can only determine whether the formal requirements set forth on Art. 38 of the BAL have been fulfilled.⁴⁶

Brazil is a party to three of the most important multilateral treaties on the enforcement of arbitral awards: the New York Convention (endorsed by Brazil in 2002); the Inter-American Convention on International Commercial Arbitration adopted in Panama in 1975 (endorsed by Brazil in 1996); and the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral awards adopted in Montevideo, Uruguay, in 1979 (endorsed by Brazil in 1995). Thus, the criteria for recognition and enforcement of foreign awards follow the principles set forth in these treaties, as well as the Code of Civil Procedure and the Court Rules of the High Court of Justice (Articles 216-A to 216-N).

A foreign award shall not be recognized if it has been annulled at the seat of arbitration (Art. 38, VI, BAL), not being enforceable in Brazil.⁴⁷ That has been decided recently by the High Court of Justice, which denied enforcement of an award rendered and annulled in Argentina.⁴⁸ The other way around, however, is also possible. A foreign award may not be recognised in Brazil even if it was not annulled at its seat.⁴⁹ This decision was taken in the well-known *Abengoa case*, in which the offense to public order was considered to deny recognition to an US-seated arbitral award.

There have been discussions about the enforceability of awards that go against judicial precedents. Since the new Code of Civil Procedure was enacted (2015), precedents have a binding force under Brazilian Law. Therefore, it may be defended that the arbitrator has the duty to follow these precedents as well. This duty derives from respect to parties' autonomy when choosing the applicable law and, therefore, may result in a possible ground for the annulment of an award. Until now, there is no consensus within the doctrine or in the case law on whether arbitrators are bound by precedents in the same way as judges are.

6. Funding arrangements

The BAL is silent on agreements regarding contingency fees or third-party funding, and there is no restriction regarding these topics. Although there has been criticism that this possibility of funding may be used for bad purposes (e.g. frivolous arbitrations, lending money at unlawful rate of interest, etc.),⁵⁰ the funding arrangements have been seen as good options for impecunious parties to be able to participate in arbitral proceedings.⁵¹

Even though third-party funding is a brand-new possibility in Brazilian arbitration, investment funds and specialized companies already provide options of funding in their portfolios.⁵² The funding can also be

⁴⁶ High Court of Justice, Special Section, Recognition Procedure nº 866, date: 17.05.2006. Available at: https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=628271&num_registro=200500349265&data=20061016&formato=PDF.

⁴⁷ Antonio Carlos Nachif CORREIA FILHO, The theories of international arbitration and related practical issues: the Brazilian approach (particularly the recent leading case on recognition of annulled awards) vis-à-vis the "delocalization trend", *Revista Brasileira de Arbitragem*, The Hague, Kluwer Law International, 2016, Vol. XIII Issue 52, p. 26-54.

⁴⁸ High Court of Justice, Special Section, Recognition Procedure nº 5782, date: 02.12.2015. Available at: https://ww2.stj.jus.br/processo/revista/inteiroteor/?num_registro=201101290847&dt_publicacao=16/12/2015.

⁴⁹ High Court of Justice, Special Section, Recognition Procedure nº 9412 / US, date: 19.04.2017. Available at: https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=1456133&num_registro=201302788725&data=20170530&formato=PDF.

⁵⁰ Napoleão Casado FILHO, Arbitragem comercial internacional e acesso à justiça: o novo paradigma do Third Party Funding, 2015, Tese (Doutorado em Direito), Pontifícia Universidade Católica de São Paulo, São Paulo, 2015, p. 132 *et seq.*

⁵¹ Arnoldo WALD, Some positive and negative aspects of arbitration financing, *Revista de Arbitragem e Mediação*, vol. 49/2016, p. 33 – 41.

⁵² Thais Cristina GADOTTI, Advantages and disadvantages of third party funding in arbitration, *Revista dos Tribunais*, vol. 981/2017, Brazil, Editora Revista dos Tribunais, 2017, p. 39-54.

contracted or provided by any capable person, as there are no specific restrictions and it is not included as an action allowed only for financial institutions.⁵³

The practice is to disclose the existence of a third-party funder, so that arbitrators can proceed with broad conflict checks.

7. Possible future reform

It is not likely for Brazil to have another reform of its Arbitration Law as it was last revised in 2015. However, there have been debates about whether arbitration should be allowed in tax disputes and insurance disputes. In addition, there has been a recent reform in the labour legislation to allow arbitration in some specific cases; there is still no precedent on the matter.

⁵³ Napoleão Casado FILHO, Arbitragem comercial internacional e acesso à justiça: o novo paradigma do Third Party Funding, 2015, Tese (Doutorado em Direito), Pontifícia Universidade Católica de São Paulo, São Paulo, 2015.

BULGARIA

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

EMIL EMANUILOV
OF **KAMBOUROV & PARTNERS**

KAMBOUROV & PARTNERS
ATTORNEYS AT LAW

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

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VERSION: 15 DECEMBER 2017

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

A jurisdiction with a strong tradition in commercial arbitration, Bulgaria was among the first to implement the 1985 Model Law. Although it has not implemented the 2006 revision of the Model Law, the Bulgarian legislator consistently develops the local environment in a pro-arbitration direction. The recent demonstration of such development is the 2017 reform which reduced the grounds for annulment of awards and partially decentralised jurisdiction among regional courts.

Easy access to *ex parte* pre-arbitration interim measures issued by local courts, respect by local judges of the *competence-competence* doctrine, readily granted assistance by state courts in support of arbitration and a large set of remedies (including interest) available to arbitral tribunals make Bulgaria an appropriate venue for resolution by arbitration of a large variety of disputes.

Key places of arbitration in the jurisdiction	<p>Currently featuring more than 25 institutions, the leading institutional arbitrations are based in the capital, Sofia. The Arbitration court with the Bulgarian Chamber of Commerce and Industry is the most frequently used institution.</p> <p>There are also institutions active in Varna and Bourgas (the seaport towns) and in Plovdiv (the second largest city), which, however, have limited impact on the arbitration climate in the country.</p>
Civil law / Common law environment?	Civil law. Sharing common features with all Eastern-Europe countries. Bulgaria is also a Member State of the European Union.
Confidentiality of arbitrations?	The Arbitration Act is silent on confidentiality; yet it is commonly accepted as a key distinguishing feature of arbitration. The rules of the leading arbitration institutions provide for confidentiality of the proceedings.
Requirement to retain (local) counsel?	<p>There are no restrictions on representation in arbitral proceedings.</p> <p>In arbitration related court proceedings (<i>e.g.</i>, annulment, recognition and enforcement, interim measures and gathering of evidence), the parties need to be represented by a lawyer or in-house counsel engaged on employment contract and having a law degree.¹ In proceedings before the Supreme Court of Cassation, the lawyer shall have at least 5 years of experience.²</p> <p>A lawyer admitted to the bar in a foreign non-EU country may appear before Bulgarian courts only upon receiving special authorization, subject to specific conditions and only together with a Bulgarian lawyer.³ A lawyer from an EU country may appear before local courts without specific authorization, but only together with a Bulgarian lawyer.⁴</p>

¹ Article 32 of the Civil Proceedings Act.

² Article 24(2) of the Advocacy Act.

³ Article 10 of the Advocacy Act.

⁴ Articles 11 and 12 of the Advocacy Act.

Ability to present party employee witness testimony?	Party employees may give witness testimony; arbitral tribunals may take the witnesses' relations with the parties into consideration when determining the probative value of their statements.
Ability to hold meetings and/or hearings outside of the seat?	The parties may agree on the place of the hearing, including outside of the seat. Absent such agreement, the tribunal will determine the place of the hearing considering all circumstances of the case and the convenience of the parties. ⁵
Availability of interest as a remedy?	Bulgarian law explicitly recognizes interest as an available remedy.
Ability to claim for reasonable costs incurred for the arbitration?	The leading principle in the allocation of costs is "the costs follow the event", save for excessive lawyers' fees, which the tribunal or the court may refuse to allocate entirely to the losing party.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Contingency fee arrangements are permitted and frequently used in practice. The only restriction in court proceedings is that the court would refuse to award costs that the parties did not incur prior to the closing of the proceedings. Third party funding is not regulated, and is yet rarely used.
Party to the New York Convention?	The New York Convention has been in force in Bulgaria since 1965. Bulgaria adheres to the New York Convention, under the reservations that: (i) it applies the Convention to awards made in the territory of other contracting states; and (ii) regarding awards made in the territory of non-contracting states, Bulgaria applies the Convention subject to strict reciprocity.
Other key points to note	<p>The Arbitration Act limits the freedom of the parties in domestic arbitration to choose foreign law applicable to their arbitration agreement. Thus, in domestic arbitration only the Arbitration Act governs the arbitration agreement.</p> <p>The Arbitration Act requires that an arbitrator sitting in Bulgaria shall be a citizen of full age, not convicted for deliberate capital offence, has university degree, at least 8 years of professional experience and high morals. The Act, however, does not require qualification in law.</p> <p>Further, a foreign citizen may not sit as arbitrator in domestic arbitration, but only in international arbitration.⁶</p> <p>The consolidation and/or joinder of arbitral proceedings are subject to very strict interpretation as the Bulgarian legal tradition pays significant tribute to the importance of the right of the parties to participate in the appointment of the tribunal. Consequently, unless the parties clearly agree on the provisions and rules beforehand, consolidation and/or joinder would be possible only upon explicit consent of all parties.</p>
WJP Civil Justice score (2018)	0.56

⁵ Article 25 of the Arbitration Act.

⁶ Article 11(2) in conjunction with para.3 of the Transitory and conclusive provisions of the Arbitration Act.

ARBITRATION PRACTITIONER SUMMARY

With very few exceptions, Bulgarian arbitration law mirrors the Model Law (1985) and follows the New York convention, which makes the local arbitration climate familiar and predictable to foreign practitioners. The local courts consistently demonstrate pro-arbitration attitude and a recent reform of the arbitration law even reduced the grounds for setting aside of domestic awards.

Notably, the local law makes non-arbitrable certain categories of disputes, some of which are traditionally arbitrable in other jurisdictions, such as alimony and labour disputes.

Date of arbitration law?	The International Commercial Arbitration Act was promulgated in 1988, the latest revision being of January 2017.
UNCITRAL Model Law? If so, any key changes thereto?	<p>Bulgaria has implemented the 1985 version of the Model Law, but not the 2006 amended version.</p> <p>In 2017, Bulgaria excluded the contradiction to public policy as a ground for the setting aside of domestic awards. The Arbitration Act also restricts foreigners from sitting as arbitrators in domestic arbitrations and provides special requirements and qualifications to arbitrators.</p>
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	<p>Until January 2017, almost all arbitration related matters fell within the exclusive jurisdiction of the Sofia City Court (and upon appeal – within the jurisdiction of the Sofia Court of Appeal and the Supreme Court of Cassation). As of January 2017, some functions were decentralized. Now, the regional court at the domicile of the debtor issues the writs of execution for domestic awards; regional courts (not only in Sofia) further have jurisdiction to assist in the gathering of evidence and issuance of injunctive measures in support of arbitration.</p> <p>However, even after the 2017 reform, the Sofia City Court still has exclusive jurisdiction to act as a court of the first instance in proceedings for recognition and enforcement of foreign arbitral awards. The Supreme Court of Cassation retains its exclusive role as the only court instance that can hear motions for annulment of domestic awards. The concentration of jurisdiction in these courts leads to de facto specialization of the judges who repeatedly sit in arbitration-related matters.</p>
Availability of <i>ex parte</i> pre-arbitration interim measures?	The Arbitration Act explicitly provides that at any time before or after instituting the arbitration proceedings, a party thereto may request from the state courts interim or injunctive measures. As a matter of principle, these are heard exclusively on an <i>ex parte</i> basis. The respondent may appeal only after the measure is imposed and notified to him.
Courts' attitude towards the competence-competence principle?	The competence-competence doctrine is well established in Bulgarian arbitration law and doctrine. Apart from being

	<p>enshrined in an explicit legal provision,⁷ in a recent decision,⁸ the Supreme Court of Cassation held that a claim before the state courts for establishing the nullity of an arbitration clause is inadmissible if the dispute was already submitted to arbitration and while the arbitration is pending. Thus, the Supreme Court partially adopted the doctrine that the arbitrators shall be the first to rule on the validity of the agreement. It is only partially adopted as in the same judgment the Supreme Court held that if the dispute has not been submitted to arbitration yet, the party may have legitimate interest to seize directly the state courts. It is yet to be seen to what extent this judgment will be followed.</p>
<p>Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?</p>	<p>Until January 2017, the grounds for annulment mirrored Article 34 of the Model Law (1985 version) and the New York Convention governed the recognition and enforcement of foreign awards. The 2017 reform of the arbitration law excluded the violation of public policy from the list of grounds for the setting aside of domestic awards, which by operation of Article VII(1) of the New York Convention may also apply to recognition and enforcement of foreign awards. Consequently, compared to the Model Law and the New York Convention, the local law restricts the grounds on which an award may be set aside.</p>
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>By virtue of Article V.1(d) of the New York convention in conjunction with Article 51 of the Arbitration Act, Bulgarian courts would not enforce foreign awards annulled by the courts in the country of origin.</p>
<p>Other key points to note?</p>	<p>ϕ</p>

⁷ Article 19 (1) of the Arbitration Act.

⁸ [Decision No 40 of 29.06.2017 in commercial case No 2448 2015 of the Supreme Court of Cassation, First Commercial Division.](#)

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction: is the arbitration law based on the UNCITRAL Model Law, and when was the arbitration law last revised?

The International Commercial Arbitration Act⁹ (“[Arbitration Act](#)” or the “Act”) regulates both international¹⁰ and domestic arbitration in Bulgaria. The Arbitration Act applies to international arbitration by virtue of Article 1 thereof. With the exception of certain specific provisions, the Arbitration Act applies to domestic arbitration by virtue of Paragraph 3 of the transitory and conclusive provisions thereof.

[Bulgarian Private International Law Code](#) and the [New York Convention](#) apply to the recognition and enforcement of foreign arbitral awards in Bulgaria.

The [Civil Procedure Code](#) defines the arbitrability and regulates arbitration-related proceedings before courts.

The Arbitration Act implements the 1985 revision of the UNCITRAL Model Law. Bulgaria has not yet implemented the 2006 revision of the Model Law.

Following a recent modification of the Arbitration Act,¹¹ violation of public policy no longer constitutes a ground for setting aside an award, which is the first substantial deviation of Bulgarian arbitration law from the Model Law. While this was intended to apply to domestic arbitration only,¹² it may be argued that, pursuant to Article VII (1) of the New York Convention,¹³ the same would also govern the recognition and enforcement regime of foreign awards in Bulgaria.

Another feature of the recent reform of the arbitration law is the intensified control of the courts over the validity of awards and a stricter monitoring by the State of the activity of arbitral institutions and arbitrators in Bulgaria. Further, the reform narrowed the scope of arbitration as it made consumer disputes non-arbitrable.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

As regards international arbitration with seat in Bulgaria, Article 47(1)(2) of the Arbitration Act binds the courts to consider the conclusion and validity of the arbitration agreement in light of the “*law chosen by the parties, or absent such choice – according to this Act*”.

⁹ Promulgated, State Gazette No. 60/5.08.1988, amended and supplemented, SG No. 93/2.11.1993, amended, SG No. 59/26.05.1998, amended and supplemented, SG No. 38/17.04.2001, SG No. 46/7.05.2002; Judgment No. 9/24.10.2002 of the Constitutional Court of the Republic of Bulgaria - SG No. 102/1.11.2002; amended, SG No. 59/20.07.2007, effective 1.03.2008, amended and supplemented, SG No. 8/24.01.2017.

¹⁰ Arbitration is international when at least one of the parties is registered or domiciled abroad, or if the predominant part of its registered capital is owned by a foreign entity/person.

¹¹ [SG issue 8 of 24 January 2017](#).

¹² In the sense that it was introduced as modification of the grounds for setting aside a domestic award – Article 47 of the International Commercial Arbitration Act.

¹³ Article VII (1) of the New York Convention reads:

“The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.” (emphasis added). Consequently, a party seeking to enforce foreign award in Bulgaria may ascertain that the public policy exception (Article V,2(b) of the New York Convention) does not apply as the local law provides a more favourable treatment.

The Arbitration Act limits the freedom of the parties in domestic arbitration to choose a foreign law applicable to their arbitration agreement.¹⁴ Thus, only the Arbitration Act governs the arbitration agreement in domestic arbitration.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Article 19(2) of the Arbitration Act mirrors the Model Law and explicitly states that the arbitration agreement is independent from the rest of the contract. Both state courts and arbitrators consistently apply this provision.

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

An arbitration agreement must refer to one or more *defined legal relationships*, regardless of whether contractual or not.

It must be *in writing*. An agreement is “in writing” if it is contained in signed documents or exchanged letters, telexes, telegrams or other means of communication. An implied agreement exists if the respondent – either in writing or by statement recorded in the transcript of a hearing – accepts for the dispute to be resolved through arbitration or participates in arbitral proceedings without objecting to the competence of the tribunal. Recently the law¹⁵ defined the forms of participation in arbitral proceedings that amount to implied acceptance. It is, however, unclear if the list is exhaustive.

Several groups of non-arbitrable disputes (discussed below) further limit the enforceability of an arbitration agreement.

Another requirement for validity, which is not included in the Arbitration Act but follows from the case law, is that the arbitration agreement must not be *unilateral*. The Supreme Court of Cassation considered as *unilateral* clauses that grant only one of the parties with a choice between arbitration and recourse before state courts.¹⁶ However, few reported awards take the view that if an arbitration clause grants equal choice to both parties, the clause was not unilateral and consequently – valid.¹⁷

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

Generally, an arbitration agreement binds only its signatories. It also binds the universal legal successors of the parties (*e.g.*, in case of a merger of companies).

The assignment of rights raises specific issues in the context of Bulgarian law. The position in arbitration case law is that the assignment of a contract automatically makes the assignee a party to the arbitration agreement contained therein. The arbitrators listed with the Bulgarian Chamber of Commerce and Industry (“BCCI”) have rendered a mandatory decision¹⁸ confirming this practice (binding only on arbitrations administered by the BCCI). None of the other arbitration institutions operating in Bulgaria has reported awards dealing with this issue; however, most probably they would endorse the same position as it upholds the jurisdiction of the arbitrator/s to resolve disputes involving the assignee.

¹⁴ Para. 3 of the Transitory and conclusive provisions of the Arbitration Act.

¹⁵ Article 7(3) of the Arbitration Act, indicating as forms of implied consent the submission of statement of reply, presentation of evidence, submission of counterclaim or appearance at the hearing without making an objection to the jurisdiction of the tribunal.

¹⁶ [Decision № 71 of 2.09.2011 of the Supreme Court of Cassation, commercial case № 1193/2010, II-nd commercial chamber.](#)

¹⁷ See, for instance, Procedural Order in ICC Case № 3/2016.

¹⁸ [Decision of 18 March 2009.](#)

On the contrary, upon a strict interpretation of an arbitration clause as an independent agreement, the Supreme Court of Cassation has adopted the opposite view.¹⁹ It now consistently rules that the assignment of contractual rights does not make the assignee a party to the arbitration clause. Consequently, any assignee that seeks redress in arbitration runs the risks that the Supreme Court may set aside the award (for domestic awards) or it may refuse to recognize and permit its enforcement in Bulgaria (for international awards).

No other grounds exist for the extension of arbitration agreements to non-signatories. Bulgarian law does not recognize *veil-piercing*, *alter ego* or the *group of companies* doctrines. Incorporation by reference, which other legal systems may consider as a ground for the extension of an arbitration agreement, is permissible in Bulgaria as an ordinary method for concluding an arbitration agreement.

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

2.5 Are there restrictions to arbitrability?

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

The Civil Procedure Code further explicitly excludes the following types of dispute from arbitration:

- disputes concerning rights *in rem* or possession of immovable assets;
- disputes concerning alimony;
- employment disputes; and
- since January 2017, disputes involving consumers are also non-arbitrable.²⁰ All cases pending at the time of the legislative change shall be terminated forthwith. Further, awards concerning consumers become null and void and therefore – unenforceable, and the state courts refuse to issue writs of execution based on such awards.

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

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

The respondent may challenge the arbitrability of the dispute as a part of its jurisdictional defence. As the non-arbitrability of a dispute is non-waivable,²¹ the objection may be made later on in the proceedings or

¹⁹ In the words of the Supreme Court of Cassation, "...the assignment of receivables under a contract does not make the assignee a party to the arbitration clause included in the contract ..." Decision №71 of 9 July 2015 of the Supreme Court of Cassation, commercial case № 3506/2014 , II commercial division. Similarly, Decision № 70 of 15.06.2012, commercial case № 112/2012, I commercial division; Decision № 122 of 18 June 2013, commercial case 920/2012 of the II commercial division.

²⁰ Unlike other jurisdiction, under Bulgarian law even submission agreements concluded by consumers after the dispute has arisen are null and void.

²¹ This follows from the mandatory character of the arbitrability rules; it is further implied in Article 5 of the Arbitration Act, according to which a "[p]arty that is aware of non-compliance with a non-imperative provision of this Act, or with a requirement provided in the arbitration agreement, but nevertheless continues to participate in the proceeding without raising immediate objections ... cannot rely on the non-compliance." Consequently, if the non-compliance or breach affects mandatory provision, the party may raise objection at a later stage, including at the stage of challenging the award before the Supreme Court of Cassation.

used as a ground for challenging the award; failure to challenge the arbitrability in due time does not deprive the respondent of the opportunity to do so later.

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

The court shall stay litigation upon objection of a party for the existence of an arbitration agreement covering the dispute. Under penalty of implied waiver, the objection for existence of arbitration agreement shall be made not later than with the statement of response. The court may only refuse to stay the litigation if it finds the arbitration agreement “null and void, inoperative or incapable of being performed”.²² The court should not distinguish between seat of arbitration in Bulgaria or abroad, as far as the arbitration clause is valid and the objection is made in due time.

Bulgarian courts generally tend to enforce arbitration agreements, even imperfect ones.

Unlike other jurisdictions, Bulgarian courts would refuse to enforce a unilateral arbitration clause that grants only one of the parties a choice between arbitration and state courts.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

Under Bulgarian law, the arbitrators have no powers to bind others but the parties to the arbitration agreement. Consequently, a judge would disregard an injunction issued by an arbitral tribunal ordering a stay of litigation. Further, unless it follows otherwise from the circumstances, the court would not consider such an injunction as a substitute of objection by a party for a stay of litigation; as specified above, the only explicit objection made by a party in due time that the dispute is covered by arbitration agreement would suffice for a stay of the litigation.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction?

In principle, the courts may intervene in arbitral proceedings only as far as permitted by the Arbitration Act.²³ Yet, in few cases courts have intervened in arbitral proceedings on the basis of the general principles of civil litigation and the general right to seek redress from state courts. For example, in one instance the Sofia City Court has issued injunctive relief and ordered suspension of arbitral proceeding based on arbitration clause, the validity of which clause was disputed in court.²⁴ However, upon appeal the Sofia Court of Appeal took the opposite view and ruled that it is inadmissible for the courts to suspend arbitration proceedings as an injunctive relief and that the eventual shortcomings of the arbitral proceedings may be invoked only in the procedure for setting aside the ensuing award.²⁵

In theory, courts may intervene in similar manner with regard to arbitral proceedings pending outside of the jurisdiction, provided they consider that there is international element that substantiates their jurisdiction. Notably, there are no reported cases allowing such intervention abroad and, taking into consideration the opinion of the Sofia Court of Appeal, most probably Bulgarian courts would be slow to intervene in arbitration proceedings conducted outside of their jurisdiction.

On the other hand, courts may intervene in support of the arbitration or in order to preserve the integrity of the process. Thus, courts may issue interim or conservatory measures for preservation of assets or *status quo* and they may assist in collecting of evidence that cannot be collected by the tribunal (usually because of

²² Article 8(1) of the Arbitration Act.

²³ Article 6 of the Arbitration Act, mirroring Article 5 of the Model Law (1985).

²⁴ Ruling of 8 March 2012, Civil Case No.2610/2012, Sofia City Court, Civil division, 4th panel.

²⁵ Ruling of 18 April 2013, Civil Case 2032/2012, Sofia Court of Appeal, Civil division, 7th panel.

the lack of coercive powers).²⁶ As regards the maintenance of the integrity of the process, the courts have certain powers with regard to challenges of arbitrators²⁷ and setting aside of awards (for domestic arbitration)²⁸ and controlling the enforcement stage (regarding foreign awards).²⁹

4. The conduct of the proceedings

Arbitrators must ensure equal treatment of the parties and provide them with equal opportunities to present their cases.³⁰

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

4.1 Can parties retain outside counsel or be self-represented?

Parties to arbitral proceedings in Bulgaria may be represented by outside counsel, in-houses, or self-represented. Absent specific agreement of the parties, there are no restrictions as to the qualifications of the representatives, in particular, those may not be lawyers, but persons with other qualification the party deems appropriate. In practice, representation by non-lawyers is rare, except for DAB procedures where it is common for engineers to attend as party-appointed representatives.

4.2 How strictly do courts control arbitrators' independence and impartiality?

An arbitrator may be challenged if:

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

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

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

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

Where the arbitral tribunal refuses to accept the challenge, the refusal may be appealed to the Sofia City Court.³¹ This provision is mandatory and cannot be derogated from by an agreement between the parties.

²⁶ Article 9 of the Arbitration Act: *"Each of the parties to an arbitration may request from a state court, prior or while arbitration proceedings are pending, issuance of conservatory measures or conservation of evidence"*.

²⁷ Article 16 of the Arbitration Act: if the arbitral tribunal dismisses a challenge to an arbitrator the challenging party may challenge the arbitrator before the Sofia City Court.

²⁸ Article 47 of the Arbitration Act: the party may challenge the award before the Supreme Court of Cassation on limited ground, among which improper constitution of the arbitral tribunal or non-compliance of the procedure with the agreement of the parties, as well as on certain procedural violations.

²⁹ Article 51 of the Arbitration Act in conjunction with Article V of the New York Convention.

³⁰ Article 22 of the Arbitration Act.

³¹ Article 16 of the Arbitration Act.

The tribunal may continue the proceedings and render an award while the challenge and appeal are pending. The decision of the Sofia City Court is final.

In practice, the Sofia City Court has applied a strict interpretation of the “reasonable doubt” test, accepting the challenge only where the circumstances objectively lead to partiality or lack of independence. Consequently, a mere failure of an arbitration to disclose should not suffice for a challenge, unless it follows from the undisclosed circumstances that the arbitrator’s impartiality or independence are tainted.

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

The Arbitration Act provides for a default procedure for the appointment of arbitrators, which allows for intervention by state courts only with respect to disputes arising from non-commercial relations.

In *ad hoc* arbitration, unless otherwise agreed, the tribunal is comprised of three arbitrators: each party appoints one arbitrator, and together the party-appointed arbitrators choose the chairperson.

If the respondent fails to nominate an arbitrator within 30 days of receiving the claimant’s notice of arbitration, or if the two party-appointed arbitrators fail to choose the chairperson within 30 days, and if the dispute arises from a commercial relationship, the chairperson of the Bulgarian Chamber of Commerce and Industry (“BCCI”), on request of one of the parties, will act as the appointing authority. The chairperson of the BCCI will consider the qualification requirements contained in the arbitration agreement (and all other relevant circumstances) with a view to appointing an independent and impartial arbitrator.³² Thus, for disputes arising from commercial relations, the chairperson of the BCCI shall act as appointing authority.

For disputes that do not arise from commercial relations, the Sofia City Court shall act as appointing authority.³³

The institutional rules provide for a separate default procedure, which is very similar to the above, except for who acts as an appointing authority.³⁴

4.4 Do courts have the power to issue interim measures in connection with arbitrations? If so, are they willing to consider *ex parte* requests?

The Arbitration Act explicitly provides that, upon request of a party, either before initiation of the arbitration or while the proceedings are pending, the state courts may order interim measures to:

- protect a party’s rights that are the subject matter of the arbitration; or
- guarantee effective enforcement of an eventual favourable award.³⁵

The courts may issue identical measures to those issued in relation to pending litigation, including attachment of movable or immovable assets or receivables (including freezing bank accounts) or other appropriate measures. These are immediately enforceable by bailiffs.

Requests to courts for the issuance of interim measures are always heard on an *ex parte* basis. The court may grant the measure if it finds that the claim in support of which the interim measure is sought is

³² Article 12 of the Arbitration Act.

³³ Para. 3(2) of the Transitory and conclusive provisions of the Arbitration Act.

³⁴ For example, the Rules of arbitration of the Arbitration court with the Bulgarian Chamber of Commerce and Industry (the most commonly used institution) provides the same procedure (each party appoints an arbitrator from a closed list and the two party-appointed arbitrators appoint a chairperson from the same list); however, upon a failure of the respondent to nominate an arbitrator or if the two party-appointed arbitrators cannot agree a about the chairperson, the chairperson of the BCCI Court of Arbitration (and not the chairperson of the BCCI) will act as appointing authority.

³⁵ Article 9 of the Arbitration Act.

admissible and if the claimant has a *prima facie* case on the merits. As further conditions, the interim measure should be appropriate, proportionate and necessary.

The counterparty may appeal against the interim measure in 7 /seven/ days from service of a notice that it was imposed.³⁶

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

The Arbitration Act contains a set of provisions, some of which are mandatory and determine the minimum standard of due process,³⁷ but most of them are default provisions that aim to supplement the missing agreement of the parties on the constitution of the tribunal and the conduct of the arbitration.

The Arbitration Act underlines that the parties are free to shape the proceedings,³⁸ and in the absence of such agreement, the tribunal shall conduct the proceedings in a manner it finds appropriate under the circumstances,³⁹ but always subject to the duty to guarantee to both parties equal opportunity to present their case.⁴⁰

In *ad hoc* arbitration, unless otherwise agreed, the proceeding is considered commenced for all purposes when the respondent receives a request to refer a dispute to arbitration. The aim of this provision was for a simple notice of intention to arbitrate to suffice for the institution of proceedings. This is consistent with Article 33 of the Arbitration Act, which provides for the termination of proceedings if the claimant fails to submit a statement of claim in the timeframe agreed by the parties or determined by the tribunal.

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

4.6 Does it provide for the confidentiality of arbitration proceedings?

The Arbitration Act is silent on confidentiality. The doctrine highlights the confidentiality and privacy as distinguishing features of arbitration, as is also reflected in certain institutional rules.⁴¹ However, unless the arbitration clause refers to institutional rules that contain explicit confidentiality provisions, the parties should be prudent to incorporate specific provisions on confidentiality in their arbitration agreement.

The Bulgarian Criminal Code qualifies it as a punishable offence if an expert witness or an interpreter discloses information which constitutes a *secret* and which has become known to them during their

³⁶ Article 396 of the Civil Procedure Code.

³⁷ Under Bulgarian law and legal doctrine, the “due process” principle encompasses the equal treatment of the parties and the opportunity to present their case (Article 22 of the Arbitration Act); those of the provisions of the Act that have mandatory character aim to safeguard the due process.

³⁸ Article 24, sentence 1 of the Arbitration Act.

³⁹ Article 24, sentence 2 of the Arbitration Act.

⁴⁰ Article 24, sentence 3 of the Arbitration Act.

⁴¹ Article 24(5) of the Rules of Arbitration of the BCCI provides that “[t]he proceedings before the Arbitration court with the BCCI are confidential.”

Article 8 (1) of the Rules of arbitration of the KRIB Arbitration Court reads as follows: “The arbitrators, the members of the Arbitration Council, the Supervisory Board and the Commissions of the Arbitration Panel, the employees of the Secretariat of the KRIB Court of Arbitration, and all the experts appointed by the Arbitral Tribunal shall be obliged to ensure confidentiality of all documents and information in the arbitration cases of the KRIB Court of Arbitration, which may come to their knowledge. The internal documentation of the KRIB Court of Arbitration and the correspondence between its bodies, the Secretariat and the arbitrators is confidential and shall not be revealed to the parties or third parties.”

participation in the arbitral proceedings.⁴² However, the provision does not indicate that the information is considered as secret because it was disclosed in a pending arbitration. Rather the secrecy follows from factors that are external to the arbitral proceedings, such as the nature of the information in question (trade secrets, patents) etc.

Related to the issue of confidentiality is the question whether information obtained in arbitral proceedings may be disclosed in subsequent proceedings. As the Arbitration Act is silent on this question, the answer depends on how the information is obtained and the nature of the subsequent proceedings.

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

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

If the information is used before state courts, the judges will determine the matter by reference to the rules of evidence contained in the Civil Procedure Code. As the litigants have a duty to submit to the courts only the truth, a judge would most probably admit a relevant document on record regardless of the fact that it was produced in breach of confidentiality provisions contained in arbitration rules/agreement.⁴³

4.7 Does it regulate the length of arbitration proceedings?

The Arbitration Act contains no specific provisions on the length of the arbitration proceedings, therefore, it is left to the parties to include appropriate provisions in their arbitration agreement. Absent such agreement, the arbitrators shall organize the conduct of the arbitration in a concise manner as to guarantee resolution of the dispute in reasonable terms.

There are no specific rules in the Arbitration Act addressing whether the tribunal would become *functus officio*, upon expiration of the term agreed by the parties. The Act only provides that the powers of the tribunal cease to exist upon conclusion of the arbitration proceedings (which is meant to be the delivery of the award), except for cases where the award needs to be interpreted or supplemented.⁴⁴ This is an indication that the concept of *functus officio* is not inconsistent with the principles of the Act, yet, notably, the Supreme Court has never dealt with such an issue.

However, as the parties may agree on a time limit either for rendering the award or for the closure of proceedings, an award rendered after the expiration of the agreed time limits may be set aside because the proceedings were not conducted pursuant to the agreement of the parties (Article 47, Item 6 of the Arbitration Act).

4.8 Does it regulate the place where hearings and/or meetings may be held?

The Arbitration Act contains default provision that, absent agreement of the parties, the tribunal will determine the venue of the hearing considering all circumstances of the case and the convenience of the parties.⁴⁵

⁴² Article 284 of the Criminal Code.

⁴³ In theory, a party that breaches contractually undertaken confidentiality obligations is liable for damages resulting from breach of contract. There is no reported Bulgarian case dealing with such situation.

⁴⁴ Article 46 of the Arbitration Act.

⁴⁵ Article 25 of the Arbitration Act.

4.9 Does it allow for arbitrators to issue interim measures?

The Arbitration Act expressly provides the arbitral tribunal, upon request by one of the parties, with the power to order the other party to take appropriate measures for the protection of the rights of the requesting party.⁴⁶ The Act further states that the tribunal may require the requesting party to post security.

The only condition provided by the Act is that the measures shall be *appropriate*. Following the constant practice developed in proceedings before state courts, most Bulgarian practitioners are likely to consider as preconditions for such measures the admissibility of the claim, the existence of a *prima facie* case on the merits for the requesting party and the proportionality and necessity of the required measures.

The powers of the arbitrators are limited to the parties; by law, they have no coercive powers that could permit them to issue orders with effect to third parties. Further, the orders are not enforceable through the courts of law and the only liability for failure of the addressee to comply with the order is the liability for damages caused to the counterparty by the failure to comply. As a result, the parties rarely apply for such measures and in most cases, they prefer to apply to state courts to issue injunctive measures.

4.10 Does it regulate the arbitrators' right to admit/exclude evidence?

The only explicit provision of the Arbitration Act concerning the collecting of evidence provides for the powers of the tribunal to appoint one or more expert witness who shall prepare a report on points in an issue that require special or technical knowledge.⁴⁷ Further, the tribunal may order the parties to present the expert witness/es with the necessary information or to procure access to documents, goods or premises as far as necessary for the preparation of the report.

As evident from the above, and by contrast to many other jurisdictions, the tribunal has a proactive role in the appointment of an expert witness. Most commonly in practice, the parties request from the tribunal to permit preparation of a report by expert witness(es) on specific issues and the tribunal, upon consideration of the relevance, admissibility, and necessity of the report, appoints one or more experts with appropriate qualification to prepare the report on specific issues.

In addition, the tribunal may request from the state courts, or upon request by a party – may authorize it to make the application directly, for the collection of evidence.⁴⁸ Such a request concerns evidence that the tribunal, due to lack of coercive powers, cannot collect itself, such as collecting witness testimony of third parties who refuse to appear before the tribunal voluntarily, and alike.

As regards the other types of evidence, the tribunal has discretion to determine appropriate rules and procedure on admissibility and collecting of evidence,⁴⁹ but most often, it is guided by the rules contained in the Civil Procedure Code.⁵⁰ Thus, the arbitrators would permit testimony of a fact witness if the testimony were relevant and necessary; allow the parties and their statutory representatives (managers or directors) to give *explanations*, and not *testimony*; permit parties' employees to present evidence, etc.

Tribunals usually would allocate the burden of proof as applicable in civil litigation, which is that each party shall prove the facts upon which it relies.

The Arbitration Act is silent on whether the tribunal may draw adverse inference from the conduct of a party, and in particular, if the party has created obstacles to the collection of evidence.

⁴⁶ Article 21 of the Arbitration Act.

⁴⁷ Article 36 of the Arbitration Act.

⁴⁸ Article 37 of the Arbitration Act.

⁴⁹ Article 24 of the Arbitration Act.

⁵⁰ It is a common practice for arbitrators sitting under the auspices of the BCCI to issue procedural order where it is specified that the tribunal will apply rules similar to those contained in the CPC, save for the preclusion periods.

4.11 Does it make it mandatory to hold a hearing?

The Arbitration Act permits the parties to agree on documents-only arbitration, in which case the tribunal needs not hold a hearing.⁵¹ However, the very same provision provides that the tribunal may nevertheless summon the parties for a hearing if it determines that this is necessary for the “*correct resolving of the dispute*”. This limitation of parties’ autonomy reflects the prevailing principles of due process and equality of the parties, expressly provided for in the Act.⁵²

4.12 Does it prescribe principles governing the awarding of interest?

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

Bulgarian legal tradition considers the issues of interest as part of the substantive law; therefore, tribunals may award interest as determined in the applicable substantive law and the contract of the parties.

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

Regarding interest as compensation (*i.e.*, late payment interest), where Bulgarian law applies and if the parties have not agreed on liquidated damages, the tribunal shall award statutory interest from the date of delay at the annual rate of the basic interest rate of the Bulgarian National Bank plus 10 points.⁵³

Notably, the arbitrators listed with the Bulgarian Chamber of Commerce and Industry (BCCI) have rendered a mandatory decision⁵⁴ on the conflict between statutory interest for delay and contractually agreed liquidated damages. According to the mandatory decision, if the contract provides for liquidated damages due for delay of payment, the tribunal shall apply it both for the period of delay and for the period from submissions of the statement of claim until final payment of all awarded amounts. This decision is mandatory only for the arbitrators sitting with the BCCI. In civil litigation, it is common that the judgment grants liquidated damages for the period of delay occurring prior to the initiation of the litigation, and statutory interest for the period from the submission of the statement of claim until final payment of all awarded amounts.

4.13 Does it prescribe principles governing the allocation of arbitration costs?

The Arbitration Act is silent on the allocation of arbitration costs. Each arbitration institution applies its own rules on costs; however, all institutions in Bulgaria structure the costs on an *ad valorem* basis (*i.e.*, in proportion to the estimated value of the transaction concerned).

Under Bulgarian legal tradition, legal costs are allocated on the “costs follow the event” principle. This rule is explicitly stipulated in the Civil Procedure Code (applicable to litigations, but followed in domestic arbitration as well). However, the parties may agree on a different allocation of costs.

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

State courts do not order security for costs, as both the Civil Procedure Code and the International Commercial Arbitration Act contain no specific provision on this matter.

⁵¹ Article 30 of the Arbitration Act.

⁵² Article 22 of the Arbitration Act: “*The parties to the proceedings are equal. The arbitral tribunal shall grant each of them equal opportunity to protect its rights.*” (free translation)

⁵³ Article 86 of the Bulgarian Obligations and Contracts act in conjunction with Ordinance № 426 of the Council of Ministers of 18.12.2014 for determination of the amount of statutory interest on overdue pecuniary obligations.

⁵⁴ [Decision №2/1 March 2010.](#)

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

4.14 Liability

4.14.1 Do arbitrators benefit from immunity to civil liability?

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

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

There has been only one court decision dealing with arbitrator liability for rendering an unenforceable award. A tribunal sitting with the Bulgarian Chamber of Commerce and Industry (BCCI) rendered an award that was subsequently denied enforcement by Italian courts. In this case the claimant filed a claim for damages against the BCCI, not the arbitrators. The Supreme Court of Cassation eventually dismissed the claim, finding that the institutional court of arbitration merely administers cases and is not liable for the alleged misconduct of the arbitrators. However, the Supreme Court of Cassation mentioned in passing that arbitrators would not be liable for rendering an unenforceable award only as far as it was not a result of wilful misconduct.

As mentioned, an important exception concerning the non-arbitrable cases involving consumers was created in January 2017. As a result, it has been established that an arbitrator who renders an award in a dispute involving a consumer is personally liable and the Minister of Justice may impose a fine between BGN 500 and BGN 2,500 and for a second offence – a fine of up to BNG 5,000.⁵⁵

4.14.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

The participants in arbitration proceedings in Bulgaria fall within the scope of application of the [Bulgarian Criminal Code](#).

Arbitrators are liable for bribery.⁵⁶ The same applies to expert witnesses and for counsel of the parties.⁵⁷

Further, the expert witnesses and interpreters are explicitly held liable for disclosure of information which constitutes a secret and which has become known to them during their participation in the arbitral proceedings.⁵⁸

⁵⁵ Article 53 (new) of the Arbitration Act; the exchange rate EUR-BGN is fixed by law at EUR 1 = BGN s1.95583.

⁵⁶ Article 305 of the Criminal Code (Amended, SG No. 92/2002): “(1) *The punishments for bribery under the preceding paragraphs shall also be imposed to an arbiter or expert, appointed by a court, institution, enterprise or organisation where they perpetrate such acts in connection with the tasks entrusted to them, as well as on the person who proposes, promises, or gives such a bribe.*
(2) *Punishments for bribery under the preceding articles shall be imposed to a defence counsel of any party in judicial proceedings where he/she commits an act, as stated above, to help adjudicate to the benefit of the adversary or to the detriment of their client pending criminal or civil proceedings at stake, as well to the individual who proposes, promises or gives such bribe”.*

⁵⁷ Article 305 of the Criminal Code (Amended, SG No. 92/2002), paragraph 2.

⁵⁸ Article 284 (Amended, SG No. 26/2004): “(1) *An official who, to the detriment of the state, of an enterprise, an organisation or private person, informs another or publishes information which has been entrusted or accessible to him officially and of which he knows it constitutes an official secret, shall be punished by imprisonment for up to two years or by probation.*

(2) *The punishment for an act under paragraph 1 shall be also imposed on a person who is not an official, who works in a state institution, enterprise or public organisation, to the knowledge of who information has come, in connection with his work, constituting an official secret.*

In addition, the expert witnesses are also liable for deliberately or negligently giving an untrue expert witness statement.⁵⁹

Finally, the witnesses of fact as well as interpreters may be held liable for perjury.⁶⁰ Further, there is a liability for giving untrue written declarations in court.⁶¹ There exists an alternative theory that these two cases do not apply to arbitration proceedings as the *arbitrators* are not *court* in the sense of a *state court*, yet the majority of scholars support the applicability of the criminal liability for perjury to arbitration proceedings.

5. The award

5.1 A. Can parties waive the requirement for an award to provide reasons?

The award must be in writing and contain reasons. The arbitrators may not reason their award, provided that the parties so agree or if the award is an award by consent.⁶²

The award must state the date on which it was rendered and the place of arbitration.⁶³

The award must be signed by the arbitrators. If it has been rendered by the majority of the arbitrators, the award need be signed only by the majority of the members; however, in such case the award must state the reasons for the missing signature(s).⁶⁴

The award must be notified to the parties. It is considered notified on the date it is delivered to at least one of the parties. From this moment, the award becomes final, binding and enforceable. Further, the term for filing a request for setting aside runs from the notification of the award.

The Arbitration Act does not provide for scrutiny of awards.

Awards are not subject to registration with the state courts. Awards are registered with the secretariats of the institutions under the rules of which they have been rendered. A recent legislative change obliged the institutions to keep the files for at least 10 years and the awards, reasoning thereto and the approved settlements – for an indefinite period. Theoretically, the same requirement would apply *by analogy* to the chairperson of an *ad hoc* tribunal.

The arbitral tribunal may award the same remedies as state courts, including specific performance, liquidated damages, interest, declaratory relief and refrain orders.

(3) If the act under paragraph (1) has been committed by an expert witness, translator or interpreter with respect to information which has become known to him in connection with a task assigned thereto, and which such a person has been obliged to keep in secret, the punishment shall be deprivation liberty for up to two years or probation."

⁵⁹ Article 291: "(1) Persons who in their capacity of expert before the court or another respective body of authority orally or in writing consciously give untrue conclusion, shall be punished by imprisonment for one to five years and by deprivation of the right under Article 37 (1), sub-paragraph 7.

(2) Where the act under the preceding paragraph has been committed through negligence, the punishment shall be imprisonment for up to one year or probation. The court may also rule deprivation of the right under Article 37 (1), sub paragraph 7."

⁶⁰ Article 290 : "(1) Persons who, in their capacity of witness before the court or before another respective body of authority, orally or in writing consciously assert untrue statement or hold back the truth, shall be punished for perjury by imprisonment for up to five years.

(2) The same punishment shall also be imposed on a translator or interpreter who before the court or another respective body of authority, orally or in writing consciously renders untrue translation or interpretation."

⁶¹ Article 290a (New, SG No. 28/1982): "Persons who assert untrue statement or hold back the truth in an affidavit presented in court, shall be punished by imprisonment for up to three years."

⁶² Article 41 (1) of the Arbitration Act.

⁶³ Article 41 (1) of the Arbitration Act.

⁶⁴ Article 41 (2) of the Arbitration Act.

5.2 Can parties waive the right to seek the annulment of the award?

Under Bulgarian law, the possibility for recourse before the Supreme Court of Cassation for setting aside of awards is considered fundamental guarantee of due process and cannot be waived.

As a result, even where the parties have waived the requirement for the award to contain reasons, the control of the Supreme Court of Cassation would be limited to an extent, yet it cannot be waived completely.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

No atypical requirements apply to rendering a valid award.

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

Awards rendered under the Arbitration Act are final and binding upon notice to the parties and are not subject to appeal,⁶⁵ such awards are subject only to requests for annulment.⁶⁶

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

On notification to the parties, domestic awards are enforceable as court judgments without limitations. In order to obtain a writ of execution, the party needs to produce to the regional court (for Sofia – the Sofia City Court) a copy of the award and evidence that it was served upon the debtor. The procedure is *ex parte* and the debtor may invoke irregularities of the procedure only by appeal against the order permitting issuance of the writ.

A recent legislative change in January 2017 extended the control of the state courts. Before the reform, the only available recourse was a request to Supreme Court of Cassation (the highest court instance in Bulgaria) for setting aside the award. Now a regional court seized with a request for issuance of writ of execution on the basis of domestic award shall dismiss the request if the award is *null and void*, i.e. if it resolves non-arbitrable dispute or if one of the parties was a consumer. Thus, not only the Supreme Court of Cassation in annulment proceedings, but also all regional courts in proceedings for issuance of writs, may control the validity of the domestic awards.

Foreign awards are enforceable only after state courts grant recognition and permit their enforcement pursuant to the New York Convention. The creditor must file a claim before the Sofia City Court, the decision of which is subject to appeal before the Sofia Court of Appeal, thence to appeal before the Supreme Court of Cassation.

As regards time limits to enforce, as a matter of Bulgarian law and under penalty of statutory preclusion, the party to whom the award is favourable should commence enforcement within 5 years from notification of the award.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

The initiation of annulment proceedings does not by itself suspend the enforcement. The time limit to apply for annulment of an award is 3 (three) months from the notification of the award to the respective party.⁶⁷ In case of requests for supplement or interpretation of the award, the term runs from the date of receipt of the supplement award/interpretation. The Supreme Court may suspend enforcement only if the party has submitted a request for annulment that is *prima facie* admissible and filed within the statutory 3-month

⁶⁵ Article 38 (4) of the Arbitration Act.

⁶⁶ Article 47 of the Arbitration Act, mirroring Article 34 of the Model Law (1985).

⁶⁷ Article 48(1) of the Arbitration Act.

period from the notification of the award, and further, only if the party presents a guarantee in the form of monetary deposit covering the entire amount of the award whose annulment is sought.⁶⁸

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

An award set aside by the courts in the country of origin would be refused recognition and enforcement on the grounds of Article V1(e) of the New York Convention. In two recent court proceedings⁶⁹ for recognition and enforcement of ICC partial awards, two different judges suspended the proceedings pending annulment procedure in Austria (the seat of the arbitration). In doing so, the judges opined that, should the awards be annulled before the courts at the seat of arbitration, recognition and enforcement in Bulgaria would not be possible.

5.8 Are foreign awards readily enforceable in practice?

The Bulgarian courts have a pro-enforcement attitude and foreign awards are generally recognized and enforced in Bulgaria. There are very few instances when foreign awards were refused recognition in Bulgaria.

6. Funding Arrangements

There are no restrictions to contingency or alternative fee arrangements, and in fact these are often used in practice. Third party funding is not contradictory to the local law, but is not very common in practice yet – there have been very few reported cases involving third party funding.

However, as a result of an interpretative decision of the Supreme Court of Cassation (which is mandatory to all state courts) the courts award only costs that are actually incurred and proven prior to the close of the respective proceedings. Consequently, a court seized with a request for annulment or for recognition of foreign award would not award contingency fees as these would not be paid (and proven) prior to the close of the proceedings.

Further, courts may refuse to order the losing party to participate in the legal costs of the winning party if those costs are excessive. This may affect the third party – funder.

7. Is there likely to be any significant reform of the arbitration law in the near future?

After the reform in January 2017, there are no imminent plans for reform of the arbitration law.

⁶⁸ Article 48 (2) of the Arbitration Act.

⁶⁹ Case № 1535/2011 Sofia City Court, Commercial Division, VI-5 panel; Case № 2248/2011 Sofia city Court, Commercial Division, VI-8 panel.

BRITISH VIRGIN ISLANDS

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

TIMOTHY HAYNES, SOPHIE KASSAM AND VIVIAN KWAN
OF WALKERS GLOBAL

 WALKERS

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

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VERSION: 14 JUNE 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Key places of arbitration in the jurisdiction	Road Town (Tortola).
Civil law/common law environment?	Common law.
Confidentiality of arbitrations?	Arbitration proceedings conducted are private and confidential to the parties.
Requirement to retain (local) counsel?	There are no restrictions on foreign law firms engaging in and advising on arbitration in the BVI.
Ability to present party employee witness testimony?	An arbitral tribunal in the BVI is not bound by the rules of evidence of the Court and may receive any evidence that it considers relevant to the proceedings, including employee witness testimony.
Ability to hold meetings and/or hearings outside of the seat?	Hearings and meetings do not have to be held in the BVI.
Availability of interest as a remedy?	Section 78 of BVI Arbitration Act 2013 (the " Act ") prescribes that, unless the award made by an arbitral tribunal provides otherwise, interest is payable on money awarded by the tribunal from the date of the award and at the 5% rate specified in section 7 of the Judgments Act 1907.
Ability to claim for reasonable costs incurred for the arbitration?	An arbitral tribunal may direct that costs, including the fees and expenses of the tribunal, be paid by one party to another. The arbitral tribunal may only allow costs that are reasonable having regard to all of the circumstances (Sections 72-78 of the Act).
Restrictions regarding contingency fee arrangements and/or third-party funding?	There is no statutory provision for contingency fee arrangements or third-party funding in the BVI. As such, the BVI follows the English common law position where third-party funding of litigation is permitted, provided that it does not offend common law principles; however legal practitioners in the BVI are prevented from entering into contingency fee arrangements.
Party to the New York Convention?	The BVI is a signatory to the New York Convention.
Other key points to note	<p>The issue of whether anti-arbitration injunctions are available in the BVI was recently addressed by the Court of Appeal in <i>Sonera Holding BV v. Cukurova Holding AS</i>.¹ In limited circumstances, such injunctions are available in BVI.</p> <p>These proceedings concerned the attempts by Sonera Holding BV ("Sonera") to enforce an ICC arbitration award made in Geneva in 2011. There have been hearings in this matter up to the Privy Council (the highest appellate court for BVI) and the facts are complex. In summary, Sonera appealed against the decision of</p>

¹ BVIHCM(COM)2011/119.

the BVI Court at first instance to dismiss its application for an anti-arbitration injunction in connection with Cukurova Holding AS's ("CH") claim in a second arbitration relating to the same dispute.

The Court considered Section 3(2)(b) of the Act, which states that *'the Court shall not interfere in the arbitration of a dispute, save as expressly provided in this Act'*. The judge at first instance held that the BVI Court had no discretion to interfere with the ongoing arbitral proceedings.

Sonera appealed on the grounds that, despite the wording of the Act, the BVI Court had jurisdiction to grant injunctions under Section 24(1) of the West Indies Associated States Supreme Court (Virgin Islands) Act (the Supreme Court Act) and that it ought to have exercised that jurisdiction in this case.

The Court of Appeal agreed with *Sonera* that the Court retained a general power and jurisdiction to grant an anti-arbitral injunction. The Court held that the Act expressed a principle of non-intervention that did not remove the Court's independent jurisdiction under the Supreme Court Act, stating:

Any provision of a statute which seeks to oust the Court's jurisdiction must be expressed in clear terms. The statement of policy contained in Section 3(2)(b) of the Act does not meet this standard.

The Court then held that the jurisdiction to grant injunctions to restrain foreign arbitral proceedings should be exercised with caution and only granted in exceptional circumstances, being an infringement of a legal or equitable right of a party, or if the proceedings were vexatious, oppressive or unconscionable.

Despite this apparently high bar, the Court held that *Sonera's* appeal should be allowed and the injunction granted. It appears from the judgment that the Court's decision was influenced by its perception that the second arbitration pursued by CH was designed to avoid the results of the first arbitration award and to nullify the BVI Court's decision. The Court held that CH's actions in bringing the second arbitration were:

"specifically aimed [...] at interfering with the Court's judgment and ought not to be permitted. The Court is duty bound to step in to protect its processes and judgments."

CH's appeal to the Privy Council against the decision was withdrawn, as a result of the final award coming out before the appeal could be heard.

Consolidation of Arbitral Proceedings

Section 6 and Schedule 2 of the Act provide that the BVI Court may consolidate two or more arbitral proceedings, if the parties expressly agree to that procedure. The consolidation may be ordered if, upon the application of a party to the arbitral proceedings, it appears to the BVI Court that:

	<ul style="list-style-type: none"> a) a common question of law or fact arises in both or all of the arbitral proceedings, b) the rights to relief claimed in those arbitral proceedings are in respect, or arise out, of the same transaction or series of transactions, or c) for any other reason it is desirable to make an order.
WJP Civil Justice score (2018)	φ

ARBITRATION PRACTITIONER SUMMARY

Date of arbitration law?	The Act came into force on 1 October 2014.
UNCITRAL Model Law? If so, any key changes thereto?	The Act incorporates the UNCITRAL Model Law on International Commercial Arbitration (the " Model Law "), with minor additions and modifications.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	The BVI has a dedicated Commercial Court which was established in 2009 as a division of the Eastern Caribbean Supreme Court. The Commercial Court currently has two judges sitting full time and is experienced in dealing with arbitration-related matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	<p>Unless otherwise agreed by the parties, an arbitral tribunal may at any time prior to the issuance of the award by which the dispute is finally decided, grant temporary measures ordering a party to:</p> <ol style="list-style-type: none"> a) Maintain or restore the status quo pending determination of the dispute; b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or d) Preserve evidence that may be relevant and material to the resolution of the dispute. <p>Article 43 of the Act also prescribes that, on the application of a party, the BVI Court may, in relation to any arbitral proceedings which have been or are to be commenced in or outside the BVI, grant an interim measure. For further details, please see paragraph 4.4.</p>
Courts' attitude towards the competence-competence principle?	<p>Article 32 of the Act incorporates Article 16 of the Model Law which provides that the arbitral tribunal may rule on its own jurisdiction.</p> <p>If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may apply to the BVI Court to determine the question of jurisdiction within thirty days after having received notice of the tribunal's ruling. The BVI Court's decision on jurisdiction is final.</p>
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	There is no general right of challenge or appeal to the BVI Court on the ground of errors of fact or law on the face of the award, although the parties are entitled to reserve such a right by including an express provision within their arbitration agreement permitting a challenge on the grounds of serious irregularity or on a question of law arising out of an award made in the arbitral proceedings.

	<p>Article 79 of the Act incorporates Article 34 of the Model Law, which provides that an arbitral award may only be set aside by the BVI Court if a party provides proof that:</p> <ul style="list-style-type: none"> a) a party to the arbitration agreement was under some incapacity or the agreement is not valid under the law to which the parties have subjected it; or b) 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 c) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, 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 d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with the Act; or <p>The BVI Court finds that:</p> <ul style="list-style-type: none"> a) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of the BVI; or b) the award is in conflict with the public policy of the BVI.
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>Pursuant to section 81(1) of the Act, an award, whether made in or outside the BVI in arbitral proceedings by an arbitral tribunal is, by leave of the BVI Court, enforceable in the same manner as a judgment or order of the BVI Court that has the same effect.</p> <p>However, it is also expressly provided under section 83(1)(f)(ii) of the Act that the BVI Court may refuse to enforce an arbitral award if the award has been set aside or suspended by a competent authority of the foreign country where the award was made.</p>
<p>Other key points to note?</p>	<p>ϕ</p>

JURISDICTION DETAILED ANALYSIS

1. Arbitration Agreement

1.1 Is the arbitration law based on the Model Law?

Yes. The Act came into force in the BVI on 1 October 2014. The Act implements the Model Law in the BVI, meaning that the framework is in line with international standards and is recognised globally.

In addition, the BVI Arbitration Rules (the "**Rules**") are based on the 2010 UNCITRAL Arbitration Rules.

1.2 If yes, what key modifications if any have been made to it?

While the Act derived from and is almost a wholesale incorporation of Model Law, the key modifications are in the definitions and rules of interpretation.²

1.2.1 Umpire

The Model Law is silent on the appointment of an umpire. Thus, the Act is specifically crafted to include the procedures of appointment of an umpire.³

The Act allows the parties to freely determine the number of arbitrators, whether it is even, uneven or with a sole arbitrator only. In the event where there is an even number of arbitrators, an umpire may be appointed at any time upon the appointment of the arbitrators, unless the parties agree otherwise.⁴

In addition, the parties are free to agree on what functions an umpire may serve.⁵ Only if the parties do not decide on the specific functions will the functions prescribed under section 29 of the Act apply.

1.3 When was the arbitration law last revised?

The Act has not been revised since coming into force on 1 October 2014.

2. The Arbitration Agreement

2.1 How do the Courts in the jurisdiction determine the law governing the arbitration agreement?

Generally, subject to the mandatory rules of the law of the seat of the arbitration, the law chosen by the parties governs arbitral proceedings.⁶

In the absence of an express or implied choice of law by the parties, the governing law is determined by the common law conflict of laws rules.⁷ Thus, the governing law is the law which the contract has its closest and most real connection, and is usually the seat of arbitration.⁸

² The Act, Section 2; According to s. 2(1), this whole section is the substitution of article 2 of the Model Law.

³ The Act, Section 2(1) and (2); "arbitral tribunal" means a sole arbitrator or a panel of arbitrators, and includes an umpire in specific to cater for the customers and professions in BVI.

⁴ The Act, Section 28.

⁵ The Act, Section 29.

⁶ Dicey & Morris, *The Conflict of Laws*, Volume 1, at page 592.

⁷ The Act, Section 62 (incorporating Article 28 of the Model Law); Dicey & Morris, *op. cit.*, para. 16-12 *et seq.*

⁸ Dicey & Morris, *op. cit.*, n. 6, at page 592.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Section 32 of the Act acknowledges that the arbitration clause is a separate contract from the rest of the agreement. This section is a direct reproduction of Article 16 of the Model Law, which allows the arbitral tribunal to treat an arbitration clause as an agreement independent of other terms of the contract.

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

'Arbitration agreement' is defined as an agreement by the parties to submit to arbitration all or certain disputes that have arisen or that may arise between them in respect of a defined legal relationship, whether contractual or not.⁹ An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement, but must be in writing.¹⁰

The interpretation of 'in writing' is given a broad and purposive definition that aims at capturing diverse expressions of intention of contracting parties. For example, it is considered to be 'in writing' if its content is recorded in any form, by conduct, or by any other means.

The Act contains various mandatory provisions that will principally apply to arbitration agreements entered into before 1 October 2014 and a number of opt-in provisions that parties may choose to include in their arbitration agreement by reference.¹¹

2.4 To what extent if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

Except where third parties agree to be bound, an arbitration agreement (and any award) will generally only affect the parties to it. There are English authorities to the effect that an award may, in certain circumstances, be relied on in a claim against a third party for an indemnity and these authorities are likely to be persuasive in the BVI Courts.

2.5 Are there restrictions to arbitrability?

The statute does not expressly define those matters that are arbitrable, and the common law will therefore govern whether a dispute is capable of being resolved by arbitration or not, which depends largely on the intention of the parties. Generally speaking, the BVI Court is likely to follow the English principles when construing the intention of the parties.

In Fiona Trust Corp v Privalov & Ors, the Court adopted a liberal interpretation of the arbitration clauses in question.¹² It was held that, absent express words to the contrary, parties are to be taken to have intended that all their disputes should be arbitrated. This forceful approach was followed in a BVI case, Victor International Corporation and Victor (BVI) Limited v Spanish Town Development Company Limited & Ors¹³. Thus, the Court is likely to uphold the arbitration agreement where possible, to give effect to the intentions of the parties that their differences should be resolved by the arbitral process and not the Courts.

Unfair prejudice claims arising from shareholder disputes are also arbitrable provided that the scope of the clause is sufficiently clear.¹⁴ However, in cases where the parties agree that the Courts of another country has jurisdiction, the Court may not be as willing to grant remedies.¹⁵

⁹ The Act, Section 17.

¹⁰ The Act, Section 17(1); Essentially Article 7 of the Model Law.

¹¹ The Act, Part XI.

¹² [2007] EWCA Civ 20.

¹³ BVI HCV 2007/0293.

¹⁴ *Ennio Zanotti v Interlog Finance Corporation*.

¹⁵ *Re Nasbulk Limited*.

3. Intervention of Domestic Courts

The Act imposes clear limits on the role of the Court in disputes between parties to a valid arbitration agreement. A party that contends that Court proceedings have been commenced in breach of such agreement must apply to have the dispute referred to arbitration not later than when submitting his first statement on the substance of the dispute.¹⁶

3.1 Will the Courts stay litigation if there is a valid arbitration agreement covering the dispute?

If the Court is satisfied that there is a valid arbitration agreement, the action must be stayed unless the agreement is then determined to be null and void, inoperative or incapable of being performed.¹⁷

3.1.1 If the place of the arbitration is outside of the jurisdiction?

Pursuant to section 18(1) of the Act, the Court has a power to stay the litigation even if the place of arbitration is outside of the jurisdiction.

3.2 How do Courts treat injunctions by arbitrators enjoining such Courts to stay litigation proceedings?

Generally, section 3(2)(b) of the Act, states that *'the Court shall not interfere in the arbitration of a dispute, save as expressly provided in this Act'*.

However, while the Act expresses a principle of non-intervention, it does not remove the Court's independent jurisdiction under other acts to intervene.

3.3 On what ground(s) can the Courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)

When determining whether they must grant a mandatory stay of a winding up petition in favour of arbitration proceedings, the Courts must consider whether there exists a *bona fide* dispute on substantial grounds.

4. The Conduct of the Proceedings

Conduct of arbitral proceedings is governed by Part VII of the Act. A significant portion of Part VII is a duplication of the Model Law, except section 44 which expressly substitutes Article 18 regarding equal treatment of parties.

The key difference between section 44 and Article 18 is that more requirements are inserted to emphasise the importance of equal treatment. For instance, the arbitral tribunal is explicitly required to be independent, to act fairly and independently between parties, and to provide fair means for resolving disputes.

4.1 Can parties retain outside counsel or be self-represented?

Yes. There are no restrictions on foreign law firms engaging in and advising on arbitration in the BVI.

4.2 How strictly do Courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the Court to accept a challenge or do Courts require that the undisclosed circumstances justify this outcome?

Section 44(3)(b) requires the tribunal to be independent, to act fairly and impartially as between parties, giving them a reasonable opportunity to present their cases and deal with the cases of their opponents and to use procedures that are appropriate to the particular case.

¹⁶ The Act, Section 18(1).

¹⁷ The Act, Section 18(4).

4.3 On what grounds do Courts intervene to assist in the constitution of the arbitral tribunal (in case of ad hoc arbitration)?

According to section 22,¹⁸ the parties are free to agree on a procedure of appointing the arbitrator(s), subject to paragraphs 4 and 5 of Article 11 of the Model Law.¹⁹ If the Arbitration Rules apply, pursuant to of the Rules, if the parties fail to agree on the number of arbitrators within 30 days after the commencement of the arbitral proceeding, three arbitrators shall be appointed.

The Court is identified as the default appointing body in section 22(1) of the Act, in which it is provided that the Court may appoint an arbitrator upon the request of a party in the following circumstances:

- *Multiple Arbitrators*
 - if a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party; or
 - if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment; or
- *Sole Arbitrator*
 - in arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator; or
- *Appointment Procedure Agreed by the Parties*
 - a party fails to act as required under such procedure, or
 - the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or
 - a third party, including an institution, fails to perform any function entrusted to it under such procedure.

4.4 Do Courts have the power to issue interim measures in connection with arbitrations?

The Court's power to issue interim measures in connection with arbitrations is provided for in Part VI of the Act. Section 43(2) of the Act gives the BVI Court power to grant interim measures.

The Court is empowered to grant interim measures in support of any arbitral proceedings that have been or are to be commenced in or outside the BVI.²⁰ This provides a statutory basis for free-standing injunctive relief. In relation to arbitral proceedings outside the BVI, interim relief can only be granted where the proceedings are capable of giving rise to an award that may be enforced in the BVI and the nature of the interim measure sought is of a type or description the BVI Court is able to grant in relation to arbitration proceedings. There is no appeal from the Court's grant or refusal of an interim measure under the Act.

In the leading authority on free standing interim relief in BVI, Court exercised a power to grant free-standing injunctions to safeguard assets in support of foreign proceedings.²¹ Yet, the Court must be satisfied that such relief is necessary in the circumstances; and that the relief sought in the main proceedings before the foreign Court will lead to a judgment which will be enforceable in the BVI.

¹⁸ Essentially Article 11 of the Model Law

¹⁹ For instance, no person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

²⁰ The Act, Section 43(2) (Incorporating Article 17] of the Model Law)

²¹ *Black Swan Investment ISA v Harvest View Limited* BVIHC (Com) 2009/399

4.4.1 If so, are they willing to consider *ex parte* requests?

Yes. Under section 68(1) of the Act, the arbitral tribunal may award any remedy or relief that could have been ordered by the Court if the dispute had been the subject of civil proceedings in the Court. Therefore, the ordinary rules for application for injunctive measures apply. The Court may consider *ex parte* requests in cases of genuine urgency or secrecy.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

Arbitration in the BVI is confidential. Although the Act is silent on the point, there is an implied duty of confidentiality in all arbitration agreements as a matter of common law.

4.5.2 Does it regulate the length of arbitration proceedings?

There is no restriction on the length of arbitration proceedings.

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

Section 46 allows the parties to freely agree on the place of arbitration. However, if no consensus can be reached, the arbitral tribunal may then determine the place of arbitration by having regard to the circumstances of the case.

4.5.4 Does it allow for arbitrators to issue interim measures?

Under the Act, articles 17 and 17A to 17G of the Model Law are brought into effect. The parties are able to agree that the tribunal **should not have** the power to grant interim measures. However, in the absence of such agreement, the tribunal has wide powers to:

- preserve the status quo;
- prevent harm or prejudice to the arbitral process itself;
- preserve assets and evidence; and
- make preliminary orders (which are binding on the parties but not subject to enforcement by the Court).

The parties may make an application to Court for interim relief if they can satisfy the tribunal that:

- costs are not an adequate remedy;
- the harm to the applicant in the absence of the remedy substantially outweighs the harm to the respondent if the remedy is granted; and
- there is a reasonable possibility he will succeed on the merits.

A party requesting a preliminary order or interim measure will be liable for any costs or damage caused to the other party in the event the tribunal ultimately determines that the order should not have been granted.

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?

The arbitral tribunal is not bound by the rules of evidence and may receive any evidence that it considers relevant to the arbitral proceedings. However, it must give the weight that it considers appropriate to the evidence adduced.

The arbitral tribunal may direct evidence to be given by affidavit, it may direct the attendance before the arbitral tribunal of witnesses in order to give evidence or to produce documents or other evidence and it may administer oaths to, or take the affirmations of, witnesses and parties and examine witnesses and parties on oath or affirmation.

4.5.6 Does it make it mandatory to hold a hearing?

Under section 50 of the Act, it is up to the parties to decide whether or not to hold a hearing. Unless the parties have agreed not to hold a hearing, the arbitral tribunal must hold such hearing at the appropriate stage of the proceedings.

In addition, the arbitral tribunal has the power to decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on basis of document and other materials.

4.5.7 Does it prescribe principles governing the awarding of interest?

Section 77 of the Act governs the award of interest specifically. It is provided that unless otherwise agreed by the parties, an arbitral tribunal may, in the arbitral proceedings before it, award simple or compound interest from the dates, at the rates, and with such rates that the tribunal considers appropriate.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

The parties may agree costs in the terms of reference. Alternatively, provisions relating to the question of costs are generally contained in the relevant rules under which the arbitration is being conducted. Under the Act, costs are dealt with in Part VIII, sections 72 to 78.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

Part XIII of the Act gives civil immunity to arbitrators. For anything done in good faith in the exercise of their powers and performance of their functions, arbitrators will have civil immunity.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding

Unless the criminal acts have taken place in BVI, the BVI Courts would not ordinarily have criminal jurisdiction over the parties to the arbitral proceedings.

5. The Award

5.1 Can parties waive the requirement for an award to provide reasons?

Article 34 of the Rules provides that the parties may expressly agree that no reasons need to be given; otherwise the arbitral tribunal shall state its reasons.

5.2 Can parties waive the right to seek the annulment of the award?

The parties can agree to exclude the right to appeal on a point of law. The right to challenge for lack of jurisdiction and serious irregularity are non-excludable.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

In arbitral proceedings with more than one arbitrator, the award may be decided by a majority unless otherwise agreed by the parties. The award must be in writing and be signed by the arbitrator or arbitrators.

Unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms, the award must state the reasons upon which it is based and shall state its date and the place of arbitration. A copy of the award must be delivered to each party.

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

5.4.1 If yes, what are the grounds for appeal?

There is no general right of challenge or appeal an award to the Court on the ground of errors of fact or law on the face of the award, although the parties are entitled to reserve such a right by including an express provision within their arbitration agreement permitting a challenge on the grounds of serious irregularity or on a question of law arising out of an award made in the arbitral proceedings.

In the absence of such a provision, an arbitral award may be set aside by the Court only if it is proved by the Applicant that:

- (i) a party to the arbitration agreement was under some incapacity, or the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the BVI; or
- (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on 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 governing law from which the parties cannot derogate, or, failing such agreement, was not in accordance with the governing law; or

if the Court finds that:

- (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of the BVI; or
- (ii) the award is in conflict with the public policy of the BVI. The Court may set aside an award made by an arbitral tribunal, which includes an arbitrator whose appointment is the subject of a successful challenge which the Court upholds.

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

5.5.1 Recognition and Enforcement of Awards

5.5.1.1 A New York Convention Award (Foreign)

A New York Convention award can be enforced in the BVI by instituting an action in the Court or by applying to seek leave of the Court.

5.5.1.2 Instituting an Action in the Court

To institute a claim in the BVI, a party must start proceedings under the Eastern Caribbean Civil Procedure Rules 2000 ("**CPR**") Part 8 with a claim form, statement of claim and affidavit (exhibiting the arbitral award).

If the party against whom enforcement is sought is a foreign defendant, this will involve applying for leave to serve out of the jurisdiction. Therefore, in most cases it is much more straightforward to use the second available method and apply to seek leave from the Court to enforce the award.

An application for leave is made under CPR 43.10 (which relates to enforcement of awards made by outside bodies). This is similar to an application for registration of a Court judgment under the Reciprocal Enforcement of Judgments Act 1922. Once the award is registered, then it can be enforced as if it was a BVI Court judgment.

5.5.1.3 By applying to seek leave of the Court

The application for leave is made by way of application notice, supported by affidavit evidence. The application can be made without notice to the other party to the arbitral award. It is not a requirement to appoint counsel to enforce judgments in the BVI, but the procedures are complex so it is advisable. The application is made to the High Court. Fees can include Court fees of:

- US\$300 for an inter partes application.
- US\$500 for an ex parte application.
- Filing fee of US\$100 for an affidavit (plus US\$25 for an exhibit).

Under CPR 43.10(5) the applicant must:

- Exhibit the award (or a copy of it) to the affidavit.
- Give an address for service for the person against whom the applicant seeks to enforce the award.
- If the award is for the payment of money, certify the amount remaining due to the applicant.

Further guidance is given on the necessary affidavit and exhibits (section 85 of the Act). The applicant must include:

- The duly authenticated original award or a duly certified copy of the original award.
- The original arbitration agreement or a duly certified copy of the arbitration agreement.
- If necessary, a translation of the award into English certified by an official or sworn translator or by a diplomatic or consular agent. Applications for leave to enforce can take three to four months, depending on Court availability.

Applications made by instituting an action will take much longer if foreign defendants are involved and the proceedings must be served out of the jurisdiction.

If leave to enforce is granted, the order must be served on the other party who can then apply to appeal and set aside that decision.

5.5.1.4 Non-New York Convention Awards

These can only be enforced by applying to seek leave from the Court. This is done in the same way as for New York Convention awards. The only difference is that the BVI Court has slightly broader powers to refuse leave.

5.5.2 Time-limits

The BVI Limitation Ordinance 1961 applies to arbitrations in the same way as it applies to Court actions. So, for example, the Limitation Ordinance imposes a six-year limitation period, commencing on the date on which the cause of action accrued, on actions founded on a contract.

5.5.3 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

Stay of enforcement is not automatic. Application for staying the enforcement has to be made to the Court.

In context of foreign arbitral awards, the Court before which enforcement of the award is sought can, if it thinks fit, adjourn proceedings for the enforcement of the award and, on the application of the party seeking to enforce the award, order the person against whom the enforcement is invoked to give security.²²

5.5.4 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Section 83 sets out the grounds for the Court to refuse enforcement of an award. For instance, the Court may refuse the award if:

- a party to the arbitration agreement was, under the law applicable to that party, under some incapacity;
- the arbitration agreement was not valid under the law that the parties subjected it;
- the person was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings;
- the award deals with a difference not contemplated by, or not falling within, the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submissions or arbitration;
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties;
- the award has not yet become binding on the parties;
- for any other reason the Court considers it just to do so.²³

5.5.5 Are foreign awards readily enforceable in practice?

There is no distinction between domestic and foreign arbitral awards. Any award, whether New York Convention or otherwise, can *prima facie* be enforced, subject to the considerations and the BVI Court's discretion. Yet, there is a distinction between awards made under the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) and non-New York convention awards.

As a starting point, arbitral awards are more broadly enforceable than foreign Court judgments that (generally) must be final and conclusive money judgments.

Awards containing injunctions or prohibiting a party from carrying out certain acts are enforceable. However, the parties must have agreed that the arbitral tribunal can make such orders. If there was no such agreement, then the party against whom the injunction or order was made will have a defence to the enforcement application in the BVI.

The party with the benefit of the award must apply to the BVI Court for leave to enforce it under Part X of the Act before taking any enforcement action. Once leave has been granted, the award has the same effect as a judgment or order of the BVI Court.

²² The Act, Section 86(5).

²³ The Act, Section 83(2).

6. Funding Arrangements: Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

There is no statutory provision for legal aid within the BVI for civil matters. Most litigation fees are structured on a time spent basis and conditional and contingency fee arrangements are infrequent.

Third-party funding of litigation is permitted provided that it does not offend common law principles against champerty and maintenance. Insurance can cover the cost of litigation.

7. Is there likely to be any significant reform of the arbitration law in the near future?

The Act is a relatively new statute and no changes are currently under consideration.

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CANADA

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

CRAIG R. CHIASSON AND ERIN PETERS
OF BORDEN LADNER GERVAIS LLP



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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS

1. Law ●
 - a. Framework ●
 - b. Adherence to international treaties ●
 - c. Limited court intervention ●
 - d. Arbitrator immunity from civil liability ●
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3. Legal expertise ●
4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

VERSION: 25 MAY 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Canada is consistently recognised as an arbitration-friendly jurisdiction, and for good reason. First, the legislative framework governing international commercial arbitration and the enforcement of foreign arbitral awards closely mirrors the Model Law and New York Convention, and severely limits the ability of courts to intervene with decisions made by arbitrators. Secondly, Canadian courts are supportive of arbitration, and continue to uphold the integrity of the arbitral process by affording broad deference to tribunals on issues of jurisdiction, findings of fact and law, and with respect to relief granted in partial and final arbitral awards. The approach of the Canadian judiciary to complex issues in international commercial arbitration should instil confidence in practitioners that Canada will remain a leader in the field of international commercial arbitration policy and jurisprudence.

Key places of arbitration in the jurisdiction	From West to East: Vancouver, BC; Calgary, AB; Toronto, ON; Ottawa, ON; Montreal, QC.
Civil law / Common law environment?	Common law, except the Province of Quebec which is a civil law jurisdiction.
Confidentiality of arbitrations?	Confidentiality is not addressed in the legislation, other than in Quebec which does provide for confidentiality. On 17 May 2018, British Columbia enacted amendments to its international commercial arbitration legislation which explicitly provide for privacy and confidentiality. In the other Canadian jurisdictions, arbitral confidentiality is presumed through the “implied undertaking” rule from court practice. Moreover, confidentiality obligations flow from the arbitration rules adopted by the parties or express confidentiality agreements entered into by the parties. That said, the open-court principle applied in Canada means that the ability to maintain confidentiality if a party resorts to court to challenge an award or otherwise seek assistance is limited; the principle requires that court proceedings presumptively be open and accessible to the public and to the media. Parties may apply to maintain confidentiality but the jurisprudence limits the circumstances in which a court will grant such protection.
Requirement to retain (local) counsel?	No.
Ability to present party employee witness testimony?	There is no bar to evidence from parties or party officers in the legislation.
Ability to hold meetings and/or hearings outside of the seat?	Yes.
Availability of interest as a remedy?	Yes, generally.
Ability to claim for reasonable costs incurred for the arbitration?	Yes, which generally includes: <ul style="list-style-type: none"> • The fees and expenses of the arbitration includes those of the arbitrator and any administering institution; • The parties’ reasonable legal fees and expenses, including witnesses and experts; and

	<ul style="list-style-type: none"> • More broadly, any other expenses incurred in connection with the proceedings.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Contingency fee arrangements have long been accepted in Canada. Third-party funding is widely used but the jurisprudence on its acceptability is limited.
Party to the New York Convention?	<p>Yes, the New York Convention entered into force in Canada on 10 August 1986.</p> <p>Canada declared that it would apply the convention only to differences arising out of legal relationships, whether contractual or not, which are considered commercial under the laws of Canada, except in the case of the province of Quebec, where the law did not provide for such limitation.</p>
Other key points to note	φ
WJP Civil Justice score (2018)	0.81

ARBITRATION PRACTITIONER SUMMARY

Canada is a federal state with ten provinces and three territories. Legislative power for commercial arbitration falls primarily within provincial and territorial jurisdictions. Canada and its provinces and territories have adopted the *UNCITRAL Model Law* ("Model Law")¹ and the New York Convention,² although with slight variations in the manner in which they were adopted.³

A number of provinces and territories, namely, British Columbia, Yukon Territory and Saskatchewan, have adopted the New York Convention under separate legislation specifically addressing the enforcement of foreign arbitral awards.⁴ Those provinces and territories have also adopted the Model Law in their *International Commercial Arbitration Acts* ("ICAA").⁵ Quebec, the sole civil law jurisdiction in Canada, incorporated the New York Convention and key aspects of the Model Law through amendments to the Civil Code of Quebec and the Code of Civil Procedure. The remaining provinces and territories have adopted the Model Law and the New York Convention into their *ICAAs*.⁶

Date of arbitration law?	International arbitration legislation was first introduced by the provinces in 1985/86. Domestic arbitration legislation goes further back in time. The dates of the current legislation across the provinces vary with British Columbia having most recently amended its international arbitration legislation in May 2018 to adopt the work of the Uniform Law Conference of Canada, which Ontario did in March 2017. Other provinces are considering similar amendments.
UNCITRAL Model Law? If so, any key changes thereto?	Yes. Canada and its provinces were among the first jurisdictions in the world to enact legislation expressly implementing the Model Law. It is incorporated into provincial legislation governing arbitration, in some cases in modified form.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes.

¹ [UNCITRAL Model Law on International Commercial Arbitration](#), UN Doc. A/40/17 (1985) Annex 1.

² [Convention on the Recognition and Enforcement of Foreign Arbitral Awards](#), June 10, 1958, 330 UNTS 3, 21 UST 2517, TIA No. 6997. The Federal Government of Canada has also enacted federal legislation pertaining to arbitration, the [Commercial Arbitration Act](#), RSC 1985, c 17 (2nd Supp) [**Federal CAA**], but it does not deal with international commercial arbitration.

³ The Uniform Law Conference of Canada has approved its working group's final report, which included a proposed new uniform International Commercial Arbitration Act for implementation throughout Canada. The proposed Act takes into account the 2006 revisions to the Model Law and aims to clarify inconsistencies in current legislation.

⁴ [Foreign Arbitral Awards Act](#), RSBC 1996, c 154; [Foreign Arbitral Awards Act](#), RSY 2002, c 93; [Enforcement of Foreign Arbitral Awards Act](#), SS 1996, c E-9.12; [United Nations Foreign Arbitral Awards Convention Act](#), RSC 1985, c 16 (2nd Supp) [**UNFAACA**].

⁵ [International Commercial Arbitration Act](#), RSBC 1996, c 233; [International Commercial Arbitration Act](#), RSA 2000, c 1-5; [International Commercial Arbitration Act](#), RSY 2002, c 123; [International Commercial Arbitration Act](#), SS 1988-198, c 1-10.2.

⁶ [International Commercial Arbitration Act](#), RSA 2000, c 1-5; [International Commercial Arbitration Act](#), RSNL 1990, c 1-15; [International Commercial Arbitration Act](#), RSPEI 1988, c 1-5; [International Commercial Arbitration Act](#), RSNS 1989, c 234; [International Commercial Arbitration Act, 2017](#), SO 2017, c 2, Schedule 5, s 15; [International Commercial Arbitration Act](#), RSNB 2011, c 176; [International Commercial Arbitration Act](#), RSNWT (Nu) 1988, c 1-6; [International Commercial Arbitration Act](#), CCSM, c C151.

Courts' attitude towards the competence-competence principle?	Highly respected.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	None.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	Courts will approach this issue on a case-by-case basis. Courts in the past have recognised the permissive nature of this issue under the New York Convention and, in certain circumstances, may enforce an award that has been set aside at the seat. However, Canadian courts will certainly consider the status of an award at the seat, including whether a challenge to it has not yet been determined.
Other key points to note?	∅

JURISDICTION DETAILED ANALYSIS

1. The Legal Framework of the Jurisdiction

Arbitration legislation exists in each of the provinces and territories of Canada, and at the federal level. British Columbia, Alberta, Manitoba, Saskatchewan, Ontario, Nova Scotia, New Brunswick, Newfoundland and Labrador, Prince Edward Island, the Yukon, the Northwest Territories and Nunavut have separate statutes for domestic arbitration (*Arbitration Act* or *Commercial Arbitration Act*) and international arbitration (*International Commercial Arbitration Act*). The *New York Convention* and *UNCITRAL Model Law* are incorporated into international legislation either wholesale or in modified forms as set out in the respective statutes. Domestic provincial legislation is also generally based on the Model Law. Federal legislation is also in place governing domestic arbitration but with limited scope (Federal Commercial Arbitration Act), also based on the Model Law. Federal legislation governs arbitrations involving a department of the federal government, a Crown corporation, and issues of maritime or admiralty law. In Quebec, Canada's only civil law jurisdiction, arbitration is governed by the Civil Code of Quebec (relevant sections in Books 5 and 10) and the Quebec Code of Civil Procedure (Book 7).

UNCITRAL adopted the Model Law in 1985, and Canada and its provinces were the first jurisdictions in the world to enact legislation expressly implementing the Model Law. At the time, there was broad acceptance of international commercial arbitration as a valid alternative to the judicial process and a high-level of predictability for parties to international arbitrations in Canada and those seeking to enforce international awards in Canada.

In late 2011, a working group of the Uniform Law Conference of Canada (the ULCC) commenced a review of the existing model International Commercial Arbitration Act, with a view to developing reform recommendations for a new model statute based on the 2006 Model Law amendments. The review process also sought to reflect changes to international arbitration law and practice in the past three decades and to enhance the uniformity and predictability with which international commercial arbitral awards may be enforced in Canada. In 2014, the ULCC approved the working group's final report, which included a proposed new uniform *International Commercial Arbitration Act*.

Among other things, the new statute establishes a 10-year limitation period to commence proceedings seeking recognition and enforcement in Canada of foreign international commercial arbitral awards. The new model statute would become law as it is enacted by the various Canadian federal, provincial and territorial legislatures. A number of provincial governments across Canada have begun consultations with a view, hopefully, to implementing legislation in the near future. In March 2017, the Province of Ontario was adopted a new International Commercial Arbitration Act, adopting most of the ULCC's recommendations in the proposed uniform act as did British Columbia in May 2018.

Widespread support for international commercial arbitration in Canada has also led to the establishment of a number of arbitration groups and institutions, including the Western Canada Commercial Arbitration Society, the Toronto Commercial Arbitration Society, the Vancouver Centre for Dispute Resolution and Vancouver Arbitration Chambers, Arbitration Place, ICC Canada's Arbitration Committee, the British Columbia International Commercial Arbitration Centre ("BCICAC"), the ADR Institute of Canada ("ADRIC"), the International Centre for Dispute Resolution Canada ("ICDR Canada") and the Canadian Commercial Arbitration Centre ("CCAC"). These organisations provide parties with a variety of useful resources and services, including sets of procedural rules, contact information for qualified arbitrators and meeting facilities.

ADRIC (1 January 2014) and ICDR Canada (1 January 2015) have recently introduced arbitration rules in line with international best practices, with the ICDR Canada opening its doors at the same time.

2. The Arbitration Agreement

2.1 Governing law

Arbitral tribunals apply the law chosen by the parties. If the parties have not expressly selected an applicable law, then the proper law of the contract must be determined in light of their agreement, considered as a whole, and any surrounding circumstances. In general, the law with which the agreement appears to have the closest and most substantial connection ought to prevail.

In Canada, courts will generally respect parties' express choice of law as to what law should govern the enforceability of an arbitration agreement where there is a question of whether the scope of matters in dispute are arbitrable.

In *Schreter v Gasmac Inc*, the parties' arbitration agreement seated the arbitration in Atlanta in the state of Georgia in the United States. An award was issued and confirmed at the seat. However, Gasmac, the losing party, failed to make the required payments to Schreter, which led to Schreter applying to enforce the award in an Ontario court. The Ontario court looked at the question of arbitrability and respected the parties' agreement – by seating their arbitration in Atlanta the law of the state of Georgia applied:

Because it is Georgia law which governs, the respondent must provide to this court evidence of Georgia law if it wishes to demonstrate that the award dealt with matters not properly within the submission.⁷

2.2 Formal requirements for an enforceable agreement

In Canada, the arbitration agreement can be included in the main contract or set out in a separate document.

Formal requirements for arbitration agreements are found in provincial legislation, which differ slightly from province to province. In most provinces, the agreement must be in writing but in Ontario this is not required.⁸ Like in the Model Law, it is possible for an arbitration agreement to be found in multiple written documents or through electronic communications. In Quebec and British Columbia, a written arbitration agreement may also be found if one party alleges such an agreement in writing and the alleged counterparty does not object.

Canadian courts take a broad approach to the enforceability of arbitration agreements and are deferential to parties' agreements to arbitrate. Unless it is clear that the arbitration agreement is void, inoperative or incapable of being performed, Canadian courts are likely to defer to the arbitrator the initial task of determining the existence and scope of the arbitration agreement, in accordance with the *competence-competence* principle.⁹

2.3 Ability to bind third parties

Generally, neither an arbitral tribunal nor a court can compel a third party who is not subject to the arbitration agreement to join in the arbitral proceedings. That said, Canadian courts have recognised a number of international principles with regard to the binding of non-signatories, including:

- where the contractual agreement between a party and the non-party incorporates the arbitration clause by reference;
- where there is an agency relationship between a party and a non-party;
- where the corporate veil is pierced as a result of a sufficiently close relationship between a parent and subsidiary to hold one corporation legally accountable for the other; or

⁷ *Schreter v Gasmac Inc* (1992), 7 OR (3d) 608 at 623 (Ont Ct J (Gen Div)) [*Schreter*].

⁸ *Arbitration Act, 1991*, SO 1991, c 17, s 5(3).

⁹ *Dell Computer Corp v Union des Consommateurs*, [2007] 2 SCR 801 [*Dell*].

- by estoppel.

The overriding principle of consent to arbitrate is often considered by courts, including findings of implied consent of a non-signatory to be bound to an arbitration agreement.

2.4 Restrictions to arbitrability

In Canada, arbitrability is generally considered a requirement for jurisdiction as opposed to a condition of validity of the arbitration agreement (with the possible exception of arbitration agreements in the consumer protection context where a lack of arbitrability of such disputes may lead to invalidity).

In considering arbitrability, Canadian courts tend to respect the *competence-competence* principle, leaving the initial determination to the arbitrator.¹⁰ For example, in *Dell Computer Corp v Union des Consummateurs*,¹¹ the Supreme Court of Canada (“SCC”) held, consistently with Articles 8 and 16 of the Model Law, that a challenge to an arbitrator’s jurisdiction or the arbitrability of a dispute should first be addressed by the arbitrator before a court could consider the issue. In Canada, if a challenge to the arbitrator’s jurisdiction or the scope of the arbitration agreement is brought to court, the court “*is required to limit itself to a prima facie analysis and to refer the parties to arbitration unless the arbitration agreement is manifestly tainted by a defect rendering it invalid or inapplicable*”.¹²

In *Gulf Canada Resources v Arochem International*, a leading international arbitration-related case in Canada, the Court of Appeal for British Columbia addressed the *competence-competence* principle:

Considering s. 8(1) in relation to the provisions of s. 16 [of the Model Law] and the jurisdiction conferred on the arbitral tribunal, in my opinion, *it is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement* because those are matters within the jurisdiction of the arbitral tribunal. *Only where it is clear that the dispute is outside the terms of the arbitration agreement or that a party is not a party to the arbitration agreement or that the application is out of time should the court reach any final determination in respect of such matters on an application for a stay of proceedings.*¹³ [Emphasis added.]

Courts in Canada will also be wary of entertaining any challenge to an arbitrator’s jurisdiction where it appears merely to be a delaying tactic on the basis of it being a potential abuse of process that would “*unduly impair the conduct of the arbitration proceeding*.”¹⁴

In *Dell*, the SCC was clear that the *competence-competence* principle should not be undermined stating that “the fact that art. II(3) of the New York Convention provides that the court can rule on whether an agreement is null and void, inoperative or incapable of being performed does not mean that it is required to do so before the arbitrator does.”¹⁵ The SCC noted that the “arbitrator first” approach is often referred to as the *prima facie* analysis test,¹⁶ which as noted above was set out in *Gulf Canada*.

Generally, in Canada, the analysis of whether a particular issue or dispute is arbitrable – in the sense that it is within the scope of the applicable arbitration agreement – involves a broad approach.¹⁷ For example, in

¹⁰ John AE POTTOW, Jacob BERGE & Tara J HAWLEY, “Presumptively Better Approach to Arbitrability” (2013) 53:3 Can Bus LJ 323 at 341.

¹¹ *Dell*, *supra* note 8.

¹² *Seidel v TELUS Communications Inc*, [2011] 1 SCR 531 at para 29 [**Seidel**].

¹³ *Gulf Canada Resources v Arochem International*, [1992] BCJ No 500, para 43 (CA) [**Gulf Canada**].

¹⁴ *Dell Computer Corp v Union des Consommateurs*, [2007] 2 SCR 801, para. 86.

¹⁵ *Dell*, *ibid*, para. 73.

¹⁶ *Dell*, *ibid*, para. 75.

¹⁷ Henri C ALAREZ, QC, “The Implementation of the New York Convention in Canada” (2008) 25:6 J Intl Arb 669 at 674.

Quintette Coal Ltd v Nippon Steel Corp, the Supreme Court for British Columbia considered whether an arbitral award, which included calculations that were not explicitly contemplated in the arbitration agreement, was enforceable in light of the Respondent's objection that the issue was not arbitrable.¹⁸ The court took a broad approach, supporting the arbitrator's interpretation of the scope of the arbitration agreement. This broad approach was consistent with that taken by other judicial authorities, which, together, has been referred to as indicative of a "powerful presumption" in favour of a broad approach in light of international comity and a global marketplace.¹⁹

Thus, there are very few matters that cannot be arbitrated under the laws applicable in the Provinces of Canada. Applicable provincial legislation provides guidance on whether particular matters are arbitrable. For example, criminal matters cannot be resolved by arbitration. In certain areas, such as patent rights, copyrights, trademarks, bankruptcy, employment and consumer contracts, and competition law matters, some jurisdictions have statutory restrictions with respect to arbitration. In Quebec, for instance, any stipulation that obliges the consumer to refer a dispute to arbitration that restricts the consumer's right to go before a court, in particular by prohibiting the consumer from bringing a class action, or that deprives the consumer of the right to be a member of a group bringing a class action is prohibited.²⁰ The status and capacity of persons, family matters, and other matters of public order are also non-arbitrable.

In the context of a consumer protection related case, the SCC, however, has suggested that recourse to the court may be had in the first instance where the jurisdiction issue is solely a question of law.²¹

However, this exception should not be applied if the issue involves questions of fact, or mixed fact and law.²²

3. Intervention of Domestic Courts

The Model Law and the New York Convention provide narrow grounds for judicial intervention in international commercial disputes that are subject to arbitration agreements. As outlined above, Canadian courts have consistently expressed their approval of these principles and frequently defer to arbitral tribunals for determinations regarding the tribunal's own jurisdiction and complex issues of fact and law. For example, in discussing the governing principles of the Model Law, one Canadian court stated that:

[T]he purpose of the United Nations Conventions and the legislation adopting them is to ensure that the method of resolving disputes in the forum and according to the rules chosen by parties, is respected. Canadian courts have recognized that predictability in the enforcement of dispute resolution provisions is an indispensable precondition to any international business transaction and facilitates and encourages the pursuit of freer trade on an international scale.²³

Courts across Canada have echoed these views; Canadian legislation provides for, and courts respect, the *competence-competence* principle, which leaves initial determinations of jurisdiction and arbitrability to the arbitrator. Indeed, the fact that the New York Convention provides that the court may rule on whether an agreement is null and void, inoperative or incapable of being performed does not mean that it is required to do so before the arbitrator does.

From above, the SCC has held, consistent with Articles 8 and 16 of the Model Law, that a challenge to an arbitrator's jurisdiction or the arbitrability of a dispute should first be addressed by the arbitrator before a

¹⁸ [Quintette Coal Ltd v Nippon Steel Corp](#), [1990] BCJ No. 2241 (CA).

¹⁹ [Mexico v Cargill, Incorporated](#), 2011 ONCA 622, para. 19.

²⁰ [Consumer Protection Act](#), RSQ, c P-40.1, Art 11.1.

²¹ [Dell](#), *supra* note 13, para. 84.

²² [Dell](#), *ibid*, para. 85.

²³ [Automatic Systems Inc v Bracknell Corp](#) (1994), 18 OR (3d) 257 at 264 (CA), cited with approval in [Seidel](#), *supra* note 12 and [Desputeaux v Editions Chouette \(1987\) Inc](#), 2003 SCC 17.

court can consider the issue.²⁴ Only where it is clear that the dispute is outside the terms of the arbitration agreement, a party is not a party to the arbitration agreement, or the application is out of time can a court reach any final determination in respect of such matters.

Canadian courts can, and do, issue anti-suit injunctions to restrain parties from proceeding with litigation in court. To enjoin a court proceeding, the parties seeking the injunction must demonstrate that:

- A valid arbitration agreement exists;
- The arbitral forum acquired by the agreement is more appropriate than the judicial forum that is the subject of the injunction based on the principles of *forum non conveniens*; and
- Granting the injunction would not unjustly cause a party to lose a legal right or advantage in the judicial forum.

4. The Conduct of the Proceedings

4.1 View on outside counsel or self-representation

Although all provinces in Canada have rules restricting the appearance of lawyers from other jurisdictions in legal matters, these restrictions do not apply to arbitration proceedings seated in Canada.

4.2 Arbitrators' independence and impartiality

The usual requirements of independence and impartiality apply. Otherwise, arbitrators are not required to be certified in any way and parties are free to agree to the appointment of non-lawyers as arbitrators if they so wish. Parties sometimes specify required qualifications in their arbitration agreements.

In accordance with the Model Law, an arbitrator may be replaced where:

- his or her qualifications are not satisfactory to the parties;
- there are justifiable doubts as to his or her impartiality or independence;
- he or she becomes unable to perform his or her functions; or
- he or she fails to act without undue delay.

Different and additional default rules apply to domestic arbitration under the relevant provincial legislation. By way of illustration, under the domestic legislation of Ontario, Alberta, Manitoba, New Brunswick, Nova Scotia and Saskatchewan, the court may remove an arbitrator on a party's application where the arbitrator becomes unable to perform his or her functions, or delays unduly in conducting the arbitration, but also if they commit a corrupt or fraudulent act, or do not conduct the arbitration in accordance with the legislation. Under British Columbia's *Arbitration Act*, the court may remove an arbitrator who commits an "arbitral error" (which includes bias) or unduly delays in proceeding with the arbitration or in making an award. In Newfoundland and Labrador, Prince Edward Island, the Northwest Territories, the Yukon and Nunavut, the court may remove an arbitrator where he or she has misconducted himself or herself, which is rare.

4.3 Court intervention to assist in the constitution of the arbitral tribunal

Under the Model Law (so in the international legislation in the provinces and territories of Canada), if a party fails to appoint an arbitrator or co-arbitrators fail to appoint a chair within the required time periods, a party may request that the court make the appointment. In the case of a single arbitrator, if the parties cannot agree, a party may request that the court make the appointment.

²⁴ *Dell Computer Corp v Union des Consommateurs*, [2007] 2 SCR 801.

Under domestic arbitration legislation, the court may appoint the arbitral tribunal on a party's application, if the arbitration agreement is silent on the appointment procedure or if the person with the power to appoint the arbitral tribunal has not done so within the time provided for in the agreement or after a party has given the person seven days' notice to do so.

4.4 Ability of courts to issue interim measures in connection with arbitrations

In Canada, as with other Model Law jurisdictions, it is not incompatible with an arbitration agreement for a party to request from a court, before or during arbitral proceedings, an interim measure of protection and for a court to grant that measure. Typically, this is done for the preservation of property and evidence, to bind others who are not party to the arbitration, or to enforce an order made by the arbitral tribunal.

If a party makes an *ex parte* application in Canada, it has a duty to disclose all the relevant facts and circumstances to the court. In hearing an *ex parte* motion, the court's first question is whether the circumstances justify granting the order without hearing the other party. To that end, the moving party needs to satisfy the court that there is some urgent need, and failing to act immediately will result in irreparable harm. The relief sought must be proportional to the prejudice suffered if the relief is not granted. Also, a party must be prepared to compensate the other parties in case the *ex parte* order is obtained improperly or results in unjustified prejudice or loss to the other parties.

4.5 Legal regulation of the conduct of the arbitration

Arbitration legislation in Canada is not overly prescriptive as to procedure, other than general provisions relating to the availability of particular procedures and the court's ability to assist arbitration proceedings. Generally, the legislation provides the parties and the tribunal with the power and flexibility to shape their own procedure; tribunals are required to conduct the arbitration in the manner they consider appropriate, subject to the parties' rights of procedural fairness and goals of efficiency and reduced costs. Institutional rules are often more prescriptive and will be respected by the courts.

Where parties have not agreed on the number of arbitrators, the Model Law, as adopted in the relevant province's international legislation, defaults to a panel of three arbitrators. Beyond the arbitrators' independence and impartiality, the default provisions do not require any default qualifications or characteristics.

Domestic legislation across all provinces and territories – with the exception of Quebec – indicates that where an arbitration agreement does not specify the number of arbitrators who are to form the arbitral tribunal, it shall be composed of a single arbitrator. Under the Quebec Code of Civil Procedure, three arbitrators is the default.

4.6 Confidentiality of arbitration proceedings

Confidentiality is not addressed in the legislation, other than in Quebec which does provide for confidentiality. However, the British Columbia *ICAA* also explicitly provides for confidentiality now that the amendments have come into force as of 17 May 2018. In the other Canadian jurisdictions, arbitral confidentiality is presumed through the "implied undertaking" rule from court practice. Moreover, confidentiality obligations flow from the arbitration rules adopted by the parties or express confidentiality agreements entered into by the parties. That said, the open-court principle applied in Canada means that the ability to maintain confidentiality if a party resorts to court to challenge an award or otherwise seek assistance is limited; the principle requires that court proceedings presumptively be open and accessible to the public and to the media. Parties may apply to maintain confidentiality but the jurisprudence limits the circumstances in which a court will grant such protection.

As a practical matter, information regarding the existence of the arbitration may also be inadvertently disclosed by persons involved in the proceedings but who would not normally be bound by any confidentiality agreement, including couriers and third-party witnesses.

4.7 Length of arbitration proceedings

International arbitration legislation of the provinces and territories is silent on time limits for delivery of an award, although limits are set on corrections, interpretations, and additions to the award. This legislation does contemplate (by providing for extensions of time) that parties may stipulate a time limit in their arbitration agreement.

Domestic arbitration legislation limits the time allowed to render an award in one of two ways. First, a time limit may be provided for the duration of the arbitration process, where an award must be rendered within X months from the commencement of the arbitration. Alternatively, an award may be required within X months of the conclusion of the arbitration hearing.

The time given for delivery of an award varies between provinces. In Nova Scotia, domestic legislation provides that the arbitrator must render a decision within 10 days of the completion of the arbitration. In British Columbia, the short rules provide for a decision to be rendered within 30 days of the closing of the hearings, whereas the standard rules allow for 60 days after the close of the hearings. Domestic legislation in Newfoundland and Labrador, the Northwest Territories, Prince Edward Island and the Yukon allow three months after entering on the reference to have the award rendered.

4.8 Place where hearings and/or meetings held

Consistent with the freedom accorded to the parties and, in the absence of agreement between them, to the arbitral tribunal to determine the procedure in the arbitration, there are no rules that govern the conduct of an international arbitration hearing aside from those set out in the Model Law.

Ordinarily, the hearing will be held in the seat of the arbitration, although the parties can agree otherwise. Where an arbitration agreement provides that the arbitration be seated in Toronto, Ontario (for example), the parties could nevertheless agree for hearings to be held in Vancouver, British Columbia and be deemed to be taking place in Toronto. In this case, the Ontario statute would still govern the procedure of the arbitration and, if the parties require court assistance, they would apply to the Ontario courts.

4.9 Ability of arbitrators to issue interim measures

Arbitrators in Canada are granted broad powers. Once appointed, arbitrators may award interim relief without prior authorisation from a court. Under international arbitration legislation, arbitral tribunals are granted broad powers to issue interim measures. Unless otherwise agreed, the arbitral tribunal may, at the request of a party, order any party to take such interim protection measures that the tribunal considers necessary in respect of the subject matter of the dispute. The arbitral tribunal may also require any party to provide appropriate security in connection with such interim measures.

Domestic legislation in Ontario, Alberta, Manitoba, New Brunswick, Nova Scotia and Saskatchewan also provides broad powers to arbitral tribunals to make an order on a party's request for the detention, preservation or inspection of property and documents which are the subject of the arbitration and may order a party to provide security in that connection. In British Columbia, 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 that the arbitral tribunal deems necessary with respect to the subject matter of the dispute and may order a party to provide security in connection with such a measure.

4.10 Arbitrators' right to admit/exclude evidence

Arbitration legislation across the provinces and territories generally affords arbitrators more flexible rules of evidence than those afforded to the courts; they are not required to apply strictly the rules of evidence. Arbitral tribunals have broad discretion to conduct the arbitration in a manner that they consider appropriate to avoid unnecessary delay or expense and to provide a fair and efficient means for the final resolution of the parties' dispute. Flowing from that discretion is the power to:

- determine the admissibility, relevance, materiality and weight of any evidence;
- exclude cumulative or irrelevant evidence; and
- direct the parties to focus their evidence or argument on specific issues which may assist in the disposal of all or part of the dispute.

Generally, in lieu of direct examination, witness evidence is provided in the form of written statements and cross-examined under oath before the tribunal. Expert evidence may be adduced by the parties or in certain circumstances tribunals may retain experts. In common practice, the evidence is provided in a written report followed by oral examinations in a hearing.

4.11 Prescription of principles governing the awarding of interest

International arbitration legislation in Canada does not provide explicitly for the award of interest, except in British Columbia. As a result, the tribunal's power to award interest is determined by the arbitration agreement or by the procedural rules adopted for the arbitration, which may contain specific provisions as to costs. Domestic legislation in some provinces provides that the arbitral tribunal has the same power with respect to interest as the court has under provincial court order interest legislation.

Parties may expressly provide for the power to award interest in their agreement or the necessity to do so may arise as part of an arbitrator's obligation to apply the general law. Where an arbitration agreement is broad enough to encompass all claims and disputes between parties, it has been recognised that arbitrators have the power to award interest.

Generally, if there is no contractually agreed rate, the rate of the governing substantive law of the parties' agreement is most likely to prevail, although in some circumstances, it may be argued that the law of the seat or the place of enforcement should apply.

4.12 Principles governing the allocation of arbitration costs

The general principle applied in Canada is that costs follow the event and can be full indemnity for reasonable legal fees, disbursements, and arbitration costs. Tribunals generally have discretion to allocate costs, which is explicitly provided for in Canadian domestic arbitration legislation. The British Columbia international arbitration legislation also provides such discretion, although the international legislation of other provinces is less explicit.

With respect to costs claims, parties are generally invited by the tribunal to provide statements of costs (and sometimes to make submissions on costs).

4.13 Liability

Arbitrators are generally immune from civil liability, except in instances of fraud or bad faith. Except in the recent amendments to British Columbia's *ICAA*, legislation in Canada provides no express immunity, but most arbitral institutions' rules do. For example, the CCAC's International Arbitration Rules provide that none of the CCAC, its staff or the members of the arbitral tribunal is liable to any party for any act or omission in relation to arbitration under these rules. In the case of *ad hoc* arbitrations, jurisprudence establishes that arbitrators who are acting in a "judicial or quasi-judicial capacity" are generally immune from civil liability in Canada, except in instances of fraud or bad faith.²⁵

5. The Award

As previously noted, courts across Canada have consistently given substantial deference to arbitrators' decisions, and have narrowly interpreted the grounds for setting aside arbitral awards. In addition, some

²⁵ See, for instance, *Flock v Beattie*, 2010 ABQB 193 (although this case was an Alberta case regarding the Alberta domestic Act, it also canvasses the applicable Canadian and international law).

provinces have explicitly accepted that international arbitral awards are akin to foreign judgments, providing parties with jurisdictional advantages and longer limitation periods for enforcing their award.²⁶

The integrity of the international commercial arbitration process has further been endorsed in recognition and enforcement proceedings. When faced with challenges to the recognition of foreign awards, Canadian courts have consistently emphasised the mandatory nature of the enforcement provisions in the Model Law and Article V of the New York Convention. Based on these limited grounds on which enforcement may be refused, courts apply a high burden on arbitral award debtors to prove any allegation of injustice or impropriety that could render an award unenforceable.

5.1 Provision of reasons

The arbitral award must state the reasons on which it is based, unless the parties have agreed that no reasons are required.

5.2 Appealing an award

There are no appeals for international awards, and only the limited grounds for set aside or refusal of enforcement under the Model Law and New York Convention apply.

Provincial legislation dealing with domestic arbitration provides limited rights to appeal an award. Generally, an appeal can be brought only on a question of law, not a question of fact. In some provinces, there is no right of appeal unless all parties have agreed to such a right or consented to an appeal. In other provinces, a right of appeal may be subject to obtaining leave to appeal from a judge or superior court of the province.

5.3 Enforcement procedures and limitation periods

The international legislation provides for Model Law and New York Convention recognition and enforcement rights. Creditors of international arbitral awards generally have access to the same enforcement remedies available to domestic litigants. Awards can be enforced in local courts; the applicable legislation identifies which level of court – usually the superior court in the province – has jurisdiction. Thus, an application for recognition and enforcement of awards will be made to the Federal Court if the subject matter of the arbitration is governed by federal law. If the subject matter of the arbitration is governed by provincial or territorial law, the application must be made to the court of inherent jurisdiction (the superior court). Typically, the party seeking to enforce the award must file it, together with evidence of the arbitration agreement on which it is founded, as part of a summary procedure.

Domestic commercial arbitral awards are enforceable once they are converted into a court judgment of the superior courts of the provinces, also through a procedure that is intended to be summary in nature. Once an award is converted into a court judgment, all usual remedies available to the holder of a court judgment are available.

A party with a foreign arbitral award should expect its award to be enforced, unless the extremely limited grounds to refuse enforcement apply. Canadian courts are highly deferential to arbitration and uphold the principles set out in the New York Convention. The grounds on which enforcement can be denied are limited to those set out in the New York Convention and the Model Law. Canadian courts construe these grounds very narrowly, and generally enforce international awards.

²⁶ For example, the definition of “local judgment” in British Columbia’s *Limitations Act*, SBC 2012, c 13, s 1 [**BC Limitations Act**] specifically includes arbitral awards to which the *Foreign Arbitral Awards Act* or the *International Commercial Arbitration Act* apply, providing arbitral creditors with a 10-year limitation period for enforcement proceedings. Similarly, the British Columbia *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28 [**Proceedings Transfer Act**] presumes a “real and substantial connection” (the standard for Canadian courts to assume jurisdiction over a dispute) in any proceeding to enforce a foreign arbitral award.

This was evident in the BC Court of Appeal decision in *Sociedade-de-fomento Industrial Private Limited v Pakistan Steel Mills Corporation (Private) Limited*,²⁷ which held that a party's claim to enforce a foreign arbitration award was "very strong, approaching certainty given the limited grounds upon which the claim could be defended", and reinforcing that an award creditor is entitled to the full panoply of enforcement remedies available to any creditor of a court judgment.²⁸

The limitation period for recognition and enforcement of foreign awards in the Federal Court is six years.²⁹ The limitation periods applicable in each province varies, as discussed below.

In Alberta, legislation does not expressly provide for a limitation period applicable to recognition and enforcement of foreign awards, but recent jurisprudence addresses the issue directly. The Alberta Court of Appeal held that the applicable limitation period for foreign judgments is two years, and that the same principles apply with respect to a foreign arbitral award. The SCC has upheld this decision. It is also worth noting, that in making its determination, the SCC found that an arbitral award is not "*a judgment or a court order for the payment of money*", and is instead subject to the general two year limitation period applicable to most causes of action, per section 3 of the *Alberta Limitations Act*.³⁰

In British Columbia, an action for recognition and enforcement of an arbitral award for the payment of money or the return of personal property and to which either the FAAA or the ICAA applies, is subject to a 10-year limitation period. An action consequent upon an arbitral award for the possession of land to which either the FAAA or the ICAA applies is not governed by a limitation period and may be brought at any time. Judicial interpretations of the BC *Limitations Act* hold that limitation periods established under that Act (which would apply to arbitral awards under the FAAA or the ICAA) only begin to run on the date on which the right to bring an action on the award or judgment in British Columbia arises. In the absence of judicial interpretation of the new BC legislation on court jurisdiction, it would be prudent to assume that the limitation period for the enforcement of arbitral awards to which the FAAA or the ICAA apply begins to run when the arbitral award is rendered.³¹

Ontario's recent enactment of the new uniform *International Commercial Arbitration Act* means that it has now adopted the 10-year limitation period applicable to the recognition and enforcement of a foreign arbitral award under the Model Law.³²

Quebec legislation does not expressly provide for a limitation period applicable to recognition and enforcement of foreign awards and there is no jurisprudence addressing the issue directly. However, Quebec courts have held that the applicable period for domestic awards is 10 years from the date the award is rendered and it is likely that the same 10-year period would apply to a foreign award. The question has yet to be put to the Quebec courts.³³

²⁷ [Sociedade-de-fomento Industrial Private Limited v Pakistan Steel Mills Corporation \(Private\) Limited](#), 2014 BCCA 205 [**Sociedade-de-fomento**].

²⁸ *Ibid* at para 47.

²⁹ *Federal Courts Act, RSC 1985, c F-7, s 39(2)* [**Federal Courts Act**]; *Compania Maritima Villa Nova SA v Northern Sales Co*, [1992] 1 FC 550 (CA).

³⁰ *Yugraneft Corp v Rexx Management Corp*, 2007 ABQB 450; 2008 ABCA 274; 2010 SCC 19.

³¹ *BC Limitation Act, supra* note 25, ss 2(1)(e), 7(a)&(b), 30; *Proceedings Transfer Act, supra* note 25, ss 3 & 10(k).

³² *Arbitration Act, 1991, SO 1991, c 17, s 10*: "No application under the Convention or the Model Law for recognition or enforcement (or both) of an arbitral award shall be made after the later of December 31, 2018 and the tenth anniversary of, (a) the date on which the award was made; or (b) if proceedings at the place of arbitration to set aside the award were commenced, the date on which the proceedings concluded".

³³ *Civil Code of Quebec*, art. 2924; *Transport Michel Vaillancourt Inc v Cormier*, 2006 QCCS 803.

5.4 Effect of annulment or appeal proceedings

Although procedural rules in each Canadian jurisdiction permit discretionary suspension of the right to enforce an award, the introduction of annulment or appeal proceedings does not automatically suspend the exercise of the right to enforce an award.³⁴

When a foreign award has been annulled at its seat, Canadian courts will approach the issue of domestic enforcement on a case-by-case basis. Courts in the past have recognised the permissive nature of this issue under the New York Convention and, in certain circumstances, may enforce an award that has been set aside at the seat. However, Canadian courts will certainly consider the status of an award at the seat, including whether a challenge to it has not yet been determined.

Canadian federal legislation adopts the language of the New York Convention, which gives Canadian courts discretion to refuse to recognise or enforce a foreign award that has been set aside by the competent authority. Neither legislation nor case law interpreting it describes the circumstances under which the court can or should exercise that discretion and refuse to recognise or enforce an award that has been set aside by the competent authority.³⁵

An Ontario court has acknowledged, in an *obiter dictum*, the discretion granted by legislation to recognise or enforce an award that has been set aside, but no court has exercised its discretion to do so.³⁶

6. Funding Arrangements

In Canada, many cases are funded. While the common law doctrine of champerty and maintenance remains in effect, there have been several court decisions approving litigation funding agreements in the class actions and commercial context, and one court decision determining that such agreements do not require approval by the court hearing the underlying dispute. In the context of consumer protection class action cases, an Ontario court has suggested that the existence of funding may need to be disclosed and subject to certain conditions. If asked to determine the legality of a third party funding agreement, a Canadian court would look at the terms of the agreement to confirm that it is not champertous in nature.

Recently, in *Re 9354-9186 (formerly Bluberi Gaming Technologies Inc) and 9354-9178 (formerly Bluberi Group Inc)*,³⁷ the Quebec Superior Court reviewed the terms of a third-party funding agreement between Bentham IMF and the debtors. Overall, the judgment can best be described as consolidating the growing case law in Canada regarding third-party funding and contributing to the conceptual division between litigation funding in the context of class actions, on the one hand, and other forms of commercial litigation, on the other. The court also highlighted the fact that these principles arise in common law provinces which apply the doctrine of champerty, whereas in Quebec – Canada’s only civil law jurisdiction – “litigation funding by a third party has been accepted”.

The recent amendments to British Columbia’s *JCAA* specifically state that third-party funding is not to be considered contrary to public policy in British Columbia (a common law province) for the purposes of subsection 36(1)(b)(ii); the effect of which is to ensure that the presence of third-party funding will not be a legitimate reason to refuse recognition or enforcement of an arbitral award.

³⁴ *Federal Courts Act*, *supra* note 29, s 50(1); Alberta Rules of Court, r 1.4(2)(h); Supreme Court Civil Rules, rr 19-3(8) and (9); *Law and Equity Act*, *RSBC 1996*, c 253, s 8(3); *Courts of Justice Act*, *RSO 1990*, c C-43, s 106; *Quebec Code of Civil Procedure*, c C-25.01, art 654.

³⁵ UNFAACA, *supra* note 4, Art. V 1(e); Federal CAA, *supra* note 2, art 36(1)(a)(v).

³⁶ *Arbitration Act, 1991*, *SO 1991*, c 17, art 36(1)(a)(v); *Schreter*, *supra* note 7.

³⁷ *Re 9354-9186 (formerly Bluberi Gaming Technologies Inc) and 9354-9178 (formerly Bluberi Group Inc)*, 2018 QCCS 1040, March 16 2018.

7. Prospects for Reform

The limits of third-party funding is an emerging issue in Canada, although the above-mentioned statement approving of it in British Columbia is a sign that it is in Canada to stay. In addition, it remains to be seen whether the provinces and territories other than Ontario and British Columbia will adopt the proposed ULCC uniform *International Commercial Arbitration Act*, and in so doing whether the distinctions between legislation among the provinces and territories will be reduced. Also, the ULCC has almost completed its work on a uniform Domestic Arbitration Act for the provinces to consider.

CHINA – MAINLAND

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

JESSICA FEI AND CELINE WANG
OF HERBERT SMITH FREEHILLS



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JURISDICTION INDICATIVE TRAFFIC LIGHTS ⁺

- | | |
|---|----|
| 1. Law | ● |
| a. Framework | ● |
| b. Adherence to international treaties | ● |
| c. Limited court intervention | ● |
| d. Arbitrator immunity from civil liability | ● |
| 2. Judiciary | ●● |
| 3. Legal expertise | ●● |
| 4. Rights of representation | ● |
| 5. Accessibility and safety | ● |
| 6. Ethics | ●● |

VERSION: 7 FEBRUARY 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Arbitration is a commonly used dispute resolution mechanism for Sino-foreign disputes in China. It is a key characteristic of the Chinese arbitration regime that PRC law draws a distinction between "foreign-related" disputes (broadly, where one or more party is domiciled or habitually resides outside mainland China, or where the subject matter of the dispute is outside mainland China) and purely domestic disputes (where all parties and other elements of the dispute are based in mainland China). This critical distinction affects many aspects of the arbitration. The regime for foreign-related disputes is considerably more flexible.

Key places of arbitration in the jurisdiction	The principal institution of relevance to non-Chinese parties is the China International Economic and Trade Arbitration Commission (CIETAC), headquartered in Beijing and with sub-commissions in Shanghai, Shenzhen, Chongqing, Tianjin, Hangzhou, Wuhan and Fuzhou within mainland China, as well as an arbitration centre in Hong Kong.
Civil law / Common law environment?	PRC law largely adopts features from the civil law tradition. Precedents have no binding authority on future cases and are only of referential value.
Confidentiality of arbitrations?	PRC Arbitration Law provides that arbitration proceedings are confidential unless the parties agree otherwise.
Requirement to retain (local) counsel?	The parties can be represented by counsel, agents or themselves. The Ministry of Justice also allows foreign law firms to represent clients in arbitration cases conducted in China and/or governed by PRC law. However, only locally qualified and licensed lawyers may express official "opinions" on PRC law during an arbitration in mainland China.
Ability to present party employee witness testimony?	φ
Ability to hold meetings and/or hearings outside of the seat?	The place of hearing is regulated by the rules of the arbitral institutions. Generally, parties are able to hold hearings outside of the seat by agreement or when so directed by the tribunal.
Availability of interest as a remedy?	In practice, arbitral tribunals seated in China usually award simple or compound interest, calculated from the date due until the date of full payment.
Ability to claim for reasonable costs incurred for the arbitration?	In arbitrations seated in mainland China, the losing party is generally ordered to compensate the winning party for the reasonable costs incurred in the arbitration. There are no express statutory limits on the amount of costs that a tribunal can order the losing party to reimburse.
Restrictions regarding contingency fee arrangements and/or third-party funding?	PRC lawyers are allowed to enter into success fee arrangements or pure contingency fee arrangements, or a combination of both with their clients. Where contingency fees are allowed, such fees are not permitted to exceed 30% of the amount in dispute. Third party funding in arbitration is not prohibited in mainland China.

Party to the New York Convention?	In 1987, China became a party to the New York Convention subject to the reciprocity and commercial reservations.
Other key points to note	φ
WJP Civil Justice score (2017-2018)	0.50, though this is believed to be not very objective due to unfamiliarity with the jurisdiction or largely due to perceived bias.

ARBITRATION PRACTITIONER SUMMARY

China has not adopted the UNCITRAL Model Law ("Model Law"). Although certain key elements of the Model Law have influenced Chinese domestic legislation, many aspects of arbitration seated in China diverge from the Model Law. For example, tribunals seated in mainland China are not empowered by law to order interim measures. China does not apply the doctrine of competence-competence; the power to decide a tribunal's jurisdiction lies with arbitral institutions and the competent courts, rather than the tribunal itself.

Arbitration is a commonly used dispute resolution mechanism for Sino-foreign disputes in China. It is a key characteristic of the Chinese arbitration regime that PRC law draws a distinction between purely domestic disputes (where all parties and other elements of the dispute are based in mainland China) and "foreign-related" disputes (broadly, where one or more party is domiciled or habitually resides outside mainland China, or where the subject matter of the dispute is outside mainland China). This critical distinction affects many aspects of the arbitration. Overall, the regime for foreign-related disputes is considerably more flexible and similar to international standards than that for purely domestic disputes.

Date of arbitration law?	The PRC Arbitration Law has been in force since 1995. An amendment concerning the qualifications of the arbitrators is effective from 1 January 2018.
UNCITRAL Model Law? If so, any key changes thereto?	China has not adopted the UNCITRAL Model Law. Although certain key elements from the Model Law can be seen to have influenced Chinese domestic legislation, PRC Arbitration Law and legal practice differs in a number of ways from jurisdictions that have adopted the Model Law.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	<p>There are 4 levels of courts of general jurisdiction: Basic (at local level), Intermediate (at city level or equivalent), Higher (at provincial level) and the Supreme People's Court in Beijing. There are also a number of courts of specialist jurisdiction (e.g. maritime courts and intellectual property courts).</p> <p>For arbitration involving foreign elements (e.g., where one party is not Chinese, or the subject matter of the dispute is located outside mainland China), applications related to setting aside the award, and validity of an arbitration agreement shall be subject to intermediate people's courts. For maritime or maritime trade disputes, cases concerning the validity of an arbitration agreement are subject to the jurisdiction of a maritime court. For recognition and enforcement of foreign awards under the New York Convention, the intermediate court where the award debtor is domiciled or has enforceable assets shall have jurisdiction. Generally, a special division of the court is set up to hear arbitration related matters together with other commercial cases.</p>
Availability of <i>ex parte</i> pre-arbitration interim measures?	Pre-arbitration interim measures are available in aid of domestic arbitration and foreign-related Chinese arbitrations administered by arbitration commissions established in mainland China. They are not available in support of an arbitration seated outside mainland China.

<p>Courts' attitude towards the competence-competence principle?</p>	<p>PRC Arbitration Law does not recognise the principle of competence-competence. Instead, the power to determine the tribunal's jurisdiction is vested in the relevant arbitral institution and the competent courts. In practice, a Chinese arbitral institution may delegate to arbitral tribunals to rule on their own jurisdiction. However, when one party has applied to the court to rule on the validity of the arbitration agreement (including the jurisdiction of the tribunal), and the other party requests the arbitral institution to decide the same issue, the court takes precedence over the arbitral institution. (Where the objection is first raised with the arbitral institution and a decision has been made, the court will not accept a later application to challenge the tribunal's jurisdiction).</p>
<p>Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?</p>	<p>For foreign awards, in general there is no additional ground for non-enforcement in China than those specified in New York Convention. However, the Chinese courts may refuse to recognise or enforce an award for reasons such as expiry of the limitation period for enforcement (2 years) under PRC law.</p>
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>Chinese courts will generally refuse to recognise or enforce an arbitral award that has been annulled at its seat.</p>
<p>Other key points to note?</p>	<p>∅</p>

JURISDICTION DETAILED ANALYSIS

1. Legal framework

1.1 Is PRC Arbitration Law Based on the UNCITRAL Model Law?

China has not adopted the UNCITRAL Model Law ("Model Law"). However, certain key elements from the Model Law can be seen to have influenced Chinese domestic legislation. For example, arbitration depends on a valid arbitration agreement between the parties, the parties exclude the jurisdiction of the Chinese courts by concluding an arbitration agreement, and an arbitral award is final and binding on the parties to the arbitration.

The main differences between the Model Law and the PRC Arbitration Law include the following:

- *Ad hoc* arbitration is permitted under the Model Law, while it is not permitted for arbitrations seated in mainland China under the PRC Arbitration Law.¹
- The Model Law adopts the doctrine of *competence-competence*, under which arbitrators have power to rule on their own jurisdiction. The PRC Arbitration Law gives this power to arbitral institutions and the competent courts,² although in practice some institutions will delegate the power to the tribunal.
- Under the Model Law, the tribunal may grant interim measures at the request of a party. Under the PRC Arbitration Law, arbitral tribunals do not have the power to grant or implement interim measures. A party seeking interim measures may apply to the relevant arbitral institution, which will forward the party's application to the competent court for determination;³
- Under the Model Law, a court may set aside, or refuse enforcement of, an arbitral award on the basis of serious procedural irregularities. In purely domestic arbitrations, PRC laws provide limited grounds relating to evidence in addition to procedural irregularities, upon which the courts may refuse to enforce arbitral awards.⁴ Any decision not to enforce a foreign-related award rendered by a domestic arbitration institution (known in mainland China as an "arbitral commission")⁵ must be based on certain jurisdictional issues, or on serious procedural defects.⁶ In its Interpretation of the PRC Arbitration Law, China's Supreme People's Court ("SPC") has sought to limit the scope for parties to rely on trifling procedural defects as a basis for challenging awards.⁷

¹ Arbitration Law of the People's Republic of China ("PRC Arbitration Law") does not expressly prohibit *ad hoc* arbitration. However the prohibition can be inferred from Article 16, which requires that an arbitration agreement shall contain the designated arbitration institution. In December 2016, the SPC indicated that "ad hoc" arbitration should be made available for companies registered in China's Pilot Free trade Zone. However, it remains to be seen how *ad hoc* arbitration will be received by the Chinese courts. Nevertheless, awards rendered outside mainland China in *ad hoc* arbitration are enforceable in mainland China.

² According to Article 20 of PRC Arbitration Law, if a party challenges the validity of the arbitration agreement, it may request the arbitral institution to make a decision or apply to the court for a ruling. If one party requests the arbitral institution to make a decision and the other party applies to the court for a ruling, the people's court shall give a ruling.

³ Article 28 of PRC Arbitration Law. Following amendments to the Civil Procedure Law in 2012 in relation to injunctive measures, it should also be possible for parties to apply directly with the court.

⁴ Article 58 of PRC Arbitration Law and Article 21 of Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Arbitration Law of the People's Republic of China ("SPC Interpretation of Arbitration Law").

⁵ An arbitration commission is an arbitration institution established according to the requirements set out in PRC Arbitration Law and registered with the administrative Departments of Justice at provincial level in mainland China.

⁶ Article 70 of PRC Arbitration Law and Article 274 of Civil Procedure Law of the People's Republic of China (2017) ("PRC Civil Procedure Law").

⁷ Article 20 of SPC Interpretation of Arbitration Law.

Arbitration is a commonly used dispute resolution mechanism for Sino-foreign disputes in China. It is a key characteristic of the Chinese arbitration regime that PRC law draws a distinction between purely domestic disputes (where all parties and other elements of the dispute are based in mainland China) and "foreign-related" disputes (broadly, where one or more party is domiciled or habitually resides outside mainland China, or where the subject matter of the dispute is outside mainland China). This critical distinction affects many aspects of the arbitration; the regime for foreign-related disputes is considerably more flexible than the domestic regime, and is similar in a number of respects to the Model Law regime.

1.2 When the Arbitration Law was last revised?

The PRC Arbitration Law was promulgated in 1994 and came into force in 1995.

To date, the PRC Arbitration Law has not been subject to any significant update or amendment. However, in September 2017 China passed amendments to a number of laws relating to the professional qualifications required of judges, prosecutors, lawyers, notaries and civil servants.⁸

As it relates to the PRC Arbitration Law, the amendment concerns the qualifications of arbitrators, and is effective from January 1st, 2018. In addition to the existing requirement of at least eight years' experience in the field of arbitration an arbitrator is required to pass the unified national examination for legal professional qualifications and to obtain a legal professional qualification. Alternatively, an arbitrator must have served as a judge for at least eight years (and retired from the bench). The other alternative qualification requirements remain the same.⁹

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the governing law of the arbitration agreement?

Under PRC law, there is no provision allowing parties to choose the governing law of a domestic contract. It is therefore generally understood that an arbitration agreement with no foreign element must be governed by PRC law.

However, parties may agree on the law applicable to a foreign-related arbitration agreement (*e.g.*, where one or more of the parties is not Chinese, or is habitually resident outside mainland China). In this regard, the SPC has clarified that the parties' agreement on governing law of the main contract should not be considered as their agreement on the governing law of the arbitration agreement.¹⁰

In the absence of party agreement, the law of the domicile of the arbitration commission or the law of the place of arbitration shall apply.¹¹ If the domicile of the arbitration commission differs from the place of arbitration, it is unclear which law prevails. If the parties do not stipulate an arbitral commission, or the place of arbitration is unclear, the Chinese courts may apply PRC laws to determine the validity of arbitration agreement.¹²

⁸ Article 6 of Decision of the Standing Committee of the National People's Congress on Amending Eight Laws including the Judges Law of the People's Republic of China.

⁹ Under Article 13 of the PRC Arbitration law, alternative qualification requirements include (1) having worked as a lawyer for at least eight years, or (2) having been engaged in legal research or legal education, and in possession of a senior professional title; or (3) having acquired the knowledge of law and engaged in the professional work in the field of economy and trade, and acquired a senior professional title or reached an equivalent professional level.

¹⁰ Reply of the Supreme People's Court on Confirmation of the Validity of Arbitration Agreement dated 9 March 2006, and Article 13 of Provisions of the Supreme People's Court on Several Issues Concerning Trial of Cases Involving Judicial Review of Arbitration.

¹¹ Article 18 of Law of the People's Republic of China on Application of Laws to Foreign-related Civil Relations, effective 1 April 2011 and Article 16 of SPC Interpretation of Arbitration Law.

¹² Article 14 of Judicial Interpretation of the Supreme People's Court on the Application of the Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations (I), effective 7 January 2013.

2.2 Is the arbitration agreement considered to be independent from the rest of the content in which it is set forth?

Under PRC law, an arbitration agreement exists independently of the contract that contains it. The amendment, rescission, termination or invalidity of main contract does not affect the validity of the arbitration agreement.¹³

If the parties have agreed when the contract is concluded to refer disputes to arbitration, failure of the formation of the contract shall not affect the validity of the arbitration agreement. If a contract does not come into effect, or is repealed after its formation, the validity of the arbitration agreement would also be determined independently.¹⁴

2.3 What are the formal requirements for an enforceable arbitration agreement?

The arbitration agreement must be in writing and must adequately identify the subject matter.

An arbitration agreement should contain the following particulars:¹⁵

- (1) an expression of intent to apply for arbitration;
- (2) the matters to be referred to arbitration; and
- (3) a designated arbitration commission.

In 2006, the SPC clarified that the requirement for a written arbitration agreement should be interpreted broadly, so as to encompass, for example, an exchange of emails.¹⁶

A more important restriction is that arbitrations involving no foreign element must be arbitrated in mainland China by a Chinese arbitral institution.¹⁷ Only foreign-related arbitrations may, in the eyes of Chinese courts, be arbitrated elsewhere. Failure to comply may result in the award being unenforceable in mainland China.

2.4 To what extent is a third party to the contract containing the arbitration agreement is bound by said arbitration agreement?

Generally, a third party is not bound by the arbitration agreement in the contract. However, there are a number of exceptions:

- (1) Transfer of credits or debts: the arbitration agreement over such rights or obligations shall be binding upon the transferee, unless the parties agree otherwise, or the transferee explicitly objects to or is unaware of the existence of a separate arbitration agreement when the credits or debts are transferred.¹⁸
- (2) Merger or split of an entity: the arbitration agreement shall be binding upon the successors to the party's rights and obligations, unless the parties agree otherwise when entering into the arbitration agreement.¹⁹

¹³ Article 19 of PRC Arbitration Law.

¹⁴ Article 10 SPC Interpretation of Arbitration Law.

¹⁵ Article 16 of PRC Arbitration Law.

¹⁶ Article 1 of SPC Interpretation of Arbitration Law.

¹⁷ Where the arbitration is seated in mainland China, the administering commission must be Chinese (Article 11 of PRC Arbitration Law). Non-Chinese arbitral institutions, for instance, ICC, HKIAC or SCC, are not permitted to administer arbitrations seated in mainland China.

¹⁸ Article 9 of SPC Interpretation of Arbitration Law.

¹⁹ Article 8 of SPC Interpretation of Arbitration Law.

- (3) Death of a party: the agreement shall be binding upon the heir to the party's rights and obligations in respect of arbitrable matters, unless the parties agree otherwise when entering into the arbitration agreement.²⁰

2.5 Are there restrictions to arbitrability?

Both contractual disputes and tortious disputes are arbitrable in mainland China.²¹

The following disputes are not permitted to be resolved via arbitration:²²

- (1) Disputes over marriage, adoption, guardianship, fostering and inheritance; and
- (2) Administrative disputes falling within the jurisdiction of the relevant administrative authorities.

Disputes concerning the validity of registered trademarks and patents are non-arbitrable.²³ However, disputes over copyrights may be resolved by arbitration.²⁴

Disputes between administrative authorities and business operators regarding the enforcement of anti-monopoly law are non-arbitrable.²⁵ Although PRC laws do not have express provisions concerning arbitrability of disputes between business operators regarding monopoly agreements,²⁶ in practice PRC courts tend to deny the jurisdiction of the arbitral tribunal.

3. Intervention of domestic courts

3.1 Will the court stay litigation if there is a valid arbitration agreement covering the dispute?

A valid arbitration agreement may exclude the court's jurisdiction over the same issue. If one party has instituted an action in a court without declaring the existence of the arbitration agreement and, after the court has accepted the case, the other party submits the valid arbitration agreement prior to the first hearing. The court is required to dismiss the case.²⁷

However if, prior to the first hearing, the other party has not raised an objection to the court's jurisdiction to hear the case, that party shall be deemed to have renounced the arbitration agreement and the court will continue with the case.²⁸

3.2 How do courts treat injunctions made by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

There is no legal basis for a PRC court to stay its proceedings in response to an arbitral tribunal's order that purports to bind that court. In practice, such orders can be made only by tribunals sitting outside mainland China (as Chinese tribunals have no power to order interim relief), and they are likely to be disregarded by the courts.

²⁰ Article 8 of SPC Interpretation of Arbitration Law.

²¹ Article 2 of PRC Arbitration Law.

²² Article 3 of PRC Arbitration Law.

²³ Articles 2 and 45 of Trademark Law of the People's Republic of China.

Articles 45 and 46 of Patent Law of the People's Republic of China.

²⁴ Article 55 of Copyright Law of the People's Republic of China.

²⁵ Article 3 of PRC Arbitration Law.

²⁶ Article 50 of Anti-Monopoly Law of the People's Republic of China.

²⁷ Article 26 of PRC Arbitration Law.

²⁸ Article 26 of PRC Arbitration Law.

3.3 Will the courts intervene in arbitrations seated outside of the jurisdiction?

There is no provision in PRC law empowering the courts to render interim measures in aid of arbitration seated outside of the jurisdiction. PRC courts do not accept applications for interim relief in aid of arbitrations seated outside mainland China. The only exception is that the mainland Chinese courts may grant interim measures in support of a foreign maritime dispute under the Law of Maritime Special Proceedings.²⁹

Orders for interim relief in support of foreign arbitrations, whether granted by a foreign court or an arbitral tribunal, are not enforceable in China. Under the New York Convention, PRC courts are under an obligation to enforce foreign awards only. Unless the order is made in the form of a partial award, it will not be enforced in China.

In general, PRC courts will not intervene in arbitrations seated outside of mainland China. However, where an arbitration agreement is China-related (e.g., in a purely domestic contract that refers disputes to arbitration outside mainland China), one party may apply to a PRC court to rule that such arbitration clause is invalid. The court's decision is likely to impact on the overseas arbitration as well as on any attempt to enforce the award in China.

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

Pursuant to the PRC Arbitration Law, parties may be represented by legal counsel or agents, or be self-represented.³⁰

Foreign or international law firms are allowed to be counsel of record to participate in Chinese arbitration proceedings. However, foreign or international counsel are restricted from arguing Chinese law issues.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

Despite of the requirements of being "fair and honest", Chinese law does not impose a mandatory disclosure obligation on arbitrators.³¹ In the following circumstances, the arbitrator must withdraw, and the parties also have the right to challenge the arbitrator before the arbitration commission:³²

- (1) The arbitrator is a party in the case or a close relative of a party or its agent in the case;
- (2) The arbitrator has a personal interest in the case;
- (3) The arbitrator has other relationship with a party or its agent which may affect the impartiality of arbitration; or
- (4) The arbitrator has privately met with a party or its agent, or accepted a gift or entertainment from a party or its agent.

In practice, such challenges are usually handled by the arbitration commissions rather than the courts. Under the CIETAC Rules 2015, arbitrators are required to sign a declaration that discloses any facts or circumstances

²⁹ Article 21(2) of Interpretation of the Supreme People's Court on the Application of the Special Maritime Procedure Law of the People's Republic of China provides that: "*Where a foreign court has already accepted a related maritime case or the relevant dispute has already been submitted for arbitration, but the involved property is within the People's Republic of China, if a party applies for maritime claim preservation with the maritime court of the place where the property is located, the maritime court shall accept the application.*".

³⁰ Article 29 of PRC Arbitration Law.

³¹ Article 13 of PRC Arbitration Law.

³² Article 34 of PRC Arbitration Law.

likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence.³³ Although the CIETAC Rules 2015 do not expressly provide any consequence for failure to disclose, in practice, parties might be able to challenge the arbitrators on that ground.

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

Under PRC law, the courts are not allowed to intervene in the nomination of arbitrators. Arbitrators are nominated by parties or appointed by the chairman of the arbitration commissions.³⁴ Since *ad hoc* arbitration is currently not permitted in mainland China, the Chinese courts will not involve themselves in, or assist with, the nomination of arbitrators.

4.4 Do courts have the power to issue interim measures in connection with arbitrations? If so, are they willing to consider *ex parte* requests?

The power to grant interim measures in respect of a dispute that is subject to arbitration is reserved to the Chinese courts. With respect to foreign-related arbitration, the court competent to hear applications for interim measures is the Intermediate People's Court at the place of the respondent's domicile or where relevant assets or evidence is located.³⁵

Usually, an application for asset or evidence preservation measures is made on an *ex parte* basis. In practice, the court usually decides the application on paper without hearing the respondent's arguments. The rationale is that, once a respondent is put on notice of the application, the risk of destroying evidence or dissipating assets increases. The respondent has a right to apply for a review of the ruling made against it.

In a complex situation, a court may invite a respondent to respond to the application and may hold hearings to hear the parties' arguments in support of their respective positions. This is often the case in evidence preservation and asset preservation applications.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

PRC Arbitration Law stipulates that arbitration proceedings are confidential, unless the parties agree otherwise.³⁶

4.5.2 Does it regulate the length of arbitration proceedings?

There is no provision in the PRC Arbitration Law limiting the length of arbitration proceedings. This issue is normally dealt with by the relevant arbitration rules. In practice, Chinese arbitral commissions readily grant extensions to arbitral tribunals. Consent of the parties to such extensions is not required.

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

The place of a hearing is generally regulated by the rules of the arbitral institutions. Unless otherwise agreed by the parties, the default place of hearing is the place of the arbitration commission which administers the case. The tribunal does have the power to decide to hold the hearing at a different place, though it is seldom exercised.

³³ Article 31-32 of China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules ("CIETAC Rules 2015"). Available at: <http://www.cietac.org/index.php?m=Page&a=index&id=42&l=en>.

³⁴ Articles 31 and 32 of PRC Arbitration Law.

³⁵ Articles 100 to 103 of PRC Civil Procedure Law (2017) and Article 28 of PRC Arbitration Law.

³⁶ Article 40 of PRC Arbitration Law.

4.5.4 Does it allow for arbitrators to issue interim measures?

In mainland China, the power to grant interim measures (such as injunctive relief or orders for asset and evidence preservation) in arbitration is reserved to the courts. The PRC Arbitration Law does not grant tribunals seated in mainland China any power to order interim measures. However, arguably these tribunals can issue interim orders of a type other than those expressly reserved for the courts.

The procedure for seeking interim relief differs where the application is made prior to initiating the arbitration proceedings or concurrently with the commencement of arbitration, and where it is made after proceedings have commenced. Once arbitration proceedings have commenced, the party seeking interim measures must submit the application to the relevant arbitration commission, which will forward the party's application to the competent people's court.³⁷ Before commencement of the arbitration, a party may apply to the competent court for property preservation or other preservative measures.³⁸ For arbitration seated in mainland China, the party may also request the court to grant pre-arbitration interim measures through an arbitration commission under the rules of a number of Chinese arbitration commissions.³⁹ If this issue arises in practice, it is important to seek legal advice on the specific circumstances of the case.

Even though the PRC Arbitration Law does not confer the power of granting interim relief to arbitral tribunals, some Chinese arbitration commission rules nevertheless provide that arbitral tribunals may order interim relief upon agreement of the parties.⁴⁰ Where the place of arbitration is mainland China, a tribunal's order made pursuant to such rules depends on the parties' voluntary compliance and will not be enforced by a PRC court. However, such an order may be enforced in a jurisdiction outside of mainland China, such as Hong Kong or Singapore.

Some arbitration commissions' rules have introduced emergency arbitrator procedures which allow emergency interim relief in support of arbitration, before the tribunal is formally constituted. These include the CIETAC Rules 2015,⁴¹ Beijing Arbitration Commission Arbitration Rules⁴² and the China (Shanghai) Pilot Free Trade Zone Arbitration Rules of Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Centre).⁴³ The above rules specify that emergency arbitrator procedures apply only to arbitrations seated outside mainland China (including Hong Kong or Macau arbitrations) administered by the respective arbitral institutions.

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence?

The PRC Arbitration Law does not provide detailed rules in relation to arbitrators' rights to admit or exclude evidence. The PRC Arbitration Law states that parties shall provide evidence to support their own arguments, and the arbitral tribunal may collect evidence of its own volition if it considers necessary.⁴⁴ However, it is widely understood and practiced that the arbitrators do have the rights to admit or exclude evidence as they see fit.⁴⁵ Unlike courts, the tribunal has no authority to compel a third party to disclose any document.

³⁷ Articles 28 and 46 of PRC Arbitration Law.

³⁸ Article 101 of PRC Civil and Procedural law (2017).

³⁹ Article 16 of BAC Rules ; Article 19 of The China (Shanghai) Pilot Free Trade Zone Arbitration Rules of Shanghai International Economic and Trade Arbitration Commission. Available at: http://www.shiac.org/upload_files/file/2016/20160228221941_9298.pdf.

⁴⁰ See, for example, Article 23(3) of CIETAC Rules 2015.

⁴¹ Article 23(2), Article 77(2) and Appendix III of CIETAC Rules 2015.

⁴² Article 63 of Beijing Arbitration Commission Arbitration Rules. Available at: http://www.bjac.org.cn/english/page/zc/guize_en.html.

⁴³ Article 21 of The China (Shanghai) Pilot Free Trade Zone Arbitration Rules of Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Centre).

⁴⁴ Article 43 of PRC Arbitration Law.

⁴⁵ In civil cases, Chinese judges have discretion to admit or reject evidence as they see fit having regard to the relevant rules of evidence. Arbitrators by analogy should also have similar discretion in admitting or rejecting evidence.

4.5.6 Does it make it mandatory to hold a hearing?

The default position is that arbitration shall be conducted by means of oral hearings.⁴⁶ If the claimant fails to appear before the arbitration tribunal without justified reasons after receiving written notice to appear, or leaves the hearing prior to its conclusion without the permission of the arbitration tribunal, it may be deemed to have withdrawn its application for arbitration. If the respondent is absent from the oral hearings, a default award may be made.⁴⁷

A hearing is not mandatory if the parties agree to arbitrate disputes without oral hearings. In that circumstance, the arbitral tribunal may render an award on the basis of the written submissions and other materials submitted by the parties during the proceedings.⁴⁸

4.5.7 Does it prescribe principles governing the awarding of interest?

The PRC Arbitration Law is silent on whether arbitrators may award interest in arbitration. In practice, arbitral tribunals seated in China usually award simple or compound interest, calculated from the date due until the date of full payment.

According to the PRC Civil Procedure Law, if a party fails to fulfil its payment obligations within the time limit specified in the judgment, ruling or "*any other enforceable legal instrument*", the party is obliged to pay double interest on the belated payment for the period of deferred performance.⁴⁹ In 2014, the SPC clarified that interest for a late payment should be calculated according to the method stated in the award, plus additional interest at the rate of 0.0175% per day.⁵⁰

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

This principle is set out in the Measures on Arbitration Fees to be Charged by Arbitration Commissions⁵¹ (the "**1995 Measures**"), which relate to "arbitration fees", *i.e.*, fees collected by an arbitration commission and used to pay the arbitrators and for the administration of the case. Article 9 of the 1995 Measures states that: "*The arbitration fees shall, in principle, be borne by the losing party*". In arbitrations seated in China, the losing party is generally ordered to compensate the winning party for its reasonable costs of the arbitration.

There are no express limits in PRC law or in Chinese arbitration rules on the amount of costs that a tribunal can order an unsuccessful party to reimburse. Awards in respect of lawyers' fees depend heavily on the individual tribunal's discretion as to whether the costs are reasonable in the eyes of the tribunal.

Where a party is only partially successful, Article 9 of the 1995 Measures (in respect of arbitration fees payable to arbitration commission and the arbitral tribunal) provides that: "*the arbitration tribunal shall determine the proportion of arbitration fees to be borne by each party according to the liability of each party.*"

Under some of the leading Chinese arbitration commissions' rules, the arbitral tribunal has discretion to decide the cost allocation between the parties. The factors that the arbitral tribunal is required to take into consideration include the outcome and complexity of the case, the workload of the successful party and/or its representatives and the amount in dispute.

⁴⁶ Article 39 of PRC Arbitration Law.

⁴⁷ Article 42 of PRC Arbitration Law.

⁴⁸ Article 39 of PRC Arbitration Law.

⁴⁹ Article 253 of PRC Civil Procedure Law 2017.

⁵⁰ Article 1 of Interpretations of the Supreme People's Court on Certain Issues Concerning the Application of Law to the Calculation of the Interest Accrued on Debts for the Period of Delay in Performance during Enforcement Proceedings.

⁵¹ Measures on Arbitration Fees to be Charged by Arbitration Commissions, Promulgated by the State Council on July 28, 1995.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

An arbitrator will become subject to civil or criminal liability, and the arbitral institution should remove his or her name from the register of arbitrators, in the following circumstances:⁵²

- (1) The arbitrators have privately met with a party or agent or accepted an invitation to entertainment or gift from a party or its agent, and the circumstance is serious;
- (2) The arbitrators have embezzled funds, accepted bribes, committed malpractice for personal benefit or perverted the law when deciding cases.

PRC law does not provide more details on this topic. There are a number of published cases in this regard, but they are not binding as precedent.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

An arbitrator who deliberately renders an award in violation of the law and against the facts may be charged with criminal liability of up to seven years imprisonment under the PRC Criminal Law.⁵³ Other participants may be subject to criminal liability if they refuse to satisfy an award and the circumstances are serious.⁵⁴

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Under the PRC Arbitration Law, an award is required to specify the claims, the facts, the reasons for the decision, the results of the award, the allocation of arbitration fees and the date of the award. However, the facts and the reasons for the decision can be omitted if the parties so agree.⁵⁵ For example, under the BAC Rules 2015, the facts and the reasons on which the award is based may not be stated in the award if the parties have so agreed, or if the award is made in accordance with the terms of a settlement agreement between the parties.⁵⁶

5.2 Can parties waive the right to seek the annulment of the award?

The PRC Arbitration Law is silent on whether any of the grounds for setting aside the award are subject to waiver by party agreement. Since the right to seek the setting aside of an award or to resist its enforcement are provided by law, in practice it is unlikely that the Chinese courts would consider that parties can waive their statutory rights by agreement.

The SPC Interpretation of Arbitration Law indicates that failure by a party to object to the validity of an arbitration agreement during arbitration proceedings would be considered a waiver of its right to raise such objection to set aside or resist enforcement of the award after the award is made.⁵⁷

⁵² Article 38 of PRC Arbitration Law

⁵³ Article 399 of Criminal Law of the People's Republic of China

⁵⁴ Article 1 and Article 2 of Interpretations of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Criminal Cases of Refusing to Satisfy Judgments or Rulings

⁵⁵ Article 54 of PRC Arbitration Law

⁵⁶ Article 48 of BAC Rules 2015

⁵⁷ Article 27 of SPC Interpretation of Arbitration Law.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

For arbitration administered by an arbitration commission in China, the arbitral award must be signed by the tribunal members and sealed by the arbitration commission.⁵⁸

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

The arbitral award is final and binding. Neither party can bring a lawsuit before a court or commence another arbitration at an arbitration commission over the same dispute.⁵⁹

The parties can only apply to the competent court to set aside or refuse to enforce an arbitral award. The ruling of a court to set aside or to refuse enforcement of an arbitral award cannot be appealed.⁶⁰

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

Arbitration awards rendered by Chinese arbitration commissions out of proceedings seated in mainland China are enforceable as domestic judgments, subject to limited grounds for non-enforcement. Foreign arbitration awards (which are rendered in arbitration seated outside of mainland China) are enforceable in mainland China under the New York Convention.

The general procedures for the recognition and enforcement of foreign awards are as follows:

(1) The competent court is the court where the party against whom enforcement is sought is domiciled or where the enforceable property is located;⁶¹

(2) The party seeking enforcement should submit a written enforcement application, the duly authenticated original award or a certified copy thereof, the original arbitration agreement or a certified copy thereof, proof of the applicant's identity and a valid power of attorney.⁶² A Chinese translation must be provided for any documents specified above that are not in Chinese;

(3) The time limit for submitting a recognition and enforcement application is two years, commencing from the last day of the performance period specified in the arbitral award, or the effective date of the arbitral award if the award does not specify a period for performance;⁶³

(4) Fees and expenses for enforcement are paid in deposit.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

If a party applies for enforcement of the arbitration award and the other party applies to set aside the same award, the court shall suspend the procedure of enforcement.⁶⁴

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

PRC courts make their decisions regarding whether to recognise and enforce a foreign arbitral award in accordance with the New York Convention. Article V(1)(e) of the New York Convention provides that the court

⁵⁸ Article 54 of PRC Arbitration Law.

⁵⁹ Article 9 of PRC Arbitration law.

⁶⁰ Article 154 of PRC Civil Procedure Law (2017).

⁶¹ Article 283 of PRC Civil Procedure Law (2017) and Article 3 SPC Notice regarding New York Convention.

⁶² SPC Notice regarding New York Convention.

⁶³ Article 239 of PRC Civil Procedural Law (2017).

⁶⁴ Article 64 of PRC Arbitration Law.

may refuse to enforce an arbitral award that has been set aside by the court at the seat. Under PRC law, the PRC courts shall refuse to enforce a foreign arbitral award if the award falls within the scope of Article V(1) or V(2) of the New York Convention.⁶⁵ Therefore, Chinese courts will refuse to recognise or enforce an arbitral award that has been annulled at its seat.

5.8 Are foreign awards readily enforceable in practice?

In general, enforcing foreign awards in China under the New York Convention is relatively easy. The SPC has adopted a pro-enforcement stance, although local courts may occasionally be less ready to enforce.

In 1995, the SPC introduced a special procedure (known as the "reporting system"), to reduce the scope for local protectionism that led to refusals to enforce arbitral awards. Under the reporting system, a local court must obtain the approval of its higher court, up to the SPC, before refusing to enforce a foreign (or foreign-related Chinese) arbitration award. The requirement both discourages refusals to enforce, and ensures that the SPC obtains an overview of arbitration-related court practice across the country, with a view to achieving consistency of approach. In practice, however, problems may still be encountered in seizing assets depending on the local situation. Under the PRC Civil Procedure Law, the courts now must also provide written reasons for any decision to refuse enforcement or set aside awards.⁶⁶

6. Funding arrangements

6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction? If so, what is the practical and/or legal impact of such restrictions?

Generally, there is no restriction on PRC lawyers entering into success fee arrangements (i.e. uplift to their fees in case of success), or pure contingency fee arrangements (i.e., charging their legal fees only if the client is successful), or a combination of both. Where contingency fees are allowed, such fees are not permitted to exceed 30% of the amount in dispute.⁶⁷

Third party funding in arbitration is not prohibited in mainland China.

6.2 Is there likely to be any significant reform of the arbitration law in the near future?

Ad hoc arbitration has long been impermissible under PRC Arbitration Law. However, recent judicial developments indicates that designation of an arbitration commission will not necessarily be required, if the arbitration agreement is (a) between enterprises registered in China's Pilot Free Trade Zones and (b) fulfils specific requirements as regards the place of arbitration, arbitration rules and arbitrators.⁶⁸ Subsequently, the first set of Chinese *ad hoc* arbitration rules were issued, under which arbitral institutions are empowered to determine the constitution of the arbitral tribunal, unless otherwise agreed by parties.⁶⁹ The SPC has not provided further clarification on these issues. It remains to be seen how ad hoc arbitration can be administered in mainland China, and on what grounds the courts will be allowed to intervene to assist in *ad hoc* arbitration seated in mainland China.

**The contents of this note do not constitute an opinion upon Chinese law. If you require such an opinion, please seek separate advice.*

⁶⁵ Article 4 of SPC Notice regarding New York Convention.

⁶⁶ Article 154 of PRC Civil Procedure Law (2017).

⁶⁷ Article 13 of Measures for the Administration of Lawyers' Service Charges.

⁶⁸ Article 9 of SPC's Guiding Opinions on Providing Judicial Safeguards for the Establishment of the Pilot Free Trade Zone (Chinese Text Only).

⁶⁹ Article 20 of Hengqin Pilot Free Trade Zone *Ad Hoc* Arbitration Rules (Chinese Text Only). Available at: <http://www.hengqin.gov.cn/hengqin/xxgk/201703/b11759a555bcb484f9016294a9b53edcd.shtml>.

CZECH REPUBLIC

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

PETR BRIZA AND TOMAS HOKR
OF **BŘÍZA & TRUBAČ** ATTORNEYS AT LAW

BŘÍZA & TRUBAČ
ARBITRATORS - ATTORNEYS AT LAW

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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS

1. Law ●
 - a. Framework ●
 - b. Adherence to international treaties ●
 - c. Limited court intervention ●
 - d. Arbitrator immunity from civil liability ●
2. Judiciary ●
3. Legal expertise ●
4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

In the Czech Republic, arbitration is considered and widely used as a speedy and cost-effective alternative to judicial dispute resolution of B2B disputes in court proceedings. The Czech state courts have been mostly supportive of the process of integrating arbitration in the the Czech legal system. The rise in the use of arbitration in the Czech Republic in recent years is mostly due to the importance of Czech businesses in the global economy. As a result, there has been a steady increase in the number of institutional arbitrations under various rules. In contrast, the caseload of the Czech arbitral institutions¹ is on the decline.²

Key places of arbitration in the jurisdiction	Prague is considered to be the key place of arbitration in the Czech Republic. Other cities in the Czech Republic are seldom used.
Civil law / Common law environment?	The Czech Republic is a Civil law country, where most of the rules are codified in statutes and regulations, among which the Czech Civil Code plays a major role.
Confidentiality of arbitrations?	Parties to a dispute are not obligated by law to keep the proceedings confidential but it is prevailing good practice to do so. Pursuant to the Arbitration Act, arbitrators are bound by a duty of confidentiality. ³ Arbitrators are subject to a duty of confidentiality for all information in connection with the case acquired during the term of their office, which can only be lifted upon the agreement of the parties to the dispute or by an order of the state court. Releasing an arbitrator from confidentiality is decided on a case-by-case basis. Nevertheless, if not released, the obligation to keep confidential any facts and issues that come to the arbitrator's attention during the term of his/her office ⁴ lasts without time limitations. However, an arbitrator is

¹ Most commercial disputes in the Czech Republic are referred to the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic. The Arbitration Court has gained international recognition mainly for arbitration of domain-name disputes (it is the only institution in the world to be authorized to arbitrate EU domain disputes). Other arbitration courts established by law are the Exchange Court of Arbitration at the Prague Stock Exchange or Arbitration Court attached to the Czech-Moravian Commodity Exchange Kladno.

² There may be various reasons for this decline including the lesser flexibility of the arbitration rules attached to the Czech institutions (e.g., as regards the selection of arbitrators not registered in the list of arbitrators maintained by the institution), less concerns for the costs of such arbitration (the lesser costs involved in a dispute administered by Czech arbitral institution arguably may have been the main driving force for choosing the Czech institution) or overall reputation.

³ Section 6 of Act No. 216/1994 Coll., on arbitral proceeding and on enforcement of arbitral awards ("Arbitration Act") reads as follows: "(1) The arbitrators shall be bound to maintain confidentiality of any circumstances they have learnt of in connection with their office of arbitrator unless they are released of their duty. (2) Arbitrators may be released from confidentiality by the parties. If the parties do not release the arbitrator from the confidentiality obligation, the decision on the release from confidentiality for serious reasons shall be made by the Chairman of the District Court with jurisdiction over the district in which the arbitrator has his or her permanent residence. If the arbitrator does not have his or her permanent residence in the territory in the Czech Republic, or if the arbitrator's residence cannot be established, the decision on the release from confidentiality shall be made by the Chairman of the District Court with jurisdiction over the district in which the arbitral award was made. If the place where the arbitral award was made cannot be established or if the award was not made in the Czech Republic, the decision shall be made by the Chairman of the District Court for Prague 1." [all quotations of the Czech regulations contained herein are unofficial translations thereof].

⁴ Starting from the appointment of the arbitrator until the arbitral proceeding is concluded.

	certainly obliged to provide information about the case in the event of a review ⁵ or execution of the award by the regular court.
Requirement to retain (local) counsel?	There is no requirement to retain counsel in the arbitral proceeding under the Arbitration Act. By way of analogy, the respective provisions of the Czech Civil Procedure Code ⁶ apply, hence a party may act on its own or through a representative using a power of attorney. The Czech Act on the Legal Profession must be observed; it follows that if a party is represented by remunerated counsel, such counsel must maintain a status within the Czech Bar Association. ⁷
Ability to present party employee witness testimony?	There are no limitations to offering witness testimony from employees of parties to the dispute.
Ability to hold meetings and/or hearings outside of the seat?	The parties are free to agree on any place for the hearing even outside the place of arbitration. In the absence of such agreement, the arbitrators have the power to decide this issue taking into consideration the interest of both parties.
Availability of interest as a remedy?	The Arbitration Act does not lay down specific rules on interest. Interest is considered as tied to a main claim and thus governed by substantive law. It follows that except if the parties agree otherwise, a claim decided under the Czech law as substantive law covers also interest (either on a contractual basis or on the statutory basis). No interest is awarded on the costs of proceedings.
Ability to claim for reasonable costs incurred for the arbitration?	As a general rule, the arbitral tribunal seated in the Czech Republic will always fix the costs of the arbitral proceedings in an award and apportion them on the basis of the principle of costs follow the event. Arbitral tribunals usually take into account each party's rate of success where either of them was partially successful in the dispute. The tribunal has the power to rule that each party shall bear their own costs, if the circumstances require so. Generally, legal expenses are calculated on the basis of the rates fixed in the Decree of the Ministry of Justice, ⁸ thus they might be different from the actual legal costs incurred by a party. The parties may agree on a different way to allocate the costs provided the agreement is reasonable under the circumstances.

⁵ Such review may be in the form of a state court proceeding initiated upon a motion to set aside an award or a motion to stop execution.

⁶ Act No. 99/1963 Coll., Civil Procedure Code, as amended.

⁷ The lawyers of EU member states may obtain a status within the Czech Bar Association on basis of Council Directive 77/249/EEC of 22 March 1977 and Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 or subject to limited requirements related to personal and professional integrity (see, Sections 35f – 35n of Act No. 85/1996 Coll., on the Legal Profession. Other foreign lawyers would usually need to pass an exam testing the knowledge of the Czech laws).

⁸ Decree of the Ministry of Justice No. 177/1996 Coll., of 4th June 1996, on fees and remuneration of lawyers for the provision of legal services (the Lawyer's Tariff). The reference to the Lawyer's Tariff results from application the Civil Procedure Code applies by way of analogy.

Restrictions regarding contingency fee arrangements and/or third-party funding?	There are no restrictions on third-party funding. Arbitral proceedings are usually funded by the parties themselves. However, it is also possible to seek assistance in financing arbitration expenses, including lawyers' and other fees. This may take the form of a standard loan or an arrangement relating to an agreed proportion of an awarded sum. As far as the contingency fee is concerned, a Czech attorney (or any other counsel maintaining status with the Czech Bar Association) must observe the Code of Professional Conduct. ⁹ Counsel's compensation may be limited (in case of a dispute between a counsel and a client) to the amount which is reasonable under the given circumstances, ¹⁰ (a success fee of more than 25% of the amount at stake is usually not permitted). ¹¹ The common types of contractual remunerations include time-based remuneration, remuneration based on number of conducted legal actions, success fee, monthly rate and others.
Party to the New York Convention?	The Czech Republic is a party to the New York Convention by way of succession since 30 September 1993 (its predecessor Czechoslovakia acceded on 10 July 1959). In accordance with the reservation made by Czechoslovakia at the time the New York Convention was adopted, the Convention does not apply to the recognition and enforcement of foreign awards (awards where the place of arbitration is outside of the territory of Convention member states), unless reciprocity is granted.
Other key points to note	<ul style="list-style-type: none"> • The Czech Republic pays particular respect to the rule of law. In the WJP Rule of Law Index 2016 the Czech Republic ranks the 17th globally with a score amongst the top in the CEE region. • The Arbitration Act does not grant the arbitral tribunals the power to order interim measures (e.g., injunctions). The arbitral tribunals have to seek assistance of the state courts.
WJP Civil Justice score (2017-2018)	0.74

⁹ See, Resolution of the Board of Directors of the Czech Bar Association No. 1/1997 of 31 October 1996.

¹⁰ The Lawyer's Tariff sets forth the basic principle in its Section 4(3): "Contractual remuneration must be reasonable and must not be in a clear disparity with the value and complexity of the matter."

¹¹ Section 10(5) of the Code of Professional Conduct reads as follows: "The attorney is free to agree on a contractual remuneration determined by a share in the value of the matter or the outcome of the matter if the amount of the remuneration thus agreed is adequate according to the provisions of paragraphs 2 and 3. However, as a rule, the contractual remuneration determined by the share in the result of a matter, shall not exceed 25%."

ARBITRATION PRACTITIONER SUMMARY

In the Czech Republic, arbitration enjoys a status equivalent to court proceedings. Arbitration has multiple advantages to the traditional court proceedings *e.g.*, single instance, prompt proceedings, informality and reasonable costs. Nowadays we witness a rapid growth in popularity of international arbitration both *ad-hoc* and institutional in the Czech Republic. Many significant domestic and international disputes are arbitrated under the various institutional rules. This has been buttressed by the recent Supreme Court case-law, under which it is possible to submit a wholly domestic dispute to international arbitration.

Date of arbitration law?	The law governing arbitration is found in the Arbitration Act ¹² and the Act on Private International Law. ¹³
UNCITRAL Model Law? If so, any key changes thereto?	Despite the fact that the Arbitration Act is not an express incorporation of the UNCITRAL Model Law, the majority of its provisions and all its fundamental principles in fact reflect the Model Law. The main differences are in the rules pertaining to arbitrators, the power of arbitrators to order interim measures and the conduct of arbitral proceedings. The Arbitration Act also does not provide for as much detail as the Model Law, since it refers to the provisions of the Civil Procedure Code with respect to issues not regulated by the Arbitration Act.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	There is no specialized court dealing with arbitration-related matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Arbitral tribunals are not empowered to order any interim measures. They do not even have the power to apply for interim measures to the court. The Arbitration Act states that only the parties may apply to the competent court (the court that would hear the dispute if the arbitration agreement did not exist) to grant interim measures in case the enforcement of an arbitral award may be jeopardized. This applies irrespective of whether the arbitration has been submitted or whether an obligation is imposed on a third party.
Courts' attitude towards the competence-competence principle?	Pursuant to the Arbitration Act, the arbitral tribunal has the power to decide on its own jurisdiction and the courts do not have jurisdiction to make preliminary rulings on the arbitral tribunal's jurisdiction once it has been constituted. If the respondent objects to the arbitral tribunal's jurisdiction in a court after an arbitration has been initiated, the court will stay its proceedings until the arbitral tribunal decides on its jurisdiction. If, however, an objection to the arbitral tribunal's jurisdiction is filed with a court before the commencement of the arbitration, ¹⁴

¹² Act No. 216/1994 Coll., on arbitral proceeding and on enforcement of arbitral awards.

¹³ Act No. 91/2012 Coll., on Private International Law (the "PIL").

¹⁴ The arbitral proceeding is deemed commenced on the day on which the request for arbitration is delivered to the permanent arbitration court or a presiding arbitrator if there is no arbitration court (such as *ad hoc* arbitration).

	<p>the court will decide if there is a valid arbitral agreement. An objection on the grounds of the non-existence, invalidity or termination of the arbitration agreement must be raised by way of an application with a court to rule on this issue no later than at the moment of the objecting party's first procedural act concerning the merits unless the invalidity of the agreement is based on the fact that it was not possible to conclude the agreement in the case.</p>
<p>Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?</p>	<p>In addition to the grounds recognized by the New York Convention, the Arbitration Act allows an award to be challenged on the following grounds in the Czech Republic: (i) the arbitral award was not adopted by a majority of the arbitrators; (ii) the arbitral award requires the party to satisfy an impossible or illegal obligation under Czech law or an obligation not requested by the claimant; and (iii) the rules of the Czech Civil Procedure Code allow a case to be re-opened – such as the discovery of a new circumstance or evidence which existed at the time of the proceedings but was unknown to the given party. Under the Supreme Court's case law only arbitral awards issued in the Czech Republic (where the (legal) seat of arbitration was in the Czech Republic) may be set aside by the Czech court.</p>
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>An award annulled at the seat, is denied enforcement in the Czech Republic. Unlike the New York Convention where the non-enforcement by reason that the award has been set aside by the court of the seat of arbitration is stipulated as a possibility, the denial of enforcement for this reason is mandatory under Czech law.</p>
<p>Other key points to note?</p>	<p>∅</p>

JURISDICTION DETAILED ANALYSIS

In the Czech Republic, arbitration has become a commonly used instrument for the resolution of B2B (*i.e.*, commercial) disputes. Even though it was originally used to settle international disputes, arbitration is more used to resolve domestic disputes. A rapid growth in popularity of international arbitrations has been supported by the recent Supreme Court case-law allowing international arbitrations in wholly domestic disputes.¹⁵

1. Legal Framework

1.1 The domestic law governing arbitration

Both domestic and international arbitration taking place in the Czech Republic are governed by the Arbitration Act. Conflict-of-laws rules and rules concerning enforcement are governed by the PIL. Despite the fact that the Arbitration Act is not an express incorporation of the Model Law, the majority of its provisions and all of its fundamental principles in fact reflect the Model Law. The main differences involve the rules pertaining to arbitrators,¹⁶ the power of arbitrators to order interim measures¹⁷ and the conduct of arbitral proceedings.¹⁸ The Arbitration Act also does not provide for as much detail as the Model Law, since it refers to the provisions of the Civil Procedure Code, which governs procedure before the local courts, with respect to issues not regulated by the Arbitration Act.

1.2 International treaties

The recognition and enforcement of foreign awards is governed by the New York Convention which was adopted in the Czech Republic by way of succession on 30 September 1993 (Czechoslovakia acceded on 10 July 1959). In accordance with the reservation made by Czechoslovakia at the time the New York Convention was adopted, the Convention does not apply to the recognition and enforcement of foreign awards (awards where the place of arbitration is outside of the territory of the Convention member states), unless reciprocity is granted. Besides the New York Convention, the Czech Republic is party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (a.k.a. the Washington Convention, since 8 April 1992), Energy Charter Treaty of 1991 (since 16 April 1998) and the European Convention on International Commercial Arbitration of 1961 (since 11 February 1964). The Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 is also still in effect in the Czech Republic, although its significance (impact on practice) is rather limited.

1.3 Institutional arbitration bodies v. *ad hoc* arbitrations

The parties may choose to have their dispute heard either before a permanent (institutional) arbitration court or before an *ad hoc* appointed arbitrator or arbitrators. Pursuant to the Arbitration Act, however, a permanent arbitration court can only be established by an act of Parliament. The arbitral awards of other permanent arbitration bodies such as those issued in the Czech Republic under institutional arbitral rules are considered to be rendered by *ad hoc* tribunals under Czech law. Although the rules of a permanent

¹⁵ See, Decision of the Supreme Court No. 23 Cdo 1034/2012, dated 30 September 2013. Pursuant to the PIL, the distinction between a domestic and an international arbitration award lies within a place where the arbitral award is rendered (*see*, Section 120 of the PIL). To this effect, the Supreme Court has clarified that a place of arbitration as agreed between the parties in the arbitration agreement is the only determiner. In contrast, the nationality of the parties and arbitrators, the language of the proceeding or a location of the hearings have no impact on such determination. It is unclear, however, whether such position would be maintained had the parties to arbitration made no agreement on the place of arbitration and thus leave it up to the discretion of the tribunal.

¹⁶ Unlike the Model Law the Arbitration Act requires an odd number of arbitrators.

¹⁷ According to the Arbitration Act arbitrators are not empowered to grant interim measures.

¹⁸ The Arbitration Act provides that – save for the agreement of the parties to the contrary – a hearing must be held.

arbitration body may simply be referred to in an arbitration agreement, Czech law requires that the rules of an *ad hoc* arbitration must be attached to a contract if the parties wish to agree on *ad hoc* arbitration.¹⁹

1.4 Arbitration Agreement

The Arbitration Act defines an arbitration agreement as an agreement of the parties in which they contract to have their property dispute, which would otherwise fall within the jurisdiction of the courts or which are subject to arbitration under special laws, decided by one or more arbitrators or by permanent arbitral institution.

1.5 Form of the arbitration agreement

Pursuant to the Arbitration Act, arbitration agreement has to be in writing to be valid. The Arbitration Act permits the conclusion of an arbitration agreement by electronic means provided that the content of the agreement and the parties to it are clearly determined. The Arbitration Act does not expressly require that the arbitration agreement be signed by both parties. It can also be concluded by a reference to general terms and conditions governing the main contract if accepted in a way that makes clear that the other party agreed with the arbitration agreement.

1.6 Arbitrability

As a general rule, Czech courts enforce arbitration agreements unless the subject matter of the dispute is non-arbitrable under Czech law. There are three requirements that render a dispute arbitrable. First, the arbitration is permitted in all property disputes. Czech courts interpret the notion of “property dispute” very broadly as a dispute concerning property rights that can be valued in monetary terms. In other words, it covers both disputes over monetary claims as well as disputes over the existence of the right to such performance. Thus, promissory notes claims are arbitrable,²⁰ as well as, e.g., a dispute over an eviction (from an apartment).²¹ By contrast, matters excluded from the scope of arbitration involve disputes related to personal status, most family law disputes, insolvency disputes, disputes arising in connection with enforcement proceedings and incidental disputes (e.g., disputes regulated by Czech Act No. 182/2006, on Insolvency and Its Resolution relating to the authenticity, amount or ranking of claims asserted in insolvency proceedings). In addition, as of December 2016 all B2C disputes are non-arbitrable under the Arbitration Act as well.

Second, the matter in dispute must fall within the court's competence. Disputes that are within the jurisdiction of executive, administrative or other authorities (such as Office for the Protection of Competition, Industrial Property Office etc.) are non-arbitrable. Selected disputes are subjected to arbitration under special laws (especially with regard to the energy and the telecommunications industry).

Third, the right to enter into an arbitration agreement is contingent on the parties’ right to settle the subject-matter of the dispute. The Arbitration Act here in fact refers to Section 99 of the Civil Procedure Code which allows for settlements in cases where parties are free to make dispositions with the claim. The boundaries lie in the distinction between adversary, allowing for settlements, and non-adversary proceedings, where the settlements are not permitted. The possibility to settle is assessed according to the law applicable to the merits of the dispute.

¹⁹ Section 19(4) of Arbitration Act reads as follows: “*The parties may also determine the procedure in the rules of arbitration if these rules are attached to the arbitration agreement. The use of the Rules of the Permanent Court of Arbitration is not thereby affected.*” That being said, the prevailing opinion is that publicly available and notoriously known rules (like, e.g., ICC Rules of Arbitration, LCIA Arbitration Rules) do not have to be attached to the arbitration agreement.

²⁰ See, Decision of the Supreme Court No. 29 Cdo 1130/2011, dated 31 May 2011.

²¹ See, Decision of the Supreme Court No. 20 Cdo 476/2009, dated 23 September 2010.

1.7 Arbitration agreement and non-signatories

The Arbitration Act (with one exception) does not provide for the joinder or consolidation of third parties in arbitration. As a matter of fact, arbitral practice in the Czech Republic generally does not recognise the binding nature of an arbitration agreement concluded by a parent company, on its subsidiary, an entity in the same corporate group, an entity in the related legal relationship or any other third party, unless it explicitly agreed to it (*e.g.*, a guarantor is not bound by the arbitration agreement between the creditor and the debtor).²² The only exception applies to the legal successors of the contracting parties which would be bound unless expressly excluded in the arbitration agreement.

1.8 The principles of separability and competence-competence

The principles of separability and competence-competence are both fully respected under Czech law. The separability principle is well established in Supreme Court case law and also reflected in conflict-of-laws rules. Section 15 of the Arbitration Act contains the principle of competence-competence, pursuant to which arbitrators have the exclusive power to decide on their own jurisdiction. If the respondent objects to the arbitral tribunal's jurisdiction in a court after an arbitration has been initiated, the court will stay its proceedings until the arbitral tribunal decides on its jurisdiction. If, however, an objection to the arbitral tribunal's jurisdiction is filed with a court before the commencement of the arbitration, the court will first decide if there is a valid arbitral agreement (Section 106 of the Civil Procedure Code). The parties must raise any objection to the arbitral tribunal's jurisdiction in their first procedural action in the proceedings; otherwise the objection is considered waived. The consent of a party to the arbitration agreement however cannot be presumed if that party is inactive and does not challenge the competence of the tribunal.²³ By contrast, arbitrators are empowered to decide on this issue (*i.e.*, the (in)validity of the agreement where a party is inactive), at any time during arbitral proceedings.

2. Arbitration Procedure

2.1 Request for arbitration

Arbitral proceedings commence on the date a request for arbitration is received either by the permanent arbitral court or by the presiding arbitrator (the chairman) if one has been determined or appointed. If the presiding arbitrator has not yet been determined or appointed, the request for arbitration must be lodged with any arbitrator already determined or appointed. The request is of a fundamental importance as it may result in significant procedural and substantive law consequences mirroring those of a submission of a lawsuit to a court (such as it stops the lapse of the statute of limitations).

2.2 Conduct of the proceedings

The parties are free to reach an agreement on the way the arbitrators conduct the proceedings. Such agreement binds arbitrators. Where parties agree on the jurisdiction of a particular permanent arbitration institution, they are also deemed to have accepted the procedural rules thereof (unless the arbitration agreement stipulates otherwise). If no agreement was concluded between the parties with respect to arbitral proceedings, the Arbitration Act states that arbitrators may conduct the proceedings in a manner they consider appropriate, subject to the principle of equality of the parties. Nevertheless, arbitrators are subject to the mandatory provisions of the Arbitration Act and the Civil Procedure Code (it must be first determined whether a particular rule is appropriate for arbitration proceedings – *e.g.*, a duty of the court to provide instructions to a litigant to supplement its pleadings if it fails to bear the burden of pleading pursuant to Section 118a of the Civil Procedure Code applies to arbitral proceedings only insofar as to

²² See, Decision of the Supreme Court No. 23 Cdo 111/2009, dated 23 February 2011. As far as the consent to arbitration is concerned, the alter ego doctrines are not recognized under the Czech law.

²³ See, Decision of the Supreme Court No. 20 Cdo 2857/2006, dated 30 October 2008.

prevent adverse *i.e.*, surprising decisions of the arbitrators),²⁴ from which they cannot deviate (such as the rules addressing the delivery of certain tribunal's correspondence).

2.3 Location of the hearings, language, confidentiality

The Arbitration Act states that arbitral proceedings have to be conducted at the location on which the parties have agreed. Otherwise the arbitral tribunal shall determine such location taking into consideration the legitimate interests of the parties. Unless otherwise agreed by the parties, a hearing has to be convened. The parties are free to agree to conduct all or part of the arbitral proceedings in writing or by means of an online arbitration facility.²⁵ If the arbitration seat is in the Czech Republic, the hearing would usually be in Prague, however, the tribunal is free to move the location of a hearing to some other location in the Czech Republic or abroad. The Arbitration Act does not contain any express provisions in relation to the language of the arbitral proceedings. Generally, hearings are conducted and decisions are made in the Czech language, unless otherwise provided in the arbitration agreement, agreed upon by the parties or determined by the rules of the relevant arbitral institution.

Pursuant to the Arbitration Act arbitral proceedings are non-public. Arbitrators are subjected to the duty of confidentiality concerning all information in connection with the case during the term of their office. The arbitrators are relieved from that duty upon the agreement of the parties or by an order of the regular state court, such as the need to disclose certain facts known to an arbitrator in the criminal proceedings. By contrast, the Arbitration Act does not extend the duty of confidentiality to the parties.

2.4 The rules of evidence

The Arbitration Act empowers an arbitral tribunal to examine documentary evidence, witnesses, experts and parties insofar as they voluntarily appear. The arbitral tribunal does not have the power to compel witnesses and the parties to appear or appoint experts to give evidence (parties may agree on such an appointment and on the related costs). In order for the tribunal to obtain evidence other than introduced by a party or to take any steps in the arbitral proceedings which the arbitral tribunal itself is unable to take, it must apply to the state court for legal assistance. Although in Czech arbitration practice the IBA Rules on the Taking of Evidence in International Arbitration are rarely used, nothing precludes parties from agreeing that the IBA Rules should apply with regard to their arbitration.

3. Arbitrators

3.1 How are arbitrators appointed?

The Arbitration Act offers three ways to determine the number of arbitrators and the procedure of their appointment. First, the parties are encouraged to agree on these matters in their arbitration agreement. The Arbitration Act provides that any number of arbitrators must be odd.

Second, the parties can also refer to arbitration rules providing for a number and a mechanism of appointment. If the parties chose to use rules that provide for *ad hoc* arbitration, such rules must be attached to the arbitration agreement. Although some foreign arbitration institutions are not *stricto sensu* considered "permanent arbitration courts" under the Arbitration Act, the prevailing view is that publicly available and notoriously known rules do not have to be attached to the parties' agreement for them to be applicable.

²⁴ See, Decision of the High Court in Prague No. 1 Cmo 56/2015-196, dated 15 September 2015.

²⁵ Online arbitration facilities are provided for by an arbitral institution (such as the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic) that allow for submissions to be filed electronically via the internet. An online arbitration facility is usually closely linked to online arbitration under a specific set of rules of arbitration. Under such rules, both parties and arbitrators would use an online setting for all actions related to the arbitral proceeding such as communication, submissions, hearings, payment of fees associated with arbitration proceedings etc.

Finally, absent any such agreement a default procedure under the Arbitration Act is triggered which provides that an arbitral tribunal is composed of three arbitrators, where each party selects one arbitrator and the two party appointed arbitrators select the chairman. If a party does not select its arbitrator within 30 days from the day it received an invitation to do so by the other party or if within the same period the two co-arbitrators cannot agree on the chairman, the respective arbitrator is appointed at the request of a party or any arbitrator by the court. The court also steps in and appoints a new arbitrator if an arbitrator resigns or can no longer fulfil his/her duties.

3.2 Who can serve as arbitrator?

Both Czech and foreign citizens may serve as arbitrators. Czech nationals are required to be of at least 18 years old, enjoy legal capacity and have a clean criminal record to serve as arbitrators. By contrast, a foreign national arbitrator is only required to have full legal capacity under Czech law or the law of his/her nationality. Arbitrators in the Czech Republic are not required to follow any arbitrators' code of ethics.

The Arbitration Act does not provide any express provision relating to the immunity of an arbitrator, therefore, the general rules of liability contained in the Civil Code²⁶ apply.²⁷ Since under the Czech law it is impossible to waive a liability in advance with respect to the natural rights, intentional harm or harm caused through gross negligence and any harm caused to a weaker party,²⁸ any exclusion of liability of arbitrators (or an arbitral institution) incorporated in the arbitration rules would be inapplicable, should the agreement be governed by Czech law. Criminal liability of arbitrators is unaffected.

3.3 Disclosures and disqualifications of arbitrators

A prospective arbitrator is required to disclose to the parties (or to the state court) all circumstances which are likely to raise justified doubts as to his impartiality and which would disqualify the arbitrator from acting as an arbitrator. The standard for disqualification of an arbitrator from the proceedings is based on an assessment whether there is a reason to doubt his impartiality, taking into account his relationship to the subject matter of the dispute, the parties or their representatives. The arbitrator must resign, if such circumstances arise or are discovered later in the proceedings. If he does not resign and the parties do not agree on his resignation, any party can apply to the state court to disqualify the arbitrator.

4. Interim Relief

4.1 Interim measures

Arbitral tribunals are not empowered to order any interim measures. They do not even have the power to apply for interim measures to state courts. The Arbitration Act states that only the parties may apply to the competent state court (the court that would hear the dispute if the arbitration agreement did not exist) to grant interim measures in case the enforcement of an arbitral award could be jeopardized. However, it can generally be stated that state courts are reluctant to interfere with foreign court proceedings, for example by issuing anti-suit injunctions (within the EU it would even violate EU law).²⁹ It is worth noting that a party applying for an interim measure must provide a security in the amount of CZK 50,000 (about USD 2,000) to cover any potential damage caused by the interim measure.

²⁶ Act No. 89/2012 Coll., the Civil Code.

²⁷ See, Decision of the Supreme Court No. 25 Cdo 167/2014, dated 27 August 2015.

²⁸ A weaker party is not defined by the Civil Code, yet it is a concept used therein. The doctrine defines a weaker party as a person (a consumer or even an undertaking) which is on an unequal footing with another party due to its economic position. One's economic position may be determined on the basis of a number of factors such as the financial strength of the business, vertical interconnection, access to technology etc., See, Section 2898 of the Civil Code.

²⁹ See, Case C-185/07, Allianz SpA (formerly Riunione Adriatica di Sicurtà SpA) and Generali Assicurazioni. Generali SpA v West Tankers Inc [2009] ECR I-663.

4.2 Security for costs

The Arbitration Act does not provide for any regulation over security for costs. The parties and arbitrators are, therefore, free to make an agreement regarding this matter.

5. Arbitration Award

5.1 Requirements for an arbitral award

The arbitral proceedings are concluded either with an arbitral award or with an order of discontinuance (when no arbitral award is issued such as when the request for arbitration has been withdrawn). Both decisions (an arbitral award and an order of discontinuance that contains decisions on costs) are enforceable. The Arbitration Act requires that the award (as well as the order of discontinuance) be rendered in writing, be adopted by a majority of arbitrators and signed by at least a majority of them. The operative part of the award must be unambiguous. Awards must also contain the reasoning unless otherwise agreed by the parties.

The validity and enforceability of an arbitral award is not dependent on any registration procedure. The Arbitration Act only stipulates that awards made in the Czech Republic are subject to safekeeping with a state court or arbitral institution.

5.2 Time frame for the arbitral awards

Czech law does not contain any provision with respect to the time limits for issuing an award or for the length of the arbitral proceedings.

5.3 Apportioning of arbitration costs, interests

Unless parties agree otherwise, in the Czech Republic, the tribunal will always include a decision on the costs of the arbitral proceedings in an award. The general rule for apportioning the costs is that the party that was fully successful in the case be reimbursed by the losing party for the costs which the winning party has incurred for the arbitral proceedings. If each of the parties was partially successful in the dispute, the arbitral tribunal apportions its cost award accordingly. The tribunal can also decide that neither of the parties is entitled to reimbursement of the costs. The legal costs are included within the reimbursement of the costs; nevertheless, the usual practice is that the legal expenses are calculated according to the rates fixed in the Decree of the Ministry of Justice.³⁰ Thus the actual amount of reimbursement might be quite different from the actual legal costs incurred by the party.

The Arbitration Act does not lay down specific rules on interest. As a matter of fact, pursuant to Czech law interest is considered to be a part of a claim and thus governed by substantive law. It follows that if parties do not exclude the powers of the arbitrators in this respect, a claim under Czech law subjected to arbitral proceedings will also cover interest (either on a contractual basis or on the statutory basis). No interest is awarded on the costs of proceedings.

6. Challenge of the Arbitration Award

6.1 Review of an award

Although the Arbitration Act provides for a rather unusual possibility to have an arbitral award reviewed by other arbitrators than the tribunal that has rendered it if the parties so agree, this is rarely used in the Czech Republic. In case an appellate procedure is agreed upon by the parties, the application for review has to be served on the other party within 30 days from the receipt of the award. The agreement of the parties on the appellate procedure would usually contain a provision concerning the scope of the review. In the absence of specific provisions regarding the scope, an arbitral award will be reviewed in whole. This

³⁰ Decree of the Ministry of Justice No. 177/1996 Coll., of 4 June 1996, on fees and remuneration of lawyers for the provision of legal services (the Lawyer's Tariff).

appeals process is considered a part of the arbitral proceedings, therefore, the provisions of the Arbitration Act apply. For obvious reasons (such as arbitration would lack one of its main benefits in comparison to court proceedings) this appellate procedure has been rarely used. In the majority of cases it is applied in cases when the award is rendered by a sole arbitrator. Instead parties often attempt to set aside arbitral awards in state court, though they are rarely successful. The Supreme Court made clear that only arbitral awards issued in the Czech Republic (where the (legal) seat of arbitration is in the Czech Republic) can be set aside (not appealed) by the court.³¹ An application to set aside an award must be filed with the Czech regional court (in Czech: *krajský soud*) within three months after service of the final award on the parties is completed. An award can be challenged on the following grounds:

- the arbitration award was issued in relation to a non-arbitrable dispute;
- the arbitration clause is invalid for other reasons, was terminated or does not cover the subject matter of the dispute (such application will be rejected by the court if the party had an opportunity to raise this ground during the arbitral proceedings but did not do so);
- an arbitrator was not entitled to decide the case based on the arbitration clause or otherwise did not have the capacity to act as arbitrator (such application will be rejected if the argument could have been raised during the arbitral proceedings but the party did not do so);
- the arbitral award was not adopted by a majority of the arbitrators;
- the party was not provided with the opportunity to present its case before the arbitral tribunal – *e.g.*, arguments such as having an opportunity to comment in writing on arguments of other party and a principle of equality in the proceedings are stressed in the Supreme Court case law³² (this is the most successful ground in Czech courts for setting aside an arbitral award);
- the arbitral award requires the party to satisfy an impossible or illegal obligation under Czech law or an obligation not requested by the claimant (there is no documented award set aside based on this ground);
- the rules of Civil Procedure Code allow a case to be re-opened – new circumstance or evidence existing at the time of the proceedings but which a party did not and could not have any knowledge of (this provision has been very seldom applied).³³

Even though a pending application does not suspend the enforceability of the arbitral award, the court can stay its enforcement upon an application of the party against which the enforcement is sought if there is a risk of serious prejudice of that party by an immediate execution of the award or if the action to set aside appears to be well grounded. Save for the last ground, only formal not factual grounds may be invoked by a party to set aside an award.

6.2 Correction of an award

Typographical errors, errors in computation, as well as other manifest defects in an arbitral award, may be corrected by the arbitrators or by the permanent arbitral institutions at any time, upon application by any party. Such corrections are made by way of a decree of correction, which is subject to the same requirements as an arbitral award (*i.e.*, in writing, decided and signed by the majority of arbitrators and served on the parties). Even though the Arbitration Act does not require a reasoning to be appended to correction, the Civil Procedure Code requires the decision, to state at least, the legal provision(s) relied on and the reasons.

³¹ Decision of the Supreme Court No. 23 Cdo 1034/2012, dated 30 September 2013.

³² *See, e.g.*, Decision of the Supreme Court No. 29 Cdo 1579/2011, dated 21 March 2013 or Decision of the Supreme Court No. 23 Cdo 2016/2011, dated 27 February 2013.

³³ *See, e.g.*, Decision of the Supreme Court No. 29 Cdo 4575/2008, dated 25 February 2010.

7. Enforcement of the Arbitration Award

Denial of enforcement of an arbitral award is also rather unusual in the Czech Republic. It is mainly because the Czech Republic is a signatory to most international treaties addressing arbitration and thus follows a pro-arbitration international practice. The Arbitration Act states that provisions of the act apply only if they do not contradict the provisions of an international treaty. Therefore, the New York Convention takes precedence over the act and foreign arbitral awards issued in jurisdictions that are party to the New York Convention must be enforced in the same manner as domestic arbitral awards (issued in the Czech Republic). A foreign award will also be enforced if it is issued in a jurisdiction that has a reciprocity agreement with the Czech Republic. The reciprocity requirement is deemed satisfied if the respective foreign country declares, in a general way, that awards are enforceable provided there is reciprocity. Nevertheless, foreign arbitral awards will not be enforced if:

- the foreign award is not final, binding and enforceable in accordance with the law of the issuing country;
- the award was annulled under the law of the country where it was issued – unlike the New York Convention which contemplates that non-enforcement by this reason is a possibility only, the PIL mandates the denial of enforcement for this reason;
- the award contains a defect for which a petition could be filed to set aside an award issued in the Czech Republic (the grounds for setting aside are mentioned above) – such a decision of the court has no impact on the validity of the award, it only affects recognition and enforcement in the Czech Republic;
- the award conflicts with Czech public order – it would be contrary to public order if the award imposes obligations contrary to mandatory law (e.g., the Constitutional Court ruled that a public order ground for non-enforcement arises when the fundamental rights of parties are violated).³⁴

7.1 Enforcement procedure

There is no specific procedure to follow in order to obtain recognition of a foreign award. An applicant must supply the court with an original or duly certified copy of the award and the arbitration agreement along with a translation into the Czech language (necessary if the foreign award is not drawn up in Czech which is not usually the case). An award containing information of its final and binding character as well as its enforceability is recognized in that it is taken into consideration as if it were a court judgment. If an obliged party does not carry out its obligations under an award voluntarily, the entitled party may file an application for enforcement with the state court (the competent court would be a court, in the territorial coverage of which the obliged party resides or has property). The decision of the court enforcing a foreign arbitral award must be reasoned. Apart from enforcement conducted by the court which tends to be rather slow, the Czech law provides for enforcement with private executors, *i.e.*, under Act No. 120/2001 (executing proceeding). Enforcement through private executors is often a preferred choice of the parties successful in the dispute since private executors are – for example – entitled to simultaneously issue multiple execution orders and the creditor is thus not obliged to pursue the property of the debtor itself. Both domestic awards and foreign awards falling under the New York Convention (and probably also by other international treaties binding upon the Czech Republic) might be enforced by private executors similarly to Czech state courts' judgments. Such option is however not as readily available to foreign arbitral awards as to the domestic awards. Under the recent Czech Supreme Court's case law, a foreign arbitral

³⁴ It is worth noting for example that in a recent decision the Supreme Court ruled that damages could have punitive and/or preventive character and thus cracked the door open for punitive damages to be enforceable in the Czech Republic albeit not permitted under Czech law (provided that the amount of punitive damages is not manifestly disproportionate to the loss sustained) – *See*, Decision of the Supreme Court No. 30 Cdo 3157/2013, dated 22 August 2014.

award can only be enforced in execution proceedings subject to prior recognition proceedings.³⁵ This is considered to be a drawback since the enforcement with private executors is deemed to be more efficient than court's enforcement.

During the enforcement proceedings, the state courts would only assess whether the formal requirements as set above have been met, they do not review the merits of the case. However, unlike provided under the New York Convention, the existence of each ground for non-enforcement will be considered by the courts ex officio.

³⁵ In Decision of the Supreme Court No. 20 Cdo 1165/2016, dated 3 November 2016, the Czech Supreme Court has refused to enforce an international arbitration award (rendered as per the New York Convention) through execution proceeding. The Court made a clear distinction between domestic arbitral awards (which without a need for recognition can be enforced through execution proceeding) and foreign arbitral awards (which in essence undergo the same procedure as any decision of a foreign court). This decision has been subject to vast criticism of all arbitration community in the Czech Republic as in fact questioning the authority of the New York Convention; *See also*, in the same vein, decision of the Supreme Court No. 20 Cdo 5882/2016, dated 16 August 2017.

DENMARK

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

PETER SCHRADIECK, JIMMY SKJOLD HANSEN
AND RIKKE SILKE KJELDSSEN
OF PLESNER

PLESNER

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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS

1. Law ●
 - a. Framework ●
 - b. Adherence to international treaties ●
 - c. Limited court intervention ●
 - d. Arbitrator immunity from civil liability ●
2. Judiciary ●
3. Legal expertise ●
4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

VERSION: 25 MAY 2018 (v01.001)

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Arbitration is a fully recognized dispute resolution mechanism in Denmark, considered on an equal footing with litigation in terms of enforceability and procedural guarantees. Denmark enacted its first statute dedicated to arbitration in 1972, which is also the year it acceded to the New York Convention on the Recognition and Enforcement of Foreign Awards. Following the 2005 revision of the Danish Arbitration Act (“DAA”), Denmark became a UNCITRAL Model Law country. Denmark ranked as number one overall out of 113 jurisdictions worldwide in the 2016 and 2017-2018 WJP Rule of Law Indexes, and is thus a very safe and modern forum for arbitration proceedings. With a legal reform currently in the pipelines, Denmark is arguably becoming an even more apparent alternative to the more traditional arbitration venues in Europe.

Key places of arbitration in the jurisdiction	Copenhagen, with its concentration of large firms and convenient access for foreign travelers, is usually the preferred venue for international arbitration proceedings seated in Denmark. Several of the Copenhagen-based law firms have facilities that will accommodate the needs of larger hearings. A selection of hotels and conference venues also offer good facilities.
Civil law / Common law environment?	Civil law. In order to identify the relevant rule(s) of law, it will often be necessary to also look to case law, custom and - to a lesser extent doctrine. This feature, together with the language barrier, makes Danish law somewhat inaccessible to foreign practitioners unfamiliar with the Nordic legal tradition.
Confidentiality of arbitrations?	The DAA does not specifically provide for the confidentiality of the arbitration proceedings but the Code of Conduct of the Danish Bar Association places Danish lawyers under a duty of professional secrecy. If the parties wish to ensure that they and the arbitral tribunal are bound by a duty of confidentiality, they should set this out in the arbitration agreement directly or request that the arbitral tribunal order the confidentiality of the proceedings.
Requirement to retain (local) counsel?	The DAA does not compel parties to retain counsel for the arbitration proceedings, but it will often be advisable to be assisted by counsel familiar with Scandinavian law and language, especially when the dispute is to be adjudicated under Danish law. Denmark belongs to the Nordic Civil law tradition and has a relatively strong tradition for codifying the law. In order to identify the relevant rule(s) of law, it will often be necessary to also look to case law, custom and - to a lesser extent doctrine. This feature, together with the language barrier, makes Danish law somewhat inaccessible to foreign practitioners unfamiliar with the Nordic legal tradition.
Ability to present party employee witness testimony?	Upon conferring with the parties, the arbitral tribunal may determine the permitted means of discovery, including whether party employees, other fact witnesses and experts shall be allowed to give testimony.

Ability to hold meetings and/or hearings outside of the seat?	Upon conferring with the parties, the arbitral tribunal may conduct meetings and hearings outside the designated legal seat.
Availability of interest as a remedy?	Upon conferring with the parties, the arbitral tribunal may decide on appropriate remedies, including whether to add simple or compound interest on any sums awarded.
Ability to claim for reasonable costs incurred for the arbitration?	Upon conferring with the parties, the arbitral tribunal may award and allocate reasonable costs.
Restrictions regarding contingency fee arrangements and/or third-party funding?	The DAA does not set forth any restrictions regarding contingency fees or third-party funding. Under the Code of Conduct of the Danish Bar Association, lawyers may not charge a percentage of the sums awarded to the client as such, but their fees may otherwise reflect the outcome of a case, and lawyers are free to operate on a "no cure, no pay" basis.
Party to the New York Convention?	Yes.
Other key points to note	ϕ
WJP Civil Justice score (2017-2018)	0.86 – ranked second (Overall score: 0.89 – ranked first globally).

ARBITRATION PRACTITIONER SUMMARY

Arbitration is a well-established dispute resolution mechanism in Denmark which enacted its first piece of statutory legislation dedicated to arbitration in 1972, when Denmark also acceded to the New York Convention on the Recognition and Enforcement of Foreign Awards (New York Convention). Denmark became a UNCITRAL model law country with the 2005 revision of the Danish Arbitration Act (DAA),¹ incorporating the 1985 version of the model law. While Denmark has not yet implemented the latest version of the model law, the jurisdiction nonetheless offers a modern and internationally recognizable legal framework for conducting arbitrations. Additionally, an imminent legal reform will, when adopted, align Denmark with the current model law and other best international practices in the field of arbitration and potentially even provide further "arbitration-friendly" benefits such as restrictions on appeal of arbitration-related court decisions and centralization of all such decisions at one specialised court.

Date of arbitration law?	The first piece of statutory legislation dedicated to arbitration was in 1972. It was revised in 2005.
UNCITRAL Model Law? If so, any key changes thereto?	Denmark is a model law country. However, the 2006 revision of the Model Law has not yet been incorporated into the DAA. As a consequence, while the DAA does set out a regime for the issuance of interim measures (albeit not to the level of detail of the 2006 model law), there is currently no applicable rules on the enforcement of interim measures ordered by arbitral tribunals. The contemplated legal reform of the DAA is expected to remedy this discrepancy between the model law and Danish legislation. The territories of Greenland and the Faeroe Islands, which enjoy Home Rule, still apply the 1972 Danish Arbitration Act and are thus not model law countries (territories).
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	At present, the DAA and the Danish Administration of Justice Act (AJA) do not draw a clear distinction between decisions taken by courts in connection with arbitral proceedings and regular litigation. As such, motions in relation to arbitral proceedings must be introduced at the competent district court (in Danish: <i>Byretten</i>) with the high court (in Danish: <i>Landsretten</i>) and, potentially, the Supreme Court acting as an appellate jurisdiction. The legal reform will, if adopted in its current form, concentrate all arbitration-related matters at the Maritime and Commercial Court of Copenhagen (in Danish: <i>Sø- og Handelsretten</i>) and significantly restrict the possibility of appeal of arbitration-related court decisions.
Availability of <i>ex parte</i> pre-arbitration interim measures?	The existence of an arbitration agreement does not preclude parties from seeking interim relief from the courts in accordance with section 40 of the AJA, but Danish courts would normally not accept granting such relief without affording all concerned parties with an opportunity to comment. Such <i>ex parte</i> measures would

¹ The law was voted unanimously by the Danish Parliament on 14 June 2005, published on 24 June 2005 and entered into force on 1 July 2005. It is available at:

http://voldgiftsinstitutet.dk/wp-content/uploads/2015/01/danish_arbitration_act_2005.pdf.

	in all likelihood be considered at variance with the principle of equal treatment set forth at section 18 of the DAA.
Courts' attitude towards the competence-competence principle?	The arbitral tribunal is competent to rule on its own jurisdiction (DAA, section 16). The arbitral tribunal's positive finding that it has jurisdiction over a matter can be contested before the courts within 30 days, provided that a partial award is issued on jurisdiction (Section 16(3) of the DAA; negative findings by the arbitral tribunal cannot be brought before the courts). Such recourse is not suspensive of the arbitration. The competence of state courts in arbitration-related matters is narrowly defined, <i>i.e.</i> , when seized of motion against the competence of the arbitral tribunal, the court will only examine the validity of the arbitration agreement and arbitrability of the issues at hand and will otherwise desist itself in favour of the arbitral tribunal (DAA, section 8(1)).
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	DAA mirrors the grounds set forth in the New York Convention for setting aside or denying enforcement of an award. Moreover, these grounds are narrowly construed in Danish case law.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The rules set forth at section 39 of the DAA on the grounds for denying enforcement of awards are mandatory, including part 1(e) which refers to awards that have not become binding or have been set aside at the seat. Whereas the wording of the provision (" <i>can be denied</i> ") suggests some discretion for the courts, we are not aware of any examples of courts having accepted to enforce awards that were annulled at the legal seat.
Other key points to note?	∅

JURISDICTION DETAILED ANALYSIS

While commercial arbitration is still little known to the general public in Denmark, it has for many years been a popular dispute resolution mechanism in commerce, considered on an equal footing with litigation in terms of enforceability and procedural guarantees.

Ranked as number one out of 113 jurisdictions worldwide in the 2016 and 2017-2018 WCJ Rule of Law Indexes,² Denmark is a "safe" jurisdiction offering reliable arbitration infrastructures, comprising a modern regulatory framework, generally arbitration-friendly courts and an increasingly specialised body of practitioners.

With a legal reform currently in the pipelines, Denmark is arguably becoming an even more credible alternative to the more traditional arbitration venues in Europe. The present Guide is intended to serve as an introduction to the current state of the law under the 2005 Danish Arbitration Act ("DAA") and the Administration of Justice Act ("AJA"), which are the relevant legal codes with respect to arbitration and arbitration-related court proceedings. We will attempt to flag areas where more comprehensive changes are being envisaged by the legal reform process. A summary of the key features of the contemplated legal reform is furthermore included in section 6 below.

1. The Legal Framework

1.1 Legal Environment

Together with the other Scandinavian countries, Denmark is commonly considered as belonging to the Romano-Germanic Civil law tradition. Denmark upholds a strong separation of powers and has a relatively strong tradition for codifying the law. The Danish legislature consists of the Danish Parliament, while the Government exercises executive powers (but may propose enactment of new laws). The role of the Danish courts – the judiciary – is exclusively to interpret the law and not to embark on law-making itself, although the Supreme Court may from time to time establish clarifications of the law or legal practices (by *obiter dicta*) in specific cases.

Nonetheless, it is often necessary to look to case law, custom and – to a certain extent – legal doctrine when identifying the relevant rule(s) of law, a considerable part of which has not been codified. These features, together with the fact that secondary sources of the law (*i.e.*, case law and doctrine) often are only available in Danish, make Danish law somewhat inaccessible to foreign (non-Scandinavian) practitioners.

The earliest statutory manifestation of arbitration in Danish law is found in the 1683 law compilation, known as "*Danske Lov*"³ which endorsed the parties' contractual liberty to withdraw a given dispute from the purview of the regular courts, subject to any royal prerogative. The first statute dedicated to arbitration was enacted in 1972,⁴ and Denmark became a UNCITRAL Model Law country with the 2005 revision of the DAA,⁵ which reflects the 1985 UNCITRAL Model Law on International Commercial Arbitration ("Model Law") with only minor amendments.

Denmark acceded to the New York Convention on the Recognition and Enforcement of Foreign Awards ("New York Convention") in 1972 and joined the European Union (then "the European Communities") the following year. Denmark is a party to a host of other international instruments aimed at facilitating transnational trade

² Denmark's overall score was 0.89; available for 2016 and 2017-2018 respectively at: https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf (p. 5) and https://worldjusticeproject.org/sites/default/files/documents/WJP_ROLI_2017-18_Online-Edition_0.pdf (p. 5).

³ Literally "The Danish Law".

⁴ Greenland and the Faeroe Islands are under home rules and still apply the 1972 Arbitration Act.

⁵ The full text in English available at: http://voldgiftsinstitutet.dk/wp-content/uploads/2015/01/danish_arbitration_act_2005.pdf.

and judicial corporation, including, *i.e.*, the Vienna Convention on the International Sale of Goods ("CISG") and several of the Hague and Geneva Conventions.

Since 1894, Denmark has had its own regional arbitration institution. The Danish Institute of Arbitration ("DIA") in its current form has existed since 1981.

Additionally, Denmark has a number of sector-specific arbitration boards and panels. From an arbitration perspective, the most relevant is the Danish Building and Construction Arbitration Board (the "Arbitration Board"; in Danish: *Voldgiftsnævnet for Bygge- og Anlægsvirksomhed*), which administers most disputes in the building and construction sector in Denmark. The Arbitration Board is a quasi-public arbitration institution in the sense that its mandate to administer arbitrations within this specific field of law is approved by the Government. The General Conditions for the Provision of Works and Supplies within Building and Engineering of 10 December 1992 (in short in Danish: *AB 92*) is an "agreed document" for the industry and thus forms part of nearly all public tenders and most contracts within the construction sector. *AB 92* designates the Arbitration Board as the forum for solving disputes (Section 47 of *AB 92*).⁶ Although parties are at liberty to opt out of *AB 92*, most disputes in the Danish construction sector are conducted under the arbitration rules of the Arbitration Board.⁷ While this form of arbitration falls within the definition of arbitration for the purposes of the DAA and the New York Convention, it differs from the usual framework of commercial arbitration in a number of ways. Most notably, parties do not take part in the constitution of the arbitral tribunal. Instead, the members of the arbitral tribunal – usually a panel of three, which are subject to usual requirements as to impartiality and independence – are selected by the Chairperson of the Presidency of the Arbitration Board.

1.2 The DAA and the UNCITRAL Model Law

As indicated above, the DAA predates the 2006 revision of the Model Law, which has therefore not yet been implemented in Denmark. While there are substantial overlaps between the most recent version of the Model Law and the DAA, some discrepancies exist.

One of the major differences between the DAA and Model Law concerns the specific conditions for the issuance of interim measures by arbitral tribunals and the regime for their enforcement, which are set out at Articles 17-17J of the Model Law. Under Danish law, and contrary to the Model Law, such measures are not directly enforceable.

Against this background, in 2016, the DIA set up a working group charged with the task of revising the DAA. One of the key initiatives of the proposed reform is to transcribe Articles 17-17J of the Model Law into the DAA. The other particulars of the reform will be treated in more detail in section 6.

2. The Arbitration Agreement

2.1 Characteristics and Validity of the Arbitration Agreement

There is no specific rule in the DAA regarding which law governs the arbitration agreement itself. Depending on the specific case and any other potential laws in play, the governing law of the contract in question (*lex causae*) will usually be considered as the governing law also with respect to the arbitration agreement.

The DAA and general Danish contract law do not set forth any specific requirements as to the form of the arbitration agreement, so in principle also oral arbitration agreements may be valid. While it is of course almost impossible to prove the existence of an arbitration agreement in the absence of any written material, arbitration agreements deductible from the parties' unambiguous behaviour (*e.g.*, failure to object throughout the proceedings), written (informal) exchanges between the parties or stipulations set out in a

⁶ Available at: <https://voldgift.dk/?lang=en>.

⁷ Available at: <https://voldgift.dk/wordpress/wp-content/uploads/2014/09/C-Voldgiftbehandling-2010-Engelsk.pdf>.

party's general terms and conditions will generally be upheld under Danish law, provided that mutual consent to arbitration can be established.

As a matter of Danish law, the arbitration agreement is considered to be severable from the remainder of a contract containing the arbitration agreement (clause). The principle of severability is enshrined in Section 16(1) of the DAA and means that the invalidity of the main contract does not necessarily lead to the invalidity of the arbitration clause.

Section 16(1) of the DAA also codifies the principle of *competence-competence*, and thus the Danish courts rarely adjudicate the validity of the arbitration agreement (see section **Error! Reference source not found.** below).

2.2 Scope of the Arbitration Agreement

2.2.1 The Possibility of Extending the Arbitration Agreement to Third Parties

The DAA is silent as to the potentially binding effect of an arbitration agreement vis-à-vis non-signatories. As a general rule, only the signatories to a contract are bound by its terms, but this is not to say that a non-signatory would not under any circumstances be considered a party to the arbitration agreement. In this respect, one might mention situations of individual and universal succession or contracts specifically designed for the re-assignment of rights and obligations to an entity which was not a party to the original agreement.

Domestic courts across Europe have occasionally accepted to "pierce the corporate veil" between a signatory and another corporate entity within the same group. This has been done when the parties' common intention that the non-signatory would also be bound by the arbitration agreement could be reasonably deduced from the involvement of the non-signatory in the conclusion, performance and termination of the contract and/or it was thought likely that the third party would draw benefit from the contract.⁸ Whereas the group of companies/alter ego theory is fairly well-established in for example French case law and the concept of "piercing the corporate veil" (in Danish "*hæftelsesgennembrud*") is also known in Danish doctrine, there is not yet any conclusive practice to this effect in Danish or Scandinavian case law.⁹

Specifically in relation to construction disputes under AB 92, this agreed document provides in Section 47(8) that in case AB 92 has been agreed between the developer and multiple parties (contractors and suppliers) the arbitration agreement in Section 47(1)-(7) of AB 92 also applies to the internal relationship between such parties. Danish case law supports this notion of extending the arbitration agreement to non-signatories within the construction sector where AB 92 has been agreed between the developer and two or more parties.

2.2.2 Limitations for Certain Types of Disputes

Pursuant to Section 6 of the DAA, parties may refer to arbitration all disputes arising from legal relationships over which they enjoy "*an unrestricted right of disposition*". In other terms, while parties are in principle at liberty to exclude the jurisdiction of the regular courts for some types of legal relationships, others are by their nature incapable of being submitted to arbitration (they are "inadmissible").

There is no official list of non-arbitrable issues. In general, under Danish law, the courts retain jurisdiction for some areas of the law involving public policy concerns. This is the case of family law and criminal law and other areas of law partially governed by public law rules and/or enforced by a specialised administrative tribunals or bodies, e.g., anti-trust/competition law. However, recent EU case law suggests that a dispute

⁸ A leading case from France is the *Dow Chemical* decision handed down by the *Cour d'Appel de Paris* (Rev. Arb. 1984, 98) in an International Chamber of Commerce matter: ICC Case No. 4131, Y.C.A. Vol. IX (1984), 131.

⁹ See, Niels Schiersing, *Voldgiftsloven*, p. 155.

involving infringements of EU competition law may be "arbitratable" provided that the aggrieved party can be considered to have specifically consented to arbitration for this type of dispute.¹⁰

Unlike certain jurisdictions, an arbitration agreement in a contract between a consumer and a professional is not automatically invalid, but it will be subjected to closer judicial scrutiny than contractual relationships between professionals. Pursuant to Section 7(2) of the DAA, pre-existing arbitration agreements in consumer contracts are not binding on the consumer. Under Section 16(4) of the DAA, a consumer will only lose the right to invoke the unenforceability of the pre-existing arbitration agreement if the consumer has been informed (by legal counsel, the arbitral tribunal or otherwise) that the arbitration agreement is unbinding and the consumer nonetheless continues with the arbitration.

3. Intervention of Domestic Courts

Where a dispute is covered by a valid arbitration agreement, the role of Danish courts is narrowly defined: Pursuant to Section 4 of the DAA, courts may intervene only where their competence is expressly foreseen by law, such as in relation to assistance with constitution of the arbitral tribunal or deciding challenges in *ad hoc* cases, assistance securing evidence, issuing or implementing interim measures and setting aside and enforcement proceedings.

3.1 Competence-competence

As mentioned, under Section 16(1) of the DAA, the arbitral tribunal is competent to rule on its own jurisdiction (*competence-competence*). Under Section 8(1) of the DAA, the Danish courts shall respect this division of competence in favour of the arbitral tribunal.

Accordingly, where a case is submitted to the Danish courts, they will – at a party's request – dismiss the case (without prejudice) if an arbitration agreement is invoked, unless the arbitration agreement is null and void, inoperable or incapable of being performed (Section 8(1), first sentence, of the DAA). The courts will make this assessment if no arbitration is pending. However, if arbitration has already been initiated, the courts can only assess whether the dispute is arbitrable (Section 8(1), second sentence, of the DAA) and in the affirmative will dismiss the case (without prejudice).

3.2 Anti-Suit and Anti-Arbitration Injunctions

Danish law does not recognize anti-suit or anti-arbitration injunctions issued by a court. In addition, anti-suit injunctions are rarely (if ever) issued by arbitral tribunals. While the latter may occur in theory, the DAA (or the AJA) does not govern such injunctions. At least in Denmark, it is difficult to see a need for anti-suit injunctions, as the courts will normally have to dismiss cases automatically if an arbitration is pending under the arbitration agreement in question, be it in Denmark or in another jurisdiction (see section **Error! Reference source not found.** above).

4. The Conduct of the Proceedings

Subject to the limitations set out at Sections 4 and 8(1) of the DAA, Danish courts oversee and may assist with certain aspects of the arbitral proceedings. For example, courts may be approached with requests for assistance with the constitution of the arbitral tribunal in the context of *ad hoc* proceedings, to decide on challenges and to provide various types of support to the arbitral tribunal and the parties while the arbitration is pending.

This being said, the DAA confers a broad discretion to the parties and the arbitral tribunals to tailor the proceedings to their needs. Section 19 of the DAA specifies that, in the absence of an agreement by the parties, the arbitral tribunal is at liberty to conduct the proceedings as it deems appropriate.

¹⁰ Available at: <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=352/13&td=ALL>.

4.1 Constitution of the Arbitral Tribunal

4.1.1 The Default Rules

Under Section 11(2) of the DAA, if the arbitration agreement is silent on the method for constituting the arbitral tribunal, there will be three arbitrators and each party shall nominate an arbitrator within 30 days of receipt of a request from the other side to do so. The co-arbitrators shall then, in turn, jointly nominate the president of the arbitral tribunal.

Where Section 11(2) does not result in the constitution of the arbitral tribunal within the 30-day time limits, each party can request the courts to designate an arbitrator on behalf of the defaulting party or on behalf of the co-arbitrators. Such requests will be accepted whenever (i) the seat of arbitration is in Denmark, undetermined or the court holds jurisdiction *ratione personae* over one of the parties to the dispute; and (ii) it is not possible to constitute the arbitral tribunal pursuant to Section 11(2) of the DAA.

The DAA does not expressly contemplate the scenario where the arbitration agreement provides for one arbitrator but the parties fail to nominate jointly the sole arbitrator within thirty days. It follows implicitly from the wording of Section 11(3) that, in such circumstances, a party may also refer the matter to the courts.

By law, when called upon to assist with the constitution of the arbitral tribunal, the courts must have regard to the desired characteristics and qualifications of the arbitrator(s) as set out in the arbitration agreements and must ensure that the arbitrators are impartial and independent of the parties.

4.1.2 Multi-Party Disputes

The DAA does not specifically envisage complex arbitrations involving more than two parties.

It has not been settled in Danish jurisprudence how Danish courts must respond to a request to compose an arbitral tribunal in a multi-party scenario where one side fails to nominate an arbitrator. It is conceivable that a court might appoint all three members of the arbitral tribunal by reference to the principle of equal treatment enshrined at Section 18 of the DAA¹¹ and, in fact, the working group preparing the draft proposal for the revision of the DAA has suggested adopting a new provision as Section 11a, whereby the courts may appoint all the members of a three-member arbitral tribunal if one side fails to jointly nominate an arbitrator within 30 days of receiving the notice from the other side.

4.2 Challenges

Section 12 of the DAA places prospective and acting arbitrators under a strict duty to disclose any circumstances of a nature to give rise to justifiable doubts as to their impartiality and independence.

Under Section 13 of the DAA, in the event of a challenge brought on the basis of an arbitrator's alleged lack of impartiality and/or independence, the arbitral tribunal itself must decide whether to uphold such challenge unless the parties have agreed to another procedure. Under section 13 of the DIA rules, for example, challenges are decided by the Chairman's Committee after affording the non-challenging party and the arbitral tribunal with an opportunity to comment.

If the challenge is rejected, the arbitral tribunal's decision can be contested before the courts within 30 days. Such proceedings are not an everyday occurrence in the Danish legal system and, accordingly, it is difficult to make any general observations about the level of scrutiny performed by the Danish courts in this context. Both the DAA and Sections 60 and 61 of the AJA, which list the grounds disqualifying judges acting in litigation proceedings, leave a wide margin of appreciation to the courts.

¹¹ This principle laid down in the leading French case of *Siemens v. BKMI and Dutco* rendered by the French *Cour de Cassation* on 7 January 1992, where it was considered at variance with the principle of equal treatment for the institution (in that case the International Chamber of Commerce in Paris) to appoint only on behalf of one side.

As one Danish scholar and practitioner observed, the judicial practice of recent years appears to be informed by the IBA Guidelines on Conflicts of Interest in International Arbitration. For example, the circumstance that an arbitrator has expressed general views on an issue that might be relevant to the resolution of the dispute, has been held insufficient to disqualify the arbitrator in question.¹²

It has not been settled in Danish case law whether and under which circumstances failure to disclose a potentially relevant piece of information may in itself be sufficient to disqualify an arbitrator. Looking to the case law in other Scandinavian countries, it would seem that although such an omission would generally not be enough in itself, it may, in conjunction with other elements, plead in favour of upholding a challenge.¹³

4.3 Interim Measures

Under Section 17 of the DAA, the arbitral tribunal may issue interim measures. This rule is broad and based on the 1985 Model Law version. The rule is addressed further in the following.

In addition, under Section 9 of the DAA, parties may also seek interim relief from the courts (in accordance with Section 40 of the AJA). Section 9 of the DAA is mandatory and applies regardless of where the seat of the arbitration is located. It appears inconceivable that Danish courts would grant any form of interim relief without affording all concerned parties with an opportunity to comment. Indeed, with the possible exception of a notoriously non-participating party known to decline service, such *ex parte* measures would in all likelihood be considered at variance with the principle of equal treatment set forth at Section 18 of the DAA.

Under Section 27 of the DAA, the courts may also assist in evidence taking.

4.4 Party Autonomy and Discretion of the Arbitral Tribunal

No obligation to retain counsel: For the arbitration proceedings, parties may elect not to retain local counsel, or use any internal/external counsel for that matter. However, considering the particularities of the Danish legal system, it will in many instances be preferable to be assisted by local counsel, particularly when the dispute is governed by Danish substantive law and/or the DAA.

Protection of confidentiality: The DAA does not provide for the confidentiality of the arbitral proceedings. However, this is normally agreed before or during the proceedings (by way of Section 19(2) of the DAA or institutional rules). Most Danish legal professionals, including lawyers, are under a strict duty of professional secrecy, subject to the ordinary rules of civil liability.

Duration of the proceedings: The DAA does not regulate the length of the proceedings. As such, the parties and the arbitral tribunal are at liberty to define the procedural calendar in view of their availability and the nature of the dispute.

Location of meeting and hearings: Danish law does not impose any physical limitations as to where the arbitral tribunal may deliberate or convene meetings or hearings. It follows from Section 1 of the DAA that the arbitration will be deemed to have taken place in Denmark whenever the designated seat in Denmark regardless where the hearings and meetings physically take place.

Need for an in-person hearing: Under Section 24 of the DAA, the arbitral tribunal can decide whether to hold a hearing or whether to decide the dispute on documents only with the caveat that an in-person hearing must be held if this is requested by one of the parties.

No arbitration-specific limits on permitted evidence: As per Section 19(2) of the DAA, the arbitral tribunal determines which evidence shall be admitted to the records and how to assess the probative value of the

¹² The IBA Guidelines lists this scenario on as a "green item" which does not give rise to a disclosure obligation for prospective arbitrators.

¹³ Schiersing, p. 227.

pieces of evidence adduced. In the event of a recalcitrant party, the arbitral tribunal, or a party having obtained prior consent from the arbitral tribunal, may solicit the courts' assistance with securing evidence. For example, an arbitral tribunal may prefer that a testimony be given before the national courts to enhance its probative value.¹⁴

Remedies: The law does not lay down any arbitration-specific limitations on the arbitral tribunal in terms of available remedies. As a matter of Danish law, nothing precludes a party from seeking, or an arbitral tribunal from awarding, simple or compound interest on the sums requested.

Costs: The initial determination of the costs is left at the discretion of the arbitral tribunal which, under Section 34 of the DAA, fixes the costs of the arbitration, including the arbitrators' fees and costs.

Under Danish law, the parties are jointly and severally liable for the costs of the arbitration. Unless the parties have already agreed on a specific allocation, the arbitral tribunal can decide in which proportion each party shall bear the costs (see Section 35 of the DAA). Pursuant to Section 35(2) of the DAA, the arbitral tribunal may require one side to cover the legal costs (in whole or in part) of the other side. The DAA does not specify the reasons that may justify awarding a party all of its costs but, usually, the "costs follow the event principle applies", *i.e.*, the party which has been successful on the merits will recover its legal costs. This being said, arbitral tribunals will generally also have regard to the parties' conduct during the proceedings and may penalize dilatory tactics and other disruptive behaviour at the costs stage. In that, Danish arbitrators may look to the relevant provisions of the AJA for guidance.¹⁵

The arbitral tribunal's decision on the quantum of the tribunal's fees and costs can be appealed separately to the Danish courts within 30 days (see Section 34(3) of the DAA), *i.e.*, without the need to challenge the award (as a whole). The decision with respect to the allocation of costs, including the fees and costs of the arbitral tribunal, and the decision with respect to reimbursement of fees and costs to the other party can only be contested by way of challenging the award (in whole or in part).

Funding and fee-arrangements: The DAA does not set forth any restrictions regarding contingency fees or third-party funding. However, as also envisaged under Article 9(2) of Delos' Rules of Arbitration, fee-arrangements between parties and arbitrators are often agreed, failing which the fees of the arbitral tribunal shall be reasonable under the circumstances. Under the Code of Conduct of the Danish Bar Association,¹⁶ lawyers may not charge a percentage of the sums awarded to the client but they may operate on a "no cure, no pay" basis.

Civil and Criminal liability: Under Danish law there are no specific concerns with respect to the civil or criminal liability of arbitrators or any other stakeholders in the arbitration proceedings. Arbitrators do not specifically benefit from any statutory immunity to civil liability but may ask parties to agree to a limitation on their liability as a condition for accepting to serve as an arbitrator. Similar to Article 11 of Delos' Rules of Arbitration, Article 36 of the DIA Rules specifically provides that, to the extent permissible under the applicable law, the arbitral tribunal and any persons appointed by it, as well as the DIA itself shall be exempt from liability for any act or omission in the context of the arbitration. The arbitration rules of the Danish Building and Construction Arbitration Board contain a similar provision at Article 36.

Interim measures: As suggested above, one of the more notable differences between the DAA and the UNCITRAL Model Law concerns the arbitral tribunal's ability to issue enforceable interim measures.

Without ever mentioning "interim measures" per se in the context of the arbitral tribunal's attributions, Section 17 of the DAA vests the arbitral tribunal with the power to take such "provisional steps" as it deems necessary, having regard to the nature of the dispute, and to order a party to put up security in connection

¹⁴ False testimony given before the state courts gives rise to criminal liability pursuant to paragraph 158 of the Danish Criminal Code.

¹⁵ See, AJA, §§318 *et seq.*

¹⁶ Available at: <http://www.advokatsamfundet.dk/Service/English.aspx>.

with such steps.¹⁷ In view of the broad wording of Section 17, it may be assumed that arbitral tribunals may grant interim measures corresponding to those available to regular courts under Chapter 40 of the AJA and the 2006 Model Law.

Unlike Sections 9 and 27 of the DAA, Section 17 only applies to arbitrations seated in Denmark and parties can vary or exclude this provision by contract.

If the party that the measure is directed at does not comply voluntarily, there is no legal basis under Danish law allowing the other side party to demand the enforcement of such "provisional steps". For this reason, and although the arbitral tribunal may decide to sanction a non-complying party at the costs stage, parties will often prefer petitioning courts directly for interim measures to avoid undue delays.

The report of the DIA Commission for the revision of the DAA heralds a rather far-reaching reform of Section 17 which will, if adopted, transcribe the 2006 UNCITRAL model provisions on interim measures into Danish law. While the actual content of the temporary measures available to arbitral tribunal will hardly be affected, these changes are expected to greatly facilitate the issuance and enforcement of interim measures where a dispute is subject to an arbitration agreement.

5. The Award

In general, the legal framework applicable in Denmark in relation to setting aside and enforcing an arbitral award does not materially deviate from the rules in the New York convention or the Model Law. Setting aside of an arbitral award and enforcement of such awards follow different procedures, but the courts' decisions in that respect turn on similar substantive issues.

5.1 Setting Aside of the Award

5.1.1 The Formal Requirements for the Award

The formal requirements for the award are set forth at Section 31 of the DAA: The award shall be in writing, signed and dated by the arbitrators and state where the award was rendered, *i.e.*, the place of arbitration. Furthermore, the award shall set forth the grounds on which it is based unless the parties have agreed to waive the requirement that the arbitral tribunal provide reasons or have requested an award merely recording a settlement agreement.¹⁸

5.1.2 The Criteria for Having an Award Set Aside

As a preliminary remark, Danish law prohibits judicial review of the award as to its merits – save where the outcome is considered at variance with the Danish public order. That is to say, as a matter of Danish law, there is no possibility of appeal *per se*.

When the seat of the arbitration is in Denmark, the courts may set aside an award on the grounds listed at Section 37(2) of the DAA, which mirrors Article V of the New York Convention and Section 34 of the model law. The list set out at Section 37(2) of the DAA is exhaustive and is generally narrowly interpreted by the courts. The provision is mandatory, that is to say that parties cannot contractually opt out of or vary Section 37.

Setting aside proceedings must be commenced before the district court within three months of receipt of the award.

¹⁷ Similarly, Article 21 of the DIA Arbitration Rules provides that arbitrators may order such interim measures as it considers necessary in respect of the subject-matter of the dispute and order a party to put up security in connection with such measure(s).

¹⁸ DAA, section 35(2).

For the time being, evidence produced in such proceedings must normally be accompanied by their translation into Danish if Danish is not the language of the arbitration. This, however, may change with the reform of the DAA.

Recourse to courts to have an award set aside pursuant to Section 37(2) does not automatically suspend enforcement, but will likely do so in most cases. Under Section 39(3) of the DAA, where setting aside proceedings are pending, the enforcement court may suspend treatment of the matter and at the demand of the requesting party and may require the other side to put up appropriate security.

5.2 Enforcement of the Award

Danish courts will readily enforce arbitral awards rendered in a foreign jurisdiction save where one of the grounds for denying enforcement set out at Section 39 is met (and most likely also when the award has been annulled by the courts at the seat – however, this issue is not yet settled in case law). These grounds are the same as those giving rise to the setting aside of an award and thus follow the New York Convention and the model law.

Pursuant to Section 38(1) of the DAA, irrespective of whether the place of arbitration is in Denmark or abroad, an award is enforceable in accordance with the rules set forth in the AJA concerning the enforcement of judgements.¹⁹

Failing voluntary compliance with an arbitral award, enforcement proceedings can be introduced before the enforcement court (in Danish: *Fogedretten*), which is a division of the district court, pursuant to chapter 46 of the AJA. Usually the competent enforcement court will be at place where the losing party is domiciled or has his usual place of business.

The party seeking to have the award enforced must produce a certified true copy of the award and the arbitration agreement (provided the latter is in writing). For the time being, such documents must normally be accompanied by a certified translation into Danish.

6. Key Features of the Contemplated Legal Reform

In 2016, the DIA set up a working group charged with drafting and presenting a proposal for the revision of the DAA in order to ensure that Denmark will be able to preserve its status as a "Model Law country" going forward and to bring Denmark on par with most recent developments in the more traditional hubs for international arbitration (or ideally provide an even better legislative framework than this). At the time of writing, the parliamentary process towards having the working group's proposal enacted as law is in its initial phases. The present guide will be updated in due course to reflect the revisions made to the DAA by the legislator.

As suggested above, one of the focal points of the legal reform is to establish a regime for the interim measures issued by arbitral tribunals and ensure that these can be easily enforced. However, the report of the working group identifies several other avenues for improving and streamlining the arbitral process, *i.e.*, restricting the possibility of appeal of court decisions in arbitration-related matters. Furthermore, it is envisaged that the Maritime and Commercial Court of Copenhagen will have exclusive jurisdiction over all such arbitration-related matters.

6.1 Interim Measures

At present, the DAA recognizes the ability of arbitral tribunals to take such temporary steps as they consider necessary for the conduct of the proceedings and to order a party to put up appropriate security in connection herewith. Parties are at liberty to contractually agree that the arbitral tribunal may order interim

¹⁹ AJA §§ 478 *et seq.*

measures, for example by opting-in to the rules of a specific institution. Nevertheless, under Danish law, there is currently no legal basis to demand the enforcement of such measures.

In order to align the DAA with the model law, the DIA working group has included new language which essentially reproduces the text of Article 17 of the model law in the draft wording of Section 17 of the DAA. The draft provision specifies the forms of interim measures available to arbitral tribunals, the conditions for their issuance. It also sets out the regime for the enforcement of interim measures, including an exhaustive list of grounds for which enforcement may be denied.

6.2 Restriction of Appeal

Under the current system, the AJA does not draw a clear distinction between decisions taken by courts in connection with arbitral proceedings and other types of decisions. As such, these are subject to appeal through the ordinary channels, save for decisions to appoint arbitrators under Section 11(3) which are not subject to appeal. As such, court decisions taken in relation to arbitral proceedings may be tried before the district court (in Danish: *Byretten*), the high court acting as an appellate jurisdiction (in Danish: *Landsretten*) and, potentially, the Supreme Court (in Danish: *Højesteret*), provided that leave for third instance appeal is granted.

In order to streamline the process, the DIA working group suggests excluding appeal for all decisions rendered under Sections 13 (challenges) 14 (replacement of arbitrators) 27 (assistance with discovery) and 34 (review of costs decisions taken by arbitral tribunals) of the DAA. It is furthermore recommended that decisions pertaining to the competence/jurisdiction of the arbitral tribunal under Section 16(2) may be appealed to the Supreme Court only if they pose a question of general interest. The same scheme is suggested for the courts' decisions under Sections 37 (setting aside of awards) and 39 (decisions denying enforcement).

6.3 Concentration and Specialisation at the Maritime and Commercial Court

It is envisaged that arbitration-related matters will be concentrated with the Maritime and Commercial Court of Copenhagen. Pursuant to the suggested scheme, the Maritime and Commercial Court will have exclusive jurisdiction in nearly all arbitration-related matters, *i.e.*, decisions on the constitution of the arbitral tribunal under Sections 11 of the DAA, decisions on the impartiality and independence of arbitrators under Section 13 of the DAA, decisions under Section 14 which deals with the replacement of arbitrators and Section 34 providing for court review of arbitrators' decisions as to costs.

Proceedings under Section 37 (setting aside of awards) will also be referred to the Maritime and Commercial Court. In the suggested scheme, enforcement proceedings under Section 38 of the DAA will still be instituted directly before the enforcement court. Recourses against a decision denying enforcement under Section 39 of the DAA, where the enforcement division of the district court retains jurisdiction in the first instance, will also be heard by the Maritime and Commercial Court.

6.4 Other Issues

Complex arbitrations: As previously mentioned, the DIA working group recommends that Section 11 of the DAA, setting out the procedure for constituting the arbitral tribunal in ad hoc arbitrations, be supplemented with provisions specifically designed for cases with more than two parties. It is also suggested that Section 19 of the DAA be completed with a provision expressly allowing for the consolidation of concurrent and related arbitration proceedings.

Expert witnesses: It is also suggested that Section 26 of the DAA be clarified so that it is clear that parties, and not just the arbitral tribunal, may engage expert witnesses.

Translation into Danish: Finally, the working group suggests that parties be allowed to produce documentary evidence in English (as well as Swedish and Norwegian) in enforcement and setting aside proceedings.

7. Further Reading in English

For a more in-depth perspective on arbitration in Denmark, readers may wish to consult: (i) Pihlblad, Steffen og Lundblad, Christian, et al., Arbitration in Denmark, 1st edition, DJØF Publishing, 2014; (ii) P.R. Meurs-Gerken, Distinctive Features of the New Danish Arbitration Act [2005] The ICC International Court of Arbitration Bulletin, volume 16 , issue 2 , s. 47-49; and (iii) Voldgiftsinstituttets inhabilitetspraksis 2016 (English) –Journal of International Arbitration, 2016, 33(6), 577-651. [JOIA-33.6] (available at: <https://voldgiftsinstituttet.dk/bibliotek-2/>).

DOMINICAN REPUBLIC

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

MARCOS E. PEÑA RODRÍGUEZ AND LAURA MEDINA ACOSTA
OF JIMÉNEZ CRUZ PEÑA ABOGADOS



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JURISDICTION INDICATIVE TRAFFIC LIGHTS

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VERSION: 11 JUNE 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

The Dominican Republic occupies the eastern two-thirds of the Caribbean island of Hispaniola, which it shares with Haiti. With a population of about 10.41 million, the Dominican Republic is a middle-income country, with the largest economy of Central America and the Caribbean.

The laws of the Dominican Republic are essentially based on the Roman law tradition, as transmitted through French and Spanish law. Although arbitration was contemplated in the French Code of Civil Procedure of 1807 which was adopted by the Dominican Republic in 1884, the use and acceptability of this alternative dispute resolution mechanism amongst business people and amongst local courts began to take form in the early 1990s, and it is still evolving. The Centers for Alternative Dispute Resolution of the Chamber of Commerce and Production of Santo Domingo and Santiago are the most prominent arbitral institutions in the country.

Key places of arbitration in the jurisdiction	Santo Domingo, the capital, and Santiago, the second most important city in terms of economy.
Civil law / Common law environment?	Civil law jurisdiction.
Confidentiality of arbitrations?	Arbitration proceedings, both <i>ad hoc</i> and institutional, are confidential.
Requirement to retain (local) counsel?	There is no express legal provision on whether a foreign lawyer may assist a client before an arbitral tribunal, when such assistance is the result of a particular case and not aimed at establishing a practice in the Dominican Republic. Our view is that a foreign lawyer may assist a client in an international arbitration taking place in the Dominican Republic.
Ability to present party employee witness testimony?	Not forbidden.
Ability to hold meetings and/or hearings outside of the seat?	Permitted, unless the parties agreed otherwise.
Availability of interest as a remedy?	Interest is available as an additional remedy under the legal system of the Dominican Republic. Law No. 183-02 dated 1 November 2002, repealed the order that established legal interest; however, the Civil Chamber of the Supreme Court of Justice decided that Law 183-02 does not govern nor limit the authority of judges to award interest as additional indemnity in damages claims. The Supreme Court of Justice further stated that in matters of civil liability, the victim has a right to receive full compensation for the damages suffered, appraised at the time of a definite decision. Awarding interest complies with this rule, given that it is a mechanism for indexation of the indemnity (SCJ, 17 September 2012). Indirect and punitive damages are not allowed under Dominican law.
Ability to claim for reasonable costs incurred for the arbitration?	Parties may claim reimbursement of costs incurred in arbitration proceedings. Upon the request of the parties, the arbitral

	tribunal may fix the costs of the arbitration in the award; these costs include the fees and expenses of the arbitrators, the costs for legal representation of the parties, fees and expenses of the arbitral institution and any such costs incurred in connection with the proceedings.
Restrictions regarding contingency fee arrangements and/or third-party funding?	There is no express provision in the law prohibiting contingency fee arrangements or third-party funding for international arbitration claims.
Party to the New York Convention?	Yes.
Other key points to note	ϕ
WJP Civil Justice score (2017-2018)	0.47

ARBITRATION PRACTITIONER SUMMARY

Law 489-08 on Commercial Arbitration governs arbitration proceedings, and the enforcement of commercial arbitration awards in the Dominican Republic. The Dominican Republic is a monistic legal system, whereby the same set of rules applies to both domestic and international arbitration proceedings seated in the Dominican Republic.

Pursuant to article 1 of Law 489-09, an arbitration is international if: (i) the parties to an arbitration agreement have their places of business in different states at the time of conclusion of that agreement; or (ii) the parties are domiciled outside the Dominican Republic; or (iii) a substantial part of the obligations of the commercial relationship is to be performed outside the state where the parties' places of business are located.

Date of arbitration law?	19 December 2008
UNCITRAL Model Law? If so, any key changes thereto?	Yes, Law 489-08 is based on the UNCITRAL Model Law with a few variations. Among these variations: <ul style="list-style-type: none"> • a specific procedure is set out for the notification of the request for arbitration when the Dominican state acts as defendant in commercial and investment arbitrations; • the number of arbitrators must be an odd number; • there is a time limit to initiate arbitration proceedings when an interim measure is granted by a local court.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No, there are no specialized courts or judges in the Dominican Republic for arbitration-related matters, except for the Civil and Commercial Chamber of the First Instance Court of the National District, which has exclusive jurisdiction to rule on requests for recognition and enforcement of foreign arbitral awards.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes, parties can request <i>ex parte</i> interim measures before or during the arbitration proceedings. Such a request is not incompatible with and cannot be construed as a waiver to the arbitration agreement.
Courts' attitude towards the competence-competence principle?	Courts tend to abide by the <i>kompetenz-kompetenz</i> principle, holding that they do not have jurisdiction when there is an arbitration agreement referring the parties to arbitration.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The Commercial Arbitration Law 489-08 follows the provisions of the UNCITRAL Model Law and of the New York Convention regarding the grounds for challenging an arbitral award. There are no additional grounds to those based on the criteria established in these texts.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The attitude of courts towards requests for recognition and enforcement of foreign arbitral awards has been positive, and they have abided by the principles and procedures stated in the law. The courts make no distinction between international arbitral awards rendered in the Dominican Republic and those rendered abroad.

Other key points to note?

Law 489-08 does not contain any provision establishing the capacity of arbitrators to issue orders or subpoenas. However, article 32 of Law 489-08 allows the arbitrators to request the assistance of a court to obtain evidence and the court will have the obligation to issue the corresponding order.

JURISDICTION DETAILED ANALYSIS

1. Legal framework of the Dominican Republic

The primary source of law relating to the recognition and enforcement of commercial arbitral awards, arbitration agreements, and arbitration proceedings in the Dominican Republic is Law 489-09 on Commercial Arbitration, dated 19 December 2008 and published in the Official Gazette No. 10502 on 30 December 2008. This law governs domestic and international arbitration proceedings that take place in the Dominican Republic, as well as the enforcement of domestic and international awards.

Prior to Law 489-08, domestic arbitration was initially governed by articles 1003 to 1028 of the Code of Civil Procedure. The use of international commercial arbitration was not contemplated by any law, and this legal framework remained virtually intact for almost a century. The first important step towards change was the enactment of Law 845 on 15 July 1978, which modified certain provisions of the Code of Civil Procedure and of the Commercial Code, including the enforceability of pre-dispute clauses or separate agreements to resolve domestic commercial disputes through arbitration. Previously, the arbitration agreement was only valid when executed in the form of a post-dispute agreement.

The second important step towards change was the enactment of Law 50-87 on Chambers of Commerce and Production, dated 4 June 1987. Articles 15 to 16 of Law 50-87 instituted administered arbitration by allowing the Chambers of Commerce and Production to establish in their respective jurisdiction a Conciliation and Arbitration Council. This law partially revoked article 1004 of the Code of Civil Procedure, as it allowed members of the Chambers of Commerce and Production to summon the Dominican state or its related entities to appear as a party before the Conciliation and Arbitration Council for the resolution of a dispute. However, it was partially revoked since article 1004, which expressly excluded from arbitration subject matters regarding the Dominican state or its related entities, remained in force for *ad hoc* arbitrations governed by the Code of Civil Procedure.

Law 489-08 is the first legal regime on international arbitration. It is based on the UNCITRAL Model Law, with a few small variations, such as:

- the definition of international arbitration is narrower, as it does not contain the opt-in option according to which the parties may expressly agree that the subject matter of the arbitration agreement relates to more than one country;¹
- the participation of the State as a party to arbitration is addressed by the law, in which a specific procedure is set out for the notification of the request for arbitration when the Dominican state acts as defendant in commercial and investment arbitrations;²
- it incorporates the set of rules that should be taken into account by the arbitral tribunal in an international procedure to determine the validity of the arbitration agreement and of the arbitrability of the dispute;³
- following the general principles of arbitration, the parties are free to determine the number of arbitrators called upon to resolve the dispute, but to reduce the risk of the decision process being frustrated, the law requires that there be an odd number of arbitrators. Failing such determination, the law provides that a sole arbitrator shall be appointed instead of three;⁴

¹ Article 1 of Law 489-08.

² Article 5 of Law 489-08.

³ According to article 10.5 of Law 489-08, in international arbitration cases, the arbitration agreement shall be enforceable if it complies with the rules agreed by the parties, or the substantive rules, or Dominican law.

⁴ Article 14 of Law 489-08.

- when interim measures are adopted by a local court, the requesting party is bound to initiate arbitration proceedings within 60 days after said order is issued;⁵
- the arbitrators, the parties and the arbitral institutions shall maintain the confidentiality of the proceedings;⁶
- to the extent that the parties have not agreed otherwise, along with the arbitration claim, a claimant shall notify the name of the proposed or appointed arbitrators, and within the specified time limit, the respondent shall notify the claimant of its statement of defense and propose an arbitrator or appoint an arbitrator.⁷ This differs from the UNCITRAL Model Law, according to which a request for arbitration is first submitted by the claimant and subsequently the statements of claim and defense are submitted within the time limits agreed by the parties or set by the arbitral tribunal;
- Given that the request for arbitration initiates the proceedings, the claimant cannot default on this basis but can do so for not appearing before the tribunal. If under these circumstances, the arbitrators continue with the proceedings and render an award, both the proceedings and the award shall be considered contradictory and no violation of the right of due process may be invoked;⁸ and
- the law states in a detailed manner the procedure to be followed by the parties in the taking and presentation of evidence before the tribunal, even addressing the situation in which the evidence has to be taken in a foreign country.⁹

In addition, Law 489-08 does not follow the exact same provisions regarding interim measures as the UNICTRAL Model Law, revised on 2006. However, it grants to the arbitral tribunal the right of amending or leaving without effect any interim measures adopted by the local courts.

Law 50-87 on Chambers of Commerce and Production was amended by Law 181-09 dated 6 July 2009, to adapt its provisions to those of Law 489-08 on Commercial Arbitration. This law, as amended, allows for international arbitration cases to be administered by the Centers for Alternative Dispute Resolution of the respective chambers.

in 2010, an express provision was included in the Constitution, in support of arbitration as a dispute resolution mechanism in contracts entered into by the Dominican State.

2. Arbitration agreements

Formal requirements. The general rule for an arbitration agreement to be enforceable is that it has to be in writing, a requirement that is met when the agreement's content is recorded in any form that is accessible for subsequent reference, such as an exchange of letters, faxes, electronic communications or any other data message format. An arbitration agreement is validly formed if it is contained in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other, or when reference is made in a contract to any document containing an arbitration clause. Despite this express provision, it is important to note that based on the principle *solus consensus obligat* (all that should count is consent), which is embodied in the Civil Code, and on the provisions of article 10(4) of Law 489-08, scholars hold that non-compliance with this requirement does not automatically render the agreement unenforceable. This requirement is considered to be *ad probationem*, with the purpose of serving as evidence of the act or compromise entered into between the parties.

⁵ Article 13 of Law 489-08.

⁶ Article 22 of Law 489-08.

⁷ Article 27 of Law 489-08.

⁸ Article 29 of Law 489-08.

⁹ Article 30 of Law 489-08.

In the case of domestic arbitration, the agreement must comply with the general principles on the formation of contracts, set out in article 1108 of the Civil Code (the most important of these principles being that the parties have the legal capacity to enter into agreements). In the case of international arbitration, The requirements for an arbitration agreement to be enforceable in an international arbitration are determined by the set of rules chosen by the parties to govern the arbitration agreement, or by the substantive law that applies to the merits of the dispute, or by Dominican law.

Autonomy of the arbitration agreement. The arbitration agreement included as part of the contract is independent from the other terms of the contract.¹⁰ Thus, the invalidity or unenforceability of the underlying agreement does not necessarily affect the arbitration agreement.

Third parties. Law 489-08 does not contain any provisions with respect to third-party participation in arbitration, and there is no record of decisions from the courts specifically referring to this issue or the situations in which consent to arbitrate may be inferred or presumed, thus extending the arbitration agreement to non-signatories. However, the Supreme Court of Justice implicitly admitted that the arbitration agreement in a main contract may extend or cover disputes from ancillary or supplementary contracts.¹¹

Arbitrability and Public Policy. The general rule is that only matters that can be submitted to compromise and settlement shall be referred to arbitration. The restrictions imposed by law to arbitrability relate mostly to specific domains: matters relating to the civil status of a person, separations between husband and wife, criminal cases and cases that concern public policy cannot be resolved through arbitration.¹²

Law 489-08 does not contain a definition of 'public policy'. In the legal framework of the Dominican Republic, this is a constantly evolving concept with a social, moral and political component. Although International Private Law 544-14 dated 18 December 2014 attempted to define the terms "*domestic public policy*" and "*international public policy*" of the Dominican Republic,¹³ these terms remain vague because of the very nature of the concept.

Despite the general trend to reduce public policy limits to arbitration and expand the scope of arbitrable matters, the Dominican Republic has shown little progress in this regard. Still today, especially in domestic proceedings, inarbitrability is a matter of continuous discussions. Local courts and practitioners tend to confuse *causes that concern public policy* with the application of mandatory or public laws. Courts and practitioners must understand that mandatory rules are not necessarily identical to public policy rules: the mere fact that a law is mandatory does not automatically mean that it is part of and reaches the level of public policy. They must also understand that arbitrators are bound to apply relevant public policy rules.

An area of law that has shown progress, and is of great concern to international arbitration, is agency agreements and the validity of arbitral clauses despite the 'public policy' nature of Law 173 for the Protection of Agents, Importers of Merchandise or Products dated 6 April 1966, which governs all forms of sales representation or agency relationships involving foreign principals and local parties in case such relationships are duly registered and protected by this law. According to article 7 of Law 173, Dominican civil procedure must be applied to claims under said law and as a result, the former view was that Dominican courts had exclusive jurisdiction to solve any such conflict resulting from registered agency agreements, and any contractual provision to the contrary was considered to be void.

In interpreting this provision, the Supreme Court of Justice had stated that the 'public policy' nature of this law precluded parties from agreeing to arbitrate disputes arising out of these contracts, and local courts would retain jurisdiction and decide disputes despite the existence of an arbitration agreement. However,

¹⁰ Article 11 of Law 489-08.

¹¹ First Hall of the Supreme Court of Justice, 13 December 2006, Judgment No. 13.

¹² Article 3 of Law 489-08.

¹³ Article 7 of Law 544-14.

first instance courts,¹⁴ courts of appeals,¹⁵ and even the Supreme Court of Justice¹⁶ have admitted the validity of arbitration agreements, acknowledged their lack of jurisdiction for these cases, supporting their decision in the different notions of ‘public policy’, the relevance of the autonomy of the parties’ will and contractual freedom, and the submission to general law contained in Law 173 for procedural matters. The enactment of the DR-CAFTA also supports the view adopted by the courts, since it allows the use of arbitration for agency agreements irrespective of whether the same are registered under Law 173.

3. Intervention of domestic courts

According to article 12 of Law 489-08, if a local court is seized of a dispute governed by an arbitration agreement, it must decline jurisdiction at the request of the defendant. This rule applies in any case, regardless of whether the place of arbitration is inside or outside of the Dominican Republic.

Unlike the UNCITRAL Model Law and most national laws, Dominican law makes no exception for local courts to retain jurisdiction when the defendant has raised a defense on jurisdiction and proves the existence of an arbitration agreement. Local courts are forced to submit the parties to arbitration and are not expressly allowed to evaluate *prima facie* if the agreement is null and void, inoperative or incapable of being performed.¹⁷

An important feature of Law 489-08 is that the decision rendered by the court declining jurisdiction is not subject to appeal. The purpose of this provision is to allow the arbitral tribunal to rule on its own jurisdiction, and to postpone the control of the courts to after the award has been rendered.

The constitutionality of this provision has been challenged before the courts without success. In a case decided by the Second Hall of the Civil and Commercial Chamber of the Court of Appeals of the National District, the plaintiff asked the court to declare article 12 contrary to the Constitution, for violating the right to challenge judgments. The Court rejected the motion, stating that the “*double degree of jurisdiction*” principle is not part of the constitutional order, and that the Constitution allows lawmakers to restrict or suppress the exercise of appeals against judgments.¹⁸

In a recent decision, the Constitutional Court reaffirmed the importance and validity of the negative effect of the *kompetenz-kompetenz* principle, as contained in Law 489-08, stating that “*when the appellant files the appeal before the ordinary jurisdiction, it is clearly a procedural error, not translating this into a violation of the fundamental guarantee of effective judicial protection with respect to due process, specifically the right of defense as said party alleges; rather, what would constitute an error would be not to recognize the principle of autonomy of the will that should prevail between the contracting parties (...). Certainly, as established by the Plenary of the Supreme Court of Justice, contractual stipulations are binding both for the parties and for the courts, when they have been agreed upon and accepted by the parties, as a consequence of the freedom to contract and on equal terms, since according to the terms of the contract and by application of the rules in force, in the case the decision given by the arbitrators was not susceptible to be challenged before the ordinary courts*”¹⁹.

Regarding anti-suit injunctions, Law 489-08 does not specifically provide for anti-suit injunctions issued by local courts to prevent an arbitral tribunal from hearing a claim or, at the end of the arbitral process, to

¹⁴ First Hall of the Civil and Commercial Chamber of the First Instance Court of the National District, 4 October 2010, Judgment 82; First Hall of the Civil and Commercial Chamber of the First Instance Court of the National District, 9 March 2016, Judgment 034-2016-SCON-00212.

¹⁵ Second Hall of the Civil and Commercial Chamber of the Court of Appeals of the National District, 8 October 2010, Judgment 633-2010.

¹⁶ First Hall of the Supreme Court of Justice, Judgment dated 4 April 2012, B.J. 1217.

¹⁷ Article 12 of Law 489-08.

¹⁸ Second Hall of the Civil and Commercial Chamber of the Court of Appeals of the National District, 5 August 2011, Judgment No. 587-2011.

¹⁹ Constitutional Court, Judgment TC/0543/17 dated 24 October 2017. Available at: <https://www.tribunalconstitucional.gob.do/sites/default/files/documentos/TC%200543%2017.pdf>.

obstruct the enforcement of the arbitral award. However, since courts are only allowed to intervene in limited circumstances and for specific purposes, it is presumed that they cannot issue anti-suit injunctions against arbitration. Nor does Law 489-08 provide for anti-suit injunctions issued by arbitrators enjoining parties to stay litigation proceedings, and there is no reported case that refers to this matter. However, it is unlikely that a court would comply with such a decision since it is not within the powers of arbitrators to give orders to domestic courts, except to request assistance in obtaining evidence.

4. The conduct of the proceedings

Legal representation. In all cases the parties must be represented by a lawyer.²⁰ However, there is no provision in Law 489-08 that refers to the nationality or any other requirement that shall be met by attorneys appearing as counsel in arbitration proceedings seated in the Dominican Republic, except in the case of the representation of the Dominican State. Under article 5 of Law 489-08, the Legal Counsel of the Executive Branch and the Attorney General's Office must ensure that the legal counsel for the State has the necessary experience and knowledge in the subject matter of the dispute and in arbitration proceedings.

Pursuant to the United States/Dominican Republic/Central American Free Trade Agreement (DR-CAFTA), a foreign lawyer who is not a member of the Dominican Bar Association can provide consulting services on foreign law, provided that the foreign lawyer has a license to exercise law in a jurisdiction that allows Dominicans to provide consulting services on foreign law. Although there is no express provision allowing a foreign lawyer to assist a client before an arbitral tribunal, when such assistance is the result of a particular case and not aimed at establishing a practice in the Dominican Republic, it is our view that a foreign lawyer may assist a client in an international arbitration taking place in the Dominican Republic.

Domestic courts' intervention in the constitution of the arbitral tribunal. In *ad hoc* proceedings, when the tribunal is composed of three or more arbitrators, each party shall appoint the arbitrators which proportionately correspond to each side, and the remaining arbitrator, who will act as chairman of the tribunal, will be appointed by the arbitrators previously selected.²¹ This rule intends to give parties equal right to participate in the constitution of the arbitral tribunal.

If a party fails to appoint the arbitrator in due time, the appointment shall be made by the first instance court of the place of arbitration, at the request of the opposing party, who is not in default²². If the parties have not agreed to a place of arbitration, the request for appointment shall be filed with the first instance court of the domicile of any of the defendants; if their domicile is located abroad, the competent court will be the first instance court of the domicile of the plaintiff, or if such domicile is abroad, the competent court will be the first instance court elected by the plaintiff.²³

Law 489-08 relies on the cooperation of local courts to prevent unjustified delays in the proceedings by a recalcitrant party.

Regarding *ad hoc* proceedings, if the parties have not agreed on the procedure to appoint arbitrators, the appointment shall be made by the competent court.²⁴ The court may only deny a request for appointment of arbitrators when the requesting party has not provided evidence of the existence of an arbitration agreement.²⁵ The court required to appoint the arbitrators shall have due regard to any qualification requirements established by the parties in their agreement, and to the subject matter in dispute.

²⁰ Article 28(2) of Law 489-08.

²¹ Article 15(2) of Law 489-08.

²² Article 15(2) of Law 489-08.

²³ Article 9(1) of Law 489-08.

²⁴ Article 15(3)(b) of Law 489-08.

²⁵ Article 15(4) of Law 489-08.

Except when the court denies the request to appoint arbitrators, any decision issued in connection with the appointment of arbitrators is not subject to appeal.²⁶

Independence and impartiality of arbitrators. Arbitrators must be independent and impartial in accordance with article 16 of Law 489-08. Each arbitrator has the obligation to disclose any grounds that may give rise to justifiable doubts as to his impartiality or independence, when appointed or during the proceedings. Following the provisions of the UNCITRAL Model Law, an arbitrator may be challenged when circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or when the arbitrator does not possess the qualifications agreed to by the parties.²⁷

Although there have not been many cases reported, courts have been strict in the control of arbitrators' independence and impartiality. In a judgment rendered in connection with a claim for annulment of an award, the Third Hall of the Civil and Commercial Chamber of the Court of Appeals of the National District admitted the claim and annulled the award due to one arbitrator's failure to disclose certain information, and the alleged lack of independence of another arbitrator who disclosed a relationship with an employee of one of the parties. In its decision, which received several criticisms, the Court failed to consider whether the circumstances that were not disclosed by the arbitrator or the relationship between the other arbitrator and a party employee were sufficient to determine that their independence or impartiality had been compromised.²⁸

Interim measures. Article 13 of Law 489-09 allows the parties to request a court to order an interim measure before or during the arbitration proceedings. If the court orders such relief, it shall request the petitioner to submit its statement of claim for arbitration within 60 days as of the date the order is issued. The court may also require the party requesting an interim measure to provide appropriate security, if necessary.²⁹ The request for adoption of an interim measure filed before the court is *ex parte*.

Once the arbitral tribunal is constituted, if it orders the suspension or termination of the interim measures adopted by the court, the decision of the arbitrators prevails.³⁰

The arbitral tribunal may, at the request of a party, grant interim measures, and require the requesting party to provide appropriate security in connection with the measure. The decision on interim relief will be subject to the rules on challenges and enforcement applicable to arbitral awards, except those relating to the suspension of enforcement of the award.³¹

In neither case does the law set the conditions for the interim measure to be ordered. Judges and arbitrators usually take into account whether the purpose is to preserve the *status quo*, or to ensure the effectiveness of the award.

Conduct of the proceedings. Law 489-08 provides a legal framework for the conduct of the arbitration proceedings. However, subject to mandatory requirements established in the law, parties are free to agree on the procedure for their arbitration.³² One of the few mandatory requirements for the conduct of the proceedings is to ensure that the parties are treated equally and that each party is given a full opportunity to present its case.³³

²⁶ Article 15(6) of Law 489-08.

²⁷ Article 16(2) of Law 489-08.

²⁸ Third Hall of the Civil and Commercial Chamber of the Court of Appeals of the National District, 29 August 2016, Judgment No. 1303-2016-SSEN-00422.

²⁹ Article 13 of Law 489-08.

³⁰ Article 13 of Law 489-08.

³¹ Article 21 of Law 489-08.

³² Article 23 of Law 489-08.

³³ Article 22(1) of Law 489-08.

The law does not regulate the length of the proceedings; there is no term for the arbitrators to render an award once appointed, unless such term is imposed by the parties.

Parties are free to decide whether to hold hearings or have an arbitration based solely on documents.³⁴ Regardless of the place of arbitration, the arbitrators may decide to hold meetings or hearings elsewhere, after prior consultation with the parties.³⁵

The admissibility, relevance, materiality and weight of any evidence are subject to the discretion of the arbitral tribunal.³⁶ There are no legal restrictions on the presentation of testimony by party employees or any other person; there are no mandatory rules on oaths or affirmations for witnesses testifying in arbitration in the Dominican Republic.

Law 489-08 contains a detailed procedure allowing a foreign party to take and present evidence before the arbitral tribunal. According to articles 9(2) and 32, an arbitral tribunal or any of the parties as authorized by the arbitral tribunal may request the local court to assist with obtaining evidence. The competent court is the Civil and Commercial Chamber of the First Instance Court of the place of arbitration or of the place where the taking of evidence has to take place.

The court may either directly order the production of evidence, or order appropriate measures to facilitate the taking of evidence before the arbitral tribunal. Law 489-08 does not limit the scope of assistance to certain types of evidence. However, for civil and commercial matters, a court cannot issue an order with the effect of forcefully compelling a person to appear or provide evidence unless it is a public institution. The only sanction in case of disobedience is a small fine.

According to article 22 of Law 489-08, arbitrators, parties and arbitration centers are required to maintain the confidentiality of any information disclosed in the course of the arbitration proceedings.³⁷

Subject to the agreement of the parties, the arbitral tribunal shall fix the costs of arbitration in the award; these costs may include the fees and expenses of the arbitrators, the costs for legal representation of the parties, fees and expenses of the arbitral institution and any such costs incurred in connection with the arbitration proceedings. However, Law 489-08 does not contain an express provision regarding the allocation of these costs. In local courts, following the provisions set forth in article 130 of the Code of Civil Procedure, the party against whom the decision is rendered shall bear the costs of the proceedings.

Liability. Law 489-08 does not refer to potential liability for any participant in arbitration proceedings and does not afford to arbitrators immunity for civil liability or for any error made during the proceedings.

There is no concern arising from potential criminal liability for arbitrators, experts, witnesses or any other participant in arbitration proceedings (unless any of the participants commit an act already punishable by criminal laws).

5. The award

The award must be reasoned unless the parties agree otherwise or unless the award is the result of a settlement between the parties.³⁸

Challenge against awards. Under Law 489-08 the action for annulment is the only way to set aside an arbitral award. According to article 40 of this Law, parties may waive their right to challenge an award rendered in this jurisdiction.

³⁴ Article 28 of Law 489-08.

³⁵ Article 24 of Law 489-08.

³⁶ Article 30(1) of Law 489-08.

³⁷ Article 22(2) of Law 489-08.

³⁸ Article 36(4) of Law 489-08.

This waiver has raised many discussions among the local legal community, because the Constitution considers as a fundamental right the right to challenge a judgement, and because of the implications of waiving future rights. As scholars have stated, the waiver of the annulment action implies the abdication of the fundamental right of effective judicial protection and corollaries of access to justice, right of defense and due process;³⁹ and such waiver cannot be absolute.⁴⁰

The challenge against awards is not an appeal *per se* or challenge in the terms of the Constitution, since the Court of Appeals cannot review the merits of the case, it can only rule on whether or not the award should be set aside. The Court of Appeals is not a superior instance with regards to the arbitral tribunal, and the parties agreed that it was for the arbitral tribunal or sole arbitrator to solve the dispute, and such power cannot be transferred to local courts by way of a challenge.

In any case, the waiver will not forbid a challenge of the award if such challenge is based on a conflict with public policy rules of the Dominican Republic, or the violation of the rules of due process, in particular the right of defense. According to articles 111 of the Constitution and 6 of the Civil Code, parties cannot modify or waive in their agreements any public policy provision. Law 489-08 even affords judges the faculty to vacate or refuse enforcement of an award *sua sponte* based on these grounds.

The annulment action does not suspend the enforcement of the award. For such purposes, parties must file a request before the President of the Court of Appeal. During the time between the request and the first hearing, enforcement is automatically stayed. If the request for suspension is admitted, the requesting party will have to present a guarantee.⁴¹ This decision is not subject to appeal before the Supreme Court of Justice.⁴²

Recognition and enforcement of awards. Awards issued in the Dominican Republic by *ad hoc* tribunals or institutions other than the Centers for Alternative Dispute Resolution of the Chamber of Commerce and Production, shall file a request before the First Instance Court of the district where the award was issued for recognition and enforcement. It is necessary to include the original award and the arbitration agreement or contract containing the agreement. The decision on the recognition and enforcement may be challenged before the Court of Appeals.⁴³

If the First Instance Court determines that the award falls under any of the causes stated in article 39 of Law 489-08, it shall remit the award to the competent Court of Appeals to determine whether the award should be annulled *sua sponte*. The enforcement of the award is stayed until the Court of Appeals renders a final judgment. If necessary, the First Instance Court could order interim measures to preserve assets for enforcement of the award, while the process is instructed before the Court of Appeals⁴⁴.

According to Law 50-87, as amended by Law 181-09 dated 6 July 2009, awards rendered by the Centers for Alternative Dispute Resolution of the Chambers of Commerce and Production do not require court authorization for enforcement.⁴⁵

Foreign awards may become enforceable in the Dominican Republic pursuant to Law 489-08, the Convention for the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), ratified on 8 November 2001, and the Inter-American Convention on International Commercial Arbitration, ratified on 24 December 2007. The request for recognition and enforcement of foreign awards is filed before the

³⁹ Alarcón, Edynson. "Comentarios a la Ley de Arbitraje Comercial de la República Dominicana", Librería Jurídica Internacional, S.R.L., (2012), p. 287.

⁴⁰ Hernández, Guillermo. "Arbitraje. Perspectiva Comparada", Librería Jurídica Internacional, S.R.L., (2015), p. 215.

⁴¹ Articles 40(2) and 40(3) of Law 489-08.

⁴² Article 40(4) of Law 489-08.

⁴³ Article 44 of Law 489-08.

⁴⁴ Article 41(2) of Law 489-08.

⁴⁵ Article 17 of Law 50-87, as amended.

Civil and Commercial Chamber of First Instance of the National District. The request must also include the original award and the arbitration agreement or the contract containing the agreement. It is a non-adversarial procedure, where the Court may only deny recognition and enforcement under the limitative causes established by law.

The decision on the recognition and enforcement may be challenged before the Court of Appeals, which shall render a final and binding decision in accordance with the applicable international convention.⁴⁶

When a foreign award has been annulled at its seat, such annulment precludes the award from being enforced in the Dominican Republic. One of the grounds for refusing recognition and enforcement of an award is if it has not yet become binding on the parties, or if it has been set aside or stayed by a competent authority of the country in which, or under the law of which, that award was made.⁴⁷

There is no time limit for the courts to decide on the recognition and enforcement of awards. However, the courts may take up to three months as of the date the request is filed.

6. Funding arrangements

There is no express provision in Law 489-08 prohibiting third party funding for international arbitration claims.

According to article 35 of the Code of Ethics for Dominican Attorneys, counsel shall not gain monetary interest from a case they are handling other than the legal fees agreed upon with the client. However, there is no specific sanction provided in the Code for counsel who funds claims. In fact, in certain matters, such as labour claims, the worker's counsel tends to advance the expenses on behalf of their client.

Contingency fees are allowed and occasionally agreed upon between clients and lawyers.

7. Possibility of reform of the arbitration law in the near future

A bill to amend the Code of Civil Procedure has been proposed to Congress several times. This bill contains a new section on Commercial Arbitration that would repeal Law 489-08 in its entirety.

A parallel effort is being promoted by the same jurists who worked on the draft arbitration law of 2008 to amend certain provisions of Law 489-08 that have shown to be confusing or contrary to the current global trends in practice. Part of such proposed amendments relate to matters that could be subject to arbitration, limited intervention of the courts and finality of the decisions issued in support of arbitration, and the waiver to challenges against arbitral awards.

⁴⁶ Article 44 of Law 489-08.

⁴⁷ Article 45(1)(e) of Law 489-08.

EGYPT

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

**MOHAMED S. ABDEL WAHAB, LOJAYNE SHAHEEN
AND NOHA KHALED ABDEL RAHIM
OF ZULFICAR & PARTNERS**



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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS

1. Law ●
 - a. Framework ●
 - b. Adherence to international treaties ●
 - c. Limited court intervention ●
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5. Accessibility and safety ●
6. Ethics ●

VERSION: 12 APRIL 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Arbitration is the prominent mechanism for the settlement of investment and commercial disputes in Egypt. With the growing number of investors in the country and the parties to commercial transactions ultimate resort to arbitration, Egypt adopts, by the year, measures and reforms aimed at aligning itself with best practices in international arbitration. By enacting the Egyptian Arbitration Act No. 27 of 1994 (the “**Arbitration Act**”), Egypt took a colossal step towards supporting arbitration and becoming an arbitration friendly jurisdiction.

Key places of arbitration in the jurisdiction	Cairo.
Civil law / Common law environment?	Civil law.
Confidentiality of arbitrations?	Arbitral awards are confidential by law and may not be published. However, confidentiality of the proceedings is compromised at the stages of eventual annulment or enforcement of awards.
Requirement to retain (local) counsel?	There is no requirement to retain local counsel in an international arbitration seated in Egypt.
Ability to present party employee witness testimony?	There is no legal restriction as to the submission of testimony by party employees except if one party is a public entity, and consequently its employee a public officer, in which case the party's approval is necessary by law.
Ability to hold meetings and/or hearings outside of the seat?	Hearings and meetings taking place during the arbitration may take place inside or outside of Egypt depending on the parties' agreement and the tribunal's power to assess convenience. Egyptian courts carefully and clearly distinguish “geographical venues” from “legal seats”.
Availability of interest as a remedy?	Under the law, the arbitral tribunal has the ultimate power to decide on issues of compensation and interest. However, a legal cap of 7% interest rate exists as a public policy rule as characterized by Egyptian courts.
Ability to claim for reasonable costs incurred for the arbitration?	The parties are free to claim the costs they incurred during the arbitral proceedings to the extent that these costs are reasonable and justifiable in the arbitral tribunal's view.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Alternative fee arrangements and contingency fees are permissible under Egyptian law with a limit of a recoverable 20% from the outcome of the dispute. There are no restrictions as to third-party funding in arbitrations although Egyptian courts have not yet addressed this issue and no legislative policy or regulation exist to address this evolving practice.
Party to the New York Convention?	Egypt is a party to the 1958 New York Convention on the

	Recognition and Enforcement of Foreign Arbitral Awards and has neither made a commerciality nor a reciprocity reservation. Egyptian courts apply the provisions of the Convention for purposes of enforcement of awards rendered outside Egypt.
Other key points to note	φ
WJP Civil Justice score (2017-2018)	0.36

ARBITRATION PRACTITIONER SUMMARY

The Egyptian Arbitration Act, which is principally derived from the UNCITRAL Model Law, addresses all principal aspects of the arbitral proceedings including the arbitration agreement, issues of arbitrability, the composition of the arbitral tribunal, the challenge of arbitrators, the conduct of the proceedings, the intervention and assistance by domestic courts throughout the proceedings, the applicable law(s) and the rules pertaining to the award, its annulment and enforcement. Albeit being generally arbitration friendly, the courts can intervene in matters such as deciding on the validity of an arbitration agreement, the challenge of arbitrators, the default power to order interim measures and conduct daunting procedures for enforcement and/or recognition.

Date of arbitration law?	The Arbitration Act was promulgated on 21 April 1994, entered into force as of 22 May 1994 and was slightly amended in 1997 and 2000.
UNCITRAL Model Law? If so, any key changes thereto?	The Arbitration Act is primarily based on the 1985 UNCITRAL Model Law but deviates from the Model Law in certain respects, including the following: the application of the Arbitration Act to both domestic and international arbitration as well as arbitration seated abroad where the parties agreed to its extra-territorial application, the internationalization of arbitration, the overriding mandatory requirement for an arbitration agreement to be in writing for purposes of validity, the strict rule on incorporation of arbitration agreements by express reference, the annulment of awards on the basis of exclusion of the chosen applicable law, the prohibition of annulment of a partial award or a decision on jurisdiction before the issuance of the final award, etc.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	∅
Availability of <i>ex parte</i> pre-arbitration interim measures?	Domestic courts have the power to rule on <i>ex parte</i> as well as ordinary adversarial requests for interim measures if the circumstances reflect urgency, necessity and likelihood to prevail on the merits.
Courts' attitude towards the competence-competence principle?	∅
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	<p>Egyptian courts are generally arbitration friendly and generally do not review domestic or foreign arbitral awards on the merits, i.e. whether the Arbitration Act is applicable or the New York Convention is applicable, save in cases raising public policy issues. Moreover, Egyptian courts have confirmed that foreign counsel may appear and represent parties in arbitral proceedings seated in Egypt.</p> <p>In case of applicability of the Arbitration Act, the annulment procedures are significantly simplified and accord little to no power with respect to review of the award on the merits by the</p>

	<p>court, save in cases where the award contravenes principles of public policy.</p> <p>In case of foreign awards, the courts apply the New York Convention.</p>
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>In case of foreign awards, the courts apply the New York Convention. Egyptian courts have had little experience with the enforcement of awards annulled at the seat but are expected to apply the New York Convention rules.</p>
<p>Other key points to note?</p>	<p>The enforcement procedure for foreign awards may be burdensome and relatively lengthy. The application for enforcement takes the form of an exequatur, but may, on average, take one to two years to secure an enforcement order. There is also a fee recoverable by the court which is based on a percentage of the amount of the dispute reaching around 2.5% of the awarded value.</p> <p>Annulment however does not, in principle, preclude enforcement except upon reasoned request of the relevant party and the court's decision to stay enforcement pending determination of the annulment.</p> <p>The Arbitration Act and, more generally, the Egyptian arbitration practice may benefit from further input with regard to internationally developed practices which remain undeveloped in Egypt, namely: conclusion of arbitration agreements electronically, extension of arbitration agreements to third parties, anti-suit injunctions, third-party funding, simplification of enforcement procedures, etc.</p>

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL model law?

The Arbitration Act is initially based on the 1985 UNCITRAL Model law on International Commercial Arbitration (the “**Model Law**”). To the exception of some provisions, the Arbitration Act significantly relies on the Model Law. There are prominent differences with the Model Law pertaining to different issues throughout the arbitration proceedings, these notably are:

- The Arbitration Act applies to both domestic and international arbitrations (Article 1);
- The Arbitration Act may extend its application to arbitrations seated abroad in the event of the parties’ agreement to such application (Article 1);
- The requirement that an arbitration agreement in an administrative contract is approved by the competent minister (Article 1).
- It introduces several criteria for the establishment of the international nature of an arbitration including amongst others whether the arbitration is institutional, whether it involves parties whose principal places of business are in different States or alternatively if the place of the arbitration determined by the arbitration agreement, the place of performance of the obligations or the place most connected to the dispute is abroad (Article 3);
- The Arbitration Act does not expressly include the possibility to enter into an arbitration agreement by way of electronic means. It does not however exclude it and is therefore considered to be implicitly included. Nevertheless, the writing requirement under the Arbitration Act is an issue of validity not just proof, such that an agreement is in writing if it is contained in a document signed by the parties or contained in an exchange of letters, telegrams or other means of communication. Absence of an arbitration agreement in writing results in a nullity of the arbitration agreement and the writing requirement under the Egyptian Arbitration Act is more strict than the Model Law (Article 12);
- In the case of incorporation by reference, the reference to the arbitration agreement must be explicit to form an integral part of the contract (Article 10);
- The requirement of an odd number of arbitrators for purposes of constitution of the arbitral tribunal, under penalty of nullity of the award (Article 15);
- A preliminary decision by the tribunal on jurisdiction cannot be the subject of a court review prior to rendering the final award; a final award deciding on the whole of the dispute must be rendered for purposes of the competent court’s review or annulment (Article 22);
- The arbitral tribunal may only issue interim relief if the parties bestow this power upon it (Article 24);
- If the parties do not agree on the language of the arbitration, the latter shall be conducted in Arabic (Article 29);
- If the parties do not agree on the applicable law, the arbitral tribunal may apply the law having the closest connection to the dispute (Article 39). This is normally the law of a State;
- The threshold used by the Arbitration Act for the challenge of arbitrators is higher than its Model Law counterpart; the doubts as to the arbitrator’s impartiality and independence must be *serious* (Article 18);

- The Arbitration Act adds a ground for annulment based on the non-application by the arbitral tribunal of the *lex causae* chosen by the parties.
- The Arbitration Act introduces a further condition for purposes of *exequatur that is not listed in the Model Law* (Article 58), namely:
- No previous judgment to the contrary has been issued by the Egyptian courts in the subject matter of the dispute.

1.2 When was the arbitration law last revised?

The Arbitration Act was not frequently revisited since its adoption except for a limited number of amendments. The two important amendments pertain to the arbitration agreement for administrative contracts and the procedure for the challenge of an arbitrator.

In 1997, the law was amended to include a requirement pertaining to the mandatory signature of the relevant Minister for the conclusion of an arbitration agreement with respect to administrative contracts, or the person exercising his authority within the relevant public entities (entering into such arbitration agreements).¹

Another amendment relates to the procedure for the challenge of an arbitrator. Law No. 8 of 2000 imposes the intervention of the local courts *in lieu* of the arbitral tribunal in the procedure of challenging an arbitrator. By virtue of this amendment, if an arbitrator does not step down within 15 days running from the date of his challenge, the Cairo Court of Appeal, the court designated by the Arbitration Act for intervention and assistance throughout the proceedings, must rule on the challenge. Its ruling is final and binding and may not be reversed.²

A third amendment pertains to the Constitutional Court decision enabling parties to challenge a decision granting or denying an *exequatur* under Article 58 of the Arbitration Act. Prior to 2001, it was only possible to challenge a decision denying *exequatur*; a decision granting an *exequatur* was not open to challenge on the premise of a pro enforcement bias under the Law. However, the Constitutional Court ruled that a challenge is possible in either case (*i.e. whether an exequatur is granted or denied*). The amendment incorporates this decision into the Arbitration Act.

The Arbitration Act has not been amended since.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

In determining the law applicable to the arbitration agreement, Egyptian courts have an obvious tendency towards the law of the seat as selected by the parties. This is the position adopted by the Court of Cassation on the one condition that the provisions of this law do not contravene Egyptian public policy rules.³

This position is based on the assumption that the arbitration agreement constitutes the first step of the arbitral proceedings and should therefore be subject to the law applicable thereto, the law of the seat. This interpretation is however strongly rejected by scholars who view the arbitration agreement as a step preceding the arbitral proceedings and should therefore be subject to the parties' choice of law which, in turn, may be implicit.

¹ Amendment introduced to Article 1 of the Arbitration Act by Law No. 9 of 1997 dated 15 May 1997.

² Amendment introduced to Article 19 of the Arbitration Act by Law No. 8 of 2000 dated 4 April 2000 and entering into force on 5 April 2000.

³ Court of Cassation, Challenge No. 453 of 42 JY (9 February 1981) and Challenge No. 1259 of 49 JY (13 June 1983).

According to some scholars, absent a choice of law, the applicable law is that of the State where the award is rendered independently from the choice of law by the parties with respect to the subject-matter to the dispute.⁴ As far as capacity to conclude the contract is concerned, the applicable law is that applicable to each party independently from the other, be it the law governing nationality, domicile for natural persons or effective principal place of management for juridical persons.⁵

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

It has long been established in Egypt that the arbitration agreement is considered independent from the original contract where it falls or which governs the subject-matter of the dispute. This has been legislatively captured by the Arbitration Act and confirmed by both Egyptian courts and scholars. The arbitration agreement, whether an arbitration clause is included in the principal contract, is separate, or takes the form of a *compromis d'arbitrage*, is considered as a legally separate instrument that is not affected by the nullity, rescission or any other defect that could affect the original contract.⁶ This severability principle is widely considered as one of the fundamental pillars of arbitration in Egypt.⁷ This principle is also expressly enshrined in Article 23 of the Arbitration Act.

It is however worth mentioning, although inexistent in practice, that the principle pertaining to the severability of the arbitration agreement is not a principle of public policy and can therefore, theoretically, be subject to derogation in certain cases where the nullity of the contract may lead to the nullity of the arbitration agreement.⁸

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

Egyptian courts will apply the law of the seat of the arbitration to the arbitration agreement. This includes the requirements for its enforceability which will draw their value from the applicable contract law. This is equally the case for Egyptian law, the primary conditions for contract enforceability of which are governed by the general theory of contract law.

In the event that the Arbitration Law is applicable (particularly in the cases where the seat is in Egypt or where the parties select the Arbitration Law to apply), further requirements, in addition to the contract law requisites, exist for the validity (and enforceability) of the arbitration agreement under penalty of nullity:⁹

- The parties must have capacity to enter into the agreement;¹⁰
- The right subject to arbitration must be arbitrable;¹¹
- The subject of the dispute to be resolved by arbitration must be specified (in the *compromis*, or in the Statement of Claim in case of a prior agreement to arbitrate);¹² and
- It must be in writing or else it is null (writing includes a document signed by the parties or an agreement by exchange of correspondences or other means of communication).¹³

⁴ Fathi Wali, Arbitration in local and international commercial disputes, Munsha'at Al Ma'aref, 2014 ed., pp. 106-107.

⁵ *Id.*

⁶ Court of Cassation, Challenge No. 824 of 71 JY (24 May 2007).

⁷ Court of Cassation, Challenge No. 933 of 71 JY (24 May 2007).

⁸ FATHI WALI, Arbitration in local and international commercial disputes, Munsha'at Al Ma'aref, 2014 ed., p. 107.

⁹ FATHI WALI, Arbitration in local and international commercial disputes, Munsha'at Al Ma'aref, 2014 ed., p. 119.

¹⁰ Article 11 of the Arbitration Act.

¹¹ Article 11 of the Arbitration Act.

¹² Article 10 of the Arbitration Act.

¹³ Article 12 of the Arbitration Act.

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

The Arbitration Act does not expressly regulate the extension of the arbitration agreement to third parties or contracts. Egyptian court decisions, all the same, do not portray a clear trend as to the doctrine and accord the ultimate weight to the parties' consent to arbitration as determined by arbitral tribunals. Egyptian courts are increasingly becoming more flexible in considering the extension of arbitration agreements to third parties and/or the joinder of third parties to arbitral proceedings and will usually defer to the arbitral tribunal's findings in this regard, unless there is no agreement in writing or principles of public policy have been contravened.

The Egyptian Court of Cassation decisively rules that an arbitration agreement included in a contract does not automatically extend to a company that forms part of a larger group of companies entering into the said contract. The company must have *actively contributed in the performance* of the contract or there must have been a confusion between the intents of the two relevant companies.¹⁴ In other words, the doctrine of group of companies is accepted by the courts for purposes of extension of the arbitration agreement in the presence of an implication in the performance process of the contract.

The doctrine of economic unity is not sufficient, in and of itself, for purposes of extension of the arbitration agreement if the third party has not exhibited consent to arbitration.¹⁵ However, Egyptian courts have shown flexibility regarding extension to third parties and would normally defer to the Tribunal's reasoning in this respect, unless a clear principle of public policy is compromised.

2.5 Are there restrictions to arbitrability? In the affirmative:

2.5.1 Do these restrictions relate to specific domains (such as IP, corporate law, etc.)?

Any matter that is not capable of settlement/conciliation is non-arbitrable under the Arbitration Act.¹⁶ Non-arbitrable matters principally pertain to matters of personal or family status, public policy, or rights *in rem* relating to immovables (e.g. registration of real estate mortgages) and penal law issues.

Otherwise, the Arbitration Act solely requires that the right subject to arbitration be of an economic nature.¹⁷

2.5.2 Do these restrictions relate to specific persons (i.e. State entities, consumers, etc.)?

All natural or juridical persons and entities who enjoy legal capacity may agree to arbitrate their disputes.¹⁸ However, arbitration agreements in administrative contracts require the approval of the competent Minister.¹⁹

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

Egyptian courts are under a legal obligation to dismiss litigation with respect to disputes subject to an arbitration agreement if the defendant, at the commencement of the proceedings, advances a plea pertaining to the existence of an arbitration agreement.²⁰ However, the court is not under an obligation to

¹⁴ Court of Cassation, Challenge No. 4729 of 72 JY (22 June 2004).

¹⁵ Cairo Court of Appeal, Commercial Circuit No. 62, Case No. 83 of 118 JY (5 August 2002), in FATHI WALLI, *Arbitration in local and international commercial disputes*, Munsha'at Al Ma'aref, 2014 ed., pp. 195-96.

¹⁶ Article 11 of the Arbitration Act.

¹⁷ Article 2 of the Arbitration Act.

¹⁸ Article 11 of the Arbitration Act.

¹⁹ Article 1 of the Arbitration Act.

²⁰ Article 13-1 of the Arbitration Act.

reject the case *ex officio* for the mere existence of an arbitration agreement; the defendant must raise his objection at the commencement of the proceedings. This is principally due to the fact that an arbitration agreement is not constitutive of public policy. In the absence of a plea by the defendant in litigation, parallel proceedings will be conducted before the arbitral tribunals and the courts and decisions will be rendered irrespective of the parties' prior agreement to arbitrate. In the event that the two decisions are contradictory, the successful party in the arbitration may elevate the conflict to the Supreme Constitutional Court in accordance with the law.²¹

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

The Arbitration Act is silent on the matter. However, as a matter of practice, arbitral tribunals do not have the power to enjoin the courts to stay litigation proceedings. An interim measure by the arbitral tribunal may only address the parties to the arbitral proceedings and cannot impact or bind third parties,²² let alone national courts.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction?

The Arbitration Act's application extends to international arbitrations seated outside of Egypt in the event where the parties agree to apply it to their arbitration. This extends the jurisdiction of Egyptian courts to all the matters where the Arbitration Act refers to the competent court. These include for instance appointing arbitrators in the event of default, their challenge, sanctioning defaulting witnesses to penalties prescribed by Egyptian Evidentiary Law, extending the time-limit for the rendering of the arbitral award based on a party's request and all matters pertaining to enforcement and annulment of arbitral awards.

The Egyptian legal system does not regulate anti-suit injunctions and there is no prohibition on the issuance of such injunctions. However, as a matter of practice, courts generally do not render such injunctions. Egyptian courts' power with respect to the stay of proceedings is in fact restrained to an exhaustive list of cases mentioned in the Egyptian Law, amongst which the anti-suit injunction does not figure. However, there have been a limited number of judicial instances where Egyptian administrative courts issued anti-suit injunctions. This however remains unregulated and questioned by scholars.²³

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

The parties have the freedom to decide whether to retain outside counsel or represent themselves in the arbitral proceedings. Representation is made by virtue of a power of attorney in favour of a representing counsel.²⁴ However, as a matter of practice, the power of attorney must reference arbitration proceedings to avert the risk of challenge of authority to represent a party in arbitral proceedings. The tribunal has the discretion to accept or reject the representation of a party before it.²⁵

Representation includes all steps of the arbitral proceedings starting from the service of the request to arbitrate through to the hearing and the issuance of the award.²⁶ The parties also have the freedom to represent themselves or retain outside counsel under the Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration.

²¹ FATHI WALI, Arbitration in local and international commercial disputes, Munsha'at Al Ma'aref, 2014 ed., p. 205.

²² FATHI WALI, Arbitration in local and international commercial disputes, Munsha'at Al Ma'aref, 2014 ed., p. 512.

²³ FATHI WALI, Arbitration in local and international commercial disputes, Munsha'at Al Ma'aref, 2014 ed., p. 492.

²⁴ MAHMOUD MOSTAFA YOUNES, *The Reference for Arbitration Principles*, Dar An-Nahda Al-Arabiyyah (2009), p. 349, para. 419.

²⁵ FATHI WALI, Arbitration in local and international commercial disputes, Munsha'at Al Ma'aref, 2014 ed., p. 434.

²⁶ FATHI WALI, Arbitration in local and international commercial disputes, Munsha'at Al Ma'aref, 2014 ed., p. 434.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

The Arbitration Act regulates challenges to arbitrators. The competent court may intervene regarding the challenge of an arbitrator in the event the latter does not step down after the lapse of a period of 15 days from the date of a party's application for challenge before the arbitral tribunal. The Arbitration Act therefore imposes a pre-requisite to the transmittal of the challenge case to the court which is the submission of the challenge before the arbitral tribunal.

The obligation to transmit the challenge to the competent Egyptian court here is incumbent upon the arbitral tribunal itself.²⁷ This is normally applicable to *ad hoc* proceedings exclusively governed by the Arbitration Act. The court's power with respect to upholding or rejecting the challenge of an arbitrator stems from the arbitrator's *legal obligation to divulge all information or circumstance* which may give rise to *doubts* as to his independence or impartiality.²⁸ The standard used for the challenge of an arbitrator is that of "*serious doubts as to his impartiality and independence*"²⁹ which the circumstances unfold.³⁰ The arbitrator's independence and impartiality are considered fundamental guarantees of justice.³¹ However, an arbitrator is presumed independent and impartial if he accepted his/her mission and the party challenging these notions bears the burden to raise and prove the opposite.³² The court's decision with respect to the application for challenge is final and may not constitute the subject of a further appeal.³³

Generally, non-disclosure does not, in and of itself, suffice to uphold a challenge; non-disclosure ought to pertain to an event, issue or fact that raises serious doubts as to impartiality and independence.

By and large, the prevailing view is that the procedure and grounds for challenge under the Arbitration Act do not normally apply to institutional proceedings, where the procedural rules regulate challenges.

4.3 On what ground do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

Egyptian courts may intervene in the arbitral process for purposes of constitution of the arbitral tribunal in various cases of *ad hoc* proceedings:

- A default in the appointment of the sole arbitrator due to absence of agreement;³⁴
- A default in the appointment by a party of its party-appointed arbitrator after the lapse of 30 days from the other party's request to it to proceed with appointment;³⁵
- A default in the appointment of the president of the arbitral tribunal for lack of agreement by the party-appointed arbitrators after the lapse of 30 days from the date of the appointment of the last arbitrator;³⁶
- A default in the appointment by the parties of arbitrators in a tribunal composed of over three members;³⁷ and

²⁷ Court of Cassation, Challenge No. 9568 of 79 JY (14 March 2011).

²⁸ Article 16-3 of the Arbitration Act.

²⁹ Article 18-1 of the Arbitration Act.

³⁰ MAHMOUD MOKHTAR Al-Berairy, *International Commercial Arbitration*, Dar An-Nahda Al Arabiyyah (2004), 3rd ed., p. 75, para. 42.

³¹ Court of Cassation, Challenge No. 240 of 74 JY (9 February 2010).

³² Court of Cassation, Challenge No. 240 of 74 JY (9 February 2010).

³³ Article 19-1 of the Arbitration Act.

³⁴ Article 17-1 of the Arbitration Act.

³⁵ Article 17-2 of the Arbitration Act.

³⁶ Article 17-2 of the Arbitration Act.

- In the case of absence of agreement by the parties as to the number and method of appointment of the tribunal members (what is known under French Arbitration Act as “*clause blanche*”).

The court’s decision with respect to the appointment of an arbitrator is final and may not be appealed³⁸ except if subject to invalidity for the reason of not following the proper legal procedures for appointment.³⁹ The court may however grant the party or parties a short period to try appointing or agreeing on the appointment of an arbitrator before rendering its decision.⁴⁰

4.4 Do courts have the power to issue interim measures in connection with arbitrations? If so, are they willing to consider *ex parte* requests?

The Arbitration Act grants the competent court in Egypt the inherent power to order interim measures upon the application by any of the parties both prior to the commencement of the proceedings and during the conduct of the arbitration.⁴¹ Egyptian law regards the role of the court as vital to the adoption of such special measures which may include for instance an order relating to a witness default in appearance to testify before the arbitral tribunal.⁴²

The court has the power, as it does in litigation cases, to order provisional or interim measures in the absence of the parties and without the obligation to state reasons to its decision if the matter requires speedy resolution and satisfies the local requirements for the issuance of such measures.⁴³ The measure may be subject to appeal before the court.⁴⁴

In practice, it is very difficult and quite rare to have a court ratify or enforce an interim measure ordered by an arbitral tribunal. However, in 2017, the Cairo Court of Appeal enforced, for the first time, an interim decision rendered by an arbitral tribunal.

4.5 Other than arbitrators’ duty to be independent and impartial, does the law regulate the conduct of the arbitration?

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

The principle of confidentiality of the arbitral proceedings is inferred from the rule prohibiting the publication of the arbitral award and is confirmed by the Explanatory Note to the Law, which explains that the confidentiality of the arbitration is of significant importance to the parties in order to preserve inter-commercial relations.⁴⁵ However, there is no explicit reference in the Arbitration Act providing for the confidentiality of the proceedings without the parties’ agreement.

4.5.2 Does it regulate the length of arbitration proceedings?

The arbitral tribunal must issue its award within the time-limit agreed by the parties. In absence of an agreement, the award must be issued within 12 months from the date of commencement of the

³⁷ BORHAN AMRALLAH, An invitation to A Common Word regarding the Appointment of the Arbitrator by the Courts, Arab Journal of Arbitration, 19th ed. (December 2012), p. 105.

³⁸ Article 17-3 of the Arbitration Act.

³⁹ Court of Cassation, Challenge No. 17170 of 74 JY (22 November 2007).

⁴⁰ BORHAN AMRALLAH, An invitation to A Common Word regarding the Appointment of the Arbitrator by the Courts, Arab Journal of Arbitration, 19th ed. (December 2012), p. 118.

⁴¹ Article 14 of the Arbitration Act.

⁴² Explanatory Note to the Arbitration Act.

⁴³ Court of Cassation, Challenge No. 1975 of 66 JY (12 December 1996).

⁴⁴ MAHMOUD SAMIR AL-CHARKAWI, *Interim and Provisional Measure in Commercial Arbitration*, Arab Journal of Arbitration, 19th ed. (December 2012), p. 70.

⁴⁵ Explanatory Note to the Arbitration Act.

proceedings, subject to possible extension by the arbitral tribunal for a period of 6 months unless the parties agree to a longer period.⁴⁶

If the award is not issued within these time-limits,⁴⁷ a party may then proceed to courts for purpose of securing an order either to extend or terminate the proceedings. In the latter case, the parties have the right to initiate a claim before the initially competent court which means that the arbitration agreement itself is terminated in such case.⁴⁸

However, Egyptian courts have confirmed that such principles apply to *ad hoc* (not institutional) proceedings only.

4.5.3 Does it regulate the place where hearings and/or meeting may be held?

The Arbitration Act makes an express distinction between the legal seat and the geographical location to proceed with one or more procedural issues. The Arbitration Act allows the parties to agree on the place of the arbitration whether inside or outside of Egypt. In the absence of such agreement, the arbitral tribunal may decide the place while taking into account the circumstances of the claim and the convenience of the place to the parties without prejudice to its given power to convene in the place it deems convenient for purposes of the arbitral proceedings such as hearing the parties, witnesses and experts or the perusal of documents, inspection of goods or monies or, finally, for deliberation purposes.⁴⁹

4.5.4 Does it allow for arbitrators to issue interim measures? In the affirmative, under what conditions?

The Arbitration Act allows the arbitral tribunal to issue interim measures upon application by a party only if the parties agreed to grant the arbitral tribunal such power.⁵⁰ This agreement can well result from a general agreement as to the application of institutional rules which automatically grant the tribunal such power. For purposes of enforcement, the measure must satisfy all requirements imposed by the Egyptian procedural law which would likely entail the court's intervention to issue an order to this effect.⁵¹ The court will have to abide by the rules prescribed for the enforcement of foreign awards in the case of an interim measure issued in an arbitration seated abroad but that requires execution in Egypt.⁵²

In the event where the party subject to the measure fails to comply with it, the tribunal may, upon request from the other party, allow the latter to undertake necessary procedures for its enforcement and execution without prejudice to the party's right to request same from the court as stated above.

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?

The Arbitration Act does not regulate the arbitrators' powers with respect to evidence. It merely gives them the right to request the originals of the documents submitted in support of the parties' claims (Article 30). However, it is unequivocal that the arbitral tribunal enjoys the power to admit and weigh evidence. Nevertheless, it should be noted that, as a matter of Egyptian law, rules of evidence have procedural and substantive aspects. The arbitral tribunal's powers include: undertaking any evidentiary procedure it deems appropriate, reversing a procedure it had previously ordered and the discretion to decide on the evidence

⁴⁶ Article 45 of the Arbitration Act.

⁴⁷ MAHMOUD MOSTAFA YOUNES, *The Reference for Arbitration Principles*, Dar An-Nahda Al-Arabiyyah (2009), p. 349, para.472.

⁴⁸ *Id.*

⁴⁹ Article 28 of the Arbitration Act; MAHMOUD MOKHTAR AL-BERAIRY, *International Commercial Arbitration*, Dar An-Nahda Al Arabiyyah (2004), 3rd ed., p.103, para.61.

⁵⁰ Article 24 of the Arbitration Act.

⁵¹ MAHMOUD SAMIR AL-CHARKAWI, *Interim and Provisional Measure in Commercial Arbitration*, Arab Journal of Arbitration, 19th ed. (December 2012), p. 78.

⁵² *Id.*

on record. Arbitrators also have the right to accept or deny a party's request for an order on evidentiary procedures without prejudice to the party's defense rights.⁵³

According to the Egyptian Code of Evidence, there is no specific prohibition with respect to the testimony of an employee of a private sector entity. However, if the employee is a public officer or an employee of a public entity, the law prohibits his testimony with regard to non-public information learnt during the performance of his work even after he ceases to work for this entity except if the latter allows it.⁵⁴

4.5.6 Does it make it mandatory to hold a hearing?

The Arbitration Act accords the arbitral tribunal the power to decide whether the case requires a hearing for the parties to present their case and whether it is satisfied with the parties' written submissions and evidence. The tribunal's power is however subject to any agreement by the parties on this matter which naturally takes priority over any such power.⁵⁵

As a matter of law and practice, the arbitral tribunal can order a hearing or proceed on a documents only basis absent the parties' agreement to the contrary.

4.5.7 Does it prescribe principles governing the awarding of interest?

The Arbitration Act does not limit the arbitral tribunal's power as to the award of interest. The tribunal must follow customary practice depending on the nature of the dispute. However, Egyptian courts will strictly deny enforcement of an award granting interest in excess of 7% per annum. The cap is imposed by the Court of Cassation and is considered a rule of public policy for purposes of enforcement and annulment even in the case where the parties agree a higher rate, which will have to be reduced to the mentioned cap.⁵⁶ The only exception to the cap is the award of interest in certain banking transactions which the legislator exempts from the public policy rule.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

The Arbitration Act does not include any provision relating to the allocation of costs which accords the tribunal a great discretion in this regard. Arbitration tribunals seated in Egypt are generally inclined to follow international practice as to costs' allocation by adopting the "costs follow the event" rule.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

Albeit the absence of any legal text providing for the arbitrator's immunity, such immunity is presumed from the legislative immunity accorded to the judge/court. However, the immunity does not apply in cases of fraud, deceit or gross negligence, in which cases the arbitrator's civil liability can be exceptionally invoked before the courts.⁵⁷

4.6.2 Are there any concerns arising from potential criminal liability for any participants in an arbitration proceeding?

The arbitral tribunal's jurisdiction does not extend to criminal matters which are considered inarbitrable. If a criminal matter is however introduced or revealed before the arbitral tribunal, the Arbitration Act allows it to carry on with the arbitral procedures if such matter is not indispensable for purposes of resolution of

⁵³ MAHMOUD SAMIR AL-CHARKAWI, *International Commercial Arbitration: A Legal Comparative Study*, Dar An-Nahda Al-Arabiyyah (2011), p. 320-21.

⁵⁴ Article 65 of the Arbitration Act.

⁵⁵ Article 33 of the Arbitration Act.

⁵⁶ Court of Cassation, Challenge No. 3778 of Judicial Year 64 (17 February 2004).

⁵⁷ FATHI WALI, *Arbitration in local and international commercial disputes*, Munsha'at Al Ma'aref, 2014 ed., pp. 369-71.

the dispute. Otherwise, the tribunal is expected to stay the proceedings until the incidental and inseparable matter is determined by the courts.⁵⁸

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

The Arbitration Act allows the parties to agree to dispense with the reasoning requirement. Another exception is in the case where the applicable procedural rules do not impose a requirement as to the inclusion of the tribunal's reasoning for the decision.⁵⁹ Absent these exceptions, an unreasoned award is susceptible of annulment as per the Law.⁶⁰

5.2 Can parties waive the right to seek the annulment of the award? If yes, under what conditions?

A party may independently waive its right to seek the annulment of the award. However, this waiver will only produce its effect if made after the issuance of the arbitral award where it will preclude the initiation of any annulment proceedings.⁶¹ This applies *mutatis mutandis* to the parties' agreement to waive this right.⁶²

Waiver may be explicit or implied in accordance with Egyptian legal principles. A party's acceptance of the enforcement of the award is considered as an implied waiver to seek annulment.⁶³

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

For purposes of validity, the award must satisfy a set of normative requirements notably: (i) being made in writing, (ii) the inclusion of the arbitrators' signature (in case of dissent, the signature of the majority and the reason for the dissent), names and addresses of the parties and arbitrators, capacities and nationalities of the arbitrators, (iii) the inclusion of a summary of the parties' claims, submissions and documentation, (iv) the inclusion of the *dispositif* or the content of the decision, (v) the date and place of issuance and (vi) the reasoning if there is no agreement by the parties to exclude such reasoning. The award must be accompanied by a copy of the arbitration agreement or an explicit citation thereto within the text of the award.⁶⁴

At the time of the deposit of the award for enforcement, a certified Arabic translation of the award must accompany its original or copy.⁶⁵

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

An award is not subject of an appeal before the Egyptian courts. Save for setting aside (annulment), any other form of challenge of or recourse against the arbitral award is strictly prohibited by the Arbitration Act.⁶⁶

⁵⁸ Article 46 of the Arbitration Act.

⁵⁹ Article 43-2 of the Arbitration Act.

⁶⁰ MOHAMED SELIM AL-AWWA, *International Arbitration in Egypt and the Arab Countries: Commented based on scholarly writings and case law*, 2014 ed., Vol. II, p. 374.

⁶¹ Article 54-1 of the Arbitration Act.

⁶² FATHI WALI, *Arbitration in local and international commercial disputes*, Munsha'at Al Ma'aref, 2014 ed., p. 782.

⁶³ *Id.*

⁶⁴ Article 43 of the Arbitration Act.

⁶⁵ Article 47 of the Arbitration Act.

⁶⁶ Article 52 of the Arbitration Act.

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

Enforcement of Awards subject to the Arbitration Act

The scope of the Arbitration Act only encompasses local and international arbitrations seated in Egypt or arbitrations seated abroad where the parties agree on the application of the Arbitration Act. With respect to enforcement procedures, the Arbitration Act sets the following requirements:

- the deposit of an original or a signed copy of the award and its Arabic translation if in another language;
- the deposit of a copy of the arbitration agreement; and
- a copy of the minutes indicating the deposit of the award at the court.⁶⁷

The decision is then issued without the need for a hearing. Pursuant to a Constitutional Court ruling, a party may contest an order granting or refusing enforcement within 30 days of its issuance.⁶⁸ An application for enforcement will not be accepted except after the lapse of the time-limit set for the application for annulment of the award (90 days from the date of notification to the losing party). Enforcement may be refused in the following cases:⁶⁹

- contradiction with a previous judgment by the Egyptian courts on the subject matter of the dispute;
- contravention of rules of public policy (pertaining to, amongst others, arbitrability); and
- improper or lack of notification to the losing party.

Enforcement of Foreign Awards

In addition to the Arbitration Act requisites above, enforcement of foreign awards is also subject to the New York Convention requirements, to which Egypt is signatory.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

The Arbitration Act specifically prohibits the possibility to apply for enforcement before the lapse of the time-limit for the application for annulment.⁷⁰ Nonetheless, the mere application for annulment proceedings does not, *per se*, stay the enforcement of the arbitral award – if a party applies for annulment, this does not preclude the other party from applying for enforcement and does not even preclude the issuance of an order to this effect.⁷¹

The court may however stay enforcement if the applicant for annulment so requests in its application which shall include the reasons for such request. The court will rule on the stay of enforcement within 60 days from the date of the first hearing. If it does stay enforcement, it must decide on annulment within 6 months from the date of the order providing the stay.⁷²

⁶⁷ Article 56 of the Arbitration Act.

⁶⁸ Article 58-3 of the Arbitration Act.

⁶⁹ Article 58-2 of the Arbitration Act.

⁷⁰ Article 58-1 of the Arbitration Act.

⁷¹ FATHI WALI, *Arbitration in local and international commercial disputes*, Munsha'at Al Ma'aref, 2014 ed., p. 620.

⁷² Article 57 of the Arbitration Act.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Egyptian law provides for the supremacy of international conventions. In this instance, the Egyptian courts shall apply the New York Convention. However, the Arbitration Act does not contain a provision that is similar to the New York Convention with respect to the possibility for the court to refuse enforcement based on the setting aside of the award by the courts of the seat. Egyptian courts have not issued any decisions that determine a clear position on the matter and will assess the possibility of enforcement of a set aside award on a case by case basis.

5.8 Are foreign awards readily enforceable in practice?

Egypt is a signatory State of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Egyptian courts are favorable to enforcement despite the lengthy procedure applicable to the enforcement of foreign awards pursuant to the New York Convention's Article 3. Generally, recent practice shows an increasingly supportive position for the enforcement of foreign awards in Egypt.

6. Funding arrangements

6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

The Arbitration Act does not include provisions relevant to contingency fees. However, Egyptian Advocacy Law No. 17 of 1983 allows lawyers to receive contingency fees, and therefore allows them to enter into alternative fee arrangements, in a margin of 5% to 20% of the outcome of the case. However, the 5% minimum was declared unconstitutional by the Supreme Constitutional Court, and so there is no minimum threshold as a matter of Egyptian law.⁷³ Alternative fee arrangements between client and counsel cannot be based on the client's solvency as ruled out by the Supreme Constitutional Court.⁷⁴

As regards third-party funding, the Arbitration Act is silent on the issue. Albeit the absence of significant case law on the matter, this does not preclude, *per se*, arbitration tribunals from embracing this increasingly important practice.

7. Is there likely to be any significant reform of the arbitration law in the near future?

There are ongoing discussions for reform and possible amendments are being considered, but it is not expected that the Arbitration Act will be amended soon.

⁷³ Supreme Constitutional Court, Case No. 22 of JY 14 (12 February 1994).

⁷⁴ *Id.*

ENGLAND & WALES

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

GREG FALKOF AND MARGRIT TREIN
OF EVERSHEDES SUTHERLAND

EVSHEREDS
SUTHERLAND

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

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VERSION: 16 APRIL 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Arbitration in England and Wales is subject to a sophisticated legal regime, supported by knowledgeable, efficient and commercially astute local courts, and practiced by experienced local practitioners.

Arbitral proceedings are governed by the English Arbitration Act 1996 (the “**1996 Act**”) and are founded upon the principles of party autonomy, fairness and the non-intervention of the courts. English law recognises the confidentiality of arbitral proceedings, subject to limited exceptions.

The 1996 Act provides English courts with a wide range of powers exercisable in support of arbitral proceedings seated in England and Wales. English courts, which have a well-deserved reputation for fairness and impartiality, generally show deference to arbitral tribunals and proceedings and refrain from intervening, save in limited circumstances. English courts will enforce arbitral awards, both local awards rendered under the 1996 Act and foreign awards enforceable pursuant to the New York Convention 1958, again subject to very limited exceptions.

The 1996 Act confers wide powers on an arbitral tribunal, including as regards its powers to decide on matters relating to its jurisdiction, the conduct of arbitral proceedings, evidentiary and procedural matters and the remedies it may impose.

Key places of arbitration in the jurisdiction	London.
Civil law / Common law environment?	Common law.
Confidentiality of arbitrations?	The 1996 Act is silent on confidentiality, but English law recognises the confidentiality of arbitral proceedings subject to limited exceptions.
Requirement to retain (local) counsel?	There is no requirement to retain local counsel for arbitral proceedings, although local counsel (barristers or solicitor-advocates) must be retained to appear before the English courts for any court proceedings in support of arbitrations seated in England. ¹
Ability to present party employee witness testimony?	Not specifically, but tribunals have wide powers to decide on evidentiary matters, including the power to summon witnesses (both resident and non-resident in England and Wales) (section 34 of the 1996 Act).
Ability to hold meetings and/or hearings outside of the seat?	Yes, parties are free to decide on all procedural matters, including whether the meetings and/or hearings are to be held outside of the seat (section 34(2)(a) of the 1996 Act).
Availability of interest as a remedy?	Yes. Unless otherwise agreed by the parties, the 1996 Act confers a wide discretion on arbitral tribunals regarding interest (section 49 of the 1996 Act).
Ability to claim for reasonable costs incurred for the arbitration?	Yes. Unless the tribunal or the court determines otherwise, the successful party will be allowed to claim a “ <i>reasonable amount in</i>

¹ The higher courts include the various divisions of the High Court, the Court of Appeal and the Supreme Court.

	<i>respect of all costs reasonably incurred</i> " (section 63(5)(a) of the 1996 Act). A pre-dispute agreement on the allocation of costs is unenforceable (section 60 of the 1996 Act).
Restrictions regarding contingency fee arrangements and/or third-party funding?	Conditional fee arrangements ("CFAs") and damages-based agreements ("DBAs") may be entered into under English law. Third party funding is also available.
Party to the New York Convention?	Yes.
Other key points to note	An unsuccessful party has the right to challenge an arbitral award to an English court for a " <i>serious irregularity</i> " affecting the award and causing it " <i>substantial injustice</i> ", and, unless the parties agree otherwise, to appeal to a court on a point of English law determined in the arbitral award. However, the vast majority of such actions do not succeed and parties may agree to exclude the right to appeal on a point of law either expressly in their contract or waive it as a result of their choice of institutional rules.
WJP Civil Justice score (2017-2018)	0.81

ARBITRATION PRACTITIONER SUMMARY

The 1996 Act was drafted to align the arbitration laws of England and Wales with international practices whilst ensuring that key principles that had emerged from the common law were preserved. The 1996 Act is broadly based on the UNCITRAL Model Law (though wider in scope) and incorporates internationally recognised principles of arbitration. Party autonomy is at the centre of the 1996 Act, and accordingly, with few exceptions, most provisions may be altered or contracted out of by the parties. The English courts enjoy wide powers to support arbitral proceedings, but in line with the principle of non-intervention contained within section 1(c) of the 1996 Act, the English courts have in practice shown deference to arbitral tribunals, and have refrained from intervening.²

Notably, the 1996 Act allows for arbitral awards to be appealed to the English courts on a point of law, where the parties have not agreed otherwise – this is a peculiarity of the 1996 Act not reflected in the Model Law.

Date of arbitration law?	1996 (with most provisions coming into force on 31 January 1997).
UNCITRAL Model Law? If so, any key changes thereto?	The UNCITRAL Model Law was not adopted wholesale, but the 1996 Act is broadly based on it, with the scope of the 1996 Act being wider. One of the key changes in the 1996 Act is that it allows for arbitral awards to be appealed on a point of law (section 69 of the 1996 Act).
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Yes, arbitration matters are generally dealt with by suitably experienced judges in the courts which determine commercial disputes, primarily in the specialist courts of the Business and Property Court of the High Court of Justice, which includes the Commercial Court, the Admiralty Court, the Technology and Construction Court, the Circuit Commercial Court (formerly, the Mercantile Court) and the Chancery Division courts. ³
Availability of <i>ex parte</i> pre-arbitration interim measures?	Pre-arbitration interim measures are available from the courts, and the courts will grant these <i>ex parte</i> (or without notice), where appropriate. However, these are subject to a subsequent <i>inter partes</i> (on notice) hearing to determine whether the interim measure should remain in place. Section 44 of the 1996 Act, which deals with the English courts' powers exercisable in support of arbitral proceedings, restricts the courts' powers to situations where the arbitral tribunal or institution holding those powers either " <i>has no power or is unable for the time being to act effectively</i> " (section 44(5) of the 1996 Act). It is not uncommon for a court to grant such interim measures.
Courts' attitude towards the	The principle of competence-competence is firmly stated in

² Note that there are recent cases demonstrating that the English courts are willing to grant injunctions to stop a foreign-seated arbitration (see *e.g. Excalibur Ventures LLC v Texas Keystone Inc* [2011] EWHC 1624 (Comm); *Whitworths Ltd v Synergy Food Ingredients & Processing BV* [2014] EWHC 4239 (Comm)).

³ Claims under the 1996 Act must be commenced in accordance with the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996. Details about the appropriate forum for bringing an arbitration claim are also contained within Rule 62 of the Civil Procedure Rules ("CPR") and in the corresponding Practice Direction to Part 62.

competence-competence principle?	section 30(1) of the 1996 Act and is respected by the English courts. However, there are circumstances where, either by agreement or with the permission of the arbitral tribunal, the English courts may give a preliminary ruling on the arbitral tribunal's jurisdiction (section 32 of the 1996 Act). A tribunal's decision on its own jurisdiction may be subsequently challenged before the courts (section 30(2)) and the English courts have shown that they are willing to review a tribunal's decision on its own jurisdiction. ⁴
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The 1996 Act allows the courts to vacate an award, where it has been successfully appealed on a point of law arising from the tribunal's award pursuant to section 69 of the 1996 Act.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The English courts will generally abide by the decision of the tribunal at the seat of the award. The courts will not normally enforce an arbitral award that has been vacated (<i>i.e.</i> , annulled at the seat), but there are limited situations in which the English courts may depart from this approach, for example, where the foreign court's set-aside decision was " <i>so extreme and incorrect as not to be open to [that foreign] court acting in good faith</i> ". ⁵
Other key points to note?	∅

⁴ See *e.g.*, *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

⁵ *Maximov v Open Joint Stock Company "Novolipetsky Metallurgichesky Kombinat"* [2017] EWHC 1911 (Comm).

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law?

The 1996 Act, which applies to domestic and international arbitrations seated in England and Wales, is broadly based on the UNCITRAL Model Law. However, the Model Law was not adopted wholesale.⁶ As such, there are a number of differences between the UNCITRAL Model Law and the 1996 Act, as further outlined below.

Unlike the UNCITRAL Model Law, the 1996 Act is not limited to international commercial arbitration, but also extends to domestic arbitration.

The default position under the 1996 Act is that the tribunal will consist of a sole arbitrator where the parties have not agreed otherwise (section 15(3)), whereas the default position under the UNCITRAL Model Law is a panel of three arbitrators (Article 10(2)).

Significantly, the 1996 Act allows for arbitral awards to be appealed to the English courts on a point of law under section 69 unless the parties have excluded the courts' jurisdiction under this section by agreement. The UNCITRAL Model Law does not make provision for arbitral awards to be appealed on a point of law.

The procedural grounds upon which an award can be appealed in England and Wales, contained in section 68(2) of the 1996 Act (on the grounds of serious irregularity), are more wide-ranging than the grounds for the set-aside of the award contained in Article 34(2) of the UNCITRAL Model Law. However, section 68(2) requires a higher test for an award to be set aside.

An applicant seeking a set-aside under section 68 must establish that there was a "*serious irregularity*" which has caused or will cause "*substantial injustice*" to the applicant.⁷ Whilst the English courts have found that "*substantial injustice*" may occur if a party is not given an opportunity to put its case⁸ or where the arbitral tribunal fails to deal with a substantial point,⁹ the mere presence of these circumstances is not enough for a challenge to succeed and the applicant will have to establish that it has in fact suffered prejudice.

1.2 When was the arbitration law last revised?

The arbitration law was last formally revised in 1996 with the introduction of the 1996 Act, with few amendments made since its enactment. However, the law in this area continues to develop through ongoing advancements in case-law from the English courts. The Law Commission (established for the purpose of promoting the reform of the law) has also recognised that reforms to the 1996 Act are required, for instance, to include the power for arbitral tribunals to give summary judgments, or strike out spurious claims or defences. Despite this, it has not included the 1996 Act in its latest programme for reform.

⁶ This was a result of the recommendation of the Departmental Advisory Committee on Arbitration, a committee of arbitration experts set up in 1985 and dissolved in 1997 to consider arbitration legislation in the United Kingdom from the perspective of the UNCITRAL Model Law.

⁷ The seminal judgment of the House of Lords (as it then was) in *Lesotho Highlands Development Authority v Impregilo SpA and others* [2005] UKHL 43 highlights the high threshold for a successful challenge under section 68.

⁸ See e.g., *Kalmneft v Glencore International AG and another* [2002] 1 All ER 76.

⁹ See e.g., *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

Under English law, arbitration agreements are separable, meaning that the law of the arbitration agreement (*i.e.*, the law that applies to the contractual requirement to refer a dispute to arbitration) may be distinct from the law of the contract between the parties (*i.e.*, the law governing the commercial agreement between the parties).¹⁰

If the parties have not expressly or impliedly (for example, by application of choice of law rules) chosen a law to govern their arbitration agreement, the English courts will often adopt the rebuttable presumption that the law governing the parties' substantive agreement also governs their arbitration agreement. This presumption may be ousted in certain circumstances, for example, if an application of the substantive law would render the arbitration agreement ineffective.¹¹

If the parties have not expressed (or implied) a choice of law for the substantive agreement, the English courts will often determine that the law of the seat shall govern the arbitration agreement.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Section 7 of the 1996 Act stipulates that, unless otherwise agreed between the parties, an arbitration agreement is distinct and separate from the underlying agreement, meaning that it will survive the underlying agreement being invalid, not coming into existence or becoming ineffective. There are limited circumstances where the arbitration agreement may be declared invalid on the same grounds as the underlying agreement (for example, bribery).

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

While both oral and written arbitration agreements are valid as a matter of English law, an arbitration agreement needs to be in writing or evidenced in writing in order to bring the arbitration within the scope of the 1996 Act (sections 5(1) and (2) of the 1996 Act). "*In writing*" is construed widely and includes *inter alia* an oral agreement to submit to arbitration by reference to "*terms which are in writing*" (section 5(3)). Evidential issues may arise in respect of oral arbitration agreements and the extent of the provisions in aid of arbitration under the English common law are much more limited compared to those available under the 1996 Act.

To the extent that the validity of the arbitration agreement is called into question at the enforcement stage, the 1996 Act stipulates that recognition or enforcement of an award may be refused where the party to the arbitration agreement was (under the law applicable to it) under some incapacity, or in circumstances where the arbitration agreement was not valid under the applicable law or, where there is no indication about this, under the law of the country where the award was rendered (section 103(2)(a) and (b)). Accordingly, when seeking to enforce an award in England and Wales regard must be had to the applicable law of the arbitration agreement.

Compliance with the requirements for a valid arbitration agreement under section 5 of the 1996 Act may not be sufficient for the enforcement of an arbitral award under the New York Convention 1958 outside of the United Kingdom. Most importantly, the New York Convention requires arbitration agreements to be signed (Article II(2)) and a foreign court may therefore require such a requirement even though this formality is not required under English law.

¹⁰ See *e.g.*, *Sulamerica CIA Nacional de Seguros SA & ors v Enesa Engenharia SA & ors* [2012] EWHC 42 (Comm), at [7]; *C v D* [2007] EWCA Civ 1282, at [22]-[29].

¹¹ *Sulamerica CIA de Seguros v Enesa Engenharia SA* [2012] EWCA Civ 638.

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

Given that arbitration is a contractual and consensual process, arbitration agreements will typically only bind those parties who have consented to submitting their dispute to arbitration. However, English law recognises a number of exceptions, in which a third party, as a non-signatory, may nevertheless be bound by an arbitration agreement.

This occurs for example in circumstances where a party can be said to have consented to arbitration, for example in agency relationships, where the agent enters into a contract containing an arbitration agreement on behalf of the principal.

Further, as provided under the Contracts (Rights of Third Parties) Act 1999, a third party may be entitled to, or indeed bound, to submit to arbitration to enforce a right or benefit conferred to it under a contract, in circumstances where the contract contains an arbitration agreement that covers the dispute. The leading case on arbitration matters involving the Contracts (Rights of Third Parties) Act 1999 is *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm), where brokers were entitled to claim payment of commission in arbitration proceedings provided for in a charterparty.

Section 82(2) of the 1996 Act also makes it clear that a third party may be bound by an arbitration agreement if it claims under or through a party to the arbitration agreement. This may occur where the original agreement has been assigned or novated to a third party.

English law does not recognise the “*group of companies*” doctrine. Entities within the same corporate group will be treated as separate legal entities, including for the purposes of establishing whether they are a party to an arbitration agreement. The English courts have very occasionally applied the “*alter ego*” doctrine and pierced the corporate veil where there has been substantial wrongdoing such as fraud or where the corporate structure has been used to escape legal responsibilities.

2.5 Are there any restrictions to arbitrability? In the affirmative:

English law places restrictions on the arbitrability of disputes, *i.e.*, on whether the subject matter of the dispute is capable of being arbitrated (as distinct from issues concerning the scope of the arbitration agreement or the arbitral tribunal’s jurisdiction). Arbitrability is not defined in law or under the 1996 Act, however, section 103(3) of the 1996 Act acknowledges that an award may not be recognised or be enforceable “*if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.*” Subject matters commonly considered “*in arbitrable*” include *inter alia* certain issues of criminal law, family law, planning, insolvency and certain matters contrary to public policy such as contracts that are void for illegality.

2.5.1 Do these restrictions relate to specific domains (such as IP, corporate law etc.)?

Yes, as noted above. Arbitrable issues which may have wider consequential effects will, once arbitrated, have limited scope of enforcement. For example, disputes relating to the validity of intellectual property rights are capable of being submitted to arbitration under English law, but any award subsequently rendered will only be binding on the parties to the arbitration.

2.5.2 Do these restrictions relate to specific persons (i.e. State entities, consumers etc.)?

No.

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

3.1.1 If the place of the arbitration is inside of the jurisdiction?

Where court proceedings are commenced in breach of an arbitration agreement, the defendant(s) may make an application to the English courts for the proceedings to be stayed, pursuant to section 9 of the 1996 Act. This must be done within the relevant time period for acknowledging service of a claim under the CPR. The defendant is not required to serve a defence to the claim in the court litigation until the jurisdictional issues have been resolved. However, if the defendant does serve a defence, this will be taken as acceptance of the court's jurisdiction.

Pursuant to section 9(4) of the 1996 Act, the courts must grant the stay unless the arbitration agreement is null and void, inoperative or incapable of being performed. In addition to the powers conferred on the courts under section 9, the courts also have an inherent jurisdiction to stay proceedings before them in favour of arbitration, in circumstances where there is an issue as to whether the parties entered into a binding arbitration agreement or whether the subject matter of the action was within the scope of the arbitration.¹² This has been described as a residual jurisdiction "*principally confided to dealing with cases not contemplated by the statutory provisions*",¹³ where the strict requirements of section 9 cannot be satisfied. This power is rarely exercised.¹⁴

3.1.2 If the place of the arbitration is outside of the jurisdiction?

In accordance with section 2(2)(a) of the 1996 Act, section 9 applies even if the seat of arbitration is outside England and Wales, or if no seat has yet been designated or determined.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

The 1996 Act does not oblige the English courts to recognise or enforce an injunction issued by an arbitral tribunal enjoining the court to stay ongoing litigation. The better course of action for a party seeking to stay ongoing litigation proceedings may be to make an application to the court under section 9 of the 1996 Act, which also applies to arbitrations seated outside England and Wales.

3.3 On what grounds can the courts intervene in arbitrations seated outside of the jurisdiction?

The English courts have the power to intervene in arbitrations seated outside of the jurisdiction in a number of ways. Under section 37 of the Senior Courts Act 1981, a party may apply to the court for an anti-suit injunction if it wishes to restrain another party from either commencing or carrying on with proceedings abroad in breach of an arbitration agreement. However, following the ruling of the European Court of Justice (as it then was) in *Allianz SpA v West Tankers Inc (Case C-185/07)*, the English courts cannot grant anti-suit injunctions to prevent proceedings in the courts of other EU member states in breach of arbitration agreement, *where such proceedings fall within the scope of the original Brussels Regulation*.¹⁵ *The position in relation to Switzerland, Iceland and Norway is likely to be similar to the position under the original Brussels Regulation on the basis that the provisions contained in the 2007 Lugano Convention are nearly identical. It is yet to be seen whether the recast Regulation*¹⁶ *reinstates the courts' power to grant anti-suit*

¹² *A v B* [2006] EWHC 2006 (Comm).

¹³ *Etri Fans Ltd v NMB (UK) Ltd* [1987] 1 WLR 1110, 1114.

¹⁴ *See e.g., A v B* [2006] EWHC 2006 (Comm).

¹⁵ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. It is not currently clear what the position of the English courts will be post-Brexit.

¹⁶ Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

injunctions in respect of proceedings brought in another EU member state. Anti-suit injunctions are however available in respect of proceedings brought outside the EU or the Lugano Convention states.

Under section 44(2)(e) of the 1996 Act, the court also has the power to grant interim injunctions in support of arbitration proceedings, including freezing orders (formerly known as “*Mareva orders*”) to prevent a party from dissipating its assets. Such freezing orders are often issued alongside associated disclosure orders requiring the party against whom the order is made to provide details of its assets.¹⁷

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

Yes. There are no restrictions in the 1996 Act or the common law on the instruction of outside counsel or self-representation in arbitration proceedings.

4.2 How strictly do courts control arbitrators’ independence and impartiality? For example: does an arbitrator’s failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

Section 33 of the 1996 Act imposes a general duty on the arbitral tribunal to act fairly and impartially as between the parties, in its conduct of the proceedings, as regards procedural and evidentiary matters and more generally, in its exercise of all the powers it holds. While the 1996 Act requires members of an arbitral tribunal to act ‘impartially’ as between the parties, it does not expressly impose a separate requirement for the arbitrators to be ‘independent’ of the parties.

Where the circumstances give rise to justifiable doubts as to an arbitrator’s impartiality and also have caused or will cause “*substantial injustice*” to a party, a party can apply to the court for the arbitrator to be removed under section 24(1) of the 1996 Act. The English courts will have regard to various sources, including English case law on judicial bias, the IBA Guidelines on Conflicts of Interest in International Arbitration and arbitral decisions relating to challenges, when rendering its decision on whether or not an arbitrator is, or appears to be, biased. The English courts will decide the matter on a case by case basis as regards the evidence, applying the test of whether the circumstances would “*lead a fair-minded and informed observer to conclude that there was a real possibility ... that the [arbitrator] was biased*”.¹⁸

Where an arbitrator has a prior interest that may call into question his or her impartiality, it is advisable that this be disclosed at the earliest opportunity, although a failure to disclose will not, of itself, give rise to an automatic finding of partiality.

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal in the case of *ad hoc* arbitration?

Where an arbitration agreement is silent on the procedure to be adopted to constitute the tribunal and the parties have not otherwise agreed on the procedure, the 1996 Act sets out a number of key provisions that the parties may rely upon to constitute the tribunal.

The default position under the 1996 Act as to the number of arbitrators is a sole arbitrator pursuant to section 15(3). Section 16 sets out the default appointment procedure to be followed both for a sole arbitrator and for a tribunal of two or more members. Section 17 provides a mechanism to constitute a tribunal if one party fails to or refuses to appoint its arbitrator, allowing the other party to appoint their nominated co-arbitrator to be the sole arbitrator in the dispute and for the sole arbitrator’s award to be binding on both parties.

¹⁷ Guidance as to the circumstances in which it will be appropriate for the court to enforce a worldwide freezing injunction is provided in *Dadourian Group Int Inc v Simms* [2006] EWCA Civ 399.

¹⁸ *Re Medicaments & Related Classes of Goods* [2001] 1 W.L.R. 700; *Porter v Magill* [2001] UKHL 67.

Where the parties have failed to constitute a tribunal, section 18 gives the courts the powers to i) give directions as to the making of any necessary appointments (section 18(3)(a)); ii) direct that the tribunal be constituted by such appointments (or any one or more of them) as have been made (section 18(3)(b)); iii) revoke any appointments already made (section 18(3)(c)); and iv) make any necessary appointments itself (section 18(3)(d)). The parties are however free to agree on the procedure to be followed in the event of a failure of the procedure for the appointment of the arbitral tribunal under section 18(1), and any such agreement would take priority over the intervention of the court.

4.4 Do courts have the power to issue interim measures in connection with arbitrations?

Yes. Pursuant to section 44 of the 1996 Act, the courts have wide powers to grant interim measures in support of arbitral proceedings. However, the courts' powers may be excluded by agreement of the parties (for instance, in their arbitration agreement). In all cases, the courts may only act if the arbitral tribunal, institution, etc. has no relevant power or is otherwise unable to act effectively (section 44(5)). The inability to act will include situations such as where interim relief is required but the arbitral tribunal has not yet been constituted, or where the order has to be enforced against a third party which a tribunal would be unable to ensure.

The specific powers granted to the courts under the 1996 Act regarding interim measures are the same powers available to the courts in relation to court litigation, and include the power to summon witnesses (both resident and non-resident in England and Wales), to grant freezing orders, appoint receivers, powers for the sale of goods, and powers to require persons to produce evidence. In non-urgent cases, agreement from the other party or permission from the arbitral tribunal is required for the English courts to grant interim measures (section 44(4)). For urgent cases, these requirements are not necessary, but the English courts are limited to making such orders as the courts consider "*necessary for the purpose of preserving evidence and assets*" (section 44(3)).

4.4.1 If so, are they willing to consider ex parte requests?

Section 44(3) of the Act makes it clear that ex parte requests shall only be granted in urgent cases.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

4.5.1 Does the law provide for the confidentiality of arbitration proceedings?

Although the 1996 Act is silent on the issue of confidentiality, English law recognises the confidentiality of arbitral proceedings, which extends to documents produced or generated during the arbitration.¹⁹ The duty of confidentiality is subject to a number of broad exceptions, including where disclosure is in the interests of justice or in the public interest,²⁰ it is ordered or permitted by the court, and/or it is necessary to pursue or protect a party's legal right. The parties may waive or modify the duty of confidentiality by agreement. For example, Article 30 of the London Court of International Arbitration ("LCIA") Rules 2014 expressly provides for arbitral awards and other arbitration documents produced during LCIA proceedings to remain confidential.

4.5.2 Does the law regulate the length of arbitration proceedings?

Although Article 1(a) of the 1996 Act states that "*the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense*", English law does not regulate the length of arbitration proceedings.

¹⁹ *Emmott v Michael Wilson and Partners* [2008] EWCA Civ 184.

²⁰ *London and Leeds Estates Ltd v Paribas Ltd* [1995] 1 E.G.L.R. 102; *Ali Shipping Corp v Shipyard Trogir* [1999] 1 W.L.R. 314.

4.5.3 Does the law regulate the place where hearings and/or meetings may be held?

No. Under section 34 of the 1996 Act, the parties are free to decide on all procedural matters, including the location of any part of the proceedings, such as meetings and hearings (section 34(2)(a)). If the parties so wish, meetings and/or hearings may be held outside of England and Wales.

4.5.4 Does the law allow for arbitrators to issue interim measures?

The 1996 Act allows the parties to agree on the powers exercisable by the tribunal. Unless otherwise agreed, the 1996 Act confers the express powers on arbitrators to order security for costs (section 38(3)), to issue orders relating to the inspection or preservation of property which is the subject of arbitral proceedings (section 38(4)), to make orders directing that a party or a witness be examined on oath or affirmation (section 38(5)) and to issue orders for the preservation of evidence (section 38(6)). Furthermore, the parties may agree to grant the tribunal the power to order on a provisional basis any relief which it would have the power to order in a final award, including interim payments on account of costs of the proceedings, or provisional payments as between parties (section 39), but there are questions surrounding the enforceability of such relief and these powers are seldom used in practice.

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence?

Unless otherwise agreed between the parties, arbitral tribunals have wide discretionary powers under section 34(1) of the 1996 Act to decide all evidential matters. Such matters include for instance the language or location of hearings, the form of submissions, whether the tribunal should take initiative in ascertaining the facts or the law, whether documents should be disclosed in the arbitration, and what rules of evidence should be applied, and whether (and the extent to which) there should be oral or written evidence or submissions.

There are no express restrictions relating to the presentation of testimony by a party employee.

4.5.6 Does the law make it mandatory to hold a hearing?

The 1996 Act does not make it mandatory to hold a hearing. Pursuant to section 34(2)(h), the tribunal has the power to decide whether or not there should be a hearing. However, where it decides to dispense with an oral hearing, the tribunal must have regard to all the circumstances, so as not to give rise to a subsequent challenge.

4.5.7 Does it prescribe principles governing the awarding of interest?

Unless otherwise agreed by the parties, the 1996 Act confers a wide discretion on the arbitral tribunal to award simple or compound interest for such periods and at such rates "as it considers meets the justice of the case" (section 49).

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

The 1996 Act allows the parties to agree between themselves the allocation of costs in the event of an arbitration, provided the agreement was entered into *after* the relevant dispute arose (section 60). Any agreement as to costs which was made before the relevant dispute arose is not valid or enforceable. The default position under the 1996 Act for the allocation of costs is that costs follow the event (*i.e.*, the losing party pays the winning party's fees), except where it is inappropriate to do so in relation to either all or part of the costs (section 61(2)).

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

Yes. Under section 29 of the 1996 Act, which is mandatory, arbitrators and their employees or agents benefit from statutory immunity to civil liability for their acts and/or omissions, except where their act or

omission can be shown to be in bad faith. "*Bad faith*" is not defined within the 1996 Act but there is some guidance in case law as to what the English courts understand this to mean. The burden of proving "*bad faith*" is on the party alleging it.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

Whilst it is accepted that an arbitral tribunal does not have the power to render a criminal conviction or impose a custodial sentence, English case-law recognises that arbitral tribunals have the power to find facts which establish a criminal offence (fraud being such an example) and that in certain circumstances, arbitral tribunals have jurisdiction to find that a criminal offence has been committed.²¹

5. The award

5.1 Can parties waive the requirements for an award to provide reasons?

Yes. Section 52(4) provides that the parties have the right to dispense with a requirement of reasons to be provided.

5.2 Can parties waive the right to seek the annulment of the award?

The parties may waive their right to appeal the award on a point of law under section 69. Parties cannot waive their right to challenge the tribunal's substantive jurisdiction under section 67, or to challenge the award on the basis of a serious irregularity under section 68. Under section 73, a party may lose its right to challenge an award before a court if it failed to raise the same objection promptly before the arbitral tribunal.

Where a successful challenge is brought, this will not necessarily (although it may) result in the award being annulled, but may instead result in the award being varied, remitted to the same arbitral tribunal for consideration, or for an award to be declared to have no effect in part. The courts cannot carry out a *de novo* review of a tribunal's findings of facts, unless the facts in question are directly relevant to a challenge concerning the tribunal's jurisdiction.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at the seat of jurisdiction?

The 1996 Act does not prescribe any atypical requirement to render a valid award. The requirements as to the form of the award in section 52 of the 1996 Act (that it be in writing, signed by all the arbitrators, contains reasons, states the seat and the date of the award) may be disapplied by party agreement.

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

Appeals on findings of fact are not permitted. Section 69 of the 1996 Act allows a party to appeal an award on a question of law. A question of law is defined in section 82(1) and excludes issues of foreign law.

These rights can be waived, and section 69(1) states that an agreement to dispense with reasons for the tribunal's award will be construed as an agreement to exclude the application of this section. Choosing institutional rules that preclude the parties' rights of appeal will exclude the application of this section. Permission must be sought, either from all the parties to the proceedings or from the court, in order to bring an appeal.

²¹ *The London Steamship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain, The French State* [2013] EWHC 3188 (Comm); *The London Steamship Owners' Mutual Insurance Association Ltd v Spain* [2015] EWCA Civ 333, at [78] ("It was not disputed that in the ordinary way an arbitrator has jurisdiction to find facts which constitute a criminal offence (fraud being an all too common example) or that in an appropriate case an arbitrator also has jurisdiction to find that a criminal offence has been committed. As the judge pointed out, however, it is necessary to distinguish between a finding of criminal conduct and a conviction which provides the basis for a penal sanction. It may also be important to distinguish between a claim and a dispute or difference."); *Interprods v De La Rue International* [2014] EWHC 68.

The requirements for obtaining permission are set out in section 69(3) and include (i) that the determination will “*substantially affect*” the rights of one or more parties;²² (ii) that the question of law is one which has been put to the tribunal to determine;²³ (iii) that on the basis of the findings of fact in the award, either the decision of the tribunal on the question is obviously wrong, or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt,²⁴ and (iv) that despite the agreement of the parties to resolve the matter by arbitration, it is “*just and proper*” for the court to determine the question in all the circumstances.²⁵

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

Normally, domestic awards will be enforced by summary procedure (i.e., no full trial is required) pursuant to section 66 of the 1996 Act. This section extends to awards rendered outside of the jurisdiction (section 2(2)(b)) and provides for awards, with the permission of the court, to be “*enforced in the same manner as a judgment or order of the court to the same effect*” (section 66(1)). Where permission is granted, judgment may also be given in terms of the award (section 66(2)). Permission will not be granted where the tribunal lacked jurisdiction (section 66(3)), where doing so would go against public policy or, where an award is defective, vague or ambiguous.

Alternatively, an “*action on the award*” may be brought (section 66(4)), but this option is normally more costly and protracted, and would only be pursued in circumstances where the summary procedure contained in sub-section (1) and (2) is not available.

The recognition and enforcement of foreign awards is set out in Part III of the 1996 Act. This part covers the recognition and enforcement of Geneva Convention awards (section 99) as well as New York Convention awards (sections 100 to 104). The provisions relating to New York Convention awards mirror the provisions contained in the New York Convention.

Under the Limitation Act 1980, the limitation period to make an application to the court to enforce an award and to bring an action on the award is 6 years from the last moment when the award should have been satisfied (section 7) or 12 years where the arbitration agreement is under seal (section 8). Where it is not clear when this would be, the cause of action will accrue when a reasonable time to pay has passed, according to the circumstances of the specific case.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

Where an application for the setting aside or suspension of the award has been made, there is no automatic suspension of the right to enforce under English law. However, section 103(5) of the 1996 Act gives the court the power to adjourn the decision on recognition or enforcement of the arbitral award, and the court may even order the party seeking the suspension or setting aside of the award to give suitable security. The rationale behind not automatically staying proceedings is so that proceedings cannot be frustrated by a party bringing a challenge.

Where a party has appealed an award under section 67 on the basis of lack of jurisdiction, the 1996 Act expressly allows the arbitral tribunal to continue with the arbitral process (section 67(2)). This relates to situations where the arbitral proceedings continue, for example in bifurcated proceedings where the tribunal's jurisdictional finding is issued as a partial or separate award.

²² See e.g., *CMA CGM SA v Beteiligungs-KG MS "Northern Pioneer" Schiffahrtsgesellschaft* [2002] EWCA Civ 1878 (CA).

²³ See e.g., *Michael Wilson & Partners Ltd v John Forster Emmott* [2011] EWHC 1441 (Comm).

²⁴ See e.g., *Demco Investments & Commercial SA v SE Bankers Forsakring Holding Aktiebolag* [2005] EWHC 1398 (Comm); *HMV UK Limited v Propinvest Friar Limited Partnership* [2011] EWCA Civ 1708.

²⁵ See e.g., *HMV UK Limited v Propinvest Friar Limited Partnership* [2011] EWCA Civ 1708.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Contrary to the approach taken by the courts in other jurisdictions, the English courts normally take the approach that an award that has been vacated at the seat of arbitration, cannot be enforced in England. This is not to say that the English courts will never allow enforcement of an award that has been vacated, however, the recent High Court judgment in *Nikolay Viktorovich Maximov v Open Joint Stock Company*²⁶ provides a reminder that a party seeking to enforce an award in such circumstances must meet a high threshold, which it was not able to satisfy in this case.

5.8 Are foreign awards readily enforceable in practice?

Yes, foreign arbitral awards are readily enforceable in practice, in particular, where an award is rendered by a State which is a signatory to the New York Convention. The procedure is straightforward, as set out in sections 100 to 104 of the 1996 Act, and the grounds for resisting enforcement are limited.

6. Funding arrangements: are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

Conditional fee arrangements ("CFAs"), whereby a client pays a base amount for the lawyer's fees in any event plus a success fee in certain circumstances (circumstances may include an award of damages above a threshold value), are permitted in arbitration. However, the maximum amount of the success fees is limited. Damages-based agreements ("DBAs") such as "*no win, no fee*" arrangements are available so long as they comply with the required statutory requirements governing such fee arrangements. Third party funding is also generally available.

7. Is there likely to be any significant reform of the arbitration law in the near future?

At present, there are no publicised plans for a significant reform of the arbitration law. However, the current political developments surrounding Brexit will inevitably affect some aspects of the arbitral proceedings seated in England and Wales. The biggest change is likely to be brought about as a result of EU law ceasing to apply to the UK. This may have an impact on the recourse available to parties to an arbitration agreement. For instance, parties may in the future be able to seek anti-suit injunctions, where court proceedings have been commenced in another member state in breach of an arbitration agreement. A large number of areas will however remain unaffected by Brexit on the basis that EU law does not dictate in many key areas, including the law governing the enforcement of arbitral awards which is guided by the New York Convention (as incorporated into the 1996 Act) or the powers of the arbitral tribunal, which are set out in the 1996 Act.

²⁶ *Nikolay Viktorovich Maximov v Open Joint Stock Company "Novolipetsky Metallurgichesky Kombinat"* [2017] EWHC 1911 (Comm).

FINLAND

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

ANDERS FORSS, MARKO HENTUNEN AND JERKER PITKÄNEN
OF CASTRÉN & SNELLMAN



CASTREN & SNELLMAN

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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS

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 - a. Framework ●
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 - c. Limited court intervention ●
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5. Accessibility and safety ●
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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Finland is an arbitration friendly jurisdiction. Finland has a long history of arbitration, and in commercial disputes between business entities, arbitration is the rule rather than the exception. A majority of the arbitrations in Finland are institutional. Finland is a party to, *inter alia*, the New York convention and the Washington convention on the settlement of investment disputes between States and nationals of other States.

Key places of arbitration in the jurisdiction	Helsinki.
Civil law / Common law environment?	Civil law jurisdiction.
Confidentiality of arbitrations?	Arbitrations are not public, but also not automatically confidential. Confidentiality requires an agreement between the parties. Institutional rules may also provide for confidentiality.
Requirement to retain (local) counsel?	There is no requirement to retain local counsel. In-house counsel may also be used.
Ability to present party employee witness testimony?	There are no limitations as to who can act as a witness. Thus, for example, employee witness testimony is allowed. However, special legislation may prevent certain people such as doctors, priests and attorneys from giving testimony about issues that are confidential.
Ability to hold meetings and/or hearings outside of the seat?	The Finnish Arbitration Act (967/1992, 'FAA') explicitly allows hearings to be held outside the seat. Meetings can also be held at any location without restrictions.
Availability of interest as a remedy?	Interest can and normally is awarded. The parties can agree on the interest rate.
Ability to claim for reasonable costs incurred for the arbitration?	Generally, the losing party bears the cost of the arbitration. However, an arbitral tribunal is free to apportion the costs between the parties in such a manner as it considers appropriate having regard to the circumstances of the case.
Restrictions regarding contingency fee arrangements and/or third-party funding?	The most common fee arrangement for counsel is based on hourly rates, but a party and its counsel may also agree on contingency fees and other alternative fee arrangements.
Party to the New York Convention?	Yes
Other key points to note	None.
WJP Civil Justice score (2017-2018)	0.87

ARBITRATION PRACTITIONER SUMMARY

Arbitration in Finland is very common, especially in business-to-business disputes. Finnish courts respect arbitration agreements, and are able and willing to provide swift assistance to arbitral proceedings, *inter alia*, by providing provisional relief in support of arbitration. Finland has an active arbitration community with internationally highly regarded arbitration experts.

Date of arbitration law?	The Finnish Arbitration Act (967/1992, 'FAA') came into force in 1992.
UNCITRAL Model law? If so, any key changes thereto?	The FAA is based on the UNCITRAL Model law, but like for example Sweden, Switzerland and France, Finland is not formally a model law country.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	There are no special arbitration courts in Finland. All arbitration related matters are handled by the ordinary courts (District Courts, Courts of Appeal and the Supreme Court).
Availability of <i>ex parte</i> pre-arbitration interim measures?	Courts may and often do issue <i>ex parte</i> interim measures.
Courts' attitude towards the competence-competence principle?	The competence-competence principle is accepted and applied in Finland.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	<p>Foreign arbitral awards can be challenged on the grounds set out in the New York Convention. The only exception is that a foreign arbitral award cannot be challenged if the subject matter of the dispute is not capable of settlement by arbitration under Finnish law. The grounds for challenging a domestic arbitral award are similar to those set out in the New York convention and the UNCITRAL Model law. A notable difference is that an arbitral award under limited circumstances is considered null and void.</p> <p>One reason for an arbitral award to be declared null and void is if it is not signed by the arbitrator. An arbitrator's refusal to sign the award will not lead to it being null and void, if the award is signed by the majority of arbitrators and contains a statement by them on why the non-signing arbitrator has refused to sign the award.</p> <p>Challenge proceedings can generally be handled quite rapidly, as there seldom is a need for extensive witness testimony in challenge proceedings. There are no official statistics, but recent case law suggests that challenge proceedings last approximately 12 – 18 months in the district courts. The district court decision may be appealed if a leave of appeal is granted, and proceedings in the Court of Appeal last approximately as long as in the district courts. If leave of appeal to the Supreme Court is granted it will generally take at least 18 months before the decision is rendered.</p>

	<p>Challenge proceedings do not automatically stay the enforcement of arbitral awards. However, the court before which an action for challenging an award is pending may order that enforcement shall be stayed.</p> <p>Only final awards are enforceable in Finland. Thus, interim awards are not enforceable in Finland, whereas separate awards can be enforced.</p>
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>A foreign award, which has been set aside in the state in which, or under the law of which, that award was made, will not as a rule be recognised and enforced in Finland.</p>
<p>Other key points to note (significant idiosyncrasies not covered elsewhere)?</p>	<p>φ</p>

JURISDICTION DETAILED ANALYSIS

1 The legal framework of the jurisdiction

1.1 Legislation

The current Finnish Arbitration Act (967/1992, 'FAA') came into force on 1 December 1992, with no major revisions taking place after that. The FAA contains both mandatory provisions, mainly relating to due process and challenge proceedings, as well as non-mandatory provisions, such as provision concerning the appointment of arbitrators and the conduct of the arbitral proceedings to a limited extent.¹

The FAA is largely compatible with the UNCITRAL Model law, but like e.g. Sweden, Switzerland and France, Finland is not formally a model law country. The most noticeable difference is that, in addition to the possibility for an award being set aside on certain specified grounds, an arbitral award according to the FAA is considered null and void under certain conditions. There is no time limit for presenting a challenge on such grounds. The conditions which can lead to an award being declared null and void are 1) when the arbitral tribunal has decided a non-arbitrable issue, 2) when the award is contrary to Finnish ordre public, 3) if the award is so obscure or incomplete that it does not appear in it how the dispute has been decided or 4) if the arbitral tribunal has not been made in writing or is not signed by the arbitrators. An arbitrator's refusal to sign the award will not lead to it being null and void, if the award is signed by the majority of arbitrators and contains a statement by them on why the non-signing arbitrator has refused to sign the award.

1.2 Institutional rules

Although there are no statistics on the number of ad hoc arbitrations in Finland, it is generally held that the majority of arbitrations taking place in Finland are institutional arbitrations.

2 The arbitration agreement

Any dispute in a civil or commercial matter which can be settled by agreement between the parties may be referred to arbitration. Consequently, for example, criminal matters or matters concerning the legal capacity of natural persons, divorce, adoption or child custody cannot be decided in arbitration.

According to the FAA, an arbitration agreement must be made in writing in order to be valid. Normally an arbitration agreement is contained in a document duly signed by both parties, but an arbitration agreement is also regarded to be made in writing if it is agreed upon in an exchange of letters or electronic communication. An arbitration agreement is further considered to be made in writing if it is referred to in an agreement which fulfils the requirements mentioned above.

An arbitration agreement may also be binding on third parties. Arbitration agreements are generally binding for the successor in a situation where a valid assignment of rights and obligations has occurred. Thus, arbitration agreements are, for example, generally binding for the acquiring party in a general corporate succession or for a bankruptcy estate in insolvency situations. The Supreme Court of Finland has also considered a third-party beneficiary to be bound by an arbitration clause contained in a shareholders' agreement.

The separability doctrine is accepted in Finland. Thus, the arbitration agreement will be reviewed and interpreted separately from the contract in which it is set forth. There are no separate provisions in the FAA on how to determine the law governing the arbitration agreement. The parties may agree on the law applicable to the arbitration agreement, but in practice, this is rarely done. If the parties have not agreed on the law governing the arbitration agreement, it is up to the arbitral tribunal or the national court examining

¹ An unofficial English translation of the FAA is available at: [HTTP://WWW.FINLEX.FI/FI/LAKI/KAANNOSET/1992/EN19920967.PDF](http://www.finlex.fi/fi/laki/kaannokset/1992/en19920967.pdf).

the arbitration agreement to decide the applicable law. In practice, a court or arbitral tribunal will often apply either the law applicable to the main agreement or the law of the seat of arbitration (*lex arbitri*).

3 Intervention of state courts

Finnish state courts are considered 'arbitration friendly'. A valid arbitration agreement excludes the jurisdiction of the courts, regardless of the place of arbitration. If a dispute is covered by an arbitration agreement, the court cannot take the matter into consideration but shall refer the matter to arbitration, provided that the opposing party invokes the arbitration agreement before he states his case on the merits in court. If the arbitration agreement is invoked in time, the court can only determine whether the arbitration agreement is valid, in force and applicable to the dispute. A party may also seek declaratory relief that an arbitration agreement is not valid, in force or applicable to a certain dispute.

The court cannot decline jurisdiction because of an arbitration agreement unless the arbitration agreement is invoked by a party. If a party does not object to the jurisdiction of the court in its first statement on the substance of the dispute, the party loses the right to invoke the arbitration agreement.

An arbitral tribunal can and shall determine its own jurisdiction. However, an arbitral tribunal's decision on its jurisdiction is not binding on the courts. Consequently, an arbitral tribunal does not have powers to enjoin courts to stay proceedings. If a matter is initiated in court although arbitration proceedings are already taking place, the court will independently review the validity of the arbitration agreement, and will do so only if the arbitration agreement is invoked by the opposing party before he states his case on the merits. If a court decision denying the arbitrator's jurisdiction has become final, the arbitrators should issue an order for the termination of the arbitral proceedings.

An arbitral tribunal can issue anti-suit injunctions against parties. However, according to the FAA an arbitral tribunal does not have the powers to impose fines or order other coercive measures, and as mentioned such an injunction would not be binding on a court.

State courts have limited, if any, possibilities to intervene in arbitrations outside Finland, but can under the conditions set out in the New York Convention refuse recognition and enforcement as explained below.

4 The conduct of the proceedings

4.1 Parties and party representation

An arbitration agreement can be entered into between any persons with legal capacity. Thus, natural persons as well as businesses and state entities can be parties to arbitration. However, consumers are not bound by arbitration agreements concluded before a dispute has arisen.

There are no limitations as to who can act a counsel for a party in arbitration. Parties may engage counsel from Finland or from other jurisdictions or they may be self-represented.

4.2 Court assistance in the arbitral proceedings

Firstly, state courts can intervene in arbitration proceedings by assisting in the appointment of arbitrators in ad hoc proceedings. According to the FAA, unless otherwise agreed, each party shall appoint one arbitrator and the party appointed arbitrators shall together appoint a third arbitrator to act as chairperson. The claimant shall appoint one arbitrator in the notice of arbitration and the respondent shall appoint one arbitrator within 30 days of receipt of the notice of arbitration.

If the party fails to appoint an arbitrator in time, the appointment shall be made by the court upon request of a party. The same applies if the party appointed arbitrators cannot agree on a chairperson within 30 days of their appointment. If the dispute is to be decided by a sole arbitrator, the court shall, at the request of a party, appoint the arbitrator if the parties have not been able to agree on the arbitrator within 30 days of the commencement of the arbitration proceeding.

According to the FAA, an arbitrator must immediately disclose any circumstances likely to endanger his or her impartiality and independence as an arbitrator or raise justifiable doubts related thereto. This obligation stays in force until the end of the proceedings. An arbitrator is obliged to disclose such information which could raise a party's doubts as to his impartiality or independence even though the circumstance eventually would not lead to his or her disqualification. The Supreme Court has established that the threshold for disclosure should be relatively low.

Failure to disclose does not lead to disqualification unless it raises justifiable doubt as to the independence and impartiality of the arbitrator. Failure to disclose may, however, lead to liability for damages as described below.

If a party challenges the appointment of an arbitrator, it is for the arbitral tribunal to decide the matter unless the other party accepts the challenge or the challenged arbitrator withdraws willingly. The court may review the impartiality and independence of an arbitrator only in set-aside proceedings.

An arbitrator may be disqualified if he would have been disqualified to handle the matter as a judge or if circumstances exist that give rise to justifiable doubts as to his impartiality or independence. The Code of Judicial Procedure (4/1734) contains provisions on the disqualification of judges.²

Secondly, state courts may provide assistance with respect to the gathering of evidence and the hearing of witnesses under oath. A party may request court assistance if he wishes to have a witness heard under oath, a witness or an expert examined in court or a document or other evidence produced. The request is subject to the consent of the arbitrators. In other words, an arbitral tribunal cannot on its own motion request court assistance, nor can a party do so without the consent of the arbitral tribunal.

In practice parties rarely need to seek court assistance with respect to evidence, as the arbitration proceedings provide sufficient means to gather evidence and hear witnesses. An arbitral tribunal may, at the request of a party or on its own initiative, request that a party or any other person in possession of a document (or other object) produce the document (or object). Arbitrators may also request that a party, a witness or any other person appear to be heard in the matter. An arbitrator may not, however, impose sanctions in case a party disregards such a request, but may take this into consideration and draw all necessary inferences thereof when determining what shall be deemed proven in the matter. Hence, arbitrators' requests to produce evidence are usually respected.

Thirdly, courts may provide assistance with respect to provisional relief. A party may at any time before or during the arbitral proceedings request that the court grant an interim measure. A request for interim measures is not regarded as a waiver of a party's right to submit a dispute to arbitration.

Finnish courts can and often do grant interim measures *ex parte*. In order for the court to be able to provide interim relief *ex parte* the party seeking the interim relief must show that it has a receivable or either enforceable right against the respondent and that there is a risk that this right will be endangered by the respondent if the interim relief is not immediately granted. After an *ex parte* interim relief is granted, the court will grant the respondent an opportunity to reply to the request and will then provide its final decision on the interim relief.

4.3 Provisions regarding the conduct of the proceedings

4.3.1 General overview

The FAA contains only limited provisions on the conduct of the proceedings. According to the FAA, the proceedings must be conducted in accordance with the parties' agreements. In absence of such agreement, the arbitral tribunal shall decide on the conduct of the proceedings, taking into consideration the

² An unofficial English translation of the Code of Judicial Procedure can be found at [HTTP://WWW.FINLEX.FI/FI/LAKI/KAANNOSET/1734/EN17340004.PDF](http://www.finlex.fi/fi/laki/kaannokset/1734/en17340004.pdf).

requirements of impartiality and expediency and ensuring that each of the parties is given a sufficient opportunity to present its case.

In good arbitration practice the arbitral tribunal as a rule shall arrange a preparatory conference with the parties at an early stage of the arbitration for the purpose of organising and scheduling the subsequent proceedings. The arbitral tribunal shall also typically prepare a procedural timetable. The arbitral tribunal shall also close the proceedings as soon as possible after the last hearing date and inform the parties of the date by which it expects to issue the final award.

4.3.2 Confidentiality

The FAA does not regulate arbitration confidentiality and ad hoc proceedings are not automatically confidential. *Ad hoc* proceedings are not public, but in order for the proceedings to be confidential, the parties must agree on confidentiality or must agree to apply institutional rules that provide for confidentiality.

4.3.3 Length of the proceedings

There are no separate provisions in the FAA with respect to the length of the proceedings. The FAA only states that arbitral tribunal shall conduct the proceedings taking into consideration, inter alia, the requirement of expediency.

The median duration of institutional arbitration seated in Finland is approximately 8–12 months.

4.3.4 Oral hearings

The FAA does not provide the arbitral tribunal with an obligation to arrange oral hearings unless the parties have agreed that oral hearings shall be held. If oral witness testimony is to be heard, oral hearings must of course be held.

The FAA does not either contain specific provision on the conduct of the oral hearings. The hearings shall be conducted in accordance with the parties' agreement and in the absence of such agreement, it is for the arbitrators to decide on the conduct of the hearings.

According to the FAA, the arbitral tribunal may, where appropriate, hear parties, witnesses and expert witnesses and conduct inspections also in other places than the seat of arbitration, including outside the territory of Finland.

There are no restrictions in the FAA as to where meetings can be held.

4.3.5 Interim measures

The FAA does not contain provisions on the arbitral tribunal's powers to order interim measures. Nevertheless, it is generally held that an arbitral tribunal may do so when the parties have so agreed.

Interim measures ordered by an arbitral tribunal are not enforceable in Finland and the FAA specifically prohibits the arbitral tribunal from imposing any penalty or using other means of constraint. Nevertheless, parties often comply voluntarily with interim measures ordered by the arbitral tribunal, as the arbitral tribunal may draw adverse inferences from a party's failure to comply with arbitrator ordered interim measures. The right to draw adverse inferences is, however, debatable in respect of non-compliance with other than evidentiary-related orders.

As mentioned above, a party may at any time before or during the arbitral proceedings also request interim relief from a state court.

4.3.6 Admission of evidence

The FAA does not contain any specific provisions on the admissibility of evidence. It is for the Arbitral Tribunal to determine the admissibility, relevance, materiality and weight of evidence.

According to the FAA, an arbitral tribunal may, at the request of a party or on its own initiative, request that a party or any other person in possession of a document (or other object) produce the document (or object). Arbitrators may also request that a party, a witness or any other person appear to be heard in the matter. The arbitral tribunal may also appoint one or more experts on its own accord, taking into consideration the requirement of impartiality. However, it is not very common that arbitrators appoint experts in addition to experts appointed by the parties.

There are no limitations as to who can be heard as a witness. Thus, for example, employee witness testimony is allowed. However, a witness's position, for example, as a legal representative of a party, may be taken into account when evaluating the credibility of the testimony. Furthermore, special legislation may prevent certain people such as doctors, priests and attorneys from giving testimony about issues that are confidential.

4.4 Liability of arbitrators

4.4.1 Civil liability

The liability of arbitrators in *ad hoc* proceedings is not excluded or limited. However, the Supreme Court has established that an arbitrator can be liable for damages only under exceptional circumstances. In Supreme Court praxis failure to disclose relevant information which would have led to disqualification has been considered to constitute grounds for liability.

Institutional arbitration rules may limit the liability of the arbitrators. When Finnish law is applied, limitations of liability clauses are, however, not applicable when the damage has been caused by gross negligence or wilful misconduct.

4.4.2 Criminal liability

Apart from the criminal provisions on bribery in business, there are no criminal provisions, which explicitly concern arbitrators.

According to the provision on the taking of bribes in business, it is explicitly criminalised to take or receive a bribe when serving as an arbitrator. The provisions on bribery in business are applicable to foreign and Finnish nationals also when the FAA is not the *lex arbitri*.

The two other criminal provisions, that may, in practice, become applicable to arbitrators, concern money laundering and fraud. Money laundering takes place for example when money acquired through illegal means is handled so that the criminal nature of the money is concealed. Fraud on the other hand occurs, for example, when a person through deception or other fraudulent behaviour acquires unlawful gains for him or herself or for a third party.

Taking of bribes and fraud both require intent from the perpetrator. Money laundering can also come into question when the arbitrator has been grossly negligent. In practice, this means that the arbitrator should have known that money is being laundered through the arbitration in the circumstances.

To the knowledge of the authors of this chapter, no arbitrator has ever been tried for a criminal offence committed when serving as an arbitrator.

5 The award

5.1 Formal requirements for awards

The arbitral award shall be made in writing and signed by all of the arbitrators. The FAA provides, however, that the absence of the signature of one or more arbitrators shall not make the award null and void, if a majority of the arbitrators have signed the award and on the award they have stated the reason why an arbitrator who has participated in the arbitration has not signed the award.

The arbitration award shall indicate its date and the place of arbitration as agreed or determined.

The FAA does not impose an obligation on the arbitrators to state the reasons of the award. However, good arbitration practice require the arbitrators to state the reasons, unless the parties has agreed otherwise.

5.2 Awarding interest

The FAA does not regulate or prescribe any principles governing the awarding of interest. When Finnish law is applied, the parties may agree how interest shall accrue on debts. Lacking such agreement, interest will accrue in accordance with the Finnish Interest Act (633/1982).

5.3 Cost allocation

Generally, the losing party is ordered to bear the costs of the arbitration. However, the arbitral tribunal may also allocate any of the costs of the arbitration between the parties, taking into consideration the circumstances of the case.

5.4 Challenging and award

An award cannot be appealed. An award can only be declared null and void or set aside. The grounds for declaring an award null and void or for setting aside an award are similar to those based on which the recognition and enforcement of an arbitral award may be refused under the New York convention.

An award is null and void if: the arbitral tribunal has decided an issue not capable of settlement by arbitration under Finnish law; recognition of the award would be against Finnish public policy; the arbitral award is so obscure or incomplete that it does not appear in it how the dispute has been decided; or the arbitral award has not been made in writing or signed by the arbitrators. There is no time limit to challenge an award as null and void.

A court may also set aside an award if: the arbitral tribunal exceeded its authority; an arbitrator had not been properly appointed; an arbitrator could have been disqualified but a challenge duly made by a party had not been accepted before the arbitral award was made; a party was not aware of the ground for disqualification and was not able to challenge the arbitrator before the arbitral award was made; or the arbitral tribunal did not give a party sufficient opportunity to present its case. An action for setting aside an award must be brought within three months of the date on which the party received a copy of the award.

A party cannot waive his right to challenge an award before the award has been rendered. However, a party may through its actions be deemed to have waived its right to invoke certain grounds for setting aside an award. If a party for example has not invoked grounds for challenging an arbitrator of which it has been aware, a party can be deemed to have waived its right to challenge the award based such grounds.

Introducing a challenge to an award does not automatically suspend enforcement. However, the court before which an action for challenging the award is pending may order that the award cannot be enforced during the challenge proceedings.

5.5 Recognition and enforcement of awards

A decision on enforcement (*exequatur*) is required for an award to be enforceable. Exequatur is granted by the court of first instance. The decision on enforcement may be appealed.

The proceeding for obtaining an exequatur is practically the same regardless of whether the arbitral award is domestic or foreign. In either case, a party must file the original arbitration agreement and the original arbitral award, or certified copies thereof together with the application for the enforcement of an award. A document drawn up in any language other than Finnish or Swedish shall be accompanied by a certified translation into either of these languages, unless the court grants an exemption.

Before exequatur is granted, the court will give the party against whom enforcement is sought the opportunity to be heard, unless there is a special reason not to provide the party with such an opportunity. Unless a witness or another person is to be heard in person, the court of first instance shall deal with the matter in written proceedings in chambers.

A court may refuse an application for the enforcement of a domestic award only if it finds that the award is null and void, if the award has been set aside by a court on the grounds described above, or if a court has ordered that enforcement of the award shall be interrupted or suspended.

Foreign arbitral awards are readily enforced in Finland. A foreign award will not be recognised in Finland only if the party against whom the award is being enforced can prove that (i) the arbitration agreement was not valid, (ii) the party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case, (iii) the arbitral tribunal has exceeded its authority, (iv) the composition of the arbitral tribunal or the arbitral proceedings substantially deviated from the agreement or the *lex arbitri*, or (v) the arbitral award has not yet become binding on the parties or it has been declared null and void or set aside or suspended in the state in which, or under the law of which, that award was made. It can be noted that a foreign arbitral award cannot be challenged if the subject matter of the dispute is not capable of settlement by arbitration under Finnish law, unless the award as a result also would be against Finnish *ordre public*.

6 Funding arrangements

A party may acquire external funding for an arbitration from third parties, including third party funders, insurance companies, banks etc. Special third party funding companies are not very active in the Finnish market, but it is quite common for Finnish parties to have insurance that covers the costs of disputes up to an agreed amount.

The most common fee arrangement is based on hourly rates, but a party and its counsel may also agree on contingency fees and other alternative fee arrangements.

7 Future reform

A revision of the FAA is being discussed within the Finnish arbitration community. However, opinions differ on how the law should be amended and it remains to be seen when and to what extent any amendments will take place.

8 Literature regarding arbitration in Finland

- Mika Savola, *'Guide to the Finnish Arbitration Rules'*, Helsinki 2015
- Tom Ehrström, Tuuli Timonen, Santtu Turunen et al., *'Arbitration in Finland'*, Helsinki 2017
- In 2004, the Finnish Arbitration Association published a booklet entitled, *'Law and Practice of Arbitration in Finland'*.
- There are also articles in English in various journals which cover issues relating to arbitration in Finland, for example in volume 4-5/2011 of *Tidskrift utgiven av Juridiska Föreningen i Finland*, which is a commemorative volume to justice Gustaf Möller on the theme of arbitration.

FRANCE

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

MARIE DANIS AND KAROL BUCKI
OF AUGUST DEBOUZY

AD
AUGUST DEBOUZY

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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS

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 - c. Limited court intervention ●
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5. Accessibility and safety ●
6. Ethics ●

VERSION: 22 MAY 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

French law is globally known to be one of the most arbitration-friendly in the world. Several important factors were brought together so that Paris can be perceived today as one of the safest and most convenient seats of arbitration. Nowadays, some of the most renowned arbitration practitioners in the world and arbitral institutions have set up offices in Paris.

France is one of the oldest homes of the civil law system. Most of the rules applicable to arbitration are set forth in the Code of Civil Procedure ("**CCP**"). The French arbitration law distinguishes between rules applicable to domestic and international arbitration even though some provisions are applicable to both by virtue of Article 1506 CCP. Pursuant to Article 1504 CCP, arbitration is considered to be "international" when the interests of international trade are at stake. The distinction is important, as rules applicable to international arbitration are more liberal.

Key places of arbitration in the jurisdiction	Paris holds a strong reputation as being the capital of international arbitration with the support of French arbitration law, which is well-known as one of, if not the most, arbitration-friendly in the world. As such, it is a home to leading arbitral institutions and prominent practitioners.
Civil law / Common law environment?	France is a civil law system, but many arbitrations seated in Paris are subject to foreign laws such as Swiss or English law. Arbitral practitioners, including arbitrators, are familiar with general common law concepts.
Confidentiality of arbitrations?	<p><u>Domestic arbitration</u>: pursuant to Article 1464 CCP, arbitration is confidential unless otherwise agreed upon by the parties. The scope of confidentiality is not defined but it is considered to extend to the names of the arbitrators, the arbitral institution, the legal counsel, and the seat. In addition, Article 1479 CCP provides that members of the arbitral tribunal must keep their deliberations secret.</p> <p><u>International arbitration</u>: no French legal provision imposes an obligation of confidentiality on the parties. In order to secure confidentiality, parties can, <i>inter alia</i>, enter into a separate confidentiality agreement, provide for confidentiality in their arbitration agreement or choose an institution whose rules expressly state that the arbitral proceedings are confidential. The deliberations of the tribunal must be kept confidential as Article 1479 CCP also applies to international arbitration.</p>
Requirement to retain (local) counsel?	There is no formal requirement to retain a local counsel for the arbitration itself. However, should the need arise to request a French judge to decide on certain arbitration-related issues (such as for instance the constitution of the arbitral tribunal or emergency injunctive relief), retaining a local counsel would be recommended.
Ability to present party employee witness testimony?	Pursuant to Article 1467 CCP applicable to domestic arbitration and extended to international arbitration, the arbitral tribunal may hear any person to provide testimony. Witnesses are

	generally not sworn in. The French Bar Council allows witness preparation in international arbitral procedures (Paris Bar Council Resolution, dated 26 February 2008). It is uncertain whether the same applies to domestic procedures. As a general rule, the subornation of perjury is a criminal offence under Article 434-15 of the French Criminal Code.
Ability to hold meetings and/or hearings outside of the seat?	Yes, unless otherwise provided by the parties.
Availability of interest as a remedy?	Arbitrators may award interest on any monetary claim, which will be added to the principal upon enforcement in France. Furthermore, pursuant to Article 1231-7 of the French Civil Code and established case law, interest at the French statutory rate will automatically apply and be added to the principal when the enforcement of an international award is sought in France, unless moratory interest has already been granted under the award.
Ability to claim for reasonable costs incurred for the arbitration?	There is no legal provision limiting the jurisdiction of the arbitral tribunal to render a decision on costs incurred in the arbitration (including counsel and expert's legal fees). As such, parties may claim before the arbitral tribunal for costs incurred in the scope of the arbitration.
Restrictions regarding contingency fee arrangements and/or third-party funding?	There are no specific legal provisions governing <u>third-party funding</u> . However, the Paris Bar Council has recently adopted a resolution confirming that third-party funding is a positive development for access to justice and does not contravene French Law (Paris Bar Council Resolution, dated 21 February 2017). Disclosure of third-party funding is recommended but not compulsory. Under French law, <u>contingency fee arrangements</u> where the entirety of attorney's remuneration is dependent on the outcome of the case (<i>quota litis</i> pacts) are prohibited. However, the Paris Court of Appeal held that such "pure" success fee arrangements in international arbitration procedures are not contrary to the French definition of international public policy if the agreed fees are not manifestly excessive. The National Council of the French Bars recently published a status report reflecting on the evolution of the <i>quota litis</i> pact and the possible lifting of its prohibition (National Council of the French Bars Resolution, dated 6-7 October 2017).
Party to the New York Convention?	France signed the New York Convention on 25 November 1958. It was ratified on 26 June 1959 and it entered into force on 24 September 1959.
Other key points to note	(1) An arbitration agreement entered into by the parties to international arbitration is deemed to be valid; (2) Annulment of an arbitral award at the seat of the arbitration does not prevent the award from being enforced in France.
WJP Civil Justice score (2018)	0.70

ARBITRATION PRACTITIONER SUMMARY

France has one of the most advanced and liberal arbitration frameworks in the world. Arbitration practitioners have thus wide discretion to adapt the arbitral proceedings. The State courts widely support arbitration and systematically give priority to the arbitrators to rule upon their jurisdiction. Overall, unless the arbitration agreement is held to be manifestly void or manifestly inapplicable, which is extremely rare, the State courts systematically decide that they lack jurisdiction when they are confronted with a dispute that appears to arise from an arbitration agreement. Finally, the enforcement of foreign arbitral awards is highly effective, notably because an award set aside at the seat can still be enforced in France.

Date of arbitration law?	The rules applicable to domestic and international arbitration were compiled in the second part of the 20 th century and result from a decree of 14 May 1980 on domestic arbitration and a decree of 12 May 1981 on international arbitration. A decree of 13 January 2011 reformed the current rules on both domestic and international arbitration, embodied in Articles 1442 to 1503 CCP (domestic arbitration) and 1504 to 1527 CCP (international arbitration).
UNCITRAL Model Law? If so, any key changes thereto?	The French arbitration law had existed long before the UNCITRAL Model Law was created and implemented in numerous countries. Although both systems adopt a liberal approach to international arbitration, the French system seems even more liberal than the UNCITRAL Model Law. By way of example, French arbitration law does not require the international arbitration agreement to be in writing whereas the UNCITRAL Model Law does. In addition, the enforcement of a foreign award cannot be refused on the ground that the award was set aside at the seat of arbitration.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	With regards to both domestic and international arbitration, the decree of 13 January 2011 created a dedicated judge (<i>juge d'appui</i>) who has jurisdiction over arbitration-related issues and who acts in support of arbitral proceedings. Such judge may assist the parties in the constitution of the arbitral tribunal if any problem arises. In addition, the Paris Court of Appeal has a dedicated division exclusively focused on arbitration (Section 1, Chamber 1) in order to ensure coherent case law. Similarly, the French <i>Cour de cassation</i> – the higher degree of jurisdiction in set-aside proceedings in France – systematically assigns such proceedings to its first civil division. Given the number of arbitral proceedings seated in France and the arbitration-friendly approach adopted by French lawmakers, judges dealing with arbitration-related matters are generally used to arbitration and they are familiar with the applicable rules.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Pursuant to Article 1449 CCP, which is applicable to both domestic and international arbitration, the existence of an arbitration agreement does not prevent a party from seeking

	<p>pre-arbitration interim or conservatory measures before a State court as long as the arbitral tribunal has not been appointed. Such measures can be ordered to gather evidence before commencement of the arbitral proceedings. A party who seeks other interim or provisional measures, such as freezing orders (<i>mesures conservatoires</i>) or constitution of escrow accounts reserves (<i>séquestre</i>), shall have to demonstrate urgency.</p>
<p>Courts' attitude towards the competence-competence principle?</p>	<p>The principle is widely adopted, recognized and respected by French judges as it is enshrined in the CCP. According to Article 1448 CCP, which applies to both domestic and international arbitration, State judges cannot rule on the jurisdiction of the arbitral tribunal unless (i) the arbitral tribunal is not constituted yet <u>and</u> (ii) the arbitration agreement is manifestly void or manifestly inapplicable. The judgments where State courts considered that the arbitration agreement was manifestly void or manifestly inapplicable are extremely rare as this concept is construed very narrowly.</p>
<p>Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?</p>	<p>There are no additional grounds for the annulment of international awards. In domestic arbitration, as an additional condition, the award must be signed and state the reasons for the decisions therein, its date, the name(s) of the arbitrators and it must be adopted by a majority vote.</p>
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>Contrary to the vast majority of other jurisdictions, the annulment of the arbitral award at the seat of arbitration is neither a ground nor even a significant factor to prevent such award from being recognised or enforced in France. Indeed, French arbitration law considers that the award is not attached to the seat of arbitration but rather forms part of an "arbitral legal order" distinct from state jurisdictions' legal orders, and that its annulment at the seat has no impact on its validity.</p>
<p>Other key points to note?</p>	<p>An international arbitral award can only be enforced in France if it is rendered effective by an enforcement order called "<i>exequatur</i>". This procedure is non-adversarial and only allows the French judge for a limited control. Indeed, the judge is solely requested to verify if the award that he or she is requested to enforce does exist and whether it is not manifestly contrary to the French definition of international public policy. The cases where French judges refuse to grant an <i>exequatur</i> are very rare.</p>

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 The relation between the French arbitration law and the UNCITRAL Model Law

The French arbitration law is not based on the UNCITRAL Model Law.

However, many provisions of French arbitration law comply with the Model Law as both systems adopt a very liberal and arbitration-friendly approach. Yet, French arbitration law is generally considered to be even more liberal than the Model Law as, *inter alia*, it does not require, with regards to international arbitration that the arbitration agreement be in writing. Moreover, the annulment of the award at the seat of arbitration is not a ground, under French arbitration law, for refusing its enforcement or recognition, which is the case under the Model Law.

1.2 The form of the French arbitration law

French arbitration law was initially codified in the decree No 80-354 of 14 May 1980 on domestic arbitration and the decree No 81-500 of 12 May 1981 on international arbitration. Such rules were subsequently revised by the decree No 2011-48 of 13 January 2011, which came into force on 1 May 2011. The currently-applicable rules, as amended by the 2011 decree, are mainly provided in Book IV of the CCP.¹ Articles 1442 to 1503 CCP apply to domestic arbitration while Articles 1504 to 1527 CCP apply to international arbitration. It should, however, be noted that the application of numerous provisions concerning domestic arbitration is extended to international arbitration by virtue of a reference made by Article 1506 CCP.

Rules applicable to domestic arbitration differ from those that apply to international arbitration. Whether an arbitral proceeding is deemed international will carry significant consequences in terms of applicable rules as domestic arbitration is subject to stricter rules than international one.

Pursuant to Article 1504 CCP, an arbitration will be deemed international if it affects the “*interests of international trade*”. French courts have consistently applied this definition in an extensive and pragmatic manner and consider that a dispute is international when it concerns the economy of more than one country. This means that any dispute where goods, funds, technologies, services, etc. are exchanged over a national border, at least once, will meet this standard. The international nature of a dispute is not determined on the grounds of the nationality of the parties, or the law governing the merits of the dispute. For instance, an arbitration proceeding involving French parties, with French law applicable to the merits of the case, has been deemed international merely because the dispute was related to a contract which was to be partially performed overseas.²

Several specific provisions related to arbitration can be found outside the CCP. By example, Article L. 721-3 of the French Code of Commerce deals with domestic arbitration and provides for the validity of arbitration agreements in disputes related to commercial matters. In addition, Articles 2059 to 2061 of the French Civil Code relate to the question of the arbitrability of disputes. Article 2061, in particular, has recently been amended by the Law No 2016-1547 of 18 November 2016 on the Modernization of Justice (*La loi de modernisation de la Justice du XXI^e siècle*) to allow non-professional parties (e.g., workers and consumers), whose contracts include an arbitration agreement, to solve a dispute arising from such agreement through domestic arbitration if they agree so. Previously, such clauses were automatically considered as null and void when applied in domestic arbitration.

Finally, a number of isolated provisions related to the capacity to submit certain specific persons to domestic arbitration or the arbitrability of certain specific matters can be found in other French codes such

¹ A translated version of the French Code of Civil Procedure is available [on-line](#).

² Paris Court of Appeal, 26 January 1990, RTD Com. 1991 p. 575.

as Article L. 615-17 of the French Intellectual Property Code, which authorizes arbitration of patent disputes, or Article L. 2141-5 of the French Code of Transportation which allows the French national railroad company (*SNCF Mobilités*) to enter into arbitration agreements.

1.3 Last major revision of the French arbitration law

The last major reform of the French arbitration law was brought by the decree No 2011-48 of 13 January 2011, which came into force on 1 May 2011. Furthermore, the recent Law on the Modernization of Justice of 18 November 2016 extended the possibility in domestic arbitration to resort to arbitration by non-professional parties such as employees or consumers. No major reform is currently underway or expected in the near future.

2. The arbitration agreement

2.1 Determination of the law governing the arbitration agreement

In domestic arbitration, the validity of an arbitration agreement is governed by Articles 1442 to 1447 CCP.

In international arbitration, the French *Cour de cassation* (the highest court in the French judiciary) consistently rules that the arbitration agreement is independent from all national laws - including French law - and should only be interpreted in the light of "substantive rules of international arbitration law".

There is therefore no need to proceed to the determination of the law applicable to the arbitration agreement. The courts consider that an arbitration agreement is valid if (i) the parties have consented to arbitration and (ii) the arbitration agreement is not contrary to the French definition of international public policy. However, parties have full right to decide that a national law will apply to their arbitration agreement.³

Furthermore, the French *Cour de cassation* reinforced the effectivity of international arbitration agreements by consistently ruling that pursuant to a "substantive rule of international arbitration law", an arbitration agreement is presumed to be valid.⁴

2.2 Severability of the arbitration agreement

Under French law, the arbitration agreement is considered to be completely autonomous from the underlying contract. As such, the nullity of the underlying contract will not affect the arbitration agreement itself. This principle is applicable in both international as well as domestic arbitration.

The principle of severability of the arbitration agreement was first formally recognized in international arbitration by the French *Cour de cassation* in 1963.⁵ It has since been enshrined in Article 1447 CCP, which is applicable to both domestic and international arbitration.

2.3 Form of the arbitration agreement

In domestic arbitration, pursuant to Article 1443 CCP, the arbitration clause must be in writing. Article 1443 CCP provides that the existence of the arbitration agreement can be proven by an exchange of documents or by a reference made in the principal contract to another document containing the agreement.

With regards to international arbitration, Article 1507 CCP provides that "*the arbitration agreement is not subject to any requirements as to its form*". Therefore, the arbitration agreement does not have to be in writing and will be effective as long as the parties' consent to arbitration can be established. In this respect, French law is even more liberal than Article II.1 of the New York Convention, which requires the arbitration

³ *Cour de cassation*, 1st civil Division, 30 March 2004, n°01-14.311, *Uni-Kod*, Rev. arb. 2005, p. 959, n. Seragliani.

⁴ *Cour de cassation*, 1st civil Division, 5 January 1999, n°96-21.430, *Zanzi*, Rev. arb. 1999, p. 260, n. Fouchard.

⁵ *Cour de cassation*, 1st civil Division, 7 May 1963, *Raymond Gosset v/ Société Caprapelli*.

agreement to be in writing. An arbitration agreement can therefore validly result from general terms and conditions to which a party has consented by way of reference.⁶ Should the existence of an arbitration agreement be contested before a State court, the party who wants to rely on such agreement bears the burden of proving its existence.⁷

2.4 Extension of the arbitration agreement to third parties to the contract

Article 1199 of the French Civil Code provides the general principle of privity of contracts, according to which contracts are only binding upon their signatories.

However, the French courts have recognized that the application of the arbitration agreement could be extended to third parties where their consent can be found or, at least, inferred from relevant factual circumstances.

First of all, the arbitration clause may apply to non-signatories to the main contract where such non-signatories were validly assigned substantive rights and obligations arising out of the main contract. This can be for example the case in chains of contracts transferring ownership over goods.⁸ French courts also generally admit that the transmission of the arbitration agreement can be operated through the assignment of the contract in which it is contained.⁹ The courts apply the rule of severability of the arbitration agreement to the assignment of contracts. Indeed, French courts consider that in case of a voluntary assignment the arbitration agreement is transferred.¹⁰ As a consequence, where a contract containing an arbitration agreement is assigned, the validity of the assignment agreement will not affect the transmission of the arbitration agreement to the assignee.¹¹

Secondly, non-signatories may be bound by the arbitration agreement in presence of group of contracts. As such, while there are multiple contracts but only one of them contains an arbitration agreement, the application of such agreement may be extended to the signatories of other contracts that form part of one group with the contract containing the arbitration agreement. As such, the arbitration agreement can be extended to third parties that took part in the performance of the main contract provided that it can be, at least, presumed that they knew about the existence of the arbitration agreement.¹²

Thirdly, the arbitration clause may apply to a group of companies. Indeed, in its decision concerning the motion to annul the award in the *Dow Chemical v/ Isover-Saint-Gobain* case rendered under the auspices of the ICC,¹³ the Paris Court of Appeal¹⁴ acknowledged that an arbitration agreement entered into by a subsidiary of a group of companies may bind other companies of the same group, provided that it can be proven that such other companies have directly participated in the performance of the contract.

The arbitration clause was also extended to third parties in some other cases. For example, in the *Dallah* case, an arbitration agreement entered into by a trust was extended to the government of Pakistan as the latter had actually created the trust and behaved "*as if the contract had been concluded by itself*".¹⁵

⁶ *Cour de cassation*, 1st civil Division, 9 November 1993, n°91-15.194.

⁷ *Cour de cassation*, 1st civil Division, 6 November 2013, n°11-18.709.

⁸ *Cour de cassation*, 1st civil Division, 9 July 2014, n°13-17.402.

⁹ *Cour de cassation*, 1st civil Division, 27 March 2007, n°04-20.842.

¹⁰ *Cour de cassation*, 1st civil Division, 5 January 1999, n°96-20.202.

¹¹ *Cour de cassation*, 1st civil Division, 28 May 2002, n°00-12.144.

¹² *Cour de cassation*, 1st civil Division, 7 November 2012, n°11-25.891.

¹³ ICC award n°4131, 23 September 1982.

¹⁴ Paris Court of Appeal, 21 October 1983.

¹⁵ Paris Court of Appeal, 17 February 2011, *Dallah*, Rev. arb. 2011, p. 286.

2.5 Restrictions to arbitrability

2.5.1 Restrictions in relation to specific matters

With regards to domestic arbitration, Article 2059 of the French Civil Code provides for the general rule that *"any person may submit to arbitration the rights of which he has full disposition"*. As such, Article 2060 of the Civil Code excludes the possibility to submit to arbitration any matter regarding the civil status or capacity of a person, relating to divorce or legal separation, or involving public authorities and public entities and generally concerning certain matters involving public policy.

However, the courts interpret *"matters involving public policy"* very restrictively and, consequently, they consider that the mere fact that a dispute involves public-policy substantive provisions of French Law does not, *per se*, preclude arbitration. As such, arbitral tribunals can apply the provisions of public policy and they can also sanction their violation. This is for example the case of the vast part of disputes related to competition law. Such disputes may be resolved through arbitration even though French provisions governing this matter are considered to be of public policy. However, the jurisdiction of an arbitral tribunal is limited to the civil law aspects of competition law: while an arbitral tribunal may characterize certain breaches of competition law and, as a consequence, annul a contract or award damages,¹⁶ it may not impose administrative fines or injunctions on parties. Such sanctions are of an administrative nature, and can only be imposed by State/European authorities.

The number of restricted matters seems to be even more limited in international arbitration as the only limit to arbitrability here is "French international public policy" and this notion has been construed very narrowly. As such, parties are for example free to submit intellectual property matters to arbitration.

2.5.2 Restrictions in relation to specific persons

As regards domestic arbitration, before the entry into force of the Law on the Modernization of Justice in November 2016, the arbitration clause had to be concluded in the context of a professional activity. As such, arbitration clauses stipulated in contracts concluded by consumers or employees were considered null and void.

In international arbitration, French courts followed a solution adopted in 1999 by the Employment Section of the *Cour de cassation* which held that an arbitration clause contained in an international employment contract was not automatically void and that the employee had a choice to solve his dispute against the employer either before the arbitral tribunal or before the state employment court.¹⁷

This rule is now extended to domestic arbitration as the recently-amended Article 2061 of the Civil Code provides that where a party did not contract in the context of its professional activity, it cannot be forced to resort to arbitration but it can nevertheless choose to do so.

As regards more specifically public State entities, the rule in domestic arbitration provided for in Article 2060 of the Civil Code is that a public entity cannot validly agree to arbitration. However, the same provision adds that some categories of public institutions of an industrial or commercial nature may be authorized to enter into arbitration agreements by a State decree.

The French *Cour de cassation* considers that Article 2060 does not apply to international arbitration¹⁸ and rules that States are not prohibited from concluding arbitration agreements in international matters. This solution has also been extended by French courts to encompass foreign State entities, meaning that no

¹⁶ Paris Court of Appeal, 19 May 1993, *Labinal*, Rev. arb. 1993, p. 645.

¹⁷ *Cour de cassation*, Employment Section, 16 February 1999, n°96-40.643.

¹⁸ *Cour de cassation*, 1st civil Division, 2 May 1966, *Galakis*, Rev. Crit. DIP 1967, p. 553 n. Goldman.

foreign State entity can rely on a provision of its own national law in order to walk away from an arbitration agreement to which it has validly consented.¹⁹

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

French arbitration law gives full effect to the so-called "*kompetenz-kompetenz*" principle, according to which an arbitral tribunal should be given priority to rule on its own jurisdiction.²⁰

Article 1448 CCP (applicable to domestic arbitration and extended to international arbitration by virtue of Article 1506 CCP) provides that when a challenge to an arbitration agreement is brought before French courts, they must decline their jurisdiction unless (i) the arbitral tribunal has not yet been constituted and (ii) the arbitration agreement is "*manifestly null or manifestly inapplicable*".

In any event, the State court cannot rule on the jurisdiction of an arbitral tribunal where such tribunal has already been constituted. Indeed, Article 1465 CCP, applicable to both domestic and international arbitration, specifies that the arbitral tribunal has exclusive jurisdiction to rule over any challenge to its jurisdiction except if the arbitration agreement is "*manifestly null or manifestly inapplicable*".

The notion of "*manifestly null or manifestly inapplicable*" is construed extremely narrowly and the cases where State judges refuse to give priority to arbitral tribunals to rule on their own jurisdiction are extremely rare. Indeed, a French court may only rule on the alleged nullity or inapplicability on a *prima facie* basis.²¹ Challenging an arbitration clause would be even more difficult in international arbitration where arbitration agreements are, pursuant to established case law, presumed to be valid (*principe de validité*).

However, State judges have denied the jurisdiction of an arbitral tribunal where the party challenging the jurisdiction of the State judge could not prove the very existence of the arbitration clause²² or where a dispute was manifestly outside the scope of the contract containing the arbitration agreement.²³

Where it is not established that the arbitration agreement is manifestly null or manifestly inapplicable, French courts will systematically decline their jurisdiction and allow the arbitral tribunal to rule on its own jurisdiction.²⁴ However, a party who wants to rely on an arbitration agreement must raise before the State court a motion to dismiss for lack of jurisdiction before any defence on the merits.²⁵

3.2 Anti-suit injunctions

The concept of anti-suit injunctions does not exist under French law. As such, French judges do not grant injunctions preventing the parties from commencing or continuing State court proceedings if an arbitration is under way.

The question also arose as to whether an anti-suit injunction granted abroad could produce effects in France. In a decision rendered on 14 October 2009, the *Cour de cassation* acknowledged that anti-suit

¹⁹ Paris Court of Appeal, 17 December 1991, *Sté Gatoil v/ NIOC*, Rev. arb. 1993, p.281, n. Synvet.

²⁰ *Cour de cassation*, 1st civil Division, 18 May 1971, n°69-14130, *Impex v/ P.A.Z.*

²¹ *Cour de cassation*, 1st civil Division, 9 July 2008, n°07-18.623.

²² *Cour de cassation*, 1st civil Division, 6 November 2013, n°11-18.709.

²³ *Cour de cassation*, 1st civil Division, 1 April 2015, n°14-11.587.

²⁴ *Cour de cassation*, 1st civil Division, 30 March 2004, n°01-17.800 ; *Cour de cassation*, 1st civil Division, 23 February 2011, n°10-16.120 ; *Cour de cassation*, 1st civil Division, 25 March 2015, n°13-17.372.

²⁵ *Cour de cassation*, 1st civil Division, 07 June 1989, *Anhydro v/ Caso Pillet and others*.

injunctions ordered in the United States were not contrary to public-policy substantive provisions of French Law and thus refused to annul an arbitral award on such ground.²⁶

3.3 State-court intervention in arbitrations seated outside of the jurisdiction

Pursuant to Article 1505 CCP applicable to international arbitration, a party to an international *ad hoc* arbitration faced with difficulties related to arbitral proceedings may also resort to the French *juge d'appui* even if such proceedings are seated outside his jurisdiction provided that (i) the parties chose to have their arbitration agreement governed by French procedural law or (ii) the parties expressly gave jurisdiction to the French State courts for disputes related to the arbitral procedure or (iii) one of the parties incurs the risk of a denial of justice.

4. The conduct of the proceedings

4.1 Legal counselling

French law does not require the parties to an arbitration to be represented by legal counsel. If they wish so, parties may choose to be represented by French or foreign lawyers or non-lawyers.

4.2 Independence of the arbitrators

Pursuant to Article 1456 CCP, applicable to both domestic and international arbitration, an arbitrator has a duty to disclose all "*circumstances which may affect its independence or impartiality*" before it accepts its appointment. Article 1456 CCP provides that such duty does not end with the appointment but also applies if any such circumstance arises in the course of arbitral proceedings.

Once an arbitrator has been appointed, any challenge to this arbitrator has to be addressed to the arbitral institution or, in case of an *ad hoc* arbitration, to the French *juge d'appui*. In the latter case, parties are subject to a one-month limitation period to bring the challenge proceedings before the judge, which is triggered from the moment a party has effective knowledge of the ground for challenge. A party that fails to challenge a conflicted arbitrator within this time limit (or in the case of institutional arbitration, the timeframe set by the arbitration rules) will be deemed to have waived its right to challenge the arbitrator and will be barred from seeking annulment of the award on the same ground.²⁷

The scope of the arbitrators' duty to disclose has been clarified by case law. It has been held, for example, that arbitrators have a duty to disclose the fact that they have been regularly and systematically appointed by the same party over a long period of time, thus creating a "flow of business".²⁸ It has also been held that arbitrators have a duty to disclose the professional relationships they have with the legal counsel of one of the parties, or its firm.²⁹ However, it has been held that the fact that an arbitrator attended a symposium in which one of the parties took part,³⁰ or the political opinions of an arbitrator³¹ do not constitute circumstances which need to be disclosed. Arbitrators are in a general manner dispensed from disclosing circumstances deemed notorious.³² A French court will only annul an award if it determines that the undisclosed circumstance could have created a reasonable doubt as to the impartiality of the arbitrator.³³

²⁶ *Cour de cassation*, 1st civil Division, 14 October 2009, n°08-16.369; 08-16.549.

²⁷ *Cour de cassation*, 1st civil Division, 25 June 2014, n°11-26.529.

²⁸ *Cour de cassation*, 1st civil Division, 20 October 2010, n°09-68.131 and n°09-68.997.

²⁹ Paris Court of Appeal, 9 September 2010, Rev. arb. 2011, pp. 970-976.

³⁰ Paris Court of Appeal, 14 October 2014, Rev. arb. 2014, p. 1028.

³¹ *Cour de cassation*, 1st civil Division, 29 June 2011, n°09-17.346, Rev. arb. 2011, p. 959.

³² Paris Court of Appeal, 16 February 2010, SAS Nidera France, D. 2011, p. 3023.

³³ *Cour de cassation*, 1st civil Division, 10 October 2012, n°11-20.299.

4.3 Court intervention for the constitution of the tribunal

As regards international arbitration, Article 1508 CCP provides that the parties to an arbitration can either (i) expressly appoint the arbitrators in their arbitration agreement, or (ii) provide for a procedure of appointment either expressly or by way of reference to arbitration rules. If the arbitration procedure is silent on this matter or should the parties choose the French procedural law to apply, the arbitral tribunal will be appointed in accordance with Articles 1452 *et seq.* CCP.

Pursuant to Article 1452 CCP, applicable to both domestic and international arbitration, any difficulties in the appointment of the tribunal should be referred to the arbitral institution chosen by the parties in the arbitration agreement.

When the parties have agreed to an *ad hoc* arbitration seated in France, and unless otherwise provided by the parties, any difficulty in the appointment of the arbitral tribunal can be referred to a dedicated judge supervising arbitration proceedings (*juge d'appui*). In domestic arbitration, under Article 1459 CCP, the *juge d'appui* is the President of the Paris Regional Court (*Président du Tribunal de grande instance*), which has territorial jurisdiction over the place where the arbitral tribunal is seated (or the President of the Commercial Court were expressly provided by the parties). In international arbitration, pursuant to Article 1505 CCP, the *juge d'appui* is always the President of the Paris Regional Court (*Président du Tribunal de grande instance de Paris*).

As stated in paragraph 3.3 above, Article 1505 CCP provides that a party to an international *ad hoc* arbitration faced with difficulties related to the constitution of the arbitral tribunal may also resort to the *juge d'appui* when the arbitration is seated outside France provided that (i) parties chose to have their arbitration agreement governed by French procedural law or (ii) the parties expressly gave jurisdiction to the French State courts for disputes related to the arbitral procedure or (iii) one of the parties incurs the risk of a denial of justice. This last criterion concerns situations where the obstacle experienced by a party in the appointment of the tribunal can be referred to no other State court or arbitral institution throughout the world.³⁴

Article 1460 CCP applicable to both domestic and international arbitration provides that the decisions of the *juge d'appui* have *res judicata* effect and may only be appealed when the *juge d'appui* refuses to appoint an arbitrator on the ground that an arbitration agreement is manifestly null or manifestly inapplicable.

Pursuant to Article 1452 CCP applicable to both domestic and international arbitration, the *juge d'appui* may intervene to appoint a sole arbitrator in cases where the parties fail to agree on one. When the parties agreed to a three-person tribunal, the *juge d'appui* may intervene to resolve situations where one party refuses to appoint its arbitrator, or when the two arbitrators appointed by the parties fail to agree on a third one.

According to Article 1454 CCP equally applicable to both domestic and international arbitration, apart from assisting the parties in the constitution of the arbitral tribunal, any other difficulty regarding the performance of the arbitration agreement can be referred to the *juge d'appui* as a last resort. The *juge d'appui* may thus rule on disputes related to pathological clauses or regarding the removal of an arbitrator (Article 1458 CCP).

4.4 Interim measures granted by State courts including *ex parte* measures

In both domestic and international arbitration, the existence of an arbitration clause does not prevent the State courts from ordering interim measures as long as the arbitral tribunal has not been constituted. Indeed, pursuant to Article 1449 CCP, *ex parte* interim measures may be ordered by State courts even in presence of an arbitration agreement in order to (i) gather evidence on an *ex-parte* or adversarial basis under Article 145 CCP or (ii) grant conservatory measures in case of urgency.

³⁴ *Cour de cassation*, 1st civil Division, 1 February 2005, n°02-15.237.

Once the tribunal has been constituted, the State courts have no more jurisdiction to order any urgent interim measures. Indeed, unless otherwise provided by the parties, Article 1468 CCP, applicable to both domestic and international arbitration, grants the arbitral tribunal general jurisdiction to order interim or provisional measures, with the penalties it may deem necessary. However, provisional seizures (*saisies conservatoires*) and the registration of a judicial mortgage (*sûretés judiciaires*) can only be ordered by French State courts, which have exclusive jurisdiction to order such measures, and can be requested by a party at any stage of the arbitral proceedings.

4.5 The proceedings

The parties are generally free to organise their arbitral proceedings. However, some provisions of the French arbitration law set certain basic limits on the conduct of the proceedings. As a general rule, parties to domestic and international arbitration should act with promptness and loyalty in the proceedings (Article 1464 CCP). In addition, Article 1510 CCP applicable to international arbitration provides that irrespective of the procedural rules chosen by the parties, the arbitral tribunal must grant them equal treatment and due process. As in many other jurisdictions, the lack of such procedural guarantees is one of the possible grounds for the annulment of the award.

4.5.1 Confidentiality

While French arbitration law specifically provides for the confidentiality of domestic arbitration proceedings unless otherwise agreed by the parties (Article 1464 CCP), no similar rule applies to international arbitration. Indeed, a French court required from a party to an international arbitration to first demonstrate that an obligation of confidentiality actually existed before bringing its claims, which shows that the confidentiality should not be taken for granted.³⁵ As such, parties to international arbitrations seated in France wishing to ensure confidentiality of their proceedings should include relevant provisions in their agreement, either by way of an express provision, or through the choice of appropriate arbitration rules.

4.5.2 Length of arbitration proceedings

As regards domestic arbitration, Article 1463 CCP provides that in the absence of any timeframe specified in the arbitration agreement, the arbitral tribunal shall cease its mission after 6 months from its constitution. Such time limit for rendering an award can be extended by the agreement of the parties or, failing such agreement, by the *juge d'appui*. The French arbitration law does not set any time limit for rendering an award in international arbitration.

4.5.3 Hearings and meetings

The parties are free to determine if the hearings will actually take place and if so, what will be the place of such hearings. Meetings, hearings and even deliberations of the arbitral tribunal can take place outside the seat of the arbitration.³⁶

4.5.4 Interim measures granted by arbitrators

Once the arbitral tribunal has been constituted, Article 1468 CCP, applicable to both domestic and international arbitration, grants the arbitral tribunal general jurisdiction to order interim or provisional measures. As stated in paragraph 4.4. above, provisional seizures (*saisies conservatoires*) and the registration of a judicial mortgage (*sûretés judiciaires*) can only be ordered by French State courts, which have exclusive jurisdiction in this matter.

³⁵ Paris Court of Appeal, 22 January 2004, *Foster Wheeler*, Rev. arb. 2004, p. 647.

³⁶ *Cour de cassation*, 2nd civil Division, 9 February 1994, n°92-17.645.

4.5.5 Evidence and testimonies

Pursuant to Article 1467 CCP, applicable to both domestic and international arbitration, the arbitral tribunal may order all the measures it deems necessary to collect evidence. The arbitrators can order a party to disclose a document but the parties, in international arbitration, can agree otherwise. With regards to witnesses, Article 1467 CCP provides that an arbitral tribunal may hear witness evidence from any person, without the need for the witness to take an oath. French arbitration law has no further provisions regarding any restriction on witness evidence. Case law on this matter authorizes parties to an international arbitration and their representatives to be heard as witnesses.³⁷ A question has been raised as to whether French legal counsel were breaching their professional rules of conduct by preparing witnesses prior to their hearing. Through a resolution adopted on 26 February 2008, the Paris Bar Council clarified its position by stating that a preparation of witnesses in the context of international arbitral proceedings does not breach any principle of professional conduct of French lawyer. The resolution does not address the point whether preparing witnesses by French lawyers in the context of domestic arbitral proceedings would constitute any breach of the professional code of conduct.

4.5.6 Existence of a duty to hold hearings?

There is no requirement under the French rules applicable to domestic or international arbitration to hold hearings. For the sake of efficiency, arbitrations with a small amount in dispute are often conducted without holding hearings. However, in international arbitration, arbitrators have a general duty to ensure that the equality of the parties and due process are respected (1510 CCP).

4.5.7 Principles on the awarding of interest

Arbitrators may award interest on any monetary claim, which will be added to the principal upon enforcement in France. Furthermore, pursuant to Article 1231-7 of the French Civil Code and established case law, interest at the French statutory rate will automatically apply and be added to the principal when the enforcement of an international award is sought in France, unless moratory interest has already been granted under the award.

4.5.8 Principles on the allocation of arbitration costs

Arbitrators have wide discretion to order the parties to pay arbitration costs partially or in full.

It is a general rule under Article 700 CCP that the unsuccessful party should be condemned to pay the winning party its legal costs. Yet, the unsuccessful party is not automatically bound to bear the entirety of its opponent's fees and costs as the judge has full discretion to determine their amount. Pursuant to Article 700 CCP, the judge shall base its decision on equity and financial situation of the succumbing party. The judge can also decide not to award the winning party with any costs at all.

4.6 Arbitrators' liability

4.6.1 Immunity from arbitrators' civil liability

Arbitrators benefit from wide immunity from civil liability for matters strictly related to the fulfilment of their mission and the award they render. As such, arbitrators' liability is generally excluded where an award contains a simple error or where it is considered not to be fair. However, such immunity is not absolute and arbitrators can be held liable in case of fraudulent misrepresentation, gross negligence or denial of justice.³⁸ In domestic arbitration, absent an agreement of the parties on the time limit to render the award, an arbitrator can be held liable if he or she fails to render the award within the default 6-month time limit set forth in Article 1463 CCP without having sought an extension of this time-limit from the "*juge d'appui*"

³⁷ Paris Court of Appeal, 17 December 2009 ; Paris Court of Appeal, 10 January 2012, Rev. arb. 2012, p. 409.

³⁸ *Cour de cassation*, 1st civil Division, 15 January 2014, n°11-17.196.

where the parties had neither agreed upon such extension, nor requested for one and if the award has been annulled as a result of this failure.³⁹ In addition, by accepting their appointment, arbitrators conclude a contract with the parties and can therefore be held liable for its defective performance. Indeed, arbitrators have been held liable for breaching said "*contrat d'arbitre*" in a case where they failed to render an award within the agreed timeframe⁴⁰ or to disclose a relevant circumstance regarding their impartiality.⁴¹

4.6.2 Criminal liability of arbitrators

Arbitrators may also be held criminally liable for actions they have committed in the course of arbitration proceedings, provided that they qualify as criminal offenses pursuant to French criminal law. In particular, several articles of the French Criminal Code expressly refer to arbitrators, namely Articles 435-7 and 435-9, which both relate to corruption. An arbitrator may also be held criminally liable if he contributes to a money laundering scheme by way of an arbitral award.

5. The award

5.1 Possibility to waive the requirement for an award to provide reasons

In both domestic and international arbitration, the arbitral award has to provide for a minimum of reasons supporting the decision rendered (Article 1482 CCP). The only difference between domestic and international arbitration is that in domestic proceedings this provision is mandatory, which means that the parties cannot waive this requirement. As such, the lack of reasons is one of the grounds for annulment of a domestic award (Article 1492 CCP). Accordingly, an award which does not provide the reasoning of the arbitrators can be annulled even when the lack of reasoning causes no harm to the other party.⁴² In international arbitration, the parties can waive the requirement for an award to provide reasons (Article 1506 CCP). The lack of reasons is not a ground for annulment of the award under Article 1520 CCP.

5.2 Possibility to waive the right to seek the annulment of the award

The waiver is not possible in domestic arbitration. Article 1491 CCP provides that any provision to the contrary is deemed null and void. In international arbitration, Article 1522 CCP specifically provides that parties to an international arbitration may waive their right to seek annulment of the award at any moment. Such a waiver needs to be expressly stipulated in a separate agreement specifically dedicated to this matter. However, parties which have waived their rights to challenge the award will still be able, pursuant to Article 1522 CCP, to appeal any enforcement order granted by the French judge (*exequatur*).

5.3 Atypical mandatory requirements to the rendering of a valid award at a seat in the jurisdiction?

An arbitral award rendered in France or abroad in both domestic or international arbitration will be recognised as valid in France if (i) the tribunal had jurisdiction to hear the dispute, (ii) the tribunal was regularly constituted, (iii) the tribunal did not exceed its authority, (iv) the principle of due process was respected and (v) the award is not contrary to the French definition of international public policy.

Under Article 1481 CCP, applicable to both domestic and international arbitration, the arbitral award shall mention (i) the names, first names or corporate name of the parties, as well as the address of their residency or headquarters; (ii) the name(s) of the legal counsel as well as all other person having represented or assisted the parties; (iii) the name(s) of the arbitrators; (iv) the date of the award; (v) the seat of arbitration. In addition, Article 1482 CCP provides that the award must at the minimum briefly state the

³⁹ *Cour de cassation*, 1st civil Division, 6 December 2005, n°03-13.116.

⁴⁰ *Cour de cassation*, 1st civil Division, 6 December 2005, n°03-13.116.

⁴¹ Reims Court of Appeal, 31 January 2012, Rev. arb. 2012, p. 209.

⁴² Paris Court of Appeal, 11 December 2012.

parties' claims and counterclaims and their legal grounds as well as the reasons for the award. In international arbitration, the parties may waive the application of Articles 1481 and 1482 in their arbitration agreement whereas they are mandatory in domestic arbitration. In domestic arbitration, Article 1480 CCP provides in addition that the award must be signed by the arbitrators. Such requirement does not exist in international proceedings.

In domestic arbitration, some of the aforementioned requirements can constitute grounds for the annulment of the award. Indeed, Article 1492 CCP provides that the award may be set aside if it does not state (i) reasons, (ii) date, (iii) names of the arbitrators, but also when (iv) it is not signed or (v) it was not rendered by at least a majority of arbitrators. These grounds for annulment do not apply to foreign awards.

5.4 Possibility to appeal the award

In domestic arbitration, Article 1489 CCP provides that the appeal is not possible unless the parties agreed otherwise. The appeal allows the State judge to rule once again on the entirety of the case that was submitted to the arbitral tribunal both on law and facts. When the appeal of an award is possible, the parties cannot initiate annulment proceedings relating to the same award (Article 1491 CCP). In international arbitration, the award cannot be appealed but it can be, nevertheless, set aside.

5.5 Recognition and enforcement of domestic and foreign awards

Both domestic and foreign awards must be first recognized as effective in the French legal order in order to be enforced. They become effective when they are granted enforcement through an order called "*exequatur*". Once such order is granted, they are enforceable in the French territory. The proceedings are *ex parte* and the application for *exequatur* must be filed with the registry of the adequate Regional Court (*Tribunal de grande instance*). In domestic arbitration, the application must be filed with the Regional Court that has territorial jurisdiction over the seat of the arbitration (Article 1487 CCP). In international arbitration, the application must necessarily be filed with the Paris Regional Court (Article 1516 CCP).

The *exequatur* will be granted if the two following conditions are met on a *prima facie* basis:

- (i) the existence of the award is established by production of the original copy of the award (a certified copy is allowed for international awards) and a copy of the underlying arbitration agreement (Article 1487 applicable to domestic arbitration and Articles 1514 and 1515 CCP applicable to international arbitration). If the award and/or the arbitration agreement is not in French, it must be translated into French and the court may request a certified translation (Article 1515 CCP);
- (ii) the recognition or enforcement of the award is not manifestly contrary to the French definition of international public policy (Article 1488 CCP applicable to domestic arbitration and Article 1514 CCP applicable to international arbitration).

Exequatur proceedings are rather fast and an *exequatur* order for a foreign award is normally granted within a month from the application. The decisions refusing to grant the *exequatur* are rare. However, should the judge refuse the *exequatur*, the decision can be appealed within one month from its service. The appeal is possible in both domestic (Article 1500 CCP) and international arbitration, no matter if the award was rendered in France (Article 1523 CCP) or abroad (Article 1525 CCP).

An order granting the *exequatur* can only be appealed if it concerns a foreign award in an international arbitration, as the annulment proceedings are not possible in this case (Article 1525 CCP). In case of appeal against the order granting *exequatur*, the Court of Appeal will rule on the same grounds as those which are applicable to setting aside proceedings (Article 1520 CCP). As regards awards rendered in France in an international arbitration, an appeal is only possible when the parties have waived their rights to ask for the setting aside of the award, which is extremely rare (Articles 1522 and 1524 CCP). In domestic arbitration, an appeal against the order granting the *exequatur* is not possible but an appeal or annulment proceedings against the award rendered in France will automatically result in challenging the *exequatur* order (1499 CCP).

5.6 Suspension of the enforcement in case of annulment or appeal proceedings

Pursuant to Article 1526 CCP, applicable to awards rendered in France or abroad in an international arbitration, the enforcement measures are not suspended when the setting aside proceedings are lodged or an appeal is introduced against an *exequatur* order. The second paragraph of Article 1526 CCP provides for an exception to this general rule and allows an award debtor to apply to the First President of the Court of Appeal (or the Judge in charge of the case management of the annulment proceedings as the case may be – “*conseiller de la mise en état*”) for suspending or setting conditions for enforcement of the award if the rights of any of the parties to the arbitration could be severely prejudiced by such an automatic enforcement. The courts construe this condition very narrowly and a stay of enforcement is granted only in exceptional circumstances.

In domestic arbitration, enforcement is only possible after the expiry of the one-month time limit to lodge the appeal or the setting aside proceedings. If such proceedings are brought, the enforcement is further suspended unless the arbitrators decided that the award be granted immediate provisional enforcement (Article 1496 CCP). Parties can apply to the First President of the Court of Appeal (or the *conseiller de la mise en état*) for granting the award immediate enforcement or suspending it if such an immediate enforcement was granted by the arbitral tribunal (Article 1497 CCP).

5.7 Enforcement of an award annulled at the seat of the arbitration

French courts are extremely favourable to the recognition of foreign awards as they consider that a foreign award, which was annulled at the seat of arbitration, may still be enforced in France, provided that such enforcement is not contrary to the French definition of international public policy. This rule was first recognised in the *OTV v/ Hilmarton*⁴³ case and confirmed in the *Putrabali*⁴⁴ case. Both rulings considered that an international arbitral award was independent from any national legal system and held that its validity should only be assessed with regards to the rules applicable within the country where enforcement is sought. As a recent illustration, the former shareholders of the Russian company Yukos could carry on the enforcement of their award in France in spite of its annulment at the seat of the arbitration (the Hague).

5.8 Are foreign awards readily enforceable in practice?

As stated before, foreign awards must be granted an *exequatur* order of the French judge in order to be enforced. However, this procedure is fast and the judge does not conduct any in-depth analysis of the award. Once an award is granted the *exequatur*, it is considered a valid enforcement title under Article L. 113-3 of the Code of Civil Enforcement Proceedings and the award creditor can carry out various enforcement measures such as seizures and/or attachments or liens.

5.9 Additional point: general rules on the annulment proceedings

Annulment proceedings can only be initiated against an award which was rendered in France, be it in domestic (Article 1494 CCP) or international (Article 1519 CCP) arbitration. It has to be initiated within a month of the date where a party is officially served with the award, and presented to the adequate Court of Appeal, which has jurisdiction over the seat of arbitration. The aforementioned one-month period is extended for two months if the party bringing the annulment proceedings is not established in France (Article 643 CCP).

As regards the awards rendered in France in international arbitral proceedings, the annulment of the award can only be obtained on one of the following five grounds listed by Article 1520 CCP: (i) the arbitral tribunal wrongly declined or confirmed its jurisdiction; (ii) the tribunal was irregularly appointed; (iii) the tribunal exceeded or did not conform to the authority granted by the parties; (iv) due process was violated or (v) the award is contrary to the French definition of international public policy. The legal standard for

⁴³ *Cour de cassation*, 1st civil Division, 23 March 1994, n°92-15.137.

⁴⁴ *Cour de cassation*, 1st civil Division, 29 June 2007, n° 05-18.053.

setting aside the award is very high and any of the five aforementioned violations must be manifest so that the judge decides to annul an award.

In domestic arbitration, in addition to the five aforementioned grounds applicable to awards rendered in international arbitration, an award can also be annulled, pursuant to Article 1492 CCP, if the award does not state the (i) reasons, (ii) date, (iii) names of the arbitrators, but also when (iv) it is not signed or (v) it was not rendered by the majority of arbitrators.

In international arbitration where one party is a French State entity, the French Tribunal of Conflicts, which is a dedicated tribunal to rule over jurisdiction conflicts between civil and administrative courts, held that as a default rule, the annulment and enforcement proceedings against the award fall under the jurisdiction of the French civil courts. However, the administrative courts retain their jurisdiction if the three cumulative conditions are met: (i) the agreement containing the arbitration clause was performed in the French territory, (ii) the award was rendered in France and (iii) the award involves the issue of compliance with public policy rules of French public law relating to public property occupancy, public procurement, to public partnerships or to the delegation of public services.⁴⁵

5.10 Additional point: other available challenges of the award

In both domestic and international arbitration, a party may seek, pursuant to Article 1502 CCP, the review of an award on the basis of the *recours en révision*. This is an exceptional procedure which seeks to review the merits of the case when one of the parties discovers after the rendering of the award that (i) the arbitral tribunal was misled by fraud, or (ii) that the other party produced forged witness statements or documents, or (iii) that such party retained some key documents. In domestic arbitration, such challenge shall be brought before the arbitral tribunal or before the relevant Court of Appeal if the tribunal cannot be reunited. In international arbitration, it can only be brought before the arbitral tribunal.

6. Funding arrangements

6.1 Contingency or alternative fee arrangements

Under French ethic rules applicable to French lawyers, fee arrangements solely based on success fees are prohibited (the so-called "*quota litis* pacts").⁴⁶ However, the Paris Court of Appeal held that such contingency fee arrangements are valid in the context of an international arbitration, as they are not contrary to the French definition of international public policy.⁴⁷ The National Council of the French Bars recently published a status report reflecting on the evolution of the *quota litis* pact and the possible lifting of its prohibition.⁴⁸

6.2 Third-party funding arrangements

Third-party funding is not prohibited under French law and it has recently gained importance in France. However, there are no specific legal provisions or case law regarding this issue. While ruling on an award rendered in an arbitration funded by a third party, the Versailles Court of Appeal did not address the question of the validity of such arrangement.⁴⁹ On 21 February 2017, the Paris Bar Council adopted a resolution confirming that the use of third-party funding in international arbitration is a positive

⁴⁵ Tribunal of Conflicts, 17 May 2010, n°3754; Tribunal of Conflicts, 11 April 2016, n°4043; Tribunal of Conflicts, 24 April 2017, n°4075.

⁴⁶ [Article 10 of law n°71-1130 of 31 July 1971](#).

⁴⁷ Paris Court of Appeal, 10 July 1992, D. 1992, p. 459.

⁴⁸ Resolution of the National Council of the French Bars dated 6-7 October 2017.

⁴⁹ Versailles Court of Appeal, 1 June 2006, n°05/01038.

development for access to justice and does not contravene French Law.⁵⁰ Disclosure of the third-party funding is recommended but not compulsory. The resolution of 21 February 2017 states that legal counsel should encourage their clients to disclose the existence of any third-party funding arrangement.

However, any legal counsel of a party using a third-party funding still has to abide by its professional rules of conduct. This means in practice that legal counsel have to uphold their obligation of confidentiality towards their clients and will be barred from communicating privileged information directly to the third party funder. This also means that a legal counsel cannot place the interests of the third-party funder over those of its clients, and can only receive instructions from the latter.

7. Likelihood of future legislative reform

It seems unlikely that there will be any significant reform in French arbitration law in the next couple of years as it has already been subject to revisions and modifications twice over the last six years. The most recent change to date occurred in 2016 with the coming into force of the aforementioned Law n°2016-1547 of 18 November 2016 on the Modernization of Justice

⁵⁰

Available

http://www.avocatparis.org/system/files/publications/resolution_financement_de_larbitrage_par_les_tiers.pdf.

at:

THE GAMBIA

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

LOUBNA FARAGE
OF FARAGE ANDREWS LAW PRACTICE

FARAGE ANDREWS
LAW PRACTICE

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

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VERSION: 18 MAY 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

The Gambia is a generally arbitration friendly jurisdiction that has adopted pro-arbitration laws (most importantly the [Alternative Dispute Resolution Act 2005](#) (“**ADR Act 2005**”)), the spirit of which have been respected by its judiciary and administration. That said, as a consequence of the country’s relatively small size, the jurisdiction does not benefit from of surfeit of arbitration related practice and precedent, meaning that arbitration in The Gambia may give rise to issues that are novel in the jurisdiction. Many of the cases thus far which required arbitration involved construction disputes between contractor and client or supply agreements between supplier and purchaser.

Key places of arbitration in the jurisdiction	Banjul.
Civil law / Common law environment?	Primarily a common law jurisdiction, although customary law and sharia law are applicable to issues of land, inheritance and family law in many circumstances.
Confidentiality of arbitrations?	Yes, subject to certain exceptions.
Requirement to retain (local) counsel?	No, parties may be represented by any person of their choice.
Ability to present party employee witness testimony?	Yes.
Ability to hold meetings and/or hearings outside of the seat?	Permitted unless the parties agree otherwise.
Availability of interest as a remedy?	Yes.
Ability to claim for reasonable costs incurred for the arbitration?	Yes.
Restrictions regarding contingency fee arrangements and/or third-party funding?	None.
Party to the New York Convention?	No, but the ADR Act 2005 (ss. 52-53) provides for the recognition and enforcement of awards irrespective of the country in which they were made.
Other key points to note	Φ
WJP Civil Justice score (2017-2018)	Φ

ARBITRATION PRACTITIONER SUMMARY

Date of arbitration law?	29 July 2005, with an amendment on 27 June 2006 .
UNCITRAL Model Law? If so, any key changes thereto?	<p>The ADR Act 2005 addresses numerous forms of alternative dispute resolution, and both domestic and international arbitration, but to the extent it addresses international arbitration it is largely based on the 1985 UNCITRAL model law, with inter alia the following differences:</p> <ul style="list-style-type: none"> – Public policy as a ground for setting aside/refusing recognition or enforcement is partially defined; – The limitation period for an application for setting aside an award on the (public policy) basis that it “was induced or affected by fraud, corruption or gross irregularity” runs from when such ground was, or could reasonably have been, discovered; – There is provision for the appointment of an umpire, an individual who largely takes over the role of the tribunal in the event of a deadlock; – The substantive law governs the formalities required for the award; and – There are relatively detailed provisions on costs.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes.
Courts’ attitude towards the competence-competence principle?	The ADR Act 2005 (s. 30) enshrines the competence-competence principle, and there is no Gambian case law available in connection with this.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	No, but the ADR Act 2005 (s. 53(3)) indicates that matters in conflict with public policy include an award being “ <i>induced or affected by fraud, corruption or gross irregularity</i> ” or “ <i>a breach of the rules of natural justice</i> ” occurring during the proceedings or in connection with the making of the award.
Courts’ attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The ADR Act 2005 (s. 53(1)(a)(v)) provides that Gambian courts may refuse to recognise or enforce an award that was annulled at the seat of the arbitration. There is no Gambian case law available in this regard.
Other key points to note?	The ADR Act 2005 (s. 55) explicitly allows parties to an “ <i>an international commercial agreement</i> ” to adopt “ <i>the UNCITRAL Arbitration Rules [...] or any other international arbitration rules</i> ” to the exclusion of the provisions of the ADR Act 2005 itself.

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law?

Yes, it is substantially based on the 1985 version of the UNCITRAL Model Law, to the extent it addresses international commercial arbitration. It notably also addresses domestic arbitration, conciliation and mediation.

1.1.1 If yes, what key modifications if any have been made to it?

The principal modifications are:

- i. Public policy as a ground for setting aside, refusing recognition or refusing enforcement is partially defined in that the following are considered to be contrary to such policy:
 - an award being “*induced or affected by fraud, corruption or gross irregularity*”; or
 - “*a breach of the rules of natural justice*” occurring during the proceedings or in connection with the making of the award.¹
- ii. The limitation period for an application for setting aside an award on the (public policy) basis that it “*was induced or affected by fraud, corruption or gross irregularity*”, runs from when such ground was, or could reasonably have been, discovered;²
- iii. There are detailed provisions for the appointment of an umpire. Such individual is only required where a tribunal contains an even number of individuals that is greater than two and the arbitration agreement provides for an umpire (*i.e.* rarely). In the event of a deadlock the umpire largely takes over the role of the tribunal;³
- iv. With the parties’ consent, a court can refer a matter to arbitration in the absence of an arbitration agreement;⁴
- v. If the tribunal president is replaced, hearings must be reheard unless the parties agree otherwise;⁵
- vi. The substantive law governs the formalities required for the award;⁶ and
- vii. There are relatively detailed provisions on costs, which provide for costs to partially follow the event, and for the tribunal to request advances on costs.⁷

Notably, “*notwithstanding the provisions of [the ADR Act 2005]*” parties may opt into “*the UNCITRAL Arbitration Rules [...] or any other international arbitration rules*”.⁸ This allows the modifications made to the UNCITRAL Model Law in the ADR Act 2005 to be largely bypassed should the parties wish to do so.

¹ ADR Act 2005, ss. 49(7), 53(3).

² ADR Act 2005, s. 49(4).

³ ADR Act 2005, ss. 20-27.

⁴ ADR Act 2005, s. 9(1).

⁵ ADR Act 2005, s. 19(2).

⁶ ADR Act 2005, s. 46.

⁷ ADR Act 2005, ss. 50-51.

⁸ ADR Act 2005, s. 55.

1.1.2 If no, what form does the arbitration law take?

N/A.

1.2 When was the arbitration law last revised?

June 2006.

2. The arbitration agreement**2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?**

Courts determine the governing law principally by reference to the arbitration agreement, and, if it is included in a broader contract (as is usually case) by reference to the law governing that contract, unless such contract specifies that a different law governs the arbitration clause.

If the parties do not agree on the law governing the arbitration before the dispute arises as per the above, they may do so during the case management conference.

Finally, if the parties do not agree in this regard, or they contest the interpretation of the arbitration agreement, the arbitral tribunal will decide the matter.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Yes.⁹

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

The agreement must be in writing, which is deemed to include:

- “[T]he form of an arbitration clause in [a] contract or [...] the form of a separate agreement”; or
- An inference drawn from “an exchange of points of claim or defence in which the existence of an arbitration agreement is alleged by one party and not denied by the other”; or
- “[A] reference in a contract to a document containing an arbitration clause [...] provided that the reference is such as to make that clause part of the contract.”¹⁰

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

An arbitration agreement cannot be binding without a party's consent.

However, in court proceedings, such a third party could jointly consent, with the parties to the arbitration agreement, to the relevant dispute being referred to arbitration that would include said third party.¹¹

2.5 Are there restrictions to arbitrability? In the affirmative:

Yes, per s. 5(1) of the ADR Act 2005, notably where the arbitration agreement is contrary to public policy. The Gambia otherwise allows for arbitration of most disputes, defining a dispute as any “dispute or difference involving any civil cause or matter or arising in any other way”.¹²

⁹ ADR Act 2005, s. 30(2).

¹⁰ ADR Act 2005, s. 11.

¹¹ ADR Act 2005, s. 9(1).

¹² ADR Act 2005, s. 2.

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

Yes, a court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests no later than when submitting its first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration (unless it considers the arbitration agreement to be void, or that there is no arbitrable dispute between the parties).¹³ This provision applies irrespective of whether the place of arbitration is within or outside the jurisdiction.¹⁴

3.2 How do courts treat injunctions by arbitrators enjoining parties to stay litigation proceedings?

The courts do not have to stay proceedings to abide by an injunction issued by an arbitral tribunal, albeit there is no case-law addressing this issue.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)

The courts have relatively wide powers to issue interim injunctions in support of arbitration, including to preserve/sell goods, order security, and freeze assets.¹⁵ Said powers may also be exercised in support of arbitrations seated outside of The Gambia.¹⁶

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

Parties may be represented by any person of their choice or represent themselves.¹⁷

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

The duty to disclose conflicts and the challenge procedure are expressly set out in the ADR Act 2005.¹⁸ Such procedure provides that the parties may agree on a procedure for challenging an arbitrator. If the parties do not reach an agreement, the party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal, or after becoming aware of the circumstances justifying its challenge, send a written statement of the reasons for the challenge.

The challenge is first decided by the arbitral tribunal, such decision being appealable to the courts within 30 days.

As yet, there is little case law addressing challenges.

¹³ ADR Act 2005, s. 12.

¹⁴ See, for instance, [Musa Jallow v. Netherland Airport Consultants B.V. \(NACO\) \(unreported delivered 17 December 2014\), CSN: HC/727/13/CO/164/D2](#); [BP Investment Group FZE v. Social Security and Housing Finance Corporation \(unreported delivered 7 December 2017\), CSN: HC/439/17/MF/124/F1](#).

¹⁵ ADR Act 2005, s. 13.

¹⁶ See, for instance, [BP Investment Group FZE v. Social Security and Housing Finance Corporation \(unreported delivered 7 December 2017\), CSN: HC/439/17/MF/124/F1](#).

¹⁷ ADR Act 2005, s. 38(5). See, also, s. 33(4).

¹⁸ ADR Act 2005, ss. 16-17.

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

Generally, the courts do not intervene in matters governed by court-referenced arbitration except where such intervention is expressly provided for.

If there are issues related to the constitution of a tribunal they may be resolved by Gambia's Alternative Dispute Resolution Secretariat at the request of a party, or if such assistance is provided for in the arbitration agreement.¹⁹

4.4 Do courts have the power to issue interim measures in connection with arbitrations?

Yes, a party may apply for an interim measure before a court either before or during the arbitration proceedings.²⁰

4.4.1 If so, are they willing to consider *ex parte* requests?

Yes, though, as is the norm, such requests are granted on the condition that the other party be notified in due course, so as to have the opportunity to contest the relevant order.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

The ADR Act 2005 provides for the determination of the rules of procedure by the parties (including during the case management conference), failing such agreement, they are to be determined by the arbitral tribunal in light of the circumstances.²¹ It also provides for equal treatment of the parties, and for each party to be given full opportunity to present its case.²²

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

Yes, it indicates that "*an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings,*" subject to disclosure to advisors and disclosure foreseen in the ADR Act 2005.²³

4.5.2 Does it regulate the length of arbitration proceedings?

No.

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

The ADR Act 2005 provides that, unless otherwise agreed by the parties, the arbitral tribunal may meet at any place it considers appropriate for hearing witnesses, experts or the parties, or for the inspection of goods, other property or documents.²⁴

¹⁹ ADR Act 2005, s. 15(4).

²⁰ ADR Act 2005, s. 13; See, also, [Musa Jallow v. Netherland Airport Consultants B.V. \(NACO\) \(unreported delivered 17 December 2014, CSN: HC/727/13/CO/164/D2\)](#); [BP Investment Group FZE v. Social Security and Housing Finance Corporation \(unreported delivered 7 December 2017\), CSN: HC/439/17/MF/124/F1](#).

²¹ ADR Act 2005, ss. 29, 33.

²² ADR Act 2005, s. 32.

²³ ADR Act 2005, s. 6.

²⁴ ADR Act 2005, s. 34(3).

4.5.4 Does it allow for arbitrators to issue interim measures?

Yes.²⁵

4.5.4.1 In the affirmative, under what conditions?

At the request of a party, or of its own motion, the arbitral tribunal may order any party to take such interim measure of protection as it may consider necessary in respect of the subject matter of the dispute, and require any party to provide appropriate security in connection with any such measure taken.²⁶

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence?

No. The Tribunal has "*the power to determine the admissibility, relevance, materiality, and weight of any evidence brought before it.*"²⁷

4.5.5.1 For example, are there any restrictions to the presentation of testimony by a party employee?

No.

4.5.6 Does it make it mandatory to hold a hearing?

No, whether to hold a hearing is at the discretion of the arbitral tribunal, subject to the agreement of the parties.²⁸

4.5.7 Does it prescribe principles governing the awarding of interest?

Yes, it provides that, unless the arbitration agreement provides otherwise, or the award directs otherwise, an award of money shall carry interest as from the date of the award and at the same rate as a judgment debt.²⁹

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

The costs of the arbitration are to be borne equally by the parties, unless the award provides for a different apportionment. However, as only the costs of the legal representation of the successful party are considered permitted costs, this results in costs partially following the event.³⁰

More specifically, costs are defined as including:

- the fees of the arbitral tribunal;
- the travel and other expenses incurred by the arbitrators;
- the cost of expert advice and of other assistance required by the arbitral tribunal;
- the travel and other expenses of witnesses to the extent that such expenses are approved by the arbitral tribunal; and
- the costs of legal representation and assistance of the successful party if a claim is made for such costs and the arbitral tribunal determines such costs are reasonable.³¹

²⁵ ADR Act 2005, s. 31.

²⁶ ADR Act 2005, s. 31.

²⁷ ADR Act 2005, s. 33(3).

²⁸ ADR Act 2005, s. 38(1).

²⁹ ADR Act 2005, s. 45(5).

³⁰ ADR Act 2005, s. 50(2); 50(9).

³¹ ADR Act 2005, s. 50(9).

All other expenses, including the costs of the losing party's legal representation, do not constitute costs within the meaning of the ADR Act 2005.³²

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

Yes, arbitrators benefit from immunity to liability in respect to anything done or not done in their capacity as an arbitrator.³³

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

No.

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Yes.³⁴

5.2 Can parties waive the right to seek the annulment of the award?

No.

5.2.1 If yes, under what conditions?

N/A.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

The rules under the law governing the substance of the dispute also govern the making of the award.³⁵

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

No, there is no right to appeal an award. Recourse to a court against an arbitral award may only be made through an application for setting aside.³⁶

5.4.1 If yes, what are the grounds for appeal?

N/A.

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

The ADR Act 2005 does not provide a procedure for the recognition of awards. Rather, it confirms that an award "*shall be recognised as binding and on application to the High Court, be enforced by entry as a judgment in terms of the award,*" subject to grounds for refusing recognition or enforcement.³⁷ This provision applies irrespective of the country in which the arbitral award was made.³⁸

³² ADR Act 2005, s. 50(3).

³³ ADR Act 2005, s. 28.

³⁴ ADR Act 2005, s. 45(3)(a).

³⁵ ADR Act 2005, s. 46.

³⁶ ADR Act 2005, s. 49.

³⁷ ADR Act 2005, s. 52(1).

³⁸ ADR Act 2005, s. 52(1).

In the particular situation of awards made in the United Kingdom and other Commonwealth countries, the *Reciprocal Enforcement of Judgments Act, 1922* may apply as well, if the jurisdiction in question has implemented reciprocal legislation to allow for the enforcement of judgments made in The Gambia. In the United Kingdom, for instance, the reciprocal legislation is the Administration of Justice Act, 1920. Under the Reciprocal Enforcement of Judgments Act, 1922, a Gambian court may refuse to enforce an award on certain enumerated grounds, including fraud, lack of proper service, and recognition or enforcement being contrary to public policy.

With respect to the New York Convention, please note that, while The Gambia is not a signatory thereto, it has 'domesticated' its provisions at Schedule 2 of the ADR Act 2005,³⁹ which will come into force in the event that The Gambia accedes to the New York Convention. These domesticated provisions will apply to the enforcement of any international award arising out of a contractual relationship made in any New York Convention contracting State, provided that the relevant contracting state has reciprocal legislation recognising the enforcement of arbitral awards made in The Gambia in accordance with the provisions of the New York Convention.

Finally, in terms of formalities, the party relying on an award or applying for its enforcement must supply the duly authenticated original award or a duly certified copy and, a duly certified translation into English, where the award is not made in English.⁴⁰

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

No, this does not occur automatically. However, the courts may adjourn their decision if they consider it proper, and may in such circumstances order the debtor party to provide appropriate security.⁴¹

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

No, but it entitles the courts to refuse its enforcement at their discretion.⁴²

5.8 Are foreign awards readily enforceable in practice?

Yes. To illustrate, in the case of *Luiz Diaz de Losada Construction Company Ltd v the Gambian Government*, the Gambian Supreme Court ordered the enforcement of an ICC award against the Gambian Government.

6. Funding arrangements

6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

No.

6.1.1 If so, what is the practical and/or legal impact of such restrictions?

N/A.

7. Is there likely to be any significant reform of the arbitration law in the near future?

No.

³⁹ See, also, ss. 1(a) and 56 of the ADR Act 2005.

⁴⁰ ADR Act 2005, s. 52(2).

⁴¹ ADR Act 2005, s. 53(2).

⁴² ADR Act 2005, s. 53(1).

GERMANY

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

DR TILMAN NIEDERMAIER
OF CMS HASCHE SIGLE



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VERSION: 4 DECEMBER 2017

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Germany is an attractive option for domestic as well as international arbitration proceedings as it is known to provide an arbitration-friendly legal environment. The jurisprudence of German courts is consistent, and the German Civil Code of Procedure provides a functional and balanced arbitration law closely modelled on the UNCITRAL Model Law. The German Institute for Arbitration (“DIS”) is a well-functioning arbitration institution with modern rules (including Supplementary Rules for Expedited Proceedings and for Corporate Law Disputes) and an increasing (international) caseload.

Key places of arbitration in the jurisdiction	Frankfurt, Düsseldorf, Hamburg and Munich. Berlin, as capital city, has the potential to become an important seat for international arbitrations.
Civil law / Common law environment?	Civil law; the German arbitration law is contained in the 10 th book of the Civil Code of Procedure (“ZPO”).
Confidentiality of arbitrations?	German arbitration law does not provide for express confidentiality obligations. Hearings are usually held in closed session and awards are not published.
Requirement to retain (local) counsel?	Common but no legal requirement.
Ability to present party employee witness testimony?	Parties may submit witness testimonies of their employees. It lies in the arbitral tribunal’s discretion to weigh such evidence.
Ability to hold meetings and/or hearings outside of the seat?	Parties may choose to hold meetings at a different venue. Unless the parties have agreed on a specific venue, the tribunal has discretion to decide where to hold meetings.
Availability of interest as a remedy?	Interest is a matter of the applicable substantive law. Compounded interest applied under foreign law does not violate German public policy (“ <i>ordre public</i> ”).
Ability to claim for reasonable costs incurred for the arbitration?	The arbitral tribunal has discretion in respect of the allocation of costs but must take into consideration the circumstances of the case.
Restrictions regarding contingency fee arrangements and/or third-party funding?	German lawyers (“ <i>Rechtsanwälte</i> ”) may only enter into contingency fee agreements under very limited conditions. Third party funding is not codified in German arbitration law, but it is accepted and increasingly used.
Party to the New York Convention?	Yes, with reservations with regard to reciprocity, commercial disputes and retroactive application.
Other key points to note	Germany is a Member State since 1961.
WJP Civil Justice score (2018)	Germany ranks 6 th out of 113 countries with a score of 0.86.

ARBITRATION PRACTITIONER SUMMARY

The revision of the German arbitration law in 1998 has strengthened the focus on party autonomy, giving the parties considerable freedom in structuring the arbitration proceedings according to their needs. The German arbitration law is modeled closely on the 1985 UNCITRAL Model Law. It applies regardless of whether the arbitration is domestic or international. Furthermore, the dispute need not be of a commercial nature. Only very few mandatory statutory provisions limit the parties' freedom of contract. In 2016, the Ministry of Justice and Consumer Protection has installed a working group to review the German arbitration law in light of the 2006 amendments to the UNCITRAL Model Law.

All arbitration-related matters that require the assistance of state courts are handled by the German Higher Regional Courts. They do not act as a full court of appeal but limit their review potential grounds for annulment or refusal of recognition within a strictly limited scope (mainly questions of due process and public policy). The courts are considered to be efficient when they are requested to decide on arbitration matters. Germany has ratified the New York Convention ("NYC") without any reservations. Courts tend to adhere strictly to its provisions.

Date of arbitration law?	German arbitration law is found at §§ 1025 - 1066 ZPO and was last revised in 1998.
UNCITRAL Model Law? If so, any key changes thereto?	The German arbitration law is based in large parts on an adoption of the 1985 UNCITRAL Model Law with only few minor amendments.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Ordinary courts (the Higher Regional Courts as first instance) handle jurisdictional challenges and the annulment and enforcement of awards. Within these courts, all arbitration-related cases are regularly assigned to one specific division (" <i>Kammer</i> ") ensuring a certain level of knowledge and experience.
Availability of <i>ex parte</i> pre-arbitration interim measures?	The courts may grant <i>ex parte</i> interim measures.
Courts' attitude towards the competence-competence principle?	The arbitral tribunal may rule on its own jurisdiction. If the arbitral tribunal rules on jurisdiction as a preliminary question, any party may seize the state courts (as envisaged by the UNCITRAL Model Law).
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Only the grounds set out in the New York Convention.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The question of whether German courts are bound by the foreign court's set-aside decision is not finally settled. In the past, they have regularly respected the foreign court's decision without reviewing the merits <i>de novo</i> .

Other key points to note?

- Partial awards are recognized and enforced in accordance with the NYC.
- Duration of proceedings to obtain the enforcement of an award: usually between three months and one year (possibly longer when the German Supreme Court (“BGH”) is seized).
- Arbitration agreements are to be signed by all parties; there are stricter form requirements for particular groups of individuals (*e.g.*, consumers).
- German courts have a long-standing tradition of respecting arbitration agreements and exercising restraint in interfering with decisions by arbitral tribunals.

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law?

The German arbitration law is closely modelled on the UNCITRAL Model law. It is contained in the 10th book in §§ 1025-1066 of the Code of Civil Procedure (“ZPO”) and applies not only to commercial cases but to any kind of arbitrations.¹

Due to the broad scope of application, the legislator included some amendments and supplements to the UNCITRAL Model law, the most salient of which are outlined below:

- If the claimant or respondent is seated (or habitually resides) in Germany, German courts may be seized for assistance in the composition of the tribunal or the challenge of an arbitrator even when the seat of the arbitration is yet to be determined, *i.e.*, when it is unclear whether German arbitration law would indeed apply.²
- While German arbitration law permits a tacit acceptance to a document containing an arbitration agreement under specific conditions,³ there are stricter form requirements for arbitration agreements involving a consumer.⁴ The record or document containing the arbitration agreement must be hand-signed by the parties. The written form may be replaced by a qualified electronic form.⁵ The record or (electronic) document may not contain agreements other than those making reference to the arbitration proceedings except if the agreement is recorded by a notary.
- An application may be made to the court to declare whether or not arbitration is admissible prior to the composition of the arbitral tribunal. Yet the arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the application is pending before the court.⁶
- If an arbitration agreement puts a party at a disadvantage regarding the number of arbitrators appointed by the other party/parties, the disadvantaged party may seize the court to remedy the imbalance.⁷
- If an arbitrator refuses to take part in a decision, the other arbitrators may decide without him unless the parties have agreed otherwise.⁸
- Other than the Model Law, the German arbitration law contains an express provision on the allocation of costs (see below).⁹

¹ English translations are available at www.gesetze-im-internet.de/englisch_zpo/index.html and <http://www.disarb.org/de/51/materialien/german-arbitration-law-98-id3>.

² § 1025(3) ZPO.

³ § 1031(2) ZPO.

⁴ § 1031(5) ZPO.

⁵ § 126a German Civil Code (BGB).

⁶ § 1032(2) ZPO.

⁷ § 1034(2) ZPO.

⁸ § 1052(2) ZPO.

⁹ § 1057 ZPO.

- If an arbitral award is set aside, the arbitration agreement is regularly reinstated.¹⁰ Upon request by a party, German courts may remit a matter to the arbitral tribunal after setting the award aside.¹¹

1.2 When was the arbitration law last revised?

The German arbitration law was reformed in 1997. The new law entered into force on 1 January 1998.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

The approach of the courts, when determining the law applicable to the arbitration agreement, is not always consistent.

In principle, two approaches exist:

1. Some courts and commentators have considered arbitration agreements to be contracts of a merely procedural nature that are not governed by the rules of private international law. According to this view, Art. V(1)(a) New York Convention (NYC) and § 1059(2) no. 1 lit. a ZPO contain a general principle applying beyond the recognition and enforcement, respectively annulment, of arbitral awards according to which arbitration agreements are governed by the law chosen by the parties and, in the absence of a choice of law, by the law of the place of arbitration.¹²
2. More often the courts apply by analogy the rules of private international law relating to contracts (this would now be the Rome I Regulation which expressly excludes arbitration agreements from its scope of application).¹³ Following this approach, the arbitration agreement is governed by the law chosen by the parties in the first place.¹⁴ To the extent that the law applicable to the contract has not been chosen, the arbitration agreement is then governed by the law of the country with which it is most closely connected.¹⁵

In practice, the courts often apply (without further justification) the law governing the contract in which the arbitration clause is contained, be it based on an implied choice of law or the close connection to the main contract.¹⁶

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Yes.

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

The arbitration agreement must be contained either in a document signed by the parties or in an exchange of letters, telefaxes, telegrams or other means of telecommunication which provide a record of the agreement.¹⁷ This form requirement is deemed to have been complied with if the arbitration agreement is contained in a document transmitted from one party to the other party or by a third party to both parties

¹⁰ § 1059(5) ZPO.

¹¹ § 1059(4) ZPO.

¹² LG München I, SchiedsVZ 2014, 100, 105; *Geimer*, in: *Zöller* (ed.), *Zivilprozessordnung*, 31st ed. 2016, § 1029 para. 109.

¹³ Art. 1(2)(e) Rome I Regulation.

¹⁴ Art. 3(1) Rome I Regulation.

¹⁵ Art. 4(4) Rome I Regulation; see BGH SchiedsVZ 2011, 46, 48 (in respect of conflict of law rules preceding the Rome I Regulation); BGH NJW 1964, 591, 592; OLG Hamm, SchiedsVZ 2014, 38, 42.

¹⁶ BGH SchiedsVZ 2011, 46, 48; OLG Hamburg SchiedsVZ 2003, 284, 287.

¹⁷ § 1031(1) ZPO.

and – if no objection was timely raised – the contents of such document are considered to be part of the contract in accordance with common usage.¹⁸

A document fulfilling the above form requirements can incorporate an arbitration clause by reference to another document, *e.g.*, general terms and conditions.¹⁹

Special form requirements apply to arbitration agreements in which one party is a consumer. Such arbitration agreements must be contained in a record or document personally signed by the parties.²⁰

In international cases, the form requirement may be governed by international conventions, in particular Art. II(2) NYC and Art. 1(2) lit. a of the 1961 Geneva Convention.

The BGH has interpreted Art. VII(1) NYC as to allow for the application of national law to the extent that its form requirements are more favourable to arbitration than the New York Convention.²¹

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

In accordance with the principle of privity of contract, arbitration agreements only bind the persons which are party to it. In limited circumstances, third persons may become party to an arbitration agreement as a matter of law, rather than as a result of express consent.

The arbitration clause binds successors in title such as heirs or assignees, even if the successor does not formally accede to the arbitration agreement.²² The assignment itself does not have to follow the form requirements of an arbitration agreement.²³ The arbitration clause of a civil law partnership (“GbR”) and a general partnership (“oHG”) are also binding on the partners liable for the partnership’s liabilities.²⁴ If an arbitration clause is added to the articles of association, it will not bind the members that have not consented to this amendment.²⁵

An insolvency administrator is bound by an arbitration agreement in which the insolvent entity has entered prior to the opening of insolvency proceedings.²⁶

An extension of arbitration agreements to third parties pursuant to the “group of companies” doctrine has to date not been recognized by German courts. Although the BGH has held that the doctrine – when applied as part of a foreign law applicable according to the rules of private international law – does not necessarily violate German public policy,²⁷ it is very unlikely that the court will eventually accept the doctrine as part of German domestic law.

2.5 Are there restrictions to arbitrability?

Under German law, as a matter of principle, arbitration is allowed for all disputes over pecuniary matters.²⁸ Regarding non-pecuniary claims, an arbitration agreement is effective insofar as the parties to the dispute

¹⁸ § 1031(2) ZPO.

¹⁹ § 1031(3) ZPO.

²⁰ § 1031(5) ZPO.

²¹ BGH SchiedsVZ 2010, 332, 333.

²² BGH NJW 1998, 371; NJW 2000, 2346; BayObLGZ 1999, 255, 266 *et seq.*; *Wolf/Eslami*, in: *Vorwerk/Wolf*, BeckOK ZPO, 25th ed. 2017, § 1029 para. 16.

²³ BGH NJW 1998, 371; BayObLG SchiedsVZ 2004, 45, 46 (in respect of a „Kommanditgesellschaft“); *Geimer*, in: *Zöller* (ed.), *Zivilprozessordnung*, 31st ed. 2016, § 1029 para. 68.

²⁴ BGH NJW-RR 1991, 423, 424; *Saenger*, *Zivilprozessordnung*, 7th ed. 2017, § 1029 para. 23.

²⁵ *Geimer*, in: *Zöller* (ed.), *Zivilprozessordnung*, 31st ed. 2016, § 1029 para. 74.

²⁶ BGH SchiedsVZ 2004, 259, 261.

²⁷ BGH SchiedsVZ 2014, 151.

²⁸ § 1030(1)1 ZPO.

are entitled to conclude a settlement agreement in respect of the subject matter of the dispute.²⁹ Some limited exceptions apply to this principle (see below).

2.5.1 Do these restrictions relate to specific domains (such as IP, corporate law etc.)?

Arbitration agreements relating to disputes over the existence of a lease of residential accommodations within Germany are null and void.³⁰

Labour law disputes, save for limited exceptions, cannot be referred to arbitration.³¹

In a series of three decisions (*Schiedsfähigkeit I-III*), the BGH has established specific limits to the arbitrability of certain types of intra-company disputes. When disputes arise between certain shareholders and a stock company with regard to the validity of shareholder resolutions, court rulings declaring shareholder resolutions invalid bind all shareholders (*erga omnes*) regardless of whether they have been a party to the court proceedings.³² This is also applied to limited liability companies by way of analogy. In its first ruling on the matter (*Schiedsfähigkeit I*), the BGH denied the arbitrability of disputes pertaining to the validity of resolutions adopted by the shareholders.³³ In *Schiedsfähigkeit II*,³⁴ the court developed a set of criteria that must be fulfilled for such disputes to be submitted to arbitration and for arbitral awards to bind all shareholders: (i) all shareholders have to consent to the arbitration agreement (be it as part of the articles of association or in a separate agreement), (ii) all shareholders need to be informed about the initiation and the progress of the arbitral proceedings so they can join the proceedings at least in the capacity of an intervening party, (iii) all shareholders must be able to participate in the appointment of the arbitral tribunal if it is not selected by a neutral third party and (iv) all disputes concerning the deficient resolution have to be submitted to and decided by the same arbitral tribunal. In *Schiedsfähigkeit III*,³⁵ the BGH expanded this jurisprudence to partnerships including limited commercial partnerships ("*Kommanditgesellschaft*").

German competition law originally considerably limited arbitration in this field. However, following the entry into force of the revised arbitration law in 1998, the respective provisions were repealed. Today, the arbitrability of competition law disputed is generally recognized.

There is still no settled view on the arbitrability of patent disputes. The BGH is yet to rule on this matter. It is argued that the exclusive competence of patent courts for the revocation of patents and the grant or revocation of a compulsory licence under § 81 PatG within the German court system is tantamount to the non-arbitrability of these disputes. Again, this is based on the reasoning that arbitral awards lack the required *erga omnes* effect of a court ruling.³⁶ According to a different view, patent disputes are arbitrable in the sense that, while the arbitral tribunal is unable to revoke a patent itself, it may still order the patent holder to apply for its deletion with the competent patent authorities (which would be an enforceable obligation).³⁷

The opening of insolvency proceedings does not render a dispute non-arbitrable. Rather, the trustee is bound like a successor in title by an arbitration clause concluded by the debtor before entering insolvency proceedings. The defendant thus may invoke the arbitration clause where the trustee has brought a claim before state courts. Creditors must file their claims with the trustee, irrespective of whether they are covered by an arbitration agreement, as to allow for the orderly liquidation of debtor's assets. However, if the trustee

²⁹ § 1030(1)2 ZPO.

³⁰ § 1030(2) ZPO.

³¹ §§ 4, 101(3) of the Labour Court Act (ArbGG).

³² § 248(1)(1) AktG.

³³ BGH, NJW 1996, 1753.

³⁴ BGH, NJW 2009, 1962.

³⁵ BGH, SchiedsVZ 2017, 194.

³⁶ Seiler, in: *Thomas/Putzo, Zivilprozessordnung*, 37th ed. 2016, § 1030 para. 6.

³⁷ Geimer, in: *Zöller, Zivilprozessordnung*, 31st ed. 2016, § 1030 para. 15.

disputes the claim the creditor may enforce it. In this case, if the claim is covered by an arbitration agreement, the creditor is referred to arbitration.

With regard to the arbitrability of disputes arising out of bilateral investment treaties between different EU member states (“Intra-EU BITs”), the BGH has submitted a question on the compatibility of Intra-EU BITs with EU law to the ECJ.³⁸ The ECJ’s decision is still pending at the time of writing.³⁹

2.5.2 Do these restrictions relate to specific persons (i.e., State entities, consumers etc.)?

There are very few statutory limits to the capacity to conclude arbitration agreements.

Arbitration agreements on future legal disputes relating to investment services, ancillary services or financial futures and forward transactions are binding only if both parties to the agreement are merchants within the meaning of the Commercial Code (HGB) or legal persons under public law.⁴⁰

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

A court seized in a matter which is the subject of an arbitration agreement must, if the respondent raises an objection prior to the beginning of the hearing on the substance of the dispute, reject the action as inadmissible unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.⁴¹

Where an action referred to above is pending, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.⁴²

3.1.1 If the place of the arbitration is inside of the jurisdiction?

No difference.

3.1.2 If the place of the arbitration is outside of the jurisdiction?

No difference.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

Germany does not have a tradition of anti-suit injunctions. According to the ECJ’s *Gazprom* decision, the Brussels I Regulation does not prevent a member state from recognising anti-suit injunctions issued by arbitral tribunals.⁴³ However, it is highly unlikely that German courts would respect such injunctions, as this would run counter to the principle that German courts conduct a full review of the arbitration clause when they are asked to rule on the jurisdiction of an arbitral tribunal.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)

German courts will not issue anti-suit injunctions restraining proceedings brought in breach of arbitration clauses. They may grant interim measures in order to support arbitrations in foreign seats (such as freezing

³⁸ BGH, SchiedsVZ 2016, 328.

³⁹ ECJ, pending case C-284/16 (Slovak Republic v Achmea).

⁴⁰ § 37h of the Securities Trading Act (WpHG).

⁴¹ § 1031(1) ZPO.

⁴² § 1031(3) ZPO.

⁴³ ECJ, Judgment of 13 May 2015, C-536/13 (*Gazprom v Lithuania*).

orders or orders to secure evidence) provided that German courts have international jurisdiction for interim relief.

4. The conduct of proceeding

4.1 Can parties retain outside counsel or be self-represented?

Both is possible. Lawyers ("*Rechtsanwälte*") may not be excluded from acting as authorised representatives.⁴⁴

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

An arbitrator may be challenged only if circumstances give rise to justified doubts as to his impartiality or independence, or if he does not meet the prerequisites established by the parties.⁴⁵ In practice, German courts tend to apply the same standards as for state court judges. The IBA Guidelines are not binding on the state courts⁴⁶ and not regularly referred to.

A failure to comply with the duty to disclose all relevant circumstances as to the arbitrator's impartiality and independence may (but need not) justify a challenge of the arbitrator.⁴⁷ Whether the failure to disclose alone is sufficient to give rise to justifiable doubts depends on the circumstances. In any case, the failure might be an exacerbating factor in the overall assessment of whether there are justifiable doubts.

The same threshold applies to experts appointed by the arbitral tribunal.⁴⁸ In a recent decision of May 2017, the BGH has held that an expert's failure to disclose all circumstances relevant to his impartiality and independence is a ground to set the award aside if (i) the award is based on the expert's testimony and (ii) the non-disclosed circumstances would have justified a challenge of the expert.⁴⁹

4.3 On what grounds do courts intervene to assist in the Constitution of the arbitral tribunal (in case of ad hoc arbitration)?

A party may request the court to appoint an arbitrator if a party fails to act as required under an appointment procedure agreed upon by the parties, unless the procedure provides other means for securing the appointment. The court will intervene accordingly if the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or if a third party fails to perform any function entrusted to it under such procedure.⁵⁰

When appointing an arbitrator, the court shall have due regard to any qualifications prescribed by the agreement of the parties and to other considerations necessary to secure the appointment of an independent and impartial arbitrator. In the case of appointment of a sole or third arbitrator, the court shall also take into account whether appointing an arbitrator of a nationality other than those of the parties might be advisable.⁵¹

⁴⁴ § 1042(2) ZPO.

⁴⁵ § 1036(1), (2) ZPO.

⁴⁶ OLG Frankfurt, decision of 13 February 2012, 26 SchH 15/11, juris, para. 33.

⁴⁷ OLG Frankfurt, NJW 2008, 1325.

⁴⁸ § 1049(3) ZPO.

⁴⁹ BGH, decision of 02 May 2017, I ZB 1/16, juris relying on § 1059(2) no. 1 lit. d ZPO.

⁵⁰ § 1035(4) ZPO.

⁵¹ § 1035(5) ZPO.

4.4 Do courts have the power to issue interim measures in connection with arbitrations?

It is not incompatible with an arbitration agreement for a court to grant, before or during arbitral proceedings, a provisional or conservatory measure of protection relating to the subject-matter of the arbitration upon request by a party.⁵²

4.4.1 If so, are they willing to consider *ex parte* requests?

German courts may grant *ex parte* requests.⁵³ The courts will schedule a hearing unless this would endanger the object and purpose of the interim relief.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

§ 1042(1) ZPO enshrines the principle of equal treatment and the right of each party to an effective and fair legal hearing. Subject to the mandatory provisions of German arbitration law, the parties are free to determine the procedure themselves or by reference to a set of arbitration rules.⁵⁴ In the absence of an agreement by the parties and any stipulations in the German arbitration law, the arbitral tribunal shall conduct the arbitration in such manner as it considers appropriate.⁵⁵

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

While there is no express provision on confidentiality, neither the arbitral proceedings nor the hearings in the arbitration are public. Furthermore, arbitrators are barred from disclosing the tribunal's deliberations,⁵⁶ and the lawyers involved (be it as arbitrators or counsel) must comply with professional duties of confidentiality to which they are subject under German law.⁵⁷

4.5.2 Does it regulate the length of arbitration proceedings?

There is neither an express provision on the duration of arbitration proceedings nor a remedy against excessively lengthy proceedings. There is no case law on the question whether the excessive length of arbitral proceedings can be an annulment ground (some commentators argue in favour of annulment in such case).⁵⁸

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

The parties are free to agree on the place of arbitration. In the absence of such agreement, the place of arbitration shall be determined by the arbitral tribunal which shall pay regard to the circumstances of the case, including the suitability of the place for the parties.⁵⁹

The arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for an oral hearing, for hearing witnesses, experts or the parties, for consultation among its members or for inspection of property or documents.⁶⁰

⁵² § 1033 ZPO.

⁵³ §§ 936, 922(1) ZPO.

⁵⁴ § 1042(3) ZPO.

⁵⁵ § 1042(4) ZPO.

⁵⁶ BGH, NJW 1957, 592.

⁵⁷ § 43a(2) German Federal Lawyers' Act (BRAO).

⁵⁸ Hartmann, in: Baumbach/Lauterbach/Albers/Hartmann, ZPO, 76th ed. 2018, § 1059, para. 14.

⁵⁹ § 1043(1) ZPO.

⁶⁰ § 1043(2) ZPO.

4.5.4 Does it allow for arbitrators to issue interim measures?

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order such provisional or conservatory measures of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.⁶¹

4.5.4.1 In the affirmative, under what conditions?

There is no defined statutory threshold. German arbitration law does not include Articles 17A *et seq.* of the UNCITRAL Model Law. While some courts and commentators have held that the tribunal must apply the same threshold as state courts under German law,⁶² others have argued that the arbitral tribunal is free to apply its own standard.⁶³ In practice, this will usually boil down to the balancing of (i) the *prima facie* case and (ii) any risk of harm that cannot be adequately repaired by monetary compensation.

The tribunal may grant interim measures *ex parte*. It may require any party to provide appropriate security in connection with such measure.

Interim measures by arbitral tribunals can be enforced by state courts. Upon application by a party, the court may permit the enforcement of an interim measure of an arbitral tribunal unless a corresponding measure of interim relief has already been petitioned with a court.⁶⁴ It may issue a differently worded order if this is required for the enforcement of the measure. Likewise, the court might reverse or modify the preliminary order of an arbitral tribunal upon application by one party.⁶⁵

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence?

The arbitral tribunal is empowered to determine the admissibility of evidence, to take evidence and to assess freely such evidence.⁶⁶

4.5.5.1 For example, are there any restrictions to the presentation of testimony by a party employee?

There are no such restrictions.

4.5.6 Does it make it mandatory to hold a hearing?

Subject to agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings or whether the proceedings shall be conducted on the basis of documents and other materials.⁶⁷ Unless the parties have agreed that no oral hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings if requested by a party.

4.5.7 Does it prescribe principles governing the awarding of interest?

German arbitration law does not provide for any rules on the awarding of interest. If the main contract is governed by German substantive law, compounded interest may not be awarded.⁶⁸ If compounded interest is awarded based on the applicable foreign substantive law, this does not amount to a violation of German public policy allowing for the setting aside of the award.⁶⁹

⁶¹ § 1041(1) ZPO.

⁶² OLG Saarbrücken SchiedsVZ 2007, 323, 326; *Schwab/Walter*, Schiedsgerichtsbarkeit, 7th ed. 2005, ch. 17a para. 20.

⁶³ *Seiler*, in: *Thomas/Putzo*, Zivilprozessordnung, 37th ed. 2016, § 1041 para. 2.

⁶⁴ § 1041(2) ZPO.

⁶⁵ § 1041(3) ZPO.

⁶⁶ § 1042(4)(2) ZPO.

⁶⁷ § 1047(1) ZPO.

⁶⁸ § 248(1) German Civil Code (BGB).

⁶⁹ OLG Hamburg, decision of 26 January 1989, 6 U 71/88, juris.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

The arbitral tribunal shall allocate the costs of the arbitration between the parties unless the parties agree otherwise.⁷⁰ The cost decision is issued in the form of an arbitral award. The arbitration costs include necessary costs incurred by the parties for the proper pursuit of their claim or defence. The tribunal has discretion in its allocation but shall take the circumstances of the case, in particular the outcome of the proceedings, into consideration. Where it considers it to be appropriate an arbitral tribunal may also take into account the conduct of the parties.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

Arbitrators are not completely exempt from liability. As a matter of principle, they could be held liable for breach of contract under German contract law as any other service provider. The statutory provision limiting the state's liability for its own judges⁷¹ does not apply to arbitrators. In practice, either the terms of reference or the arbitration rules (e.g., § 44.2 DIS Arbitration Rules) will often contain an express limitation of liability. In the absence of such express provisions, the majority view (including the German Federal Supreme Court) assumes that the mandate of the arbitrators by the parties includes an implied liability limitation corresponding to the one of state court judges.⁷² Consequently, arbitrators can only be held liable if their wrongful behaviour amounts to a criminal offence. The case law on this point, however, is not finally settled and does not extend to non-judicial duties of the arbitrator. This means that an arbitrator does not benefit from the limitation of liability when he wrongfully delays the proceedings,⁷³ fails to issue the award in its proper form,⁷⁴ breaches confidentiality, recuses himself without reason or fails to disclose circumstances relevant to his appointment.⁷⁵

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

There are a number of offences that arbitrators could potentially commit, in particular intentional perversion of justice⁷⁶ and various bribery and corruption offences.⁷⁷ However, none of them give rise to any particular concerns. The threshold set by the BGH for intentional perversion of justice is extremely high so that, in practice, it is hardly ever met.

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Parties can waive the requirement to provide reasons for an award.⁷⁸ It is also possible for parties to agree on the wording of a (settlement) award.

5.2 Can parties waive the right to seek the annulment of the award?

Only with respect to certain annulment grounds (see below).

⁷⁰ § 1057(1) ZPO.

⁷¹ § 839(2) BGB.

⁷² BGH, NJW 1954, 176; see *Musielak/Voit*, Zivilprozessordnung, 14th ed. 2017, § 1035 para. 27 for further references.

⁷³ See § 839(2)(2) BGB.

⁷⁴ § 1054 ZPO.

⁷⁵ *Münch*, in: MüKo, Zivilprozessordnung, 5th ed. 2017, § 1035 para. 30.

⁷⁶ § 339 German Criminal Code (StGB).

⁷⁷ §§ 331(2), 332(2) StGB.

⁷⁸ § 1054(2) ZPO.

More specifically, parties may not generally waive their right to seek annulment of the award. This is because some of the annulment grounds affect public policy and are thus not at the parties' disposal. Yet, pursuant to one view, it is possible for parties to waive their right to invoke individual annulment grounds that solely exist for the waiving party's protection and do not protect public interests (e.g., a party may waive its right to seek annulment for the lack of an arbitration agreement or the wrongful constitution of the tribunal). In general, it can be said that the annulment grounds found in § 1059(2) no. 2 ZPO (i.e., the subject matter is not arbitrable under German law or the recognition or enforcement of the award would violate the *ordre public*) may not be waived.⁷⁹ *Ordre public* also comprises certain procedural aspects such as the right to be heard; it is unclear whether the BGH would accept a waiver of the right to seek annulment in respect of such fundamental procedural violations.⁸⁰

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

N/A

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

No, there is no *révision au fond* within German arbitration law.⁸¹

5.4.1 If yes, what are the grounds for appeal?

N/A

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

In respect of enforcement, German arbitration law differentiates between arbitral awards rendered in Germany and arbitral awards rendered abroad.

Awards rendered in Germany need to be declared enforceable.⁸² An application for a declaration of enforceability shall be refused and the award set aside if there is a ground for annulment. Yet the court may not consider such grounds for annulment that have already been subject of (unsuccessful) annulment proceedings or that have not been invoked within the time limits by the party opposing the declaration of enforceability.⁸³

The recognition and enforcement of foreign arbitral awards is governed by the New York Convention and other treaties on the recognition and enforcement of arbitral awards if they are applicable and provide more favorable terms.⁸⁴

German arbitration law does not provide for any time limits for the recognition and enforcement of awards.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

While annulment proceedings are pending, German courts are entitled to suspend enforcement under Article VI NYC. They will only do so if the award is likely to be set aside.

⁷⁹ Geimer, in: Zöller (ed.), Zivilprozessordnung, 31st ed. 2016, § 1059 paras. 79 *et seq.*

⁸⁰ See BGH, decision of 02 May 2017, I ZB 1/16, juris, paras. 16, 25 in which the BGH held that the right to be heard is part of the German *ordre public* and thus not at the parties' disposal. The Court did not explicitly address the admissibility of a waiver in respect of the *ordre public*.

⁸¹ Cf. BGH NJW 1999, 2974, 2975.

⁸² § 1060(1) ZPO.

⁸³ § 1059(3) ZPO.

⁸⁴ § 1061(1) ZPO.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

From a German viewpoint, an award that has been set aside by the courts at the seat of arbitration can no longer be enforced under Article V(1)(e) NYC. Accordingly, if the award is set aside abroad after having been declared enforceable in Germany, the declaration of enforceability may be set aside upon application by a party.⁸⁵

The question of whether German courts are bound by the foreign court's decision to set the award aside is not finally settled. In the past, German courts have followed a relatively liberal approach by not reviewing the merits of a foreign set-aside decision⁸⁶ and by not requiring reciprocity for its recognition and enforcement (as required for other foreign court decisions).⁸⁷

5.8 Are foreign awards readily enforceable in practice?

Germany is a member state of the New York Convention. Foreign arbitral awards are enforced unless there are grounds for refusal. The existence of a ground for refusal is not accepted lightly. In particular, the BGH has established a relatively high threshold for violations of public policy according to which not every breach of mandatory German law but only violations that run counter to fundamental value-based decisions of the German legislator infringe public policy.⁸⁸ Consequently, arbitral awards are hardly, if ever, set aside for violation of the German *ordre public*.

As in other EU member states, the German notion of public policy is influenced by EU law, in particular the jurisprudence of the ECJ.⁸⁹

What is more, set-aside applications are limited to one instance in the vast majority of cases thus providing for a relatively speedy process. This is because the application to set an award aside must be made with the Higher Regional Court. The only higher instance, the BGH, may only be seized if the dispute is of fundamental importance or if the development of the law or the consistency of the jurisprudence require a decision by the highest court. In practice, this is the rare exception rather than the rule.

6. Funding arrangements

6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

Yes.

6.1.1 If so, what is the practical and/or legal impact of such restrictions?

German lawyers ("*Rechtsanwälte*") subject to the Law on the Remuneration of Lawyers ("*RVG*") may only enter into contingency fee agreements under limited circumstances. A contingency fee may only be agreed upon if the client's economic circumstances would prevent him from asserting his rights in the absence of a success-related fee. Apart from that, German lawyers are barred from funding legal fees of their clients or other third parties.

⁸⁵ § 1061(4) ZPO.

⁸⁶ OLG München, SchiedsVZ 2012, 339, 341 which only reviewed the set-aside decision with regard to (i) whether the foreign court was competent for the annulment of the arbitral award, and (ii) whether the annulment was based on one of the grounds provided in the international treaty requiring German courts to enforce (the 1961 Geneva Convention in the case at hand).

⁸⁷ BGH, SchiedsVZ 2013, 229, 230.

⁸⁸ See, most recently, BGH, decision of 14 January 2016, I ZB 8/15, juris with further references.

⁸⁹ See, BGH SchiedsVZ 2016, 328, 333 *et seq.*; ECJ, Judgment of 1 June 1999, C-126/97 (*Eco Swiss v Benetton*) stating that a violation of EU competition law amounts to a failure to observe national rules of public policy.

These restrictions do not apply to foreign lawyers appearing before arbitral tribunals seated in Germany. Third-party funding by a person not subject to the RVG is permissible under German law and increasingly used in state court proceedings.

German arbitration law and jurisprudence are silent on the question of whether contingency fees can be recovered as part of the arbitration costs. Given that (i) German courts can only review a tribunal's cost decision within the setting aside or enforcement proceedings and that (ii) contingency fees are not unheard of in Germany, it is rather un-likely that a court would find a contingency fee (unless egregiously high) to be in breach of German public policy.

7. Is there likely to be any significant reform of the arbitration law in the near future?

A taskforce has been installed by the Federal Ministry of Justice and Consumer Protection in order to investigate the necessity of reforming the German arbitration law.

GHANA

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

NANAAMA BOTCHWAY, ABLA MASOPERH AND ACHIAA AKOLOUR DEBRAH
OF N. DOWUONA & COMPANY

n. dowuona & company
legal and strategic advisory services

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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS

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5. Accessibility and safety ●
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VERSION: 29 MAY 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Arbitration is quickly becoming the preferred method of settling disputes arising under commercial contracts in Ghana. The state's efforts to promote alternatives to litigation as the primary means of resolving disputes led to the repeal of the Arbitration Act, 1961 (Act 38) and its replacement with the Alternative Dispute Resolution Act, 2010 (Act 798) (the "**ADR Act**"). The ADR Act provides a modern framework which governs the commencement and conduct of arbitral proceedings as well as the enforcement of foreign and domestic arbitral awards in Ghana. Recognising the expediency of arbitration over litigation, several legislations in Ghana also encourage and/or require the settlement of disputes by arbitration as well other ADR methods. It must be noted that matters relating to national or public interest, the environment, the enforcement and interpretation of the Constitution, and any other matter that by law cannot be settled by an alternative dispute resolution method are all outside the scope of the ADR Act. The Ghana Arbitration Centre is the most widely-used arbitration centre in Ghana. Other centres include the Ghana Association of Certified Mediators and Arbitrators, the National Labour Commission and the Marian Dispute Resolution Centre. Ghana is a Common Law jurisdiction and it has incorporated into the ADR Act, the rules of the New York Convention, which it acceded to on 9th April 1968.

The ADR Act generally leaves the decision on most issues concerning the arbitral proceedings to the parties to determine and provides default rules that are applicable where the parties neglect or fail to agree on a matter. Under the ADR Act, unless otherwise agreed by the parties, the arbitration proceedings shall be private and arbitrators are required to keep the arbitration as well as the arbitral award confidential subject to the consent of the parties and the provisions of law. There is no requirement to retain local counsel but, unless the parties otherwise agree, a party may be represented by counsel or any other person chosen by the party. Parties are permitted to present employee witness testimony; however, before the hearing, a party is required to give the arbitrator and the other party personal particulars of the witnesses that the party intends calling and the substance of the testimony of each witness. The parties may also agree on the place where proceedings or hearings are to be held and in the absence of an agreement, the tribunal shall determine the venue for meetings or hearings, taking into account the convenience of the parties and circumstances of the case. The ADR Act makes provision for expedited arbitration proceedings under which parties may choose a fast track route to resolving their dispute.

The tribunal has the power to award interest as part of an arbitral award and may impose simple or compound interest at a rate determined by it in accordance with the terms of the contract and the applicable law. A party may claim and the tribunal may include reasonable expenses in any award it renders. Unless the parties agree otherwise, all expenses of the arbitration shall be paid for equally by the parties. There are no restrictions against contingency fee arrangements and/or third-party funding under the laws of Ghana.

Key places of arbitration in the jurisdiction	Accra
Civil law / Common law environment?	Common law.
Confidentiality of arbitrations?	Yes. Unless otherwise agreed by the parties or otherwise provided by law, arbitration proceedings and the arbitral award are confidential.
Requirement to retain (local) counsel?	None. A party may be represented by counsel or any other person, unless the parties agree otherwise.
Ability to present party employee	Yes. Parties are permitted to present employee witness

witness testimony?	testimony.
Ability to hold meetings and/or hearings outside of the seat?	Yes. The parties may agree to hold meetings or hearings outside the seat.
Availability of interest as a remedy?	Yes. The tribunal may grant a monetary award at simple or compound interest in accordance with the terms of the contract and the applicable law.
Ability to claim for reasonable costs incurred for the arbitration?	Yes. A party may claim and the tribunal may include reasonable expenses in the award against a party.
Restrictions regarding contingency fee arrangements and/or third-party funding?	None. Contingency fee arrangements and/or third-party funding are not restricted under the laws of Ghana.
Party to the New York Convention?	Yes. Ghana acceded to the New York Convention on April 9, 1968.
Other key points to note	<ul style="list-style-type: none"> • Non-arbitrable matters include matters relating to national or public interest, the environment, the enforcement and interpretation of the Constitution, and any other matter that by law cannot be settled by an alternative dispute resolution method. • The ADR Act makes provision for expedited arbitration proceedings under which parties may choose as a fast track to resolving their dispute.
WJP Civil Justice score (2017-2018)	0.59. Ghana is ranked 1 out of 18 in Sub-Saharan Africa and 43 out of 113 globally.

ARBITRATION PRACTITIONER SUMMARY

The ADR Act became effective on May 31, 2010, when it received presidential assent. It replaced the Arbitration Act, 1961 (Act 38) and formalised other forms of dispute resolution, other than arbitration, that hitherto, did not have legislative recognition. The ADR Act contains several provisions that are consistent with the UNCITRAL Model Law, but UNCITRAL does not consider the ADR Act to be an enactment of the UNCITRAL Model Law.

The ADR Act is indeed broader in scope than the UNCITRAL Model Law and contains provisions on certain matters on which the latter is silent. Key differences include the fact that the ADR Act extends to all matters, both domestic and international, other than those considered to be non-arbitrable under the ADR Act and includes provisions on mediation and customary arbitration. Another notable difference is the power granted under the ADR Act to the arbitral tribunal to subpoena witnesses, which is absent under the UNCITRAL Model Law. Further, the power of a court to intervene in arbitration proceedings is potentially wider under the ADR Act, than under the UNCITRAL Model Law. For instance, unlike the UNCITRAL Model Law, there is no provision in the ADR Act that expressly limits the intervention of courts in arbitration proceedings. Also, whereas under the UNCITRAL Model Law, the decision of a court, with regards to any application by a party challenging the appointment of an arbitrator or the arbitral tribunal's ruling on its jurisdiction, is not subject to appeal, the ADR Act does not contain any such limitation on decisions of the High Court with regards to such matters; except that the High Court's decision regarding the review of an arbitral tribunal's ruling on its jurisdiction may only be appealed against with leave of the High Court.

Additionally, unless otherwise agreed by parties, section 40 (1) of the ADR Act mandates the High Court to determine any question of law, arising in the course of arbitration proceedings, that is submitted by a party to the arbitration – no such authority is conferred under the UNCITRAL Model Law.

There are no specialised arbitration courts in Ghana; however, there are judges who specialise in arbitration law and are equipped to handle arbitration-related matters; hence, matters involving arbitration may be referred to them, although not exclusively. Ex-parte pre-arbitration interim reliefs may be granted in urgent cases, where the court deems it necessary for the purpose of preserving evidence or property. Unless, otherwise agreed by the parties, the arbitral tribunal must hold a case management conference within 14 days of being constituted.

In practice, the courts respect an arbitral tribunal's competence to rule on questions concerning its jurisdiction, although, the courts may review the decision of the arbitrators on an application made to it by a dissatisfied party, or in an application to set aside an arbitral award. In addition to the criteria listed in the New York Convention, an arbitral award may be annulled where the applicant satisfies the court that (a) the law applicable to the arbitration agreement is not valid; or (b) an arbitrator has an interest in the subject matter of arbitration which the arbitrator failed to disclose; or (c) the award was induced by fraud or corruption. An application to set aside an arbitral award may not be made after 3 months from the date on which the applicant received the award unless the court otherwise orders.

Leave must be sought from the High Court to enforce an arbitral award in the same manner as a judgment or order of the High Court. Ghanaian courts will not recognise or enforce a foreign arbitral award that has been annulled at the seat of arbitration or has an appeal pending against it in any court under the law applicable to the arbitration or if the court finds that the arbitration panel lacked substantive jurisdiction to make the award. A foreign arbitral award may also not be recognised or enforced if the court is not satisfied that (a) the arbitral award was made by a competent authority under the laws of the country in which the award was made; and (b) there is a reciprocal arrangement between Ghana and the country in which the award was made; or the award was made under the New York Convention or under any other international convention on arbitration ratified by the Ghanaian Parliament.

Where a party seeking to enforce a foreign arbitral award relies on a document that is not in the English Language, that party is required to produce a certified true translation of that document in English to the court. Further, the party seeking to enforce a foreign arbitral award must produce the original award and arbitration agreement or duly authenticated copies of both to the court. The copies must be authenticated in a manner prescribed by the law of the country in which it was made.

Notably, the 1996 Act allows for arbitral awards to be appealed to the English courts on a point of law, where the parties have not agreed otherwise – this is a peculiarity of the 1996 Act not reflected in the Model Law.

Date of arbitration law?	31 May 2010.
UNCITRAL Model Law? If so, any key changes thereto?	No. The ADR Act is not considered by UNCITRAL to be an enactment of the UNCITRAL Model Law. Part 1 of the Act is however, largely based on the UNCITRAL Model Law. Key differences include wider scope of application of the ADR Act, provisions on mediation and customary arbitration under the ADR Act, absence of express provisions restricting intervention of courts and empowerment of arbitral tribunals to subpoena witnesses.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No specialised courts on arbitration are available; however, there are judges capable of handling arbitration-related matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes, but only in urgent cases, where the court deems it necessary for the purpose of preserving evidence or property.
Courts' attitude towards the competence-competence principle?	The principle is recognised by the courts, but a decision on the jurisdiction of the arbitral tribunal may be reviewed by the courts on an application made to it by a dissatisfied party, or in an application to set aside an arbitral award.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Additional grounds include (i) where the law applicable to the arbitration agreement is not valid; (i) where an arbitrator fails to disclose his interest in the subject matter of arbitration; or (iii) the award was induced by fraud or corruption.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	An annulled foreign arbitral award (at the seat of the arbitration) will not be enforced by Ghanaian courts.

Other key points to note?

- Unless, otherwise agreed by the parties, an arbitral tribunal must hold a case management conference within 14 days of being constituted.
 - An application to set aside an arbitral award may not be made after 3 months from the date on which the applicant received the award unless the court otherwise orders.
 - In an application to recognise and enforce an arbitral award, documents that are not in English must be translated and certified before production in court. The original award and the arbitration agreement or validly authenticated copies of both must also be produced in court.
-

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law? If yes, what key modifications if any have been made to it? If no, what form does the arbitration law take?

Part 1 of the ADR Act is largely based on the UNCITRAL Model Law, but the entire Act is much broader in scope. As such, UNCITRAL does not consider the ADR Act to be an enactment of the UNCITRAL Model Law.¹ Key differences between the ADR Act and the UNCITRAL Model Law include:

- (a) the broad application of the ADR Act to both commercial and non-commercial matters, other than those considered to be non-arbitrable, whether domestic or international;²
- (b) provisions under the ADR Act on mediation and customary arbitration;³
- (c) the absence of any provision in the ADR Act that expressly limits the intrusiveness of the courts in arbitration. The ADR Act gives expansive powers to the court, under certain circumstances to intervene in the arbitral process;⁴
- (d) the power granted under the ADR Act to the arbitral tribunal to subpoena witnesses;
- (e) the modification by the ADR Act of Article 28(3) of the UNCITRAL Model Law which provides for the application of rules of equity subject to agreement by the parties and consent of the parties. Under the ADR Act, disputes may be resolved on the basis of the applicable substantive law as well as the rules of equity, that is, what the tribunal believes to be just and fair.⁵ Thus, the ADR Act eliminates the requirement to obtain the consent of the parties on the applicability of the rules of equity; and
- (f) the joint mandate given under the ADR Act to parties and arbitrators to determine the procedures and rules to be used for an arbitration.⁶ This is unlike the UNCITRAL Model Law which simply states that the parties are free to decide procedure. The inclusion of arbitrators under the Act in determining rules and procedure brings to question autonomy of the parties in dictating how the arbitral process is to be conducted.

1.2 When was the arbitration law last revised?

Since its coming into force on May 31, 2010, no amendments have been made to the ADR Act.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

Section 54 of the Courts Act, 1993 (Act 459) and section 48 (1) of the ADR Act, mandate Ghanaian courts to recognise and apply the system of law designated by the parties to an agreement as the governing law of the agreement. Under the ADR Act, where the parties fail to designate the governing law of the agreement,

¹ Ghana is not included in the list of countries, maintained by UNCITRAL, whose arbitration legislations are considered to be an enactment of the UNCITRAL Model Law. The list is available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

² Section 1 of the ADR Act.

³ Parts 2 and 3 of the ADR Act.

⁴ Sections 6, 7, 16 (3) (b), 18 and 19 of the ADR Act.

⁵ Section 50 of the ADR Act.

⁶ Section 5(2) of Alternative Dispute Resolution Act, 2010 (Act 798).

the court shall determine the governing law according to the conflict of laws rules it considers applicable.⁷ In practice, where the governing law is not expressly stated and cannot be inferred from the agreement, Ghanaian courts will apply the system of law with which the agreement has its closest and most real connection.⁸ Depending on the particular circumstances of the case, this may or may not be linked to the seat of the arbitration. The court will take into consideration all relevant factors such as where the contract was made, the parties to the contract and where the contract is to be executed in determining the governing law.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

The ADR Act provides that, unless otherwise agreed by the parties, an arbitration agreement which forms or is intended to form part of another agreement, shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid or did not come into existence or has become ineffective and shall for that purpose be treated as a distinct agreement.⁹ Thus, under the ADR Act, the arbitration clause or agreement is considered to be independent from the rest of the substantive contract.

Nevertheless, the Supreme Court in the case of *Attorney General v. Balkan Energy Ghana Ltd And 2 Ors.*¹⁰ took a contrary position in relation to the provision of the ADR Act and held *inter alia* as follows:

"An international commercial arbitration draws its life from the transaction whose dispute-resolution it deals with. We therefore have difficulty in conceiving of it as a transaction separate and independent from the transaction that has generated the dispute it is required to resolve."

In the opinion of the author, this decision of the Supreme Court is inconsistent with the provisions of the ADR Act relating to separability of the arbitration clause. Given the clear language of the ADR Act on the separability of an arbitration clause from the agreement which it is intended to form part of, the Supreme Court's decision in the *Balkan Energy* case can only, respectfully, be regarded as having been held per incuriam.

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

Under the ADR Act, an arbitration agreement shall not be enforced unless the following requirements are satisfied:

- the parties consent to the agreement;
- parties have legal capacity;
- the agreement is reduced into writing;¹¹ and
- the subject matter is arbitrable.

A provision to submit to arbitration can be in the form of:

- an arbitration clause in the agreement;
- a separate agreement;
- any other modern electronic means of communication; or
- an exchange of pleadings where an assertion of an arbitration agreement is not denied.

⁷ Section 48 (1), (2) and (3) of the ADR Act.

⁸ This principle was established in the Court of Appeal case of *Societe Generale de Compensation v Ackerman* (1972) 1 GLR 413.

⁹ Section 3 of the ADR Act.

¹⁰ *Attorney General v. Balkan Energy Ghana Ltd And 2 Ors.* [2012] 2 SCGLR 998.

¹¹ Section 2(3) of the ADR Act.

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

The ADR Act is silent on whether a third party to a contract can be bound by an arbitration agreement contained in a contract. Since the ADR Act only provides that parties to an arbitration agreement can resolve their dispute by arbitration, it implies that a person who is not a party to the arbitration agreement cannot generally be bound by the arbitration proceedings.¹² However, an exchange of e-mails or other electronic means of communication in which a third person agrees to be part of or bound by the arbitration agreement, is sufficient to join that person to the proceedings.¹³ On the other hand, by virtue of section 5 (1) of the Contracts Act, 1960 (Act 25), where a provision in a contract purports to confer a benefit on a person who is not a party to the contract, that provision may be enforced or relied on by that person as if the person was a party to the contract. It is therefore submitted that a third-party beneficiary to a contract should be able to enforce an arbitration agreement as if he is a party to that agreement, if the contract confers such a right on him.¹⁴

2.5 Are there restrictions to arbitrability? In the affirmative: Do these restrictions relate to specific domains (such as IP, Corporate law etc.)? Do these restrictions relate to specific persons (i.e. state entities, consumers)?

Yes, there are restrictions to arbitrability. Section 1 of the ADR Act provides that cannot be applied in matters relating to:¹⁵

- (a) the national or public interest;
- (b) the environment;
- (c) the enforcement and interpretation of the Constitution; or
- (d) any other matter that by law cannot be settled by an alternative dispute resolution method. This would include offences that are regarded as felonies under the criminal laws of Ghana.¹⁶

These matters, which fall outside the scope of the ADR Act in Ghana, do not relate to specific persons. The excluded matters are not defined under the ADR Act and therefore broad interpretations may be given to them to allow the government or other public authorities avoid arbitration agreements which they have entered into on the basis of "*national or public interest.*"

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute? If the place of the arbitration is inside of the jurisdiction? If the place of the arbitration is outside of the jurisdiction?

The ADR Act requires that the courts will stay proceedings if there is a valid arbitration agreement whether or not the place of arbitration is Ghana. Where there is an arbitration agreement and a party commences an action in court, the other party may, on notice to the party who commenced the action, apply to the court to refer the matter (or a part of the matter to which the arbitration agreement relates) to

¹² We are not aware of any case that directly deals with whether third parties to an arbitration agreement can be bound by its terms.

¹³ Section 2 of the ADR Act.

¹⁴ Section 5(1) of the Contracts Act provides that "*Any provision in a contract...which purports to confer a benefit on a person who is not a party to the contract, whether as a designated person or as a member of a class of persons, may, subject to the provisions of this Part, be enforced or relied upon by that person as though he were a party to the contract.*"

¹⁵ Relevant sector legislations do not contain a similar provision. However, Article 130 of the 1992 Constitution confers exclusive original jurisdiction on the Supreme Court to determine matters relating to the interpretation and enforcement of the Constitution. This implies that constitutional matters may only be resolved by the Supreme Court of Ghana and not any other judicial or arbitral authority.

¹⁶ Section 73 of the Courts Act.

arbitration.¹⁷ The court is required to stay proceedings and refer the matter to arbitration, if it satisfied that the matter is one in respect of which there is an arbitration agreement and the application for a stay of proceedings has been made; a court will not assume jurisdiction over matters which the parties have agreed to resolve by arbitration.

In the case of *BCM Ghana Limited v. Ashanti Goldfields Limited*,¹⁸ a case involving a contract with an arbitration clause, the Supreme Court stayed litigation giving effect to the parties' wishes as contained in their agreement. In *George Kodua v Interbeton B.V.* [H1/53/2004], the Court of Appeal outlined the broad principles to be applied by courts in determining an application for staying litigation that has been commenced in breach of an arbitration agreement. The court must consider:

- (a) whether there is an arbitration agreement;
- (b) whether the party applying for the stay of the court proceedings is a party to the arbitration agreement;
- (c) whether there are any legal proceedings between the parties;
- (d) whether the applicant has been served with copies of the legal proceedings;
- (e) whether the applicant has not taken any step before challenging the legal proceedings;
- (f) whether the party who commenced the legal action has been served with the application for stay of proceedings; and
- (g) whether the arbitration agreement is not null and void, inoperative or incapable of being performed.

3.2 How do courts treat injunctions by arbitrators enjoining parties to stay litigation proceedings?

The law does not empower arbitrators to issue injunctions enjoining courts to stay litigation proceedings. However, the courts will typically give effect to and respect the wishes of the parties as expressed in their agreement. As mentioned, the ADR Act allows a party to an arbitration agreement to make an application to the court to stay proceedings and the grant of such application, based on the principles established in the Interbeton case above, shall serve as a stay of proceedings in the court.¹⁹

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)

Ghanaian courts will intervene in arbitrations seated outside of Ghana where the dispute or contract which is subject to arbitration, falls outside the scope of matters that are arbitrable under the laws of Ghana or where approvals which are a pre-requisite to the execution of the contract have not been obtained by a party. The courts in Ghana have on a number of occasions intervened in agreements involving the Government of Ghana even where the parties chose that the arbitration to be conducted outside Ghana. Such agreements are those that require parliamentary approval under article 181 of the 1992 Constitution of Ghana by reason of them being an international business or economic transaction or loan agreement involving the government of Ghana.²⁰ In the case of *Attorney General v. Balkan Energy Ghana Ltd*,²¹ the Supreme Court intervened and nullified a contract between the government of Ghana and a private party under which the parties had agreed to hold the arbitration outside Ghana.

¹⁷ Sections 6(1) and 7(5) of the ADR Act.

¹⁸ *BCM Ghana Limited v. Ashanti Goldfields Limited* CAJ4/17/2005 judgment delivered on 24/5/2006. The reported facts of this case do not indicate whether it involved a reference to domestic or international arbitration. But the clear principle established in this case, which has been applied and/or cited with approval in subsequent cases, is that courts are required to enforce mandatory dispute resolution clauses in contracts as agreed by the parties.

¹⁹ Section 6(3) of the ADR Act.

²⁰ Article 181 (3) and (5) of the 1992 Constitution.

²¹ *Supra*, note 13.

Under the ADR Act, Ghanaian courts have the power to make orders for the preservation of evidence, preservation or protection of property and the grant of other interim reliefs, unless the parties agree otherwise.²²

4. Conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

Parties can retain outside counsel or be self-represented, unless the parties agree otherwise. If outside counsel is retained by a party, then unless a claim or an answer is filed by counsel, the party who he represents must notify the other party in writing at least 7 days before the arbitral proceedings commence, of the name and address of his appointed counsel.²³

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

Under the ADR Act, an arbitral award may be set aside by a court on the ground that an arbitrator has an interest in the subject matter of the arbitration which the arbitrator failed to disclose.²⁴ There is no requirement for the undisclosed circumstances to justify the outcome of the arbitration proceedings. The independence and impartiality of arbitrators are key to the arbitration proceedings, and hence, where there exist any circumstances likely to give reasonable cause to doubt an arbitrator's independence or impartiality, the arbitrator is required to make a prompt disclosure to the parties.²⁵ This is a continuing obligation that the arbitrator must satisfy from the inception of the case through to the end of the arbitration proceedings.

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of ad hoc arbitration)?

Under the ADR Act, parties are at liberty to determine the procedure to be followed in constituting an arbitral tribunal and may designate an appointing authority (which, in practice, may include a court) to appoint an arbitrator in the event of a failure of the agreed procedure.²⁶ The courts are also mandated to determine any application filed by a party challenging the appointment of an arbitrator by the other party.²⁷

4.4 Do courts have the power to issue interim measures in connection with arbitrations? If so, are they willing to consider *ex parte* requests?

The courts are mandated to issue interim measures on an application by a party, with notice to the other party and the arbitral tribunal, and with the arbitral tribunal's permission or the written agreement of the other party.²⁸ Interim measures may only be granted *ex parte* in urgent circumstances where the court deems it necessary for the purpose of preserving evidence or property.²⁹

4.5 Other than arbitrators' duty to be independent and impartial does the law regulate the conduct of the arbitration?

Yes, it does.

²² Section 39 of the ADR Act.

²³ Section 42 of the ADR Act.

²⁴ Section 58 (2) (f) of the ADR Act.

²⁵ Section 15 (4) of the ADR Act.

²⁶ Section 14 of the ADR Act.

²⁷ Section 16 (3) (b) of the ADR Act.

²⁸ Section 39 (2) of the ADR Act.

²⁹ Section 39 (2) of the ADR Act.

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

Yes. Under section 35 of the ADR Act, the arbitrator is required to ensure the confidentiality of the proceedings, unless the parties otherwise agree or a law otherwise provides. Additionally, section 49 (7) of the ADR Act provides that an arbitral award shall not be made public without the consent of the parties.

4.5.2 Does it regulate the length of arbitration proceedings?

No. The ADR Act only requires an arbitration management conference to be held within 14 days of the arbitral tribunal being constituted, unless the parties otherwise agree.³⁰ As part of the arbitration management conference, the parties and the tribunal shall determine, among other things, the dates, times and duration of the arbitration proceedings. The tribunal may hold further arbitration management conferences as and when necessary.

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

No. If not specified in the arbitration agreement, this is decided by the parties and the arbitral tribunal at the arbitration management conference(s) mentioned above.³¹

4.5.4 Does it allow for arbitrators to issue interim measures? In the affirmative, under what conditions?

Yes. The arbitral tribunal may upon a party's request grant any interim relief that the tribunal deems necessary for the purpose of protecting or preserving property. The tribunal may require the payment of costs by the party requesting the interim measure subject to its grant.³²

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?

Partly. Arbitrators are at liberty to determine what evidence to admit or exclude upon consideration of any objections made against its admission by a party.³³ However, they are required to take into consideration principles of legal privilege in determining the admissibility of any evidence.³⁴

4.5.6 Does it make it mandatory to hold a hearing?

It is not mandatory to hold an oral hearing. The ADR Act distinguishes between oral hearings and written hearings and provides that unless otherwise agreed by the parties, the arbitral tribunal shall determine whether to hold oral hearings for the presentation of evidence or for argument, or whether the proceedings should be conducted on the basis of documents and other materials.³⁵

4.5.7 Does it prescribe principles governing the awarding of interest?

No concrete principles are prescribed. However, the arbitral tribunal is generally mandated to award monetary reliefs at simple or compound interest in accordance with the contract and the applicable law.³⁶ The rate of interest must also be determined by the tribunal.³⁷

³⁰ Section 29 (1) of the ADR Act.

³¹ Section 29 (1) of the ADR Act.

³² Section 38 of the ADR Act.

³³ Section 35 (2) of the ADR Act.

³⁴ Section 35 (4) of the ADR Act.

³⁵ Section 34 (11) of the ADR Act.

³⁶ Section 48 (7) of the ADR Act.

³⁷ Section 49 (6) of the ADR Act.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

Yes. Unless otherwise agreed by the parties or a specific expense against a party is included in the award by the tribunal, the parties shall share liability for the arbitration costs equally.³⁸

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

Arbitrators are not liable for any act or omission in the discharge of their functions except where it can be shown that they have acted in bad faith. This immunity extends to an employee or agent of an arbitrator.³⁹ An arbitrator's immunity does not apply to liability arising out of deliberate wrong doing.⁴⁰

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

The ADR Act itself, does not specify criminal repercussions for any participant of an arbitration as a result of the acts or omissions of that participant under the arbitration proceedings. However, the Criminal and other Offences (Procedure) Act⁴¹ does not exempt any class of persons from liability if a criminal offence has been committed. Therefore, if any of the participants in an arbitration proceeding commits any act that constitutes an offence under the Criminal Offences Act⁴² or any other law of Ghana, they may be subject to criminal prosecution in Ghana, should the commission of such offence come to the knowledge of the appropriate law enforcement agencies.

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Yes, the parties can agree that no reasons should be provided by the arbitral tribunal.⁴³

5.2 Can parties waive the right to seek the annulment of the award? If yes, under what conditions?

The ADR Act does not mandate parties to waive their right to seek an annulment of the award. However, a party may not exercise the right to seek an annulment of an award after the expiration of 3 months from the date on which the party received the award, unless the court orders otherwise.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

The requirements for rendering a valid award under the ADR Act are not unusual. The arbitral tribunal, by a majority decision, must decide the dispute in accordance with the applicable law, taking due consideration of the terms of the contract and the chosen law of the parties, or principles of conflict of law in the absence of a clear choice of law by the parties. A monetary award is required to be made in the same currency as the contract, unless the tribunal decides that another currency is more appropriate. With regards to form, the parties are at liberty to agree on the form of the award. Where no such agreement exists, the award must be in writing, stating the date and place where it was made and the reasons for the award. It must be

³⁸ Section 55 of the ADR Act.

³⁹ Section 23 of ADR Act.

⁴⁰ Section 54 (1) of the ADR Act.

⁴¹ The Criminal and Other Offences (Procedure) Act, 1960 (Act 30).

⁴² The Criminal Offences Act, 1960 (Act 29).

⁴³ Section 49 (3) (c).

signed by all the arbitrators or a majority of the arbitrators stating the reasons for the omission of the signatures of the remaining arbitrator(s).⁴⁴

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)? If yes, what are the grounds for appeal?

No. An arbitral award is not subject to appeal under the ADR Act. Subject to parties' rights to seek an annulment on limited grounds, an arbitral award is final and binding as between the parties and their successors or assigns.⁴⁵

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there is a distinction to be made between local and foreign awards?

Local and foreign arbitral awards are enforced by the same procedure – through an application to the High Court for leave to enforce the arbitral award.⁴⁶ For a local arbitral award, leave shall be granted unless it is shown that the arbitral tribunal lacked jurisdiction to render the award.⁴⁷ A party that seeks to enforce a foreign arbitral award must however satisfy certain additional conditions. The party must satisfy the court that:

- (a) the award was made by a competent authority and under the laws of the country in which the award was made;
- (b) a reciprocal arrangement exists between the Republic of Ghana and the country in which the award was made or the award was made under the New York Convention or under any other international convention on arbitration ratified by the Parliament of Ghana;
- (c) the original award and the agreement pursuant to which the award was made or duly authenticated copies of both the award and the agreement have been produced to the court;⁴⁸ and
- (d) there is no appeal pending against the award in any court under the law applicable to the arbitration.⁴⁹

Leave shall be granted to enforce a foreign arbitral award if the above requirements are satisfied and there is no evidence that:

- (a) the award has been annulled in the seat of arbitration;
- (b) the party against whom it is invoked was given insufficient notice to enable the party present his case;
- (c) a party lacking legal capacity was not properly represented;
- (d) the award does not deal with the issues submitted to arbitration; or
- (e) the award contains a decision that is beyond the scope of matters submitted for the arbitration.⁵⁰

Should leave be granted to enforce a domestic or foreign arbitral award, judgment shall be entered in terms of the award and the award shall be enforced in the same manner as a judgment of the court.⁵¹ This implies the use of any of the execution processes permitted under the civil procedure rules of the High Court. An arbitral award made in respect of an agreement not under seal is time-barred after 6 years from the date on which the award became enforceable, and no action may thereafter be brought by a party to

⁴⁴ Section 49 of the ADR Act.

⁴⁵ Section 52 of ADR Act.

⁴⁶ Section 57 (1) of the ADR Act.

⁴⁷ Section 57 (3) of the ADR Act.

⁴⁸ If a party relies on any document that is in a foreign language, an English translated copy, duly certified, must also be provided to the court.

⁴⁹ Section 59 (1) of the ADR Act.

⁵⁰ Section 59 (3) of the ADR Act.

⁵¹ Section 57 (2) of the ADR Act.

enforce the award.⁵² In respect of an arbitration agreement made under seal,⁵³ no action to enforce the award may be brought after 12 years from the date on which the award became enforceable.⁵⁴

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

Under the ADR Act, leave to enforce an arbitral award shall be granted if the court is satisfied that there is no appeal pending against the award and that the award has not been annulled.⁵⁵ Given that annulled arbitral awards are not enforceable, it stands to reason, that where annulment or appeal proceedings have been initiated by a party, the court will not grant leave for the award to be enforced until the annulment or proceedings are determined.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Yes. Ghanaian courts will not enforce a foreign arbitral award that has been annulled or appealed at the seat of arbitration.⁵⁶

5.8 Are foreign awards readily enforceable in practice?

In practice, foreign arbitral awards that meet the criteria set out under section 59 of the ADR Act are recognised and readily enforceable. The procedure for enforcing a foreign arbitral award is the same, regardless of whether the party seeking to enforce it relies on the New York Convention or a reciprocal arrangement with Ghana. Ghanaian courts will determine whether the basis for granting leave, as set out in section 59 of the ADR Act have been met and once such leave is granted, the award is enforceable in the same manner as an ordinary judgment of the high court.

5.9 Funding arrangements - Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction? If so, what is the practical and/or legal impact of such restrictions?

No. The ADR Act does not restrict the use of contingency or alternative fee arrangements or third-party funding.

5.10 Is there likely to be any significant reform of the arbitration law in the near future?

No, this is not likely. No proposals for reform of the ADR Act have as yet been made.

⁵² Section 4(1)(e) of the Limitations Act, 1972 (NRCD 54), available at: <http://laws.ghanalegal.com/acts/id/374#>.

⁵³ Unlike a simple contract, a contract made under seal, is a specialty contract executed as a deed and for which no consideration is required.

⁵⁴ Section 5 (1) (b) of Limitations Act, supra.

⁵⁵ Sections 59 (1) (e) and 59 (3) of the ADR Act.

⁵⁶ Section 59 (3) of ADR Act.

GUINEA

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

JOËL SANON, DJENABOU BARRY ET MARIAMA TIGUIDANKÉ SOW
OF THIAM & ASSOCIÉS



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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS

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VERSION: 16 JUNE 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

The Republic of Guinea is a member of the Organization for the Harmonization of Business Law in Africa (“OHADA”). OHADA provides for a uniform system of business law directly applicable in its Member States through “Uniform Acts” (Uniform Acts are sets of material rules adopted to regulate a specific legal field (i.e., commercial contracts) which are designed to apply in all OHADA States once they have been adopted by the OHADA’s Council of Ministers). There are currently ten Uniform Acts, all largely inspired by French law, covering matters such as corporate law, securities, bankruptcy and arbitration. The Uniform Act on Arbitration sets out the basic rules applicable to arbitrations having their seat in an OHADA Member State.

Parties seeking to arbitrate under OHADA may choose between ad hoc arbitration under the Uniform Act on arbitration, and institutional arbitration according to the Arbitration Rules of the Common Court of Justice and Arbitration (“CCJA”), located in Abidjan (Ivory Coast), which is the key place for arbitration hearings. CCJA also serves as OHADA supra-national court to enforce uniformity in judgements and recognition of process and can be seized as a last resort.

In addition, since August 17, 1998, the Republic of Guinea benefits from its own national arbitration institution, namely the Chamber of Arbitration of Republic of Guinea (“CAG”), located in Conakry.

Given that the Republic of Guinea is a member of OHADA, *ad hoc* arbitrations are governed by the Uniform Act on Arbitration. Until recently, all OHADA arbitrations were governed by the Uniform Act on Arbitration of March 11th, 1999 (“Uniform Act on Arbitration”). The Uniform Act on Arbitration is based on a combination of the UNCITRAL Model Law of June 1985, the French Code of Civil Procedure, and the Arbitration Rules of the International Chamber of Commerce of 1988. It was last amended on November 23rd, 2017 (the “Revised Arbitration Act”). The Revised Arbitration Act entered into force on March 15, 2018 and shall apply to all arbitrations commenced after that date.

Key places of arbitration in the jurisdiction	Conakry.
Civil law / Common law environment?	Civil law.
Confidentiality of arbitrations?	<p>There are no provisions prescribing confidentiality of arbitrations under Guinean law. Parties wishing their arbitrations to be confidential should therefore expressly so provide in their underlying agreement. This provision will bind the parties, counsels and arbitrators.</p> <p>Article 6 of the Guinean Arbitration Rules provides that the arbitration procedure is confidential. The confidentiality extends to any person participating to the procedure and the arbitral awards cannot be published without consent of all the parties to the arbitration procedure.</p>
Requirement to retain (local) counsel?	<p>There are no provisions relating to the choice of counsel concerning <i>ad hoc</i> arbitrations. Nor are there specific provisions in the CCJA Arbitration Rules. As a consequence, it is possible for the parties to retain outside counsel or to be self-represented.</p> <p>Article 19 of the Guinean Arbitration Rules provides that the parties can retain any counsel of their choice, subject to the communication of the names and addresses of said counsel(s) to the opposing party and to the Secretariat of the Chamber of</p>

	Arbitration of Guinea. Given that there is no provision to the contrary, the parties may represent themselves.
Ability to present party employee witness testimony?	Article 21-4 of the Guinean Arbitration Rules provides that the arbitral tribunal can decide to hear witnesses, party-appointed experts, or any other person, in the presence or absence of the parties. Given this, it seems possible to produce party employee witness testimony.
Ability to hold meetings and/or hearings outside of the seat?	<p>There are no provisions relating to this subject-matter, neither for for <i>ad hoc</i> arbitrations, nor in the Guinean Arbitration Rules. However, we understand that it may be possible to hold meetings outside the seat of arbitration, with the agreement of all parties to the arbitration procedure.</p> <p>Pursuant to Article 13 of the CCJA Arbitration Rules, an arbitrator acting under the CCJA Arbitration Rules may decide to hold meetings outside the seat of the arbitration, after consulting the parties.</p>
Availability of interest as a remedy?	There is no specific provision relating to the awarding of interests as a remedy.
Ability to claim for reasonable costs incurred for the arbitration?	There is no specific provision relating to the allocation of costs.
Restrictions regarding contingency fee arrangements and/or third-party funding?	To the best of our knowledge, there are no restrictions in Guinea regarding contingency fee arrangements and/or third-party funding.
Party to the New York Convention?	Yes. The Republic of Guinea is party to the NY Convention following its ratification on 23 January 1991. The NY convention entered into force on 23 April 1991.
Other key points to note	
WJP Civil Justice score (2018)	N.A.

ARBITRATION PRACTITIONER SUMMARY

Date of arbitration law?	The OHADA Uniform Act on Arbitration was adopted on 11 March 1999, and last amended on 23 November 2017.
UNCITRAL Model Law? If so, any key changes thereto?	The Uniform Act on Arbitration is modelled after the UNCITRAL Model Law.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	There is no specialised court or judge for the handling of arbitration-related issues.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes.
Courts' attitude towards the competence-competence principle?	<p>Article 13 of the OHADA Edited Arbitration Act provides that Courts may declare themselves incompetent where there is an arbitration agreement, whether an arbitration tribunal has been seized or not, unless the arbitration agreement is manifestly void or manifestly inapplicable. In addition, the Court has to rule on this matter within a 15-day time limit. As a result, Guinean Courts have an obligation to apply this principle.</p> <p>Guinean Courts recognise the competence-competence principle (article 5-4 of the Guinean Arbitration Rules).</p>
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The only difference between the New York Convention and the Edited Arbitration Act, the CCJA Arbitration Rules and the Guinean Arbitration Rules is that the last three texts provide that an action for a nullity of the award is only admissible if the award has breached a rule of international public policy, while the New York Convention refers to the breach of a rule of national public policy.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	To the best of our knowledge, no decision has been rendered in relation to this subject-matter by Guinean Courts or by the Common Court of Justice and Arbitration. However, in light of the position under French law, it seems that Guinean courts, when confronted to this situation, would likely decide to recognize and enforce foreign awards annulled at the seat of the arbitration.
Other key points to note?	∅

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

As a former French colony, the Republic of Guinea's legal environment largely derives from civil law.

Given that the Republic of Guinea is a member of OHADA, *ad hoc* arbitrations are governed by the Uniform Act on Arbitration. Until recently, all OHADA arbitrations were governed by the Uniform Act on Arbitration of March 11th, 1999 ("**Uniform Act on Arbitration**"). The Uniform Act on Arbitration is based on a combination of the UNCITRAL Model Law of June 1985, the French Code of Civil Procedure, and the Arbitration Rules of the International Chamber of Commerce of 1988. It was last amended on 23 November 2017 (the "**Revised Arbitration Act**"). The Revised Arbitration Act entered into force on 15 March 2018 and shall apply to all arbitrations commenced after that date.

Institutional arbitrations in the Republic of Guinea are usually governed by:

- the Arbitration Rules of CCJA, as amended on November 23rd, 2017 (the "**CCJA Arbitration Rules**"); and
- Decree N°A/2016/033/MJ/CAB/16 dated February 8th, 2016, relating to the Arbitration Rules of the Chamber of Arbitration of Guinea (the "**Guinean Arbitration Rules**"). Guinea Arbitration Rules are largely based on the CCJA Arbitration Rules (which is itself derived from the UNCITRAL Model law, as abovementioned).

Finally, it is noteworthy that the Republic of Guinea ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, of March 18, 1965, and the Rules of Procedure for Arbitration Proceedings may apply when the conditions set forth by the relevant legal instrument are met. The Republic of Guinea has also ratified all texts from the United Nations Commission on International Trade Law (UNCITRAL) relating to arbitration, including:

- the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the "Mauritius Convention on Transparency"); and
- the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention").

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

Pursuant to Article 4 of the Revised Arbitration Act, the arbitration agreement is independent from the rest of the contract in which it is set forth. Its validity shall not be affected by the nullity of the underlying contract and shall be determined by reference to the intention of the Parties without the need to refer to a state law. Parties always have the possibility to resort to arbitration even when proceedings have already been initiated in a state court.

The Guinean Arbitration Rules contain no provisions relating to the law governing the arbitration agreement. Indeed, the Guinean Arbitration Rules only refers to the law governing the merits of the dispute. Thus, article 24 of the Guinean Arbitration Rules provides that in a domestic arbitration, the Guinean and OHADA Laws in force shall govern the dispute. In an international arbitration, the arbitrator shall apply the law on which the Parties have agreed, and where the parties have made no such choice, the arbitrator shall determine the dispute on the basis of the laws that it deems appropriate, while taking into consideration the provisions of the relevant agreement and international trade practice.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Pursuant to Article 4 of the Revised Arbitration Act, the arbitration agreement is independent from the rest of the contract in which it is set forth. Its validity shall not be affected by the nullity of the underlying contract and shall be determined by reference to the intention of the Parties without the need to refer to a state law.

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

According to Article 3-1(4) of the Revised Arbitration Act, the arbitration agreement must be made in writing or by any other means that may be used to prove its existence and contents, in particular by reference to a document stipulating it.

There are no other formal requirements for an enforceable arbitration agreement.

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

A third-party can only be bound by an arbitration agreement to the extent that it has agreed to the arbitration agreement (Article 659 of the Guinean Civil Code relating to the concept of "*stipulation pour autrui*").

2.5 Are there restrictions to arbitrability? In the affirmative:

2.5.1 Do these restrictions relate to specific domains (such as IP, corporate law etc.)?

Certain subject-matters cannot be referred to arbitration:

- people's status and family law, given that it is impossible for parties to resort to arbitration for marriage, divorce, or paternity suits. However, the financial consequences relating to the people's status, such as maintenance obligation or quota of the maintenance allowance, can be subject to arbitration;
- criminal matters are not arbitrable. However, the monetary compensation owed to the victim of a criminal offence recognized in a judgment of a criminal court can be subject to arbitration; and

2.5.2 Do these restrictions relate to specific persons (i.e. State entities, consumers etc.)?

Disputes related to the powers of a public authority, and specifically, the validity of a right or a situation arising from a decision of a public authority, may not be subject to arbitration.

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

Article 13 of the Revised Arbitration Act provides that courts may declare themselves incompetent where there is an arbitration agreement, whether an arbitration tribunal has been seized or not, unless the arbitration agreement is manifestly void or manifestly inapplicable. In addition, the Court has to rule on this matter within a 15-day time limit. As a result, Guinean Courts have an obligation to apply this principle.

In practice, Guinean courts will stay litigation if there is a valid arbitration agreement covering the dispute.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

In the presence of a valid arbitration agreement, Guinean courts generally welcome favourably injunctions by arbitrators enjoining them to stay litigation proceedings.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)

Generally, Guinean courts intervene only in relation to matters of jurisdiction, provisional measures and enforcement of awards.

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

The Revised Arbitration Act does not contain any provision relating to the choice of counsel. Therefore, it is possible for the parties to retain outside counsel or to be self-represented.

Noteworthy, Article 19 of the Guinean Arbitration Rules provides that the parties can retain any counsel of their choice, subject to the communication of the names and addresses of said counsel(s) to the opposing party and to the Secretariat of the Chamber of Arbitration of Guinea. Given that there is no provision to the contrary, the parties may represent themselves.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

As a general rule, any presumed arbitrator shall inform the parties of any circumstance likely to create in their mind a legitimate doubt as to his independence and impartiality and may accept his mission only with their unanimous and written consent (Article 7 of the Revised Arbitration Act).

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of ad hoc arbitration)?

Pursuant to Article 6 of the Revised Arbitration Act, Courts intervene to assist in the constitution of the arbitration tribunal when the parties failed to appoint the members of the arbitral Tribunal, and in the event that an appointment is required because of recusal, incapacity, death, resignation or dismissal of an arbitrator.

4.4 Do courts have the power to issue interim measures in connection with arbitrations?

Pursuant to Article 13 of the Revised Arbitration Act, domestic courts may, in cases of urgency and pursuant to a reasoned decision, or when a measure shall have to be enforced in a non-member State of OHADA, order interim measures as long as the measures do not require examining the merits of the claim, for which only the arbitration tribunal is competent.

Article 14 of the Revised Arbitration Act provides the possibility for the arbitral tribunal, upon the request of one of the parties, to issue interim or protective measures, excluding assets seizures and judicial guarantees, which remain the exclusive competence of State court jurisdictions (the first-degree judges and mainly the President of the court intervening in matters of interim).

Pursuant to Article 20 of the Guinean Arbitrations Rules, any party can, before the transmission of the file to the arbitration tribunal, ask the competent State judicial authority to order interim measures.

In practice, as the interim measures rendered by the arbitral tribunal are subject to *exequatur*, it is recommended to the parties to apply directly to the State judge who, despite referral to the arbitral tribunal, may still intervene to order provisional or protective measures, provided that the said measures do not deal with the merits of the case.

In case of emergency, the state judge may order provisional measures before the arbitral tribunal is seized. For instance, the court may take precautionary measures such as seizures or even the sale of seized articles

when they are perishable, in which case the sale price will be sequestrated (other measure) or measures to preserve the means of evidence, like ordering expertise etc.

The available provisional measures are the ones provided by the Uniform Act Organizing Simplified Recovery Procedures and Measures of Execution (such as preventive seizure, seizure for sale, seizure-award, etc.) and the Code of Civil, Economic and Administrative Procedure of the Republic of Guinea.

Interim measures are also permitted under the CCJA Arbitration Rules.

4.4.1 If so, are they willing to consider *ex parte* requests?

Yes, in practice, Guinean courts are willing to consider *ex parte* requests.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

There are no provisions prescribing confidentiality of arbitrations under Guinean law. Parties wishing their *ad hoc* arbitrations to be confidential should therefore expressly so provide in their underlying agreement. This provision will bind the parties, counsels and arbitrators.

By contrast, institutional arbitrations are confidential, as provided for in Article 14 of the CCJA Arbitration Rules and Article 6 of the Guinean Arbitration rules.

4.5.2 Does it regulate the length of arbitration proceedings?

Article 12 of the Revised Arbitration Act provides that if the arbitration agreement does not provide for a time limit for the arbitration, the assignment of the arbitrators may not exceed six months as from the date when the last of them accepted the assignment. However, the legal or agreed duration may be extended either by agreement of the parties, upon request by one of the parties or by the arbitration tribunal, or by the competent judge in the Member State.

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

There are no provisions relating to this subject matter in the Revised Arbitration Act. The Guinean Arbitration Rules does not contain such rule either. However, we understand that it may be possible to hold meetings outside the seat of arbitration, with the agreement of all parties to the arbitration procedure.

4.5.4 Does it allow for arbitrators to issue interim measures?

With respect to interim measures, Article 14 of the Revised Arbitration Act provides the possibility for the arbitral tribunal, upon request of one of the parties, to issue interim or protective measures, to the exclusion of good seizures and judicial guarantees.

The CCJA Arbitration Rules and the Guinean Arbitration Rules contain specific provisions as to interim measures.

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence?

The Revised Arbitration Act contains no specific provision related to the admission or exclusion of evidence.

4.5.6 Does it make it mandatory to hold a hearing?

The Revised Arbitration Act contains no specific provision related to the obligation to hold a hearing.

4.5.7 Does it prescribe principles governing the awarding of interest?

The Revised Arbitration Act contains no specific provision related to the awarding of interest.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

The Revised Arbitration Act contains no specific provision related to the allocation of arbitration costs.

4.6 Liability

The Revised Arbitration Act does not provide for liability of arbitrators. As a result, parties are free to determine whether the arbitrators may be held liable in the exercise of their mission.

Pending a judicial decision in the OHADA on this matter, the default position should be that arbitrators are protected from civil liability in the normal exercise of their powers because functional immunity is the principle governing the exercise of jurisdictional powers. However, given that no case law exists yet, to the best of our knowledge, arbitrators would be well advised to provide in their contract of arbitration, elective terms of liability or to subscribe insurance against their potential civil law suit and liability.

There is no provision relating to the liability of arbitrations in the Guinean Arbitration Rules. In the absence of provisions, we understand that, as is the case for ad hoc arbitrations, there is a possibility of a choice between responsibility or irresponsibility of the arbitrators in the exercise of their mission.

Finally, specific provisions apply in respect of CCJA arbitrations.

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

No, neither the Revised Arbitration Act, the CCJA Arbitration Rules, nor the Guinean Arbitration Rules allow parties to waive the requirement for an award to provide reasons.

5.2 Can parties waive the right to seek the annulment of the award?

Under article 25(3) of the Revised Arbitration Act, the parties may expressly waive the right to file an application to set aside, save where this waiver is contrary to international public policy.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

There are no atypical mandatory requirements applying to the rendering of a valid award rendered in the jurisdiction.

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

Article 25 of the Revised Arbitration Act provides that the arbitration award cannot be appealed. The same rule applies to institutional arbitrations.

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

As a preliminary remark, it is important to point out that, on the basis of Article 34 of the Revised Arbitration Act, enforcement and execution of foreign awards intervene under the same conditions as those provided for local awards.

Article 30 of the Revised Arbitration Act provides that the award can only be subject to mandatory enforcement by virtue of an *exequatur* awarded by the competent judge in the Member State.

Furthermore, Article 31 of the Revised Arbitration Act provides that the recognition and *exequatur* of the award requires that the party wishing to rely on it establishes the existence of the award, in particular, by the production of the original award accompanied by the arbitration agreement or copies of these documents satisfying the conditions required for their authenticity. When the documents are not written in French, the

party shall produce a translation certified by a translator registered on the list of experts established by the competent court. The competent court must render its decision within fifteen days from the date on which it has been seized. At the expiration of this time limit, and absent any decision by the court, the *exequatur* shall be considered granted. When the *exequatur* is granted, one of the party seizes the clerk or the competent authority of the Member State so that they will affix the *exequatur* mention over the decision.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

Article 28 of the Revised Arbitration Act provides that except where the provisional enforcement of the award has been ordered by the arbitration Tribunal, the enforcement of the award shall be stayed until such time that the competent judge in the Member State has ruled on the setting aside application.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

In France, a jurisdiction on which Guinean law is based, the French *Cour de cassation* held, in the famous *Norsolor*,¹ *Hilmarton*,² and *Putrabali*³ cases, that French courts may recognise and enforce foreign awards in spite of their having been annulled by the courts at the seat of the arbitration.

To the best of our knowledge, no decision has been rendered by Guinean courts in relation to this subject-matter. However, in light of the position under French law, it seems that Guinean courts, when confronted to this situation, would likely decide to recognise and enforce foreign awards annulled at the seat of the arbitration.

5.8 Are foreign awards readily enforceable in practice?

It depends on the quality of the parties involved. When a State body/party is involved, foreign awards may not be readily enforceable in practice. Otherwise, in any other cases, foreign awards are readily enforceable.

6. Funding arrangements

6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

To the best of our knowledge, there are no restrictions in Guinea regarding contingency fee arrangements and/or third-party funding.

7. Is there likely to be any significant reform of the arbitration law in the near future?

Given that the Revised Arbitration Act just recently entered into force (on 15 March 2018), we do not expect any significant other reform of arbitration law at the OHADA level in the near future.

The situation is the same regarding the Guinean Arbitration Rules, which is also relatively recent, resulting from the Decree N°A/2016/033/MJ/CAB/16 dated February 8th, 2016.

¹ Société Pablak Ticaret Limited Sirketi v. Norsolor S.A., French Cour de Cassation, 9 November 1984 (Arrêt n° 730).

² Société Hilmarton Ltd. v. Société Omnium de Traitement et de Valorisation (OTV), French Cour de Cassation, 23 March 1994 (Arrêt n° 484 P).

³ Société PT Putrabali Adyamulia v. Société Rena Holding et Société Moguntia Est Epices, French Cour de Cassation, 29 June 2007 (Arrêt n° 1021 FP-P+B+I).

ICELAND

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

GARÐAR VÍÐIR GUNNARSSON
OF LEX



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JURISDICTION INDICATIVE TRAFFIC LIGHTS

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VERSION: 23 MAY 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

The Icelandic Arbitration Act (“IAA”) entered into force in 1 January 1990. The Act’s sources of inspiration was the arbitration law of neighbouring jurisdictions, *i.e.* the Norwegian, Danish and Swedish arbitration acts in force at the time as well as the original 1985 version of the UNCITRAL Model Law. Legal practitioners as well as users of arbitration have in recent years been calling for a comprehensive reform of the legal framework of arbitration in Iceland, this is corollary to the increased interest in arbitration as a dispute resolution mechanism in recent years. Thus, it is likely that a comprehensive legislative reform (based on the UNCITRAL Model Law) modernizing the legal framework for arbitration in Iceland is due in the near future.

Key places of arbitration in the jurisdiction	Reykjavik
Civil law / Common law environment?	Civil law
Confidentiality of arbitrations?	Not addressed in the IAA but there is an underlying assumption and expectation of confidentiality
Requirement to retain (local) counsel?	Not required
Ability to present party employee witness testimony?	Permitted
Ability to hold meetings and/or hearings outside of the seat?	Permitted, unless the parties agreed otherwise
Availability of interest as a remedy?	The IAA does not prescribe any principles on awarding interest. This matter is generally regarded as a part of substantive law.
Ability to claim for reasonable costs incurred for the arbitration?	According to IAA the Arbitral Tribunal has discretion to allocate the arbitration costs as it deems appropriate.
Restrictions regarding contingency fee arrangements and/or third-party funding?	The IAA is silent on contingent fees, alternative fee arrangements and third-party funding. It should be noted that the Act on Professional Attorneys specifically permits contingent fees.
Party to the New York Convention?	Yes, since 2002.
Other key points to note	Comprehensive legislative reform modernizing the legal framework for arbitration in Iceland is expected in the near future.
WJP Civil Justice score (2018)	ϕ

ARBITRATION PRACTITIONER SUMMARY

Date of arbitration law?	1 January 1990
UNCITRAL Model Law? If so, any key changes thereto?	No. The original 1985 version of the UNCITRAL Model law was one of the sources of inspiration of the IAA. However, the text of the IAA cannot be described as an UNCITRAL Model Law one. The IAA does not address the competence of the tribunal to rule on its own jurisdiction, nor interim measures. The requirements of independence and impartiality of arbitrators are included therein with reference only to the Act on Civil Procedure. The IAA only provides for setting aside procedures to challenge an award and does not specifically address grounds to refuse recognition and enforcement.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No, arbitration-related matters fall within the jurisdiction of the District Courts in the first instance and the High Court, which is the second instance appellate court.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes. A request for an interim measure is usually addressed to the District Commissioner (enforcement and administrative body) and subject to subsequent judicial review. The District Commissioner will consider <i>ex parte</i> requests taking into account the need for urgency of the requested interim measure and several other factors.
Courts' attitude towards the competence-competence principle?	The IAA does not address the competence of the Arbitral Tribunal to rule on its own jurisdiction. Yet, the domestic courts recognise the fact that the IAA was inspired by international texts and the courts generally have a positive disposition towards arbitration, including the competence-competence principle.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The IAA only provides for ground to have an award set-aside which also apply for recognition and enforcement proceedings. Article 12 of IAA exhaustively lists the grounds for having an award set-aside. Article 12(1)(6) allows <i>inter alia</i> for setting aside if the award is founded on unlawful grounds. It is not entirely clear from the drafting history of the IAA what this term "unlawful grounds" entails. The domestic courts have, however, been reluctant to set aside arbitral awards.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The IAA is silent on this issue. This issue has not been addressed by the domestic courts.
Other key points to note (significant idiosyncrasies not covered elsewhere)?	The standard of arbitrators' independence and impartiality under the IAA derives from a reference to the Act on Civil Procedure making this issue inaccessible for international users of arbitration in Iceland. The Act does not differentiate between setting aside procedures

on the one hand and the recognition and enforcement procedures on the other and there are no time limits to commence setting aside proceedings.

JURISDICTION DETAILED ANALYSIS

1. The legal framework of arbitration in Iceland

The Icelandic Arbitration Act No 53/1989 (the “**Act**”), which entered into force on 1 January 1990, was the first comprehensive legislation that addressed arbitration in Iceland. Prior to its enactment, Icelandic law contained only one provision (found in Danish legislation from 1687) that dealt indirectly with arbitration.¹ As stated in the *travaux préparatoires*, the Act’s source of inspiration was sought in the arbitration laws of neighbouring jurisdictions, i.e., the Norwegian, Danish, and Swedish Arbitration Acts in force in 1989 when the Act was drafted, as well as the original 1985 version of the UNCITRAL Model Law on International Commercial Arbitration (the “**UNCITRAL Model Law**”).² Even though the 1985 version of the UNCITRAL Model Law was one of the sources of inspiration at the time the Act was drafted, the Act does not bear any resemblance to the UNCITRAL Model Law. Accordingly, Iceland cannot in any way be described as a UNCITRAL Model Law jurisdiction.

Regardless of the fact that the first comprehensive legislation on arbitration was only enacted in 1990, arbitration as means of resolving disputes in Iceland can be traced back to the era of the Icelandic Commonwealth, as early as the eleventh century.³ It is, thus, clear that arbitration, in one form or another, has long been part of Icelandic’s legal and cultural history as means of resolving disputes without resorting to arms.⁴

The Act governs both domestic and international arbitration in Iceland and consists of 15 Articles, which can be divided into four sections. The first section deals with the arbitration agreement, the second section with the qualifications, independence and impartiality of arbitrators, the third section addresses the arbitral procedure and procedural issues, and the fourth section deals with the award and the recognition and enforcement of awards. As can be expected, given the Act’s brevity, there are various issues that are not addressed in as much detail as in the UNCITRAL Model Law, or even not addressed at all. For example the Act does not address the competence of the tribunal to rule on its own jurisdiction, nor interim measures. Furthermore, the provisions regarding the independence and impartiality of arbitrators and the challenge and replacement procedure are not as detailed as in the UNCITRAL Model Law and the Act does not differentiate between setting aside procedures on the one hand and the recognition and enforcement procedures on the other. The Act is complemented by the accompanying *travaux préparatoires*, and some useful, albeit limited, case law of the Supreme Court of Iceland.⁵ Generally, Icelandic courts attribute high interpretative value to the *travaux préparatoires* and this is the same when the courts have to resolve arbitration, as case law demonstrates.⁶

¹ The Norwegian Law of Christian V. from 15 April 1687, Chapter 6. See, also, V. Sigurðsson, *Um samningsbundna, gerðardóma*, Tímarit lögfræðinga, Volume 40, year 1990, No 1, pp. 28-37, at pp. 28-29; and S. Stefánsson, *Um samningsbundna gerðardóma*, Tímarit lögfræðinga, Volume 40, year 1990, No 1, 38-50, at pp. 38-39, and P. Sigurðsson, *Verksamningar*, Bókaútgáfa Orators (1991), at p. 295.

² Commentary on the bill on Contractual Arbitration, 111th Legislative Session 1988-89, parliamentary document No 619, parliamentary item No 342, at general comments.

³ F. Madsen, *Commercial Arbitration in Sweden*, Oxford University Press, 2007, at p. 17. Moreover, the decision of the chieftain Thorgeir Ljosvetningagodi at the Althing in the year 1000, which provided for the peaceful conversion of Icelanders to Christianity, bears a resemblance to arbitration. See G. Gunnarsson, “Iceland”, in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at pp. 2-3.

⁴ W. Miller, *Bloodtaking and Peacemaking – Feud, Law and Society in Saga Iceland*, the University of Chicago Press, 1990, Chapter 8, “Peacemaking and Arbitration”, at pp. 259-300; J. Jochens, “Late and peaceful: Iceland’s conversion through arbitration in 1000”, *Speculum a Journal of Medieval Studies*, 1999, pp. 621-655, at p. 623; F. Madsen, *Commercial Arbitration in Sweden*, Oxford University Press, 2007, at p. 17; and J. Byock, *Feud in the Icelandic Saga*, University of California Press, 1982, at p. 99.

⁵ H. Larusson, and G. Gunnarsson, “Icelandia (Iceland)” in *Arbitraje Comercial Internacional en Europa*, Mario Castillo Freyre, 2013, pp. 741-759, at p. 743.

⁶ Supreme Court of Iceland, Case No 433/2006 of 29 March 2007.

Iceland ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the “New York Convention”) in January 2002 without reservations and it entered into force on 24 April 2002.⁷ Iceland has also ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, D.C., 1965) (the “Washington Convention” or “ICSID Convention”), which entered into force in Iceland on 14 October 1966.⁸

The Act has been revised on two occasions. First, in 2002 following Iceland’s ratification of the New York Convention. Second, in 2016 which was purely a formalistic amendment as a result from changes made to the judiciary in Iceland introducing a new appellate instances. As a result the reference to the Supreme Court in the Act was replaced with a reference to the newly established High Court, which commenced operations on 1 January 2018, regarding some issues where the assistance of the domestic courts may be sought. As is evident from the above, Iceland did not adopt the 2006 amendments made to the UNCITRAL Model Law.

2. The arbitration agreement

2.1 Law applicable to the arbitration agreement – mandatory provisions

The Act does not directly address the issue of the law governing the arbitration agreement. According to Article 1(1) of the Act, it is applicable to arbitral proceedings taking place in Iceland. Accordingly, the mandatory provisions of the Act, such as due process, would be applicable for an arbitral proceeding where the place of arbitration is Iceland, even though the substantive dispute in question is governed by a different substantive law. Moreover, the Act applies if parties to an arbitration taking place in Iceland require the assistance of the domestic courts.

With respect to the capacity of the parties to enter into arbitration, the domestic courts shall examine the validity of arbitration agreements with reference to the capacity of the parties pursuant to the law applicable to them.

Thus, arbitral tribunal sitting in Iceland and domestic courts alike are bound by the mandatory provisions of the Act and if there is a choice of law provision in the arbitration agreement itself, the judges or arbitrators should use their best endeavours to enforce the parties’ intention. However, in the absence of such a choice of law clause in the arbitration agreement, the judges or arbitrators will use the conflict of law rules they deem appropriate to reach a conclusion on the law governing the arbitration agreement.

2.2 Separability of the main contract and the arbitration agreement

Although arbitration practitioners in Iceland are in agreement that the arbitration agreement is separable from the rest of the contract in which it is set forth, the Act does not provide expressly for the doctrine of separability and the issue has not been addressed by the domestic courts. Yet, the domestic courts recognise the fact that the Act was inspired by international texts such as the UNCITRAL Model Law and that these texts have an important interpretative value.⁹ Also, the legislator in other acts recognised the autonomous nature of dispute resolution clauses¹⁰ and the Act recognises the authority of the arbitral tribunal to determine the validity of the arbitration agreement.¹¹ Accordingly, should the issue arise, the domestic courts will presumably confirm the separability of the arbitration agreement.

⁷ Icelandic Law and Ministerial Gazette, C-/2002.

⁸ Icelandic Law and Ministerial Gazette, C-13/1966.

⁹ Supreme Court of Iceland, Case No 433/2006 of 29 March 2007.

¹⁰ G. Gunnarsson, “Iceland”, in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at p. 27, and Commentary on the bill on Consumer Contracts, 128th Legislative Session 2002-2003, parliamentary document No 904, parliamentary item No 556, commentary on section 49.

¹¹ Commentary on the bill on Contractual Arbitration, 111th Legislative Session 1988-89, parliamentary document No 619, parliamentary item No 342, at commentary on section 4. See, also, G. GUNNARSSON, “Iceland”, in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at p. 27.

2.3 Formal requirements for arbitration agreements

Article 3(1) of the Act sets out formal positive requirements that an enforceable arbitration agreement must satisfy. Arbitration agreements must (i) be in writing; (ii) unequivocally state the parties' intent to arbitrate; (iii) clearly identify the parties, and (iv) define the subject matter that is to be arbitrated. Although the Act refers to "*in writing*", there is no mentioning of actual signatures as such. As the Supreme Court of Iceland has in its case law confirmed the importance of the Act's international sources of inspiration and that it should be interpreted accordingly.¹² Therefore, it is likely that the domestic courts will consider recent developments in international arbitration, such as, the 2006 amendments to the UNCITRAL Model Law, although the Act has not been amended to reflect these changes, as well as UNCITRAL's recommendations as to the interpretation of Art. II(2) of the New York Convention, when interpreting the Act.¹³

Furthermore, Article 3(2) of the Act provides for negative requirements and notwithstanding the mandatory language of Article 3(1) this provision states that an arbitration agreement is not binding (i) if it materially deviates from the requirements of Article 3(1); (ii) if the dispute is not arbitrable; or (iii) if the provisions pertaining to the appointment of arbitrators, the arbitral procedure or other provisions of the arbitration agreement "*do not ensure adequate judicial protection*". What this entails is not altogether clear as the wording is open-ended and the issue has not been settled by the domestic courts, although it has been addressed. However, it is likely that the provision encompasses generally accepted principles of international arbitration.¹⁴

2.4 Extension of the arbitration agreement to third parties

As stated above, one of the conditions an enforceable arbitration agreement must satisfy is to identify clearly the parties. Notwithstanding the above, there are two instances where the domestic courts have extended the binding effects of an arbitration agreement to a third party, on the basis of established principles of private law – such as agency and succession.¹⁵ Therefore, arbitration agreements can presumably be extended to third parties in exceptional circumstances.¹⁶

2.5 Arbitrability

The general principle under Icelandic law is that natural persons, legal persons, and the State alike can enter into arbitration agreements.¹⁷ Although Article 3(2) makes a reference to the concept of arbitrability, the Act is otherwise silent on the substantive criteria of arbitrability. Moreover, Article 1(1) of the Act expressly states that parties can only arbitrate matters where they would be able to reach a settlement. "*Therefore, one can expect to find in Iceland the 'usual suspects' which are generally considered to fall outside the scope of international arbitration, such as various matters falling within the fields of criminal law, family law, intellectual property law and civic rights.*"¹⁸

There is currently no legislation in force that restricts the use of arbitration by specific persons. Furthermore, neither the Icelandic Constitution nor any general legislation seems to preclude arbitration when it comes to agreements entered into with the Icelandic state or state entities. Indeed, State organs have in the past participated in arbitral proceedings and the Icelandic Parliament has granted the

¹² Supreme Court of Iceland, Case No 433/2006 of 29 March 2007.

¹³ G. Gunnarsson, "Iceland", in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at p. 12.

¹⁴ G. Gunnarsson, "Iceland", in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at p. 15.

¹⁵ Supreme Court Case, No 386/1996 of 23 October 1996 and Supreme Court Case, No 433/2006 of 29 March 2007.

¹⁶ G. Gunnarsson, "Iceland", in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at p. 26

¹⁷ G. Gunnarsson, "Iceland", in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at pp. 32-34.

¹⁸ H. Larusson, and G. Gunnarsson, "Islandia (Iceland)" in *Arbitraje Comercial Internacional en Europa*, Mario Castillo Freyre, 2013, pp. 741-759, at p. 745.

government the authority to enter into arbitration agreements on various occasions in the past,¹⁹ although such permission is not a prerequisite for the State concluding such agreements.

Thus, a dispute is arbitrable under Icelandic law if (i) the domestic courts would have jurisdiction in the absence of a valid arbitration agreement, and (ii) the parties would be able to reach a legally valid, binding, and enforceable settlement in relation to the dispute if they so choose.²⁰

3. Intervention of domestic courts

The Act explicitly states that the domestic courts are obliged to dismiss a case brought before the courts, if a responding party requests dismissal on the grounds that there is a valid arbitration agreement in existence. This slightly differs from what is stated in the New York Convention, which states that the courts shall refer the parties to arbitration. The obligation to dismiss a case, pursuant to such a request from the responding party, remains the same regardless of the fact whether the place of arbitration is in Iceland or abroad. The case law available from the domestic courts confirms that the courts consistently uphold and enforce arbitration agreements by dismissing cases brought before them despite there being a valid arbitration agreement in existence.²¹ If, however, the claimant refutes the validity of said arbitration agreement, the domestic courts may undertake a full review regarding the existence and validity of said arbitration agreement.²² Furthermore, the issue of injunctions by arbitrators to stay litigation proceedings has seemingly not arisen before the domestic courts. Additionally, the Act is silent on whether the domestic courts can intervene in arbitrations seated outside of Iceland.

4. The conduct of the proceedings

4.1 Party representation

The Act is silent on issues regarding party representation in arbitral proceedings. Considering that party autonomy is the prevailing principle of the Act, it is safe to assume that the disputing parties are free to choose whether they retain outside counsel or represent themselves. Similarly, there is no obligation under Icelandic law that local counsel must be retained with respect to arbitrations which provide for Iceland as the seat of arbitration.

4.2 Arbitrators' independence and impartiality

Article 6(2) of the Act requires the arbitrators to fulfil the special requirements imposed on District Court judges for hearing individual cases, which includes a standard of both independence and impartiality.²³ This derives from a case law of the Supreme Court from 1964, where it was considered appropriate that the same standard would apply to arbitrator as is bestowed upon judges.²⁴ The fact that the Act refers to the Act on Civil Procedure No 91/1991 has been criticised as it illustrates the Act's lack of emphasis on international arbitration.²⁵ The Act is silent as to the arbitrators' duty to disclose circumstances which might compromise their independence and impartiality. Considering the facts that arbitrators are deemed to have the same obligations as domestic courts judges in this respect, "it is likely that there is an implied duty that the arbitrators themselves ensure their independence and impartiality in the same manner as national

¹⁹ G. Gunnarsson, "Iceland", in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at pp. 32-37.

²⁰ H. Larusson, and G. Gunnarsson, "Islandia (Iceland)" in *Arbitraje Comercial Internacional en Europa*, Mario Castillo Freyre, 2013, pp. 741-759, at p. 745.

²¹ See for example Supreme Court Case, No 530/2002 of 10 December 2002.

²² G. Gunnarsson, "Iceland", in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at p. 32.

²³ G. Gunnarsson, "Iceland", in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at p. 41.

²⁴ Supreme Court Case, No 127/1964 of 20 May 1964, where an award was set-aside *inter alia* on the grounds that one of the arbitrators was also a disputing party. See, also, Commentary on the bill on Contractual Arbitration, 111th Legislative Session 1988-89, parliamentary document No 619, parliamentary item No 342, at commentary on Article 6.

²⁵ G. Gunnarsson, "Iceland", in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at p. 40.

court judges.”²⁶ The limited case law that exists regarding challenges of arbitrators does not, unfortunately, provide much guidance as to the degree to which the domestic courts will police the arbitrators’ independence and impartiality.

4.3 Assistance from the domestic courts in the constitution of the Arbitral Tribunal

In the case of ad hoc arbitration, the Act provides for clear rules regarding supportive actions and the assistance from the domestic courts when it comes to the constitution of the Arbitral Tribunal. According to Article 4 of the Act the parties may request that the domestic courts appoint an arbitrator or arbitrators in the event (i) that the arbitration agreement is silent on the number of arbitrators or the appointment procedure; (ii) the parties do not agree on the constitution of the arbitral tribunal; or (iii) a party refused to appoint an arbitrator. Moreover, Article 5 of the Act promotes efficiency with respect to the domestic courts’ supportive actions.²⁷ In the same vein, the *travaux préparatoires* expressly state that under such circumstances the domestic courts shall only perform a *prima facie* review of the existence and validity of the arbitration agreement.²⁸ In practice, the domestic courts have been readily available to undertake the necessary supportive actions in favour of arbitration when requested to do so.²⁹

4.4 The authority of domestic courts to issue interim measures in connection with arbitrations and their willingness to consider ex parte requests

A disputing party can request the District Commissioner, which is the enforcement and administrative body of the government, to issue certain interim measures against the other party. If the request is granted and an interim measure is issued the applicable rules require the requesting party to file a suit before the District Court, the court of first instance, to confirm the District Commissioner’s decision. Furthermore, the *travaux préparatoires* specifically state that the Act must be interpreted as to not exclude a request for interim measures by a party.³⁰ Thus, it is possible in Iceland to have interim measures issued by competent State organ, which is the District Commissioner. The District Commissioner will consider ex parte requests in extraordinary circumstances and only if the conditions of Article 21(3) of the Enforcement Act 90/1989 are fulfilled.

4.5 Confidentiality of the arbitral proceedings

When it comes to the issue of confidentiality of the arbitration and the eventual award, the Act is silent. The *travaux préparatoires*, however, mention that one of the advantages of arbitration is that the dispute is less likely to become public.³¹ Thus, there is an underlying assumption of confidentiality. Nonetheless, in order to ensure confidentiality of the arbitral process from the beginning to the end, it is prudent for the parties to provide specifically for confidentiality, if that is their intent.

²⁶ G. Gunnarsson, “Iceland”, in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at pp. 41-42.

²⁷ Commentary on the bill on Contractual Arbitration, 111th Legislative Session 1988-89, parliamentary document No 619, parliamentary item No 342, at commentary on Articles 4 and 5. V. Sigurðsson, *Um samningsbundna gerðardóma*, Tímarit lögfræðinga, Volume 40, year 1990, No 1, at pp. 28-37, at p. 36; G. Gunnarsson, “Iceland”, in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at p. 34.

²⁸ Commentary on the bill on Contractual Arbitration, 111th Legislative Session 1988-89, parliamentary document No 619, parliamentary item No 342, at commentary on Article 5. See, also, G. Gunnarsson, “Iceland”, in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at p. 34.

²⁹ See, for instance, Judgements of the District Court of Reykjavík in case Ö-1/2010 of 2 February 2010 and the judgement of the District Court of Reykjavík in case Ö-7/2010 of 19 May 2010.

³⁰ G. Gunnarsson, “Iceland”, in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at p. 68.

³¹ Commentary on the bill on Contractual Arbitration, 111th Legislative Session 1988-89, parliamentary document No 619, parliamentary item No 342, at general comments. See, also, G. Gunnarsson, “Iceland”, in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at p. 6.

4.6 Expediency of the arbitral proceedings

The Act affords the parties the right to agree on the expediency of the proceedings in the arbitration agreement. In the absence of such provisions in the arbitration agreement, Article 7(2) of the Act expressly states that the arbitrators shall expedite the proceedings to the extent possible. Furthermore, in the event that the arbitral process is significantly delayed for reasons attributable to the neglect of an arbitrator or arbitrators, Article 9(1) of the Act affords each of the disputing parties individually the right to bring action before the District Court to have said arbitrators removed.

4.7 Hearings and/or meetings outside the seat

The Act does not regulate the place where hearings and/or meetings may be held. As party autonomy is the prevailing principle of the Act one may assume that hearings and/or meetings can be held wherever the arbitral tribunal deems appropriate after having consulted with the parties.

4.8 The authority of the Arbitral Tribunal to issue interim measures

The Act is silent as to whether the arbitral tribunal has the authority to issue interim measures. This issue of interim measures ordered by arbitral tribunals has been decided by the domestic courts. However, based on the principle of party autonomy, there is a general view that the parties can agree to grant the arbitral tribunal such powers, whether in the arbitration agreement or in a subsequent agreement between the parties.³² Regardless of whether the arbitral tribunal may be granted the authority to issue interim measures, there are certain interim measures, such as freezing of assets, that are considered *"to fall within the exclusive jurisdiction of the State and the parties must apply to the District Commissioner for such measures."*³³ Thus, when disputing parties have empowered an arbitral tribunal to issue interim measures, such measures must not contravene with those measures that are reserved for the exclusive jurisdiction of the State, and the competent State organs.³⁴

4.9 Is it mandatory to hold an oral hearing?

It is not mandatory to hold an oral hearing. The Act leaves it up to the parties to decide in the arbitration agreement whether they prefer oral hearings or a documents-only procedure. If the arbitration agreement does not address this issue specifically, the arbitral tribunal has broad discretion when it comes to making procedural decisions, including the format of the proceedings. Regardless of this broad discretion, the arbitral tribunal is still obligated to adhere to the mandatory provisions of the Act and, thus, the arbitrators must afford the parties a full opportunity to present their respective cases. Thus, the arbitral tribunal should proceed with caution in deciding whether to hold a documents-only hearing if the parties are not in agreement. Here, it may also be relevant to take into consideration that the principle encompassed in the Act on Civil Procedure is that the parties shall present their respective cases orally. Hence, if a party requests an oral hearing it is reasonable to assume that the arbitrators must accommodate such wish, as long as it does not violate the principle of party equality.³⁵

4.10 Principles on the awarding interest

The Act does not prescribe any principles on awarding interest. Nevertheless, in order to avoid issues when it comes to the enforcement of awards where interest has been awarded the arbitral tribunal would do well to provide clearly in the dispositive section of the award the interest rate and the interest period.

³² G. Gunnarsson, "Iceland", in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at p. 68.

³³ G. Gunnarsson, "Iceland", in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at p. 68.

³⁴ G. Gunnarsson, "Iceland", in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at p. 69.

³⁵ G. Gunnarsson, "Iceland", in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at p. 54.

4.11 Does the Act prescribe general principles governing the allocation of arbitration costs?

Article 11 of the Act stipulates that the Arbitral Tribunal has discretion to allocate the arbitration costs as it deems appropriate, unless the parties have agreed otherwise in the arbitration agreement. The principle of 'cost follows the event' is commonly adhered to.

Article 10 of the Act addresses the arbitrators' fees and states that the arbitrators are entitled to remuneration for services rendered including any costs incurred. If a dispute arises with respect to the arbitrators' fees, a party may request a decision from the District Court, which is subject to an appeal to the newly established High Court. Thus, in order to avoid the involvement of the domestic courts on issues of the arbitrators' fees, arbitrators in ad hoc proceedings should establish the manner by which they intend to be remunerated for their services from the outset.

4.12 Liability

The Act is silent on the issue of arbitrators' liability, whether civil or criminal. The Act on the Judiciary No. 50/2016 provides for the civil immunity for domestic court judges and, therefore, this immunity does not extend to arbitrators. *"As this issue has not been settled by national courts and absent a statutory immunity in the Icelandic Arbitration Act, the most logical presumption is that arbitrators can become liable in a similar manner as other professional experts."*³⁶

With respect to possible criminal liability, it is reasonable to assume that the same standard would be applied to arbitrators as is applicable to domestic court judges. According to Article 130 of the Penal Act No. 19/1940, a holder of public judiciary power may be prosecuted for having deliberately and unjustly administered and/or decided a case with the intention to wrongly or unjustly decide the case. Furthermore, in relation to Iceland's ratification of the additional protocol to the Council of Europe's Criminal Law Convention on Corruption, the Icelandic Penal Act was amended in 2013 and, thus, Article 128 of the Penal Act now makes bribery a punishable offence. Thus, arbitrators may be prosecuted if they have accepted or offered to partake in bribery in relation to their functions as arbitrators.

5. The Award

5.1 Can the parties waive the requirement for the award to provide reasons?

No. The Act contains a mandatory provision to the effect that an award must be sufficiently reasoned.

5.2 Can the parties waive the right to seek the annulment of the award?

The Act does not expressly permit the parties to waive in advance the right to seek the annulment of the award. In the absence of a statutory provision to this effect, such advance waivers in the arbitration agreement have not been considered possible under the Act.³⁷ Article 12(2) of the Act, however, provides that the parties may be deemed to have waived their rights to challenge an award on specific grounds known to them, where they fail to object in a timely manner. Thus, a waiver of the right to seek the annulment of the award may be validly given with respect to circumstances already known to the parties at the time such waiver is given.

The Act does not provide for any express time limits to bring an action to have an award set aside or annulled. The absence of a time limit to bring such annulment action has been criticised, *"[t]he fact that there are no time limits for having an award set aside creates uncertainty for the prevailing party and undermines the finality of the award."*³⁸

³⁶ G. Gunnarsson, "Iceland", in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at p. 49.

³⁷ G. Gunnarsson, "Iceland", in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at p. 97.

³⁸ G. Gunnarsson, "Iceland", in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at p. 96.

5.3 What are the mandatory requirements applicable to awards in Iceland?

Article 8 of the Act describes the requirements necessary for the rendering of a valid award and it is clear from the *travaux préparatoires* state that these are mandatory provisions.³⁹ The award must be in writing, clearly drafted, sufficiently reasoned, and signed by the assenting arbitrators. Moreover, an additional requirement may be derived from the *travaux préparatoires* that entails that if an award is not signed by all the arbitrators, the award must specify the reasons for the omission of a signature from the dissenting arbitrators.⁴⁰

5.4 Is it possible to appeal an award?

No.

5.5 What procedures exist for the recognition and enforcement of awards, what time limits apply and is there a distinction to be made between local and foreign awards?

According to Article 14(3) of the Act, the enforcement procedures of foreign arbitral awards is the same as is applicable to foreign judgments. Therefore, the provisions of the Enforcement Act No 90/1989 will apply when seeking enforcement of a foreign arbitral award in Iceland. “[P]arties seeking enforcement of foreign arbitral awards shall apply to the District Court to have the award declared enforceable. In most cases the District Court simply endorses the application and the party seeking enforcement can go to the District Commissioner to have it enforced.”⁴¹ For awards that are rendered in the territory of a Contracting State of the New York Convention, the District Court may only refuse endorsement on the grounds stated in Article V of the New York Convention. This is the only manner by which the Act makes a distinction between local and foreign awards, whereas in the case of a local award the party seeking enforcement can directly request enforcement before the District Commissioner. The Act does not impose any time limits for having an award enforced in Iceland. Although, there are various factors that may impact the time-efficiency, the procedure to enforce an award in Iceland is efficient.

5.6 Does the introduction of an annulment proceedings automatically suspend the right to enforce an award?

No, not automatically. However, pursuant to a request from a party, the District Courts may, according to Article 12(3) of the Act, decide to suspend the award until a decision has been made in the annulment proceedings. The District Court’s decision is subject to an appeal to the High Court.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforceable in Iceland?

The Act is silent on this issue. As Iceland is Contracting State of the New York Convention and given the previous case law of the Supreme Court, it is reasonable to assume that it is not precluded, although possible.⁴²

5.8 Are foreign awards readily enforceable in practice?

Yes. According to Article 14(1) of the Act, the recognition and enforcement of arbitral awards rendered in accordance with international conventions to which Iceland is a party shall be recognised and enforced in Iceland. Moreover, Article 14(2) states that foreign awards, other than those that fall within the scope of

³⁹ Commentary on the bill on Contractual Arbitration, 111th Legislative Session 1988-89, parliamentary document No 619, parliamentary item No 342, at commentary on Article 8. See also, S. Stefánsson, *Um samningsbundna gerðardóma*, Tímarit lögfræðinga, Volume 40, year 1990, No 1, pp. 38-50, at p. 46.

⁴⁰ Commentary on the bill on Contractual Arbitration, 111th Legislative Session 1988-89, parliamentary document No 619, parliamentary item No 342, at commentary on Article 8.

⁴¹ G. Gunnarsson, “Iceland”, in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at p. 103.

⁴² G. Gunnarsson, “Iceland”, in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at p. 12 and Supreme Court of Iceland, Case No 433/2006 of 29 March 2007.

Article 14(1), shall also be recognised and enforced if they fulfil the requirements of the Act. Hence, foreign awards originating in states that are not Contracting States of the New York Convention may also be recognised in Iceland, provided that they satisfy the requirements of the Act.⁴³ The difference between the two is the presumption that awards rendered in accordance with the New York Convention already satisfy the requirements of the Act.⁴⁴

6. Funding arrangements

The Act is silent on issues that pertain to contingent fees or alternative fee arrangements. However, Act No 77/1998 on Professional Attorneys specifically permits contingent fees and alternative fee arrangements provided that it is within the realm of reason. Furthermore, the Act does not address the issue of third-party funding nor are such arrangements common in cases brought before the domestic courts. Thus, such arrangements are presumably possible.

7. Future legislative reform

Legal practitioners, users of arbitration, and those involved with arbitration, such as the Iceland Chamber of Commerce, have in recent years been calling for a comprehensive reform of the legal framework of arbitration in Iceland. The rationale is to provide for an adequate and modern legal environment, particularly for international arbitration, *inter alia*, to make Iceland a more viable choice as a seat in international arbitration. The Minister of Justice has echoed these concerns and the necessity to undertake a comprehensive review of the legal framework of arbitration in Iceland. Therefore, it must be considered likely that a comprehensive legislative reform based primarily on the UNCITRAL Model Law is due in the near future.

⁴³ G. Gunnarsson, "Iceland", in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at p. 101.

⁴⁴ G. Gunnarsson, "Iceland", in *World Arbitration Reporter* (2nd Edition), Juris Publishing, 2010, at p. 102.

INDONESIA

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

KAREN MILLS, ISWAHJUDI A. KARIM AND MARGARET ROSE
OF KARIMSYAH

KarimSyah

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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS †

1. Law ●
 - a. Framework ●
 - b. Adherence to international treaties ●
 - c. Limited court intervention ●
 - d. Arbitrator immunity from civil liability ●
2. Judiciary ●
3. Legal expertise ●
4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

VERSION: 26 FEBRUARY 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Key places of arbitration in the jurisdiction	Jakarta.
Civil law / Common law environment?	Indonesia's legal system is based on civil law, inherited from the Dutch, who ruled Indonesia until 1945. As in civil law jurisdictions, the courts do not strictly follow precedent, but rely primarily upon written codes and/or laws.
Confidentiality of arbitrations?	Although it is generally considered that arbitration should be confidential, the Arbitration Law does not expressly provide for a very high degree of confidentiality. It requires only that the hearings be closed to the public. Thus if the Parties wish to address the confidentiality of their arbitration with more clarity, or to provide for a higher degree of confidentiality, they should include relevant language in their agreement to arbitrate.
Requirement to retain (local) counsel?	There is no requirement to engage local counsel, although if the matter is governed by Indonesian law it would be advisable to do so.
Ability to present party employee witness testimony?	The general rule under Indonesian law is that an employee or family member of a party is not considered as a 'witness' but as part of such party. This does not prevent any such person from appearing as a witness in arbitration, but the relationship will be taken into consideration by the tribunal in evaluating the veracity of the testimony.
Ability to hold meetings and/or hearings outside of the seat?	∅
Availability of interest as a remedy?	Interest on a debt may be awarded only if the parties have agreed for interest to apply to an unpaid indebtedness. There is no such prohibition against imposing interest on late or unsatisfied awards.
Ability to claim for reasonable costs incurred for the arbitration?	Generally, the costs of an arbitration proceeding in Indonesia shall be borne by the losing party, but the award may rule otherwise. The parties' legal costs, however, can only be shifted if the Parties have so agreed in their agreement to arbitrate or otherwise.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Contingency fees and third-party funding are generally not utilised in Indonesia, but there is no prohibition against either.
Party to the New York Convention?	Indonesia has been a party to the New York Convention since 1981. There is only one Arbitration Law and its procedures that apply to all arbitrations held in Indonesia, all of which are defined as

	<p>“domestic” regardless of nationality of the parties or other factors. With respect to foreign-rendered awards, i.e. awards made outside Indonesia, only the enforcement provisions of the Arbitration Law are applicable. These differ in some respect from those mentioned in the UNCITRAL Model Law, as well as the New York Convention</p> <p>Enforcement differs slightly between domestic and international awards, specifically the court to which one applies and the time limit to register the award, a prerequisite for enforceability (there is no time limit for international awards). Note that registration of foreign-rendered awards requires a certificate from the Indonesian diplomatic mission in the place of arbitration to the effect that that state and Indonesia are both signatories to the New York Convention.</p>
<p>Other key points to note</p>	<p>Under the Arbitration Law, anyone over 35 with over 15 years of experience in their field, and not a court or government official, may act as arbitrator.</p> <p>Arbitration in Indonesia is regulated by Law No. 30 of 1999 (the “Arbitration Law”). The Arbitration Law deals with matters such as the requirements for an arbitration agreement, qualification of arbitrators and also contains skeleton rules in case the parties have not designated others. It is not based on the UNCITRAL Model Law but has many similarities with it.</p> <p>Where Parties have agreed in writing to arbitrate their disputes, the Indonesian courts have no jurisdiction over such disputes. The only involvement of the courts is with the annulment and/or enforcement of final and binding awards, and the appointment of arbitrators, in cases where no other appointing authority has been designated by the parties or in rules chosen by the parties. Although the Arbitration Law gives arbitral tribunals the power to issue interlocutory or interim relief, such relief will not be enforced by the courts.</p> <p>The Arbitration Law provides that the Parties are free to hold their arbitration pursuant to whatever procedural rules or under whatever arbitral institution they may agree. Failing agreement, the Arbitration Law includes some procedural rules of its own. The Parties may choose <i>ad hoc</i> arbitration, the most common rules for which are the UNCITRAL Rules, or they may opt to have it administered by an arbitral institution (locally or elsewhere). They are also free to hold hearings or meetings wherever they may mutually agree. If the parties have not agreed upon a different language, the arbitral proceedings and hearings will be conducted in Indonesian.</p>
<p>WJP Civil Justice score (2017-2018)</p>	<p>0.52</p>

ARBITRATION PRACTITIONER SUMMARY

Date of arbitration law?	Arbitration in Indonesia is governed by Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution ("The Arbitration Law"), which came into force on 12 August, 1999.
UNCITRAL Model Law? If so, any key changes thereto?	The Indonesian Arbitration Law is not based upon the UNCITRAL Model Law, but has many similarities with it.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	∅
Availability of <i>ex parte</i> pre-arbitration interim measures?	Although the Arbitration Law gives arbitral tribunals the power to issue interlocutory or interim relief, such relief will not be enforced by the courts. Nor will the courts issue any interim orders in aid of an arbitration.
Courts' attitude towards the competence-competence principle?	<p>There is no explicit provision providing for <i>kompetenz-kompetenz</i>, but it should be implicit from Articles 3 and 11 of the Arbitration Law that only the arbitral tribunal has the jurisdiction to determine its own jurisdiction, as well as whether a matter is capable of being arbitrated or not.</p> <p>There is no specific reference to severability. However, Article 10 of the Arbitration Law states that the agreement to arbitrate shall survive even if the main contract expires or is declared void. This will not apply, however, if the contract is determined to be void <i>ab initio</i>, as in that case the arbitration clause will be deemed not to have been agreed upon at all.</p>
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	An arbitral award may be challenged through an application to the court for annulment of the award. Article 70 of the Indonesian Arbitration Law provides limited grounds for annulment. The three grounds for annulment are: false or forged letters submitted in the hearings, discovery after the award of decisive documents intentionally concealed by a party, and where an award was rendered as a result of fraud committed by one of the parties to the dispute. Likewise, a court may refuse to enforce an award if the dispute is not of a commercial nature or if it can be established that the Parties did not agree to arbitrate such dispute.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The Arbitration Law does not refer to awards annulled in the place of arbitration and, to the knowledge of the writers, the issue as to whether such awards may still be enforced in Indonesia has not arisen.

Other key points to note?

The Arbitration Law provides that only disputes of a commercial nature and those that are within the authority of the parties themselves to resolve may be arbitrated. [Articles 3 and 11](#) make it clear that where the parties have agreed to arbitrate their disputes, the courts do not have and may not take jurisdiction over such matters. The only role of the court is that of annulment and/or enforcement of final and binding arbitral awards (or the appointment of arbitrators if a party does not do so and the parties have not chosen any specific rules or otherwise designated a different appointing authority).

Although agreements in general are not required to be in writing to be valid and binding under Indonesian law, [Article 1\(3\)](#) of the Arbitration Law requires arbitration agreements to be in writing. Such agreement may be made either before or after a dispute has arisen. In the latter case, the contents of such written agreement must be more comprehensive, and even the arbitrators need to be named.

The enforcement process for domestic and international awards differs slightly. Awards are defined as domestic, regardless of the nationality of the parties or other factors, where the arbitration is held in Indonesia. Awards are defined as international if they are rendered outside Indonesia. Regardless of whether the award is domestic or international, the award must first be registered with the court by the arbitrators or their duly authorised representatives. Note, therefore, that as a practical matter arbitrators issuing awards likely to be enforced in Indonesia should include in, or separately from, the award a power of attorney to the parties, or either of them, to effect registration of the award. Domestic awards must be registered, within 30 days of rendering, with the District Court having jurisdiction over the respondent. Foreign-rendered, or international, awards must be registered with the District Court of Central Jakarta. There is no time limit for registration of international awards. Registration of an international award will require submission of a certificate from the Indonesian diplomatic representative in the country in which the award is rendered to the effect that that country and Indonesia are both signatories to the New York Convention. (Indonesia has been a signatory since 1981.)

JURISDICTION DETAILED ANALYSIS

1. Legal framework

Arbitration in Indonesia is regulated under [Law No. 30 of 1999 regarding Arbitration and Alternative Dispute Resolution](#), also known as the Arbitration Law. Prior to its enactment, arbitration was governed by a handful of clauses in a mid-19th Century Dutch-originated code of civil procedure, known as the “RV”. The Arbitration Law is not based on the United Nations Commission of International Trade Law (UNCITRAL) Model Law, although it does contain a number of similar provisions. One early draft was based upon the Model Law but the Arbitration Law, as eventually promulgated, is the result of many drafts and revisions by a number of different sources, and includes incorporation of a number of principles from the previous legislation. As a result, there is considerable similarity in principle between the Arbitration Law and the RV. Some practitioners have suggested that Law No. 30 of 1999 be amended to comply even more closely with the UNCITRAL Model Law, but there has been no such amendment considered by the Indonesian Parliament as yet.

There are a number of differences between the texts of the Model Law and that of the Arbitration Law. Perhaps the primary one is that the Arbitration Law applies to all arbitrations held within the territory of the archipelago of Indonesia and there is no distinction between “domestic” and “international” with regard to the nationality of the parties or the location of their project or dispute. The only effective difference between a *domestic* arbitration, defined in the Arbitration Law as one held in Indonesia, and an *international* one, defined as one held outside of Indonesia (or one which, under the provisions of Indonesian law (of which there are none so stating as yet) is deemed to be International), is the procedure and venue for enforcement of the award.

Some of the other differences from the Model Law include:

- Reference to Arbitration: the Arbitration Law does not specifically require a court to refer to arbitration a dispute brought before it where there is an agreement to arbitrate. It only states that the courts do not have jurisdiction to hear such case.
- Jurisdiction: the Arbitration Law does not specify that the arbitrators are competent to rule on their own jurisdiction (*kompetenz-kompetenz*), although this should be implicit from [Articles 3 and 11](#), which divest the court of jurisdiction where the parties have agreed to arbitrate.
- Language: unless the parties otherwise agree, the Arbitration Law ([Article 28](#)) provides that the language will be Indonesian, regardless of the language of the underlying documents.
- Arbitrators: criteria for arbitrators are stated in the Arbitration Law ([Article 12](#)). These criteria are very inclusive and a person independent of the parties who is over 35 years of age with 15 years of experience in his/her field may serve as arbitrator, except court or government officials.
- Hearings: the Arbitration Law states that the case is decided on documents unless the parties or the arbitrators wish to have hearings, whereas the Model Law requires hearings unless the parties agree otherwise.
- Awards: the Arbitration Law ([Article 54](#)) provides a list of requirements that apply to awards, including that they must be reasoned.
- Time-limit for Award: the Arbitration Law ([Article 57](#)) provides that the award must be rendered no later than 30 days after the conclusion of the hearings.
- Corrections: under the Arbitration Law ([Article 58](#)), only the parties may request typographical errors and similar to be corrected, unlike the UNCITRAL Model Law which provides both that parties may so request and that the tribunal may so correct on its own initiative, and parties have only 14 days from

the rendering of the award to so request, as compared to 30 days under the UNCITRAL Model Law.

- **Annulment:** the grounds for annulment of awards under the Arbitration Law ([Article 70](#)) are far more limited than those set out in the Model Law, as the former provides for annulment of an award only in cases involving fraud, forgery or deliberately concealed material documents.
- **Enforcement:** the grounds for refusing enforcement of an international arbitration award under the Arbitration Law ([Article 66](#)) are different from those set out in the Model Law – limited to the violation of public order or the failure to obtain an order of Exequatur from the Chief Judge of the District Court of Central Jakarta – and puts the burden of proof on the award creditor rather than the award debtor.

2. The agreement to arbitrate

The crux of the Arbitration Law is to ensure that where parties have agreed to arbitrate their disputes, the Indonesian courts do not have and may not take jurisdiction over such matters. This right is limited to commercial disputes, being those that the Parties have the authority to resolve themselves, thereby giving them the right to delegate that authority to an arbitral tribunal and divest the courts of jurisdiction thereover. The only role of the courts then becomes that of the annulment or enforcement of final and binding arbitral awards, and the appointment of arbitrators where a party fails to do so, or the two party appointed arbitrators cannot agree upon the chair and the parties have not chosen any specific rules or otherwise designated a different appointing authority.

Although agreements in general are not required to be in writing to be valid and binding under Indonesian law, [Article 1\(3\)](#) of the Arbitration Law requires the agreement to arbitrate to be in writing. The validity of contracts in general is covered in the Indonesian Civil Code, of which Article 1320 sets out the basic requirements for a valid contract: (i) free consent of the parties to be bound, (ii) competence/authority of the parties to contract, (iii) clearly defined subject matter/rights and obligations and (iv) a lawful purpose. Writing is not required, but becomes an evidentiary matter, as it is difficult to prove consent and subject matter where there is no writing to evidence it. The agreement to arbitrate must, of course, meet the general contractual requirements, but, unlike other agreements, it must also be in writing in accordance with [Article 1](#) of the Arbitration Law. Where Indonesian law governs the contract, or in most cases where an arbitration is held in Indonesia, the validity of the agreement to arbitrate will be a matter of Indonesian law and it must in such cases comply with the above requirements.

The Arbitration Law recognises agreements to arbitrate made before a dispute arises, most commonly in an arbitration clause in a contract, and also agreements to arbitrate made after a dispute has already arisen. The latter case is covered by [Article 9](#) of the Arbitration Law, which sets out the components that must be included to render such agreement valid and binding. These include, *inter alia*, clear identification of the elements of the dispute and relief requested and also identification of the arbitrators and a statement of their willingness so to serve.

Incorporation by reference is not recognized in Indonesia unless it can be shown that the party contesting actually read and agreed to the arbitration clause in the document sought to be incorporated. This is based upon the freedom of contract principles embodied in Articles 1320 *ff* of the Indonesian Civil Code (also based upon pre-Independence Dutch law).

While there is no specific reference to severability, *per se*, of the agreement to arbitrate, [Article 10](#) of the Arbitration Law states that the agreement to arbitrate shall survive even if the main contract expires or is declared void. The arbitration clause will not, however, survive a court declaration that the underlying contract is void *ab initio*, in which case the arbitration clause will be deemed never to have been agreed upon at all.

Although an agreement, including an agreement to arbitrate, binds only the parties who have concluded it, [Article 30](#) of the Arbitration Law provides that a third party who is not a party to the arbitration agreement may be allowed to participate in the arbitration proceedings if he or she has a relevant interest in the

proceedings, upon the consent of all of the parties and arbitrator(s). However, there is no mechanism to force the joinder of a non-consenting third party. Therefore, not unexpectedly, this provision is unlikely to be invoked.

As mentioned above, the Arbitration Law ([Article 5](#)) provides that only disputes of a commercial nature and those that are within the authority of the parties themselves to resolve may be arbitrated. The rationale for this is that parties to commercial transactions always have the ability, and the right, to resolve by themselves any disputes that might arise between or among them. Accordingly, they also have the authority to delegate that right to others, most commonly to an arbitrator or arbitral tribunal. By agreeing to arbitrate the Parties divest the court of jurisdiction over any such disputes. This is, of course, not possible where some nature of state participation or confirmation is sought or needed (such as for adoption, divorce, or when it involves any criminal matter). This right and limitation is implicit in all arbitration systems and explicit in Indonesia's Arbitration Law.

3. The role of the courts

[Articles 3 and 11](#) of the Arbitration Law make it clear that where the parties have agreed to arbitrate their disputes, the courts do not have and may not take jurisdiction over such matters. The only role of the court is that of annulment and/or enforcement of final and binding arbitral awards.

Aside from that, [Article 14](#) allows a party to request the court to appoint a sole arbitrator if the parties cannot agree upon one, and in the case of three arbitrators, [Article 15](#) allows a party to request the court to appoint the chair of the arbitral tribunal if the two appointed arbitrators are unable to agree on one. This is only effective, of course where the parties have not chosen specific rules to govern the procedure, nor otherwise designated a different appointing authority, and thus is rarely, if ever, applied in practice.

[Article 32](#) of the Arbitration Law gives the Tribunal the power to issue a provisional award or order other interlocutory relief. However, such interim orders will not be enforced by the courts as only final and binding awards and court judgements may be enforced. Thus there is no effective recourse if the subject party does not comply with the Tribunal's order. Nor will the Indonesian courts issue any injunctions or other interim orders in aid of an arbitration, regardless of where the arbitration is held. Even injunctions issued by courts of another jurisdiction will not be enforced by the Indonesian courts. Judgements of foreign courts are not enforceable in Indonesia at all ([Article 463](#) of the Dutch-era Code of Civil Procedure, known as the RV, still in force). Even for court cases, the case would have to be heard again in the Indonesian courts, with the foreign judgement utilised as *prima facie* evidence of what it holds. Thus the courts are not permitted to interfere in arbitrations in Indonesia in any manner, negative or positive, other than to annul and/or enforce the eventual final and binding award.

4. Arbitration procedure

[Article 34](#) of the Arbitration Law recognises the parties' right to hold their arbitration before any institution or pursuant to any rules they may mutually agree. Only to the extent that the parties have not designated different rules will the procedural guidelines set out in the Arbitration Law be applicable. These latter guidelines are skeletal, but sufficient for an arbitration procedure to be conducted. However, parties do invariably opt for either *ad hoc* arbitration with rules designated, almost always UNCITRAL, or institutional arbitration, normally either ICC, SIAC, HKIAC, or one of the institutions in Indonesia itself. Although the primary arbitral institution in Indonesia is BANI, there are also a growing number of industry-specific institutions as well.

4.1 Representation

The Arbitration Law does not regulate who may represent a party in an arbitration, so it is left up to the parties to choose their own counsel or even to represent themselves, although the latter is very rarely, if ever, done. Nor is there any requirement to engage local counsel, although if the matter is governed by

Indonesian law it would be advisable to do so. The rules of BANI do require the participation of at least one Indonesian qualified counsel if the governing law is Indonesian.

4.2 Arbitrators

[Article 12](#) of the Arbitration Law sets out the qualifications for those who may be appointed as arbitrators. These include only that the arbitrator must be mentally competent, over 35 years of age and have at least 15 years of experience in their field, and must not be a court or government official. There is no citizenship or residency requirement.

4.3 Recusal

[Article 22](#) of the Arbitration Law gives the parties a right to demand recusal of their arbitrator(s) if *“there is found sufficient cause and authentic evidence to give rise to doubt that such arbitrator will not perform his/her duties independently or will be biased in rendering an award.”* The recusal application shall be made to the arbitral tribunal itself, unless the arbitrator concerned was appointed by the court, in which case it is made to the President of the relevant court. Note that in this, as all other procedural matters, if the parties have designated institutional or *ad hoc* rules, then those rules will supersede the provisions of the Arbitration Law. Only mandatory provisions of the Arbitration Law must be complied with. As mentioned above, the courts will not otherwise get involved in the arbitral process at all; it is simply outside of their jurisdiction.

4.4 Confidentiality

In accordance with [Article 27](#) of the Arbitration Law, all hearings of the arbitration are closed to the public. Although this means that the hearings are private, and not necessarily confidential, the elucidation of that provision also states that the award and the dispute are not to be disclosed to public. Parties wishing a broader degree of confidentiality will need to provide for this in their agreement to arbitrate. Note, however, that awards must be registered with the court to be enforceable and once an award is so registered it can no longer be fully confidential.

4.5 Venue

[Article 31](#) of the Arbitration Law provides that the time frame and venue of the arbitration, and place of the hearings, if different, shall be agreed upon by the parties. If the parties have not, or cannot, so agree, it will be left to the tribunal to decide.

4.6 Hearings

[Article 36](#) of the Arbitration Law provides that the arbitral hearings of the dispute shall be done by written documents. However, oral hearings may be held if so desired by the parties or if deemed necessary by the arbitrator or arbitration tribunal. As a practical matter, most arbitrations do involve at least one oral hearing. Generally, if one party wishes to be heard, the tribunal will agree.

4.7 Evidence

The general rule under Indonesian law is that an employee or family member of a party is not considered as a ‘witness’ but as part of such party. This does not prevent any such person from appearing as a witness in arbitration, but any relationship with the party or parties will be taken into consideration by the tribunal in evaluating the veracity of the testimony.

[Article 37\(3\)](#) of the Arbitration Law provides: *“[e]xamination of witnesses and expert witnesses before the arbitrator or arbitration tribunal shall be carried out in accordance with the provisions of the Code of Civil Procedure.”* This restriction is generally considered superseded where the parties have chosen other procedural rules to govern the arbitral proceedings, as mentioned above.

4.8 Language

Pursuant to [Article 28](#) of the Arbitration Law, the language of the arbitration will be Indonesian unless all the parties agree to a different language, which is still subject to the consent of the tribunal. Parties should take note of this and be sure to provide a different language in the agreement to arbitrate if they do not wish to submit all documents and argue in Indonesian.¹

4.9 Time limitations

[Article 48](#) of the Arbitration Law imposes a time limit of 180 days from the constitution of the tribunal for completion of hearings, and [Article 57](#) imposes a time limit of 30 days from close of conclusion of hearings for issuance of the award. However, these time limits may be waived by the parties and such waivers are invariably found in the agreement to arbitrate. It is incumbent upon the tribunal to ensure that the parties agree at least to an extension of time for the issuance of the award if they anticipate it will take more than the 30 days. If the tribunal fails to do so, [Article 20](#) provides that the arbitrators may be ordered to pay compensation to the parties for any costs and losses occasioned by the delay. However, it is not clear who could issue such order, since the courts would not ordinarily have jurisdiction, unless of course the issue were to arise in conjunction with an action to annul an award for failure to meet such time limit. Otherwise the arbitrators are immune from liability. [Article 21](#) of the Arbitration Law states: *"The arbitrator or arbitration tribunal may not be held legally responsible for any action taken during the proceedings to carry out the function of arbitrator or arbitration tribunal unless it is proved that there was bad faith in the action"*.

4.10 Costs

The costs of arbitration are covered in [Articles 76 and 77](#) of the Arbitration Law. Generally, the costs of an arbitration proceeding shall be borne by the losing party, but where a claim is only partially granted, these costs shall be charged to the parties equally. The parties' legal costs, and those of their expert and other witnesses, however, can only be shifted if the Parties have so agreed in their agreement to arbitrate or otherwise.

4.11 Interest

In keeping with general principles of Indonesian law, interest on a debt may be awarded only if the Parties have agreed for such interest to apply to an unpaid indebtedness. There is no such prohibition against imposing interest on late or unsatisfied awards.

5. The award

5.1 Requirements

[Article 54](#) of the Arbitration Law contains specific requirements for arbitral award. An arbitral award, wherever rendered, must contain:

- (a) the heading: *'Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa'* (For the sake of Justice based on belief in One Almighty God);
- (b) the full name and addresses of the disputing parties;
- (c) a brief description of the matter in dispute;
- (d) the respective position of each of the parties;
- (e) the full names and addresses of the arbitrators;
- (f) the considerations and conclusions of the arbitrator or arbitration tribunal concerning the dispute as a whole (*in other words, it must be reasoned*);
- (g) the opinion of each arbitrator in the event that there is any difference of opinion within the arbitration tribunal (*if one arbitrator fails to sign, the reason for this must be stated*);
- (h) the order of the award;

¹ Note that BANI, the primary local arbitral institution, normally insists that hearings are held, and often documents submitted, in Indonesian, or at best two languages, even where the parties have agreed upon a different language.

- (i) the place and date of the award;
- (j) the signature(s) of the arbitrator or arbitration tribunal; and
- (k) a time limitation within which the award must be implemented.

The above requirements are mandatory, and not waivable. As explained below, the place of its issuance is also relevant, and may have substantial consequences.

6. Enforcement

As mentioned earlier, pursuant to [Article 1\(9\)](#) of the Arbitration Law, awards are defined as *domestic* if they have been rendered within the archipelago of Indonesia, regardless of the nationality of the parties, location of the project and other factors, and defined as *international* if rendered elsewhere. This distinction affects primarily the enforcement process, which differs slightly between the two, primarily on administrative elements.

6.1 Registration

Regardless of whether the award is domestic or international, the award must first be registered with the court, by the arbitrators or their duly authorised representatives. Therefore, in practice, arbitrators issuing awards likely to be enforced in Indonesia should include in and/or separately, with the award, a power of attorney to the parties, or either of them, to effect registration of the award. Domestic awards must be registered within 30 days of rendering with the District Court having jurisdiction over the respondent, while international awards are registered with the District Court of Central Jakarta. There is no time limit for registration of international awards. Awards must be in the Indonesian language, or, if the original is in another language, must be accompanied by a translation into Indonesian prepared by a licensed "sworn" translator. For enforcement purposes, the court will refer to the Indonesian version, so any translation should be carefully vetted before registration.

Registration of an international award must also be accompanied by (i) the original or a certified copy of the document containing the parties' agreement to arbitrate and (ii) a certificate from the Indonesian diplomatic representative in the country in which the award is rendered to the effect that that country and Indonesia are both signatories to the New York Convention.

All awards must be registered to be enforceable. Application for an Exequatur Order for an international award is made to the District Court of Central Jakarta, unless the state is a party, in which case the Exequatur Order can only be issued by the Supreme Court.

6.2 Execution

Once the Exequatur Order is issued, the issuing court will send it to the District Court having jurisdiction over the losing party for execution over the identifiable assets of such party. As domestic awards are registered with the latter court, a sometimes lengthy step is eliminated when the arbitration is held in Indonesia (and the award is thereby defined as domestic). Note that the party seeking such execution must be able to identify the assets to be executed against, including their location and, where a bank account, the account number, in order to allow the court bailiff to locate and attach such assets.

Execution may take some time, depending upon the nature and location of the assets, but the process is reliable if a bit lengthy, despite uninformed writings to the contrary.

Both exequatur and execution may also be delayed where the losing party applies unconscionable tactics such as bringing a related action in the court based on a non-commercial issue such as tort, or involving a third party who is not a party to the agreement to arbitrate, in order to circumvent the [Articles 3 and 11](#) restrictions on the court's jurisdiction. This does in fact occur with some regularity, but the courts almost invariably will enforce the awards, even if they will await the outcome of the jurisdictional challenge and dismissal of such unauthorized suits.

6.3 Recourse

[Article 60](#) of the Arbitration Law clearly states that the award is final and binding upon the parties. This clearly means that there can be no amendment procedure for awards (subject to the limited availability of a request to the tribunal for correction for administrative or typographical errors), which coincides with the restriction on court involvement of [Articles 3 and 11](#), mentioned above.

An arbitral award may only be challenged through an application to the court for annulment of the award. [Article 70](#) of the Arbitration Law provides limited grounds for annulment. The three grounds set out in [Article 70](#) are: false or forged letters or documents submitted in the hearings, discovery after the award of material documents intentionally concealed by a party, or where an award was rendered as a result of fraud committed by one of the parties to the dispute. Likewise, a court may refuse to enforce an award if the dispute is not of a commercial nature, or if it can be established that the Parties did not agree to arbitrate such dispute, or that enforcement would violate public order.

A decision by the applicable court to issue the Exequatur Order is not subject to appeal, whereas a decision to refuse to issue such an order can be appealed to the Supreme Court except where the state is a party, in which case there is no appeal against the Supreme Court's action in either issuing or refusing to issue the Exequatur. As to annulment proceedings, both an order to annul and a decision not to annul may be appealed to the Supreme Court.

6.4 Awards annulled at seat

The Arbitration Law makes no reference to awards annulled in the place of arbitration nor its impact on enforcement in Indonesia. To the knowledge of the writers, the issue as to whether such awards may still be enforced in Indonesia has not arisen. The writers believe it unlikely that should such a situation arise, the Indonesian courts would follow the example of the French courts and enforce anyway, over proof of such annulment presented by the losing party, although it is debatable whether the Code of Civil Procedure prohibition against enforcement of foreign court judgments, referred to above, might not be used to persuade a court to disregard such annulment, if the grounds relied upon for annulment did not coincide with those set out in the Arbitration Law.

7. Other matters

7.1 Liability and Immunity

[Article 21](#) of the Arbitration Law provides that the arbitrator(s) may not be held legally responsible for any action taken during the proceedings in carrying out their function as arbitrator(s) unless bad faith can be proven. The only possible liability otherwise would be under [Article 20](#), as mentioned above, in the event the tribunal were to take more than 30 days after close of hearings to issue their award where the parties had not agreed to a waiver or extension of such time limit.

7.2 Third-Party Funding

Neither the Arbitration Law, nor any other law, restricts the freedom of parties to either agree with their counsel as to the quantum or method of payment of their fees, nor whether they may utilise external/third-party funding. Contingency fee arrangements, or a variation thereof, are not common but may occasionally be applied, depending upon the agreement of the parties and their counsel. Third-party funding is generally not utilised as of yet, and the writers are not aware of any such arrangement having been applied, although the possibility exists as there are no requirements for transparency in such regard.

7.3 Reform or Revision of Arbitration Law

The Arbitration Law was issued less than 20 years prior to time of writing of this note, and it has proven for the most part to be quite flexible and certainly serves the purpose of divorcing the arbitral process almost completely from the Indonesian court system, which has fallen into unfortunate repute. A few

practitioners occasionally suggest that the Arbitration Law ought to be revised, or replaced by one following the UNCITRAL Model Law, but there has been no serious effort on the part of the legislature to make any such changes. It is not an issue that will gain political capital for anyone, nor is there really any pressing necessity, so it is unlikely there will be any significant revision in the near future.

IRAN

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

NASIM GHEIDI, MOHAMMADREZA MALEKI AND SARA TAJDINI
OF **GHEIDI & ASSOCIATES**



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JURISDICTION INDICATIVE TRAFFIC LIGHTS

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 - c. Limited court intervention ●
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3. Legal expertise ●
4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Arbitration laws were included as part of the Iranian Civil Procedure Law (“**CPL**”) up until 1997, when arbitration was further codified under the Law on International Commercial Arbitration (“**LICA**”). The LICA and the CPL (last modified in 2001) are the latest applicable laws governing international commercial disputes and local disputes respectively. Chapter 7 of the CPL deals with arbitration. The provisions of this chapter are applicable only to arbitration where both parties to the dispute have Iranian nationality.

In 1997, in order to harmonize and facilitate the provision of arbitration with international practice, the Iranian Parliament passed the LICA, which is largely based on the UNCITRAL Model Law. According to Article 1(B) of the LICA, *“International arbitration is the case where one of the parties, at the time of conclusion of the arbitration agreement, is not a national of Iran under the Iranian laws.”* The LICA applies to arbitration in international commercial relationships including, *inter alia*, sale of goods and services, transportation, insurance, financial matters, consulting, investment, technical cooperation, representation, factoring or similar activities as per Article 2(1).¹ In practice, accepted principles and procedures of international arbitration are recognized and applied by arbitral tribunals seated in Iran. For example, although confidentiality of arbitration is not held as a requirement under the LICA, it is an accepted principle applied within arbitration proceedings.

In the years following the enactment of the LICA, Iran ratified the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (the “**New York Convention**”) in 2001, taking a noteworthy further step towards enhancing the climate for foreign investment in Iran. The accession to the New York Convention has paved the way for the referral of disputes by foreign investors to international arbitration outside of Iran; foreign arbitral awards are recognized and may be enforced in Iran, provided that there is no ground for annulment or refusal in accordance with Article V of the New York Convention.²

As per the reservation rights provided under the New York Convention, Iran applies the Convention only to commercial disputes, whether contractual or non-contractual, and to awards issued in other contracting states on the basis of reciprocity. It is also worth noting that when public and state properties are involved, there are fundamental challenges to arbitrability. In particular, Article 139 of the Iranian Constitutional Law mandates as follows: *“The settlement of claims relating to public and state property or the referral thereof to arbitration is in every case contingent on the approval of the Board of Ministers, and the Parliament must be informed of these matters. In cases where one party to the dispute is a foreigner, as well as in important domestic cases, the approval of the Parliament must also be obtained. Law will specify the cases which are considered to be important.”* In line with Article 139 of the Constitutional Law, the CPL also establishes exactly the same restriction in terms of arbitrability. Therefore, legal scholars and professionals have endeavoured to limit the applicability of this provision, as it may discourage foreign investors seeking to refer their disputes to arbitration rather than Iranian domestic courts.³

The adoption of a Comprehensive Arbitration Law is currently on the agenda of the Iranian Parliament. The Arbitration Center of the Iran Chambers (“**ACIC**”) was tasked by the Judiciary with drafting this law, which is intended to replace current regulations on arbitration and provide a comprehensive package of laws thereon. The ACIC was established on 3 February 2002, pursuant to the approval of the “ Law on Articles of Association of ACIC” by the Iranian Parliament. Although ACIC is organized as an affiliate to the Iran Chamber of Commerce, it has an independent legal personality. It is the first Iranian independent arbitration institution established for the purpose of settlement of both domestic and international disputes through arbitration

¹ Available at: <https://efilablog.org/2016/12/08/arbitration-in-iran-with-focus-on-international-commercial-arbitration/>.

² Available at: <https://efilablog.org/2016/12/08/arbitration-in-iran-with-focus-on-international-commercial-arbitration/>.

³ Available at: <https://efilablog.org/2017/04/11/arbitration-in-iran-with-focus-on-international-commercial-arbitration-2/>.

or conciliation.⁴ Besides ACIC, the other major and active arbitration institution in Iran is the Tehran Regional Arbitration Center ("TRAC"). It is an independent international organization established under the auspices of the Asian-African Legal Consultative Organization ("AALCO"), pursuant to the Agreement signed on 3 May 1997 between the Islamic Republic of Iran and AALCO. TRAC enjoys the privileges and immunities applicable to international organizations. The TRAC Rules of Arbitration are essentially based on the UNCITRAL Rules of Arbitration.⁵

Key places of arbitration in the jurisdiction	Tehran.
Civil law / Common law environment?	The Iranian legal system is now based on Sharia, which is integrated into a civil law system.
Confidentiality of arbitrations?	Confidentiality is not explicitly indicated in the laws, however it is recognized and applied as an accepted principle in practice.
Requirement to retain (local) counsel?	No.
Ability to present party employee witness testimony?	Yes, in accordance with Articles 19 and 20 of the LICA, the parties may agree on the rules of procedure, including presentation of party employee witness testimony. Failing such agreement, the arbitrator shall conduct the procedure in an appropriate manner. Relevance, materiality and weight of evidence offered are at the arbitrator's discretion.
Ability to hold meetings and/or hearings outside of the seat?	Yes. In accordance with Article 20 of the LICA, arbitration may take place at a venue mutually agreed to by the parties; failing such agreement, the venue of arbitration shall be determined by the arbitrator with due consideration given to the circumstances of the case and to the accessibility for the parties.
Availability of interest as a remedy?	Yes.
Ability to claim for reasonable costs incurred for the arbitration?	Yes, in practice, it is possible to claim reasonable costs sustained in the course of the arbitration proceedings.
Restrictions regarding contingency fee arrangements and/or third-party funding?	No.
Party to the New York Convention?	Yes.
Other key points to note	<p>The LICA does not contain any provisions on criminal liability of arbitrators or experts. However, under the Iranian Penal Code, criminal liability has been defined for arbitrators and experts in the event of bribery or breach of confidentiality.</p> <p>In case one of the parties requests the annulment of the arbitral award from the court and the other party demands its recognition</p>

⁴ See <http://arbitration.ir/En/Home/index>.

⁵ Available at: <http://www.trac.ir/Staticpages/ShowPage.aspx?staticpageID=6>.

	<p>or enforcement, the court shall provide that the party demanding nullification pay the eventual damages, if so requested by the party demanding recognition or enforcement (Article 35 of the LICA).</p> <p>Moreover, based on Article 6 of the Law concerning the Accession of Iran to the New York Convention, an application for the setting aside or suspension of the award must be made before a competent authority. The authority may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.</p>
<p>WJP Civil Justice score (2017-2018)</p>	<p>0.48</p>

ARBITRATION PRACTITIONER SUMMARY

The primary regulations on arbitration can be found in Articles 454-501 of the Iranian Civil Procedure Law (“CPL”), which is in force and applicable to purely domestic arbitrations. On 17 September 1997, the Iranian Law on International Commercial Arbitration (“LICA”) was adopted, based on the UNCITRAL Model Law on International Commercial Arbitration (1985). However, certain provisions of the law do not exactly reflect the Model Law and instead are tailored to satisfy local requirements. Arbitration laws have not allocated specific tribunals to arbitration proceedings and have not set restrictions or specific qualifications on arbitrators to be appointed by the parties to arbitration, except that persons who lack legal capacity or have been deprived of social rights (by court) cannot be appointed as arbitrators.

The law has granted some specific powers to arbitrators, that are similar to judges’ powers, including the ability to issue an injunction upon request by a party in matters related to a dispute which require immediate action. However, the ability to issue pre-arbitration interim measures is not provided for in the law.

The principle of *Kompetenz-Kompetenz* is included in the LICA, and an arbitrator may rule on his/her jurisdiction as well as on the question of the existence or validity of an arbitration agreement, even if the CPL is silent on this principle, as well as on many other principles and rules that are adopted under the LICA. The LICA also includes provisions on, amongst others, (i) party autonomy to agree on the procedure of arbitration proceedings, (ii) recognition of institutional arbitration, (iii) independence and impartiality of arbitrators, and (iv) arbitrator jurisdiction to identify the applicable law in the event that the parties have failed to do so.

Recognition and enforcement of arbitral awards are recognized under the LICA, unless an award is either set aside or is null and void *ab initio*.

It is worth noting that the LICA does not include any provision on the enforcement and recognition of foreign awards that have been annulled at the seat of arbitration by a competent authority. Therefore, it seems that the Courts will refuse to enforce such awards.

Date of arbitration law?	17 September 1997.
UNCITRAL Model Law? If so, any key changes thereto?	Yes, although certain provisions of the law do not exactly reflect the Model Law and are specifically tailored to local requirements.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No.
Availability of <i>ex parte</i> pre-arbitration interim measures?	No, although <i>ex parte</i> pre-arbitration interim measures are not available within Iranian jurisdiction, arbitrators have the ability to issue injunctions upon a request by a party in matters related to the dispute which require immediate action.
Courts’ attitude towards the competence-competence principle?	Based on Article 16 of the LICA, the arbitral tribunal is empowered to make a determination as to its own jurisdiction to adjudicate the substantive claims in dispute.
Grounds for annulment of awards additional to those based on the criteria for the recognition and	Grounds of annulment of an international award in Iran are the same as those stated in Article 5 of the New York Convention. However, the LICA further provides that the award is null and void <i>ab initio</i> when the award with respect to immovable property located in Iran is incompatible with the mandatory

<p>enforcement of awards under the New York Convention?</p>	<p>provisions of the laws of Iran, or with respect to official deeds, unless the arbitrator has been given the authority to reach a compromise.</p>
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>Courts refuse to enforce foreign arbitral awards that have been annulled at the seat of arbitration by a competent authority. It is argued that enforcing an annulled award results in unacceptable and inconsistent consequences. Bearing in mind the analytical framework below, other key points to note, in particular any significant idiosyncrasies of the jurisdiction not covered elsewhere in the summaries (e.g. atypical formality requirements for an award to be deemed valid, such as its signature at the seat of arbitration; whether it is sufficient for the institution to notify an award to trigger the time-limit for seeking the annulment of the award; issues with the enforcement of partial and interim awards).</p>
<p>Other key points to note?</p>	<p><u>Typical formality requirements for an award to be deemed valid:</u></p> <p>The award shall be in writing and signed by the arbitrator(s). In cases where there is more than one arbitrator, the signature of the majority of the arbitrators shall be sufficient, provided that the reason(s) for non-signature by the other member is indicated.</p> <p>The reasoning of the decision shall be stated in the text of the award, unless the parties agree that the reasoning not be provided, or unless the award has been issued on the basis of a mutual agreement by the parties.</p> <p>The award shall contain the date and venue of the arbitration.</p> <p><u>The enforcement of partial awards:</u></p> <p>The LICA is silent on the enforcement of partial awards, hence it seems that there are no legal obstacles to the enforcement of partial awards</p>

JURISDICTION DETAILED ANALYSIS

For the purpose of this detailed analysis, we would like to **first** focus on the following fundamental challenge to **arbitrability** in the Iranian jurisdiction:

"In case the national law of the place of arbitration or the law of the state where award enforcement is being sought imposes a restriction on referring to arbitration either regarding the subject matter of the dispute or against a party, it is quite likely that an award would be vacated by the national court on the grounds that the dispute was not capable of arbitrability in the first place. Courts often refer to "public policy" as the basis of such restriction. Thus, the issue of arbitrability is of great importance in determining whether to refer a dispute to arbitration from the beginning stage of contract execution.

In this regard Iranian law is faced with some ambiguous provisions, requirements of which might be quite discouraging for foreign companies hoping to invest in Iran as most of them are more willing to refer their disputes to arbitration rather than Iranian domestic courts. A very fundamental challenge in arbitrability lies in Article 139 of the Iranian Constitution Law that mandates as follow[s]:

"The settlement of claims relating to public and state property or the referral thereof to arbitration is in every case contingent on the approval of the Board of Ministers, and the Parliament must be informed of these matters. In cases where one party to the dispute is a foreigner, as well as in important domestic cases, the approval of the Parliament must also be obtained. Law will specify the cases which are considered to be important."⁶

The above constitutional restriction in terms of arbitrability is reflected in the CPL. Legal scholars and professionals, in their interpretation of this provision, are trying to limit the applicability of this provision.

A preliminary distinction must be drawn between State entities and the properties belonging to those entities. We will then discuss which properties are considered as public and State property under the Iranian legal system.

A distinction exists between subjective arbitrability and objective arbitrability. Subjective arbitrability refers to the restrictions relating to the parties to the dispute. For example, in some jurisdictions, States or State entities may not be allowed to enter into arbitration agreements at all or may require a special permission. Objective arbitrability restrictions are based on the limitations imposed on the subject matter of the dispute, and are even more challenging. In other words, certain subject matters may constitute a threat to public policy or national interest, so that they should only be dealt with by national courts or be referred to arbitration under certain conditions. The restriction that Article 139 of the Constitutional Law imposes on the arbitrability is an objective one, as it applies to the subject matter of the dispute. Therefore, it could be said that Iranian State entities can participate in an arbitration without needing to obtain approval to do so from the Board of Ministers or from the Parliament, as long as the dispute is not related to or does not arise from State or public properties.

Despite the fact that State and public properties are referred to under the Iranian Constitutional Law and the CPL, they have not been defined in a Parliamentary enacted provision. Hence, we must refer to some executive bylaws and commentaries.

Based on the opinions of certain Iranian scholars, public properties are owned by the entire people, do not have a specific owner and can be utilized by the entire people. Furthermore, they cannot be sold or seized by an order, judgment or award. They include mineral resources, jungles, mountains, roads, bridges, etc. Also, it should be noted that public properties are ruled by the state to be used as public good. Therefore, such properties cannot be either owned or notarized.

⁶ Nasim Gheidi & Parham Zahedi, *Arbitration in Iran: With Focus on International Commercial Arbitration (Part II)*, EFILA Blog, 11 April 2017, available at <https://efilablog.org/2017/04/11/arbitration-in-iran-with-focus-on-international-commercial-arbitration-2/>.

The Executive Bylaw on State-Owned Properties adopted in 1993 and amended in 1995 by the Council of Ministers defines State properties as *“those which are bought by ministries and the State-agencies or possessed by the State through any other legally permitted manner”*. Accordingly, in contrast to public properties, State-owned properties can be sold, rented out or mortgaged. However, in order to determine the scope of this definition, one must distinguish between the properties that the State possesses in its sovereign capacity, and those that it possesses in a contractual capacity. Based on this doctrine, which was first proposed by French scholars, only properties in possession of the government in its sovereign capacity shall be considered as State properties. In fact, when State-owned entities are acting in their contractual capacities, they shall be treated like any other private entities running their businesses.

Iranian courts have different opinions in this regard. However, there is a positive trend to limit the scope of State properties definition. According to a verdict of a branch in Tehran Public Court, *“properties that are subject of Article 139 of the Constitutional Law are confined to the properties that the government has possessed while acting in its sovereign capacity, like properties of national army, rather than properties that the government has possessed in its contractual capacity. In general, actions undertaken by the government in its contractual capacity and the properties thereof like those of national Shipping Company are out of the scope of Article 139 of the Constitutional Law.”*

Furthermore, in an arbitration proceeding administered by the Arbitration Center of Iran Chamber (“**ACIC**”), a private company, the claimant, resorted to arbitration to force the defendant, which was a State-owned company, to compensate the loss of claimant due to non-conformity of the goods with the contract. The defendant argued that since it is a State-owned company and that its properties are subject to Article 139 of the Constitutional Law, the permission of the Board of Ministers should have been obtained, otherwise the arbitral tribunal has no jurisdiction. The arbitral tribunal found that the conditions of Article 139 of the Constitutional Law were not applicable, and stated that:

“Article 139 of the Constitutional Law is not in principle an obstacle to the jurisdiction of the tribunal in a commercial dispute that a State-owned company is a party of the dispute since the properties that are subject of the dispute are considered private properties and are being possessed by the defendant in its contractual and commercial capacity.”

In conclusion, by adopting these interpretations, the scope of Article 139 of the Constitutional Law can be limited, thus removing a major obstacle to recourse to arbitration in Iran. In fact, the requirements of this article would otherwise be inconsistent with the principle of rapidity in international commercial trade, and would also be contrary to the principle of good faith. Foreign investors expect from the host government to ensure the implementation of the agreement and arbitration clause rather than disregard the investor’s rights and hamper the arbitration process. Moreover, laws and regulations must not be interpreted in a way that allows State-owned entities to be unilaterally relieved from their contractual commitments. Therefore, differentiation between the properties possessed by the government in its sovereign capacity and in its contractual capacity is a key point to resolve this problem.⁷

The **second** subject that we would like to discuss here is about the **recognition and enforcement** of arbitral awards.

It is an accepted approach in international arbitration that arbitration treaties play the most important role in the enforcement of foreign arbitration awards. However, by early 2001, Iran had not joined any of the multilateral treaties, including the New York Convention. Therefore, Iran’s treaties on the enforcement of foreign arbitration awards were limited to a few bilateral treaties.

One reason for the delay in the accession of Iran to the New York Convention was the concern of conflict with the application of favorable judicial supervision on the enforcement of the awards within the country. The first and most important step in order to facilitate and accelerate the enforcement of foreign arbitral

⁷ Available at: <https://efilablog.org/2017/04/11/arbitration-in-iran-with-focus-on-international-commercial-arbitration-2/>.

awards was the accession to this convention, which is not inconsistent with the rules of Iranian national law but even provides a guarantee of enforcement of foreign awards in line and in conformity with domestic regime.

One way to enforce foreign arbitral awards within the framework of domestic law in jurisdiction is to simulate the foreign arbitral awards to domestic arbitral awards. To achieve this, the development of the national enforcement regime for foreign arbitral awards is a proper solution, which may require the development of civil procedural law or an international commercial arbitration law.

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law?

The LICA is a modern arbitration law based on the UNCITRAL Model Law, which entered into force in 1997.

1.1.1. If yes what key modifications if any have been made on it?

Certain provisions of the LICA do not exactly reflect the UNCITRAL Model Law in its entirety and instead are adapted to satisfy local requirements.

The LICA covers disputes arising from international trade relationships. This definition is to a considerable extent contrary to Article 1(1) of the UNCITRAL Model Law, which emphasizes the international character of arbitration, rather than the nature of the relationship.

In addition, the LICA relies on the non-Iranian nationality of one of the parties to the arbitration as the sole criterion of the internationality of the arbitration, which is incompatible with the definition of international arbitration provided in Article 3(1) of the UNCITRAL Model Law.

Moreover, the LICA provides that the Iranian party shall not appoint an arbitrator or an arbitral body with the same nationality as the foreign party to the agreement before the dispute arises, while the Model Law does not contain any such restriction.⁸

1.2 When was the arbitration last revised?

The law was adopted on 15 October 2001 and it has not been revised since then.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

Under Iranian conflict of law rules, the law governing a contract is the law of the place of execution of the contract, except when both parties are foreigners and have agreed on a law other than the laws of Iran. Therefore, when a contract is concluded outside of Iran, it might be subject to foreign law even if the parties are Iranian (Article 968 of the Iranian Civil Code).

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Yes, based on Article 16(1) of the LICA, although the arbitration clause is a part of the underlying contract, it is essentially independent from the rest of the contract.

2.3 What are the format requirements (if any) for an enforceable arbitration agreement?

Under Article 7 of the LICA, the arbitration agreement shall be signed by both parties by way of signature of a document or through exchange of letter, telex, telegram or any other similar written format, evidencing

⁸ Jamal Seifi, 'The New International Commercial Arbitration Act of Iran – Towards Harmony with the UNCITRAL Model Law' (1998) 15 Journal of International Arbitration, Issue 2, pp. 5–35.

acceptance of arbitration by both parties. Further, it is possible for one party to claim the existence of an arbitration agreement through an application or a notice, and the other party accepts this in practice.

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

Under Iranian Civil Law, undertakings or contracts are only binding on the two parties concerned or their legal substitutes, except in cases coming under Article 196, which stipulates that anyone who makes a contract is deemed to be acting for himself, unless otherwise agreed or unless subsequent evidence to the contrary is established. When entering into a contract, however, anyone can include a provision for the benefit of a third person.

2.5 Are there restrictions to arbitrability?

Yes, there are certain subjects under the CPL that cannot be settled through arbitration. This is also stipulated in Article 34 of the LICA. These subjects are: disputes regarding bankruptcy and some aspects of family relations including marriage, divorce and parenting. Only disputes of a private civil nature can be referred to arbitration.

2.5.1. Do these restrictions relate to specific domains (such as IP, corporate law etc.)?

As explained above, Article 675 of the CPL provides that disputes relating to marriage, divorce, cancellation of marriage, parenting and bankruptcy cannot be settled through arbitration.

2.5.2. Do these restrictions relate to specific persons? (i.e. State entities, consumers etc.)?

As discussed above, *"the settlement of claims relating to public and State property or the referral thereof to arbitration is in every case contingent on the approval of the Board of Ministers, and the Parliament must be informed of these matters. In cases where one party to the dispute is a foreigner, as well as in important domestic cases, the approval of the Parliament must also be obtained. Law will specify the cases which are considered to be important."*⁹

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

3.1.1 If the place of the arbitration is inside the jurisdiction?

3.1.2 If the place of the arbitration is outside the jurisdiction?

In line with the UNCITRAL Model Law, according to the LICA, the main effect of the arbitration agreement is to deprive the court from the right to adjudicate the dispute. Based on Article 8, if a dispute governed by an arbitration agreement arises in court, the court is required to refer the parties to arbitration, unless the arbitration agreement is void or unenforceable. There is no difference between domestic and international arbitration.

3.2 How do courts treat injunctions by arbitrators enjoining parties to stay litigation proceedings?

No provision or practice on this issue.

3.3 On what grounds the court (s) intervene in arbitrations seated outside of the jurisdiction? (relates to the anti-suit injunction but not only)

No provision or practice on this issue.

⁹ Article 139 of the Iranian Constitution Law at http://rc.majlis.ir/fa/content/iran_constitution.

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

Yes, there are no restrictions to either.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

In accordance with Article 16-3 of the LICA, in the case of an objection to the jurisdiction and/or to the existence or validity of the arbitration agreement (except in cases where the parties have agreed otherwise), the arbitral tribunal shall decide on the objection as a preliminary matter before examining the merits of the case. Objections to an arbitrator stepping out of the limits of his capacity which may occur during the arbitral investigation process may be made part of the award. Should an arbitrator confirm his jurisdiction at the outset, each of the parties shall be allowed to request, within thirty days after the date of service of the relevant notice, the court mentioned in Article 6 to investigate and make a decision. As long as such request is under investigation, the arbitrator shall continue his investigation and may also render his award.

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of ad hoc arbitration)?

Unlike the UNCITRAL Model Law, the LICA does not contain explicit provisions preventing court intervention in arbitration proceedings. However, the law provides that the parties may agree on the arbitration procedures, provided that they observe the mandatory rules of the Law. In the absence of such agreement, an arbitrator shall appropriately administer and take charge of the arbitration with due observation of the regulations of this Law.

4.4 Do courts have the power to issue interim measures in connection with arbitrations?

Yes, based on Article 9 of the LICA, each party may demand, prior to or during arbitral proceedings, the issuance of interim measures from the relevant courts.

4.4.1 If so, are they willing to consider ex parte requests?

Based on Article 9 of the LICA, each party may demand the interim measures independently.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

In general, there are no provision on the specifications of the arbitrators. In other words, parties are free to agree on a procedure of appointing the arbitrators. It could be said that the parties have the discretion to determine the type of arbitration (*ad hoc* arbitration or institutional arbitration) and the procedure, as well as the law governing the arbitration, the number of arbitrators and the seat of the arbitration.

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

No.

4.5.2 Does it regulate the length of arbitration proceedings?

No.

4.5.3 Does it regulate the place where hearings and/or meeting may be held?

No. At first, the parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

4.5.4 Does it allow for arbitrators to issue interim measures? In the affirmative, under what conditions?

As per Article 17 of the LICA, unless otherwise agreed by the parties, the arbitrator or arbitral tribunal may, at the request of a party, at any time prior to the issuance of the award, grant interim measures. The arbitrator can require the party requesting an interim measure to pay appropriate eventual damages.

4.5.5 Does it regulate the arbitrator's right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?

No.

4.5.6 Does it make it mandatory to hold a hearing?

No. But if a party requests holding a hearing, the hearing must be held.

4.5.7 Does it prescribe principles governing the awarding of interest?

No.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

No.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

No, based on the general rules of Iranian civil law as well as tort law, leave or violation of his duties by the arbitrator can be followed by the different sanctions, including civil liability. Based on Article 501 of the CPL, the arbitrator shall be liable in cases of fraud or failure to uphold responsibilities related to the performance of duties.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

As a general rule, if the arbitrator commits a crime, like any other person, he will be punished. Moreover, based on Article 588 of the Criminal Law, an arbitrator who commits bribery may be punished. Furthermore, unauthorized disclosure of confidential information obtained through occupations and professions will be punished. So, if the arbitrator discloses information pertaining to the arbitration proceeding without any legal authorization, he/she will be punished according to Article 648 of the Criminal Law.

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Yes, based on Article 30 of the LICA, all the reasons on which the award has been relied upon shall be stated in the text of the award, unless the parties agree not to mention such reasons, or unless the award has been issued on the basis of mutually agreed reasons.

5.2 Can parties waive the right to seek the annulment of the award?

5.2.1 If yes, under what conditions?

There are no provisions regarding the waiver of the right to seek the annulment of the award, and it seems that parties cannot waive such rights, given that it is a mandatory regulation that cannot be compromised. However, there is a right for waiver of objection under Article 5 of the LICA where one party, being aware of a failure in observing any non-authoritative regulation of this Law or any failure in observing the conditions of the arbitration agreement which may lead to the removal of an arbitrator, continues with arbitration and

fails to raise any objection immediately or within a deadline fixed for this purpose. In this case, it shall be considered that such party has waived his right for objection.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

The following requirements apply to the rendering of a valid award rendered at a seat in Iran: the award shall be made in writing and bear the signature of the arbitrator(s); in cases where there is more than one arbitrator, the signature of the majority of the arbitrators shall be sufficient, provided that the reasons for non-signature by the other member are mentioned. All the reasons on which the award relies upon shall be stated in the text of the award. The award shall contain the date and venue of arbitration.

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

5.4.1 If yes, what are the grounds for appeal?

In general, all awards rendered under the law are not subject to review or appeal, except under limited circumstances, as mentioned earlier, where arbitral awards can be annulled or cancelled.

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

As mentioned earlier, Iran is a party to the New York Convention. Based on the “Law concerning the Accession of Iran to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards”, in order to recognize and enforce foreign arbitral awards in Iran, the applicant shall provide the following documents:

- (a) the duly authenticated original award, or a duly certified copy; and
- (b) an official translation of the arbitral award approved by an official or sworn translator or by a diplomatic or consular agent.

Applications for annulment of an award pursuant to Article 33 of the LICA shall be filed within three months from the date of notification of the arbitrator’s award, including amending, complementary or exegetic judgment to objector, to the court, subject to Article 6 above. Otherwise, it will not be acceptable.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

It does not happen automatically. Based on Article 35 of the LICA, in case one of the parties requests the annulment of the arbitral award by the court and the other party demands its recognition or enforcement, the exercise of the right to enforce the award will not be suspended. Instead, the court shall provide that the party requesting the annulment pay the eventual damages, if so requested by the party demanding recognition or enforcement.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

There is no explicit regulation on this issue. However, in the event of such silence, recognition and enforcement of foreign annulled awards is not accepted in the jurisdiction.

5.8 Are foreign awards readily enforceable in practice?

In practice, enforcement of foreign arbitral awards in Iran may come along with considerable inconsistency and disconformity.

6. Funding arrangements**6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?**

No.

6.2 If so, what is the practical and/or legal impact of such restrictions?**7. Is there likely going to be any significant reform of the arbitration law in the near future?**

Yes, according to Article 211 of the Law of the Fifth Development Plan, the judiciary is obliged to cooperate with the government to establish an independent domestic as well as an international arbitration body. In this regard, the preparation and drafting of the Comprehensive Arbitration Law has been the responsibility of ACIC since 2011. The draft has been prepared and is in the process of adoption by Parliament.

ITALY

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

VALENTINE CHESSA AND FEDERICA IORIO
OF CASTALDIPARTNERS

CASTALDIPARTNERS

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

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VERSION: 29 MAY 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Italian arbitration law is a so-called “monistic” system, whereby the same set of rules applies to both domestic and international arbitrations. Most provisions governing arbitration are contained in the Code of Civil Procedure. In 2006, the arbitration law was entirely revamped to better reflect the principles of the UNCITRAL Model Law.

Ever since, the legislator has continued to make efforts to favour the recourse to arbitration. For example, tailored rules for arbitration in specific sectors have been adopted, such as the rules for arbitration concerning public contracts or arbitrations founded on arbitral clauses contained in companies’ bylaws. In addition, in 2014, the legislator has introduced the possibility to “migrate” from court proceedings to arbitral proceedings.

Overall, Italy can thus be considered as offering an arbitration-friendly environment.

Key places of arbitration in the jurisdiction	Milan, Rome.
Civil law / Common law environment?	Civil law.
Confidentiality of arbitrations?	Not explicitly provided.
Requirement to retain (local) counsel?	No.
Ability to present party employee witness testimony?	Parties are free to determine their own rules on the taking of evidence.
Ability to hold meetings and/or hearings outside of the seat?	Yes.
Availability of interest as a remedy?	Yes.
Ability to claim for reasonable costs incurred for the arbitration?	Yes.
Restrictions regarding contingency fee arrangements and/or third-party funding?	The Code of Ethics of the Italian National Bar Association prevents lawyers from applying contingency fees only. However, lawyers are allowed to calculate part of their fees on the value of the compensation awarded. Third-party funding is reserved to entities meeting certain legal requirements (such as banks or financial institutions).
Party to the New York Convention?	Yes. Italy has been a party to the New York Convention since 1969 with no reserves.
Other key points to note	Arbitrators are deprived of any power to issue interim measures, except where otherwise provided by the law.
WJP Civil Justice score (2017-2018)	0.65

ARBITRATION PRACTITIONER SUMMARY

Date of arbitration law?	<p>The main source for arbitration law in Italy is the Code of Civil Procedure, which entered into force in 1942.</p> <p>The Legislative Decree n° 40/2006 revamped the arbitration law in 2006.</p>
UNCITRAL Model Law? If so, any key changes thereto?	<p>Italian arbitration law embodies most of the principles of the UNCITRAL Model law.</p> <p>The only notable differences with the UNCITRAL Model Law are that (i) Italian law does not allow arbitrators to grant interim measures and (ii) there is no exclusion of liability for arbitrators.</p>
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No. Arbitration-related matters usually fall within the jurisdiction of the Civil Court of the district of the seat of the arbitration.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Arbitrators are deprived of any power to issue interim measures. However, parties can have recourse to national courts to obtain interim measures with the view of commencing arbitral proceedings.
Courts' attitude towards the competence-competence principle?	<p>The law explicitly empowers the arbitrators with the ability to decide on their own jurisdiction. State courts abide by this rule.</p> <p>However, if a party starts court proceedings despite a valid arbitration agreement, the defendant must raise the jurisdictional objection in the first statement of defence.</p>
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Yes. The award can also be set aside if it (i) does not decide the merits of the dispute (and it is not an interim or partial award), (ii) does not provide sufficient reasoning, (iii) is missing the signature of the arbitrators (iv) is missing the operative part (v) is in contradiction with a previous award or judgement having the force of <i>res judicata</i> and such decision was raised by one of the parties during the arbitral proceedings.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	There is no case-law on the matter.
Other key points to note?	One of the most prominent characteristics of Italian arbitration law is the distinction between <i>arbitrato rituale</i> and <i>arbitrato irrituale</i> . The difference between the two types of arbitration lays in the effects of the award: while the decision issued at the end of an <i>arbitrato rituale</i> is a binding award, the <i>arbitrato irrituale</i> results in an award having the effect of a binding contract.

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law?

The main sources of law for arbitration proceedings are the provisions contained in Title VIII of Section IV of the Code of Civil Procedure (Articles 806-840), as amended from time to time.¹ These provisions are not explicitly based on the UNCITRAL Model Law, although they embody most of the principles laid out in the Model Law.

1.2 When was the law revised last?

The Code of Civil Procedure underwent a reform in 2017, but the last amendments specifically relating to Title VIII of Section IV date back to 2 February 2006, when the Legislative Decree n° 40/2006 was adopted.

The 2006 reform rewrote much of the provisions on arbitration introducing, for example, the possibility to have recourse to arbitration for non-contractual disputes.

Subsequently, Legislative Decree n° 132 of 12 September 2014 introduced the possibility for parties involved in civil court proceedings to “migrate” to arbitration.² Parties willing to take advantage of this possibility have to file a joint request to the court. Before granting such request, the court will verify whether the subject-matter of the dispute falls within the category of “arbitrable” disputes. If so, the judge will submit the file to the president of the Bar association of the district where the litigation is taking place. The members of the arbitral tribunal will be appointed jointly by the parties, in cooperation with the president of the bar association.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

In accordance with Article V §1 of the New York Convention, the Italian courts first look at whether the parties have specified the law governing the arbitration agreement. Failing such indication, they apply the law of the seat of the arbitration.³

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Yes. Article 808 § 2 of the Code of Civil Procedure sets out a general principle of autonomy and independence of the arbitration clause vis-à-vis the contract in which it is contained.

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

Italian law does not appear to be over formalistic regarding the requirements for an enforceable arbitration clause. However, it must be made in writing.

Article 807 of the Code of Civil Procedure requires the arbitration clause to: (i) be in writing (regardless of the form); and (ii) determine the subject matter of the dispute.

¹ For the sake of completeness, it is worth mentioning that special rules on arbitration are also contained in:

- Legislative Decree of 17 January 2003 n° 5 – concerning arbitration in corporate law;
- Legislative Decree of 18 April 2016 n°50 – concerning arbitration in public procurement.

² See article 1 of Legislative Decree n° 132/2014.

³ Corte di Cassazione, n. 615/1982.

In this regard, if the arbitration agreement concerns non-contractual disputes that have not yet arisen, the clause must also identify the non-contractual relationship giving rise to the dispute.

The law sets out additional requirements for arbitration clauses contained in general terms and conditions or in a standard form contract. In these cases, the clause must also be specifically approved in writing with a separate signature (Articles 1341 and 1342 Civil Code). To this purpose, it is not uncommon to find, in the general terms and conditions or standard contracts, a double signature of the party accepting said conditions: the “first signature” is for the approval of the general contract and the “second signature” is for the specific approval of the arbitration clause therein contained.

When assessing the scope of the arbitration clauses, two interpretative rules apply:

- Article 1367 of the Civil Code, according to which, in case of doubt, the contract or the individual clauses shall be interpreted in favour of their effectiveness;
- Article 808-*quater* of the Code of Civil Procedure according to which the arbitration agreement shall always be interpreted extensively. Therefore, if the arbitration clause refers to all disputes arising out of the contract, the arbitral tribunals will have jurisdiction over any dispute resulting from the contractual relationship (thus excluding, for example, disputes on unfair competition⁴).

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

In line with the general theory of privity of contract, only the parties to the arbitration agreement are deemed to be bound by the arbitration clause.

An exception to said principle occurs in case of contract in favour of a third party under article 1411 of the Civil Code: in such hypothesis, when the third parties declare to take advantage of the contract executed in their interest, they also become bound by the arbitration clause contained therein.⁵

After the litigation has arisen, a third party can be bound by an arbitration agreement in the following cases:

- voluntary intervention upon agreement: if the third party, the parties to the proceedings and the arbitrators agree, the third party can be joined to the arbitration (Article 816-*quinquies* § 1, Code of Civil Procedure);
- voluntary intervention necessary for the adjudication of the dispute: the voluntary intervention of the third party in the proceedings is always admissible and does not require the prior approval of the parties to the litigation when such a third party's right is dependent and/or related to the subject matter of the dispute (Articles 816-*quinquies* and 105 Code of Civil Procedure);⁶
- in any case, and even without the prior approval of the other parties to the proceedings, where the absence of a third-party amounts to a breach of due process (Articles 816-*quinquies* and 102 Code of Civil Procedure).⁷ An example of this occurs when the dispute concerns a good that is subject to concurrency estate, and not all of the owners are part of the proceedings.

⁴ Corte di Cassazione, n. 20673/2016.

⁵ Corte di Cassazione, n. 13474/2000; Corte di Cassazione n. 2384/1997.

⁶ The participation of a third party whose rights are dependant and/or related to the rights asserted in the arbitration allows the third party to protect its rights without waiting for the outcome of the proceedings to challenge the award, pursuant to the procedure laid down in Article 404 Code Civil Procedure. See F. EMANUELE and M. MOLFA “Selected issues in International Arbitration: the Italian Perspective”, Thomson Reuters, London 2014, pp. 128 ff.

⁷ Allowing the participation of a party that is necessary for the adjudication of the dispute is aimed at ensuring that basic due process requirements are met. See F. EMANUELE and M. MOLFA “Selected issues in International Arbitration: the Italian Perspective”, *Ibidem*.

In addition, if during the arbitral proceedings, the contract containing the arbitration clause is assigned, the proceedings continue between the original parties, but (i) the original parties can request the assignee to be joined in the proceedings (Articles 816-*quinquies* and 111 Code of Civil Procedure) and, (ii) the assignee may request to be joined.

2.5 Are there restrictions to arbitrability? In the affirmative:

Article 806 of the Code of Civil Procedure provides some limited restrictions on arbitrability.

2.5.1 Do these restrictions relate to specific domains (such as IP, corporate law etc.)?

Article 806 of the Code of Civil Procedure states that disputes concerning "*rights of which the parties may not dispose or where arbitration is otherwise prohibited by statute*" cannot be referred to arbitration. The former includes, most notably, disputes that cannot be the subject matter of a transaction, such as those concerning one's personal status, those falling under the exclusive jurisdiction of the administrative courts, those concerning tax issues or requiring the use of public force (such as enforcement procedures).

With respect to IP law disputes, although jurisdiction concerning disputes the nullity of a trademark or a patent is reserved to national courts, the issue over the validity of a trademark can be referred as a preliminary question to an arbitral tribunal in counterfeit proceedings.⁸ Contrariwise, Italian courts have admitted that a dispute concerning antitrust matters can be referred to an arbitral tribunal.⁹

Concerning employment disputes, Article 806 of the Code of Civil Procedure provides that employment disputes "*may be submitted to arbitration only to the extent that this is allowed by statute or by collective bargaining agreement*".

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

The court will stay litigation only if a party raises a jurisdictional objection in its first statement of defence, filed no later than 20 days prior to the first hearing.¹⁰ Failing a timely objection, the court can decide on the merits of the case (Articles 38 and 819-*ter* Code of Civil Procedure).¹¹

The place of arbitration (whether within or outside the jurisdiction) is irrelevant to the question of a stay of court proceedings.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

In Italy, there is a general prohibition on arbitrators issuing any form of interim measures, pursuant to Article 818 of the Code of Civil Procedure. Should the arbitrators attempt to order that the courts stay proceedings, the courts will ignore such injunction.

However, if a party starts civil court proceedings after an arbitration has already commenced on the basis of a valid arbitration clause, the civil court can be expected (upon a request by the other party) to decline its jurisdiction in favour of the arbitral tribunal, except when the dispute concerns the validity of said arbitration agreement.¹²

⁸ Award of an Arbitral Tribunal, seated in Genoa, 23 November 1992, in *Rivista dell'Arbitrato*, 1995. P. 511 and ff.

⁹ Court of Appeals of Milan, 13 September 2002, n. 2090, in *Rivista dell'Arbitrato*, 2004, pp. 105 ff.; Court of Appeals of Milan, 15 July 2006, n. 1897, in *Rivista dell'Arbitrato*, 2006, pp.744 ff.

¹⁰ Corte di Cassazione, Sez. Unite, n. 10617/96.

¹¹ Corte di Cassazione, n. 22748; Corte di Cassazione, Sez. Unite, n. 1005/14.

¹² For the sake of completeness, it is worth mentioning that Italian law recognizes the doctrine of *kompetenz-kompetenz* also for arbitral tribunals. Article 817 Code of Civil Procedure states to this purpose that: "*Should the validity, content or scope of*

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to anti-suit injunctions but not only)

Anti-suit injunctions are extraneous to the Italian legal system. There is no case law referring to this kind of measures.

Arbitrators can resort to state courts to compel a witness to appear before them (Article 255 Code of Civil Procedure). Furthermore, Italian courts' involvement is always required for issuing provisional or urgent measures to be enforced in Italy pending the arbitration proceedings and regardless of the seat.

National judges may also have a role for the constitution of the Arbitral Tribunal seated abroad: according to article 810 of the Code of Civil Procedure, failing an agreement between the parties for the appointment of the president of the Arbitral Tribunal, the parties may submit a request to the president of the Tribunal of Rome to appoint the president.

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

Article 816-*bis* of the Code of Civil Procedure provides that parties may either be self-represented or retain a counsel. In the latter case, it is irrelevant whether the counsel is a foreign or Italian qualified attorney. In practice, parties in Italy tend to choose their legal counsel in the light of the subject-matter and applicable law. It is therefore not uncommon for foreign lawyers to represent parties in arbitrations seated in Italy.

4.2 How strictly do courts control arbitrators' independence and impartiality?

For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

Under Italian law, there is no explicit duty of disclosure of conflicts or circumstances that might affect the arbitrator's impartiality. Some authors believe that such duty is implied in the general obligation to perform the contract in good faith (Article 1375 Civil Code) or in the obligation to act with the necessary diligence in the performance of one's mandate (Article 1710 Civil Code).¹³

Article 815 of the Code of Civil Procedure sets forth the criteria for the challenge of an arbitrator:

- the arbitrator does not have the qualifications agreed by the parties;
- the arbitrator or an entity under their control has an interest in the outcome of the case;
- the arbitrator or their spouse is a relative of one of the parties or lives with one of the parties, is their legal representative and/or the party's counsel;
- the arbitrator or their spouse acts against or is hostile to one of the parties, a company controlled by one of the parties or the person controlling one of the parties' company;

the arbitration agreement or the regularity of the arbitrators' appointment be challenged in the course of the arbitration, the arbitrators shall decide on their own jurisdiction.

This provision shall apply also in case the arbitrators' powers are challenged in any venue for whatever reason which has supervened in the course of the proceedings.

The party that does not object in the first statement of defense subsequent to the arbitrators' acceptance that they lack jurisdiction by reason of the non-existence, invalidity or ineffectiveness of the arbitration agreement, may not challenge the award on this ground, except in case of a non-arbitrable dispute.

The party which, during the arbitration proceedings, fails to raise the objection that the other parties' pleadings exceed the limits of the arbitration agreement may not, on this ground, challenge the award."

¹³ R. TUCCILLO, *L'imparzialità dell'arbitro: profili comparatistici*, 2012, pag. 230, <http://eprints.luiss.it/1057/1/tuccillo-20120301-tesi.pdf>

- the arbitrator is employed or acts as consultant to one of the parties, to a company owned by one of the parties, to its controlling entity or to a company subject to common control;
- the arbitrator is the legal guardian of one of the parties;
- the arbitrator acted as a consultant or an advisor, or represented one of the parties during a precedent phase of the same case or has testified as witness during the same.

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of ad hoc arbitration)?

Pursuant to Article 810 of the Code of Civil Procedure, the parties are entitled to submit a request to the president of the tribunal of the district of the seat of the arbitration for the appointment of the arbitrators. As mentioned above (paragraph 3.3), if the seat of the arbitration is outside the jurisdiction, the Tribunal of Rome has exclusive jurisdiction.

If the parties have not established the seat of the arbitration, it is for the president of the tribunal of the Italian district where the arbitration agreement was executed to appoint the arbitrators. If the arbitration agreement was executed abroad, the president of the tribunal of Rome makes the appointment.

In addition, the court can intervene (upon request of the initiating party) when a respondent has failed to appoint a co-arbitrator within 20 days from the receipt of the initiating party's notice of appointment.

The same rules apply if, in the course of the proceedings, one or more arbitrators have to be replaced and the party or parties fail to appoint the new member(s) of the arbitral tribunal promptly.

4.4 Do courts have the power to issue interim measures in connection with arbitrations?

Yes. Since arbitrators are deprived of any power to issue interim measures, injunctions and provisional measures (Article 818 Code of Civil Procedure), parties must address their requests for interim measures to courts, regardless of whether the arbitration has effectively started.

4.4.1 If so, are they willing to consider *ex parte* requests?

Yes. Requests for interim measures are generally made *ex parte*. The decisions can also be issued on an *ex parte* basis. Subsequently, a party has the right to object within 15 days before the same court,¹⁴ which can either revoke or confirm the interim measures already granted.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

Rules concerning the conduct of the proceedings can be found in:

- Title VIII, Section IV, Chapter III (Articles 816-819 Code of Civil Procedure) on the conduct of *ad hoc* proceedings;
- Title VIII, Section IV, Chapter IV (Article 820-826 Code of Civil Procedure) on the award;
- Title VIII, Section IV, Chapter VI (Article 820-826 Code of Civil Procedure) on the conduct of administrated arbitrations.

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

There is no specific provision in the Code of Civil Procedure concerning the confidentiality of arbitration proceedings.

¹⁴ The court will be the same, but the objection will be decided by a three-judge chamber that cannot include the judge that issued and/or refused the interim measure.

However, such absence does not imply that the counsel and the arbitrators are not expected to keep the proceedings and the award confidential.¹⁵ In particular, Italian-qualified attorneys are subject to an obligation of secrecy regardless of whether they are acting as counsel¹⁶ or as arbitrators.¹⁷

4.5.2 Does it regulate the length of arbitration proceedings?

Article 820 of the Code of Civil Procedure provides that the arbitral tribunal has to issue the award no later than 240 days (about 8 months) from the arbitrators' acceptance of the appointment.

The time limit can be extended by the tribunal to 420 days (an additional 180 days or about 6 months)¹⁸ in the following cases:

- if the arbitral tribunal needs additional evidence;
- if an expert is appointed by the arbitral tribunal;
- if the arbitral tribunal issues a partial or interim award;
- if the sole arbitrator or one of the members of the arbitral tribunal is replaced in the course of the proceedings.

In any case, the time limit can be extended by any length of time:

- if all the parties agree in writing;
- by the national court where the arbitration is seated, before the expiration of the time-limit, upon the parties' or arbitrators' request.

The time-limit is rarely respected, as it is very common for parties to request an extension of time. There are no statistics available on the average duration of *ad hoc* arbitration proceedings,¹⁹ but they usually last for about 18 months.

The excessive duration of the proceedings is not *per se* one of the grounds for the annulment of the award envisaged by Article 829 of the Code of Civil Procedure. However, if the time limit to render the award is not extended pursuant to Article 820 and 821 Code of Civil Procedure, the parties can request, before the award is rendered, that the arbitral tribunal be considered *functus officio*.

If the party relies on the termination of the arbitrators' authority, the arbitrators, having verified the expiry of the time-limit, shall declare the proceedings extinguished (Article 821 Code of Civil Procedure).

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

Article 816 § 3 of the Code of Civil Procedure provides that, unless otherwise prescribed in the arbitration agreement, the arbitrators may hold hearings and/or meetings in places other than the seat of the arbitration (including abroad).

¹⁵ To this regard, the rules of the Milan Chamber of Commerce provide an exception: article 8 of the rules specifically provides that the parties and the members of the Arbitral Tribunal are subject to an obligation of confidentiality.

¹⁶ Article 13 of the Professional law.

¹⁷ Article 61 of the Professional law.

¹⁸ The extension can be granted once for each single cause. See Corte di Cassazione, n. 12950/2016.

¹⁹ M. E. ARMANDOLA "Durata dei procedimenti e rapporti tra arbitri e autorità giudiziaria", in *La Nuova Procedura Civile*, Vol. 5, 2016, available at <http://www.pavia-ansaldo.it/wp-content/uploads/2016/10/Durata-dei-procedimenti-e-rapporti-tra-arbitri-e-autorit%C3%A0-giudiziaria.pdf>

4.5.4 Does it allow for arbitrators to issue interim measures?

No. Article 818 of the Code of Civil Procedure explicitly prohibits arbitrators from issuing interim measures. Aware of the fact that said prohibition is likely to dissuade some parties to have recourse to arbitration and/or chose Italy as a seat for an arbitration, in its 2017 annual report, the National Bar Association suggested to the Ministry of Justice to grant to the arbitrators the power to issue interim measures, in line with the legislation of most EU countries.²⁰

There is, however, one exception to this rule. Pursuant to Article 35 of the Legislative Decree n° 5/2003 concerning arbitration on corporate matters, if the dispute concerns the validity of a shareholder's resolution, the arbitral tribunal has the authority to suspend, "by way of interim relief", the effects of said resolution pending the proceedings.

In any event, nothing prevents the parties from voluntarily complying with any interim order issued by the arbitrators, since the parties' conduct in the course of the proceedings is one of the elements that arbitral tribunals take into account when allocating costs.

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence?

No. Pursuant to Article 816-*bis* of the Code of Civil Procedure, the parties are free to determine rules on the taking of evidence.

It is generally believed that, in the absence of a specific determination of the rules on the taking of evidence, the arbitrators have to refer to the rules governing the administration of evidence before the national courts.²¹

However, more and more arbitral tribunals also make reference to the IBA Rules on the Taking of Evidence for international cases.

4.5.5.1 For example, are there any restrictions to the presentation of testimony by a party employee?

Not specifically. Article 247 of the Code of Civil Procedure, applicable before domestic State courts, does not allow the testimony of anyone having an interest in the case. However, it has become more common to see employees testifying in favour of their own employers pursuant to the general practice in international arbitration.

4.5.6 Does it make it mandatory to hold a hearing?

Given the freedom granted to parties to set the procedural rules, there is also no provision as to where the hearings should be held or if they should be held at all. Consequently, if the parties decide to hold hearings, they are free to decide on the place that they find most suitable (including outside Italy).

4.5.7 Does it prescribe principles governing the awarding of interest?

Not specifically. However, if claimed, interest is generally awarded and is calculated on the basis of criteria set forth in Article 1284 of the Civil Code.

²⁰ 2017 Annual Report of the Italian National Bar Association (Consiglio Nazionale Forense), p. 12. Available at <http://www.consiglionazionaleforense.it/documents/20182/246419/Rapporto+annuale+2017+ONPG.pdf/7ad64f73-9378-451d-aed7-11c98ffef91d>

²¹ S. LA CHINA, *L'arbitrato il sistema e l'esperienza*, Milan, 2007, p. 166; M. BOVE, "L'istruzione probatoria nel giudizio arbitrale", in *Il Giusto Processo Civile*, 1/14, pp. 961 *et ff.*; adde F. AULETTA, "L'istruzione probatoria", in *Diritto dell'arbitrato rituale*, 2nd éd., Turin, 2000, p. 197. *Contra* S. SATTI, *Contributo alla dottrina dell'arbitrato*, Milano, 1931, p. 34 *et seq.*

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

Article 91 of the Code of Civil Procedure lays out the general principle according to which the unsuccessful party must pay the legal costs to the successful party. Italian arbitrators commonly allocate costs according to this principle, and quantify them according to the parameters set in the Ministerial Decree n° 55/2014, although they have ample discretion in this regard.²²

Recoverable costs include administrative fees, legal fees and documented expenses. The allocation of costs has to be reasoned.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

No. Article 813-ter of the Code of Civil Procedure provides that arbitrators are held liable only for acts committed with intent or gross negligence.

Specifically, arbitrators are held liable for all damages suffered by the parties when they have, with intent or gross negligence:

- omitted or postponed an act, thus causing the forfeiture of the act;
- resigned without a reasonable justification; and/or
- completely omitted the release of the award or postponed it beyond the deadline.

There is a presumption of gross negligence when the arbitrators have:

- manifestly violated the law;
- affirmed the existence of a fact, the existence of which is unquestionably rebutted by the evidence filed in the proceedings; and/or
- denied the existence of a fact, the existence of which is unquestionably demonstrated by the evidence filed in the proceedings.

The arbitrator cannot be held to be grossly negligent in their interpretation of the evidence in the case,²³ unless such interpretation falls within the categories identified above.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

Not specifically. However, following the formalization of the jurisdictional nature of arbitral proceedings by the Legislative Decree n. 40/2006,²⁴ some commentators consider that criminal provisions relating to the corruption of judges might extend to arbitral tribunals.²⁵

Experts and witnesses cannot be criminally liable for false statements. They have no obligation to take the oath.

²² This is, of course, the case when the arbitration is not administrated.

²³ Corte di Cassazione, Sez. Unite n. 9839/2011; Corte di Cassazione n. 17466/2016.

²⁴ In this respect, see also the judgement of the Constitutional Court n. 223/2013.

²⁵ R. POLIDORI, "Arbitrato rituale e questioni penali: corruzione di arbitri, falsa testimonianza e falsa perizia", in *Rivista dell'Arbitrato*, Vol. 2 (2016), pp. 399 *et seq.*

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

There is no explicit prohibition of waiver to the requirement to provide reasons. However, under Article 829 (read in conjunction with Article 823) of the Code of Civil Procedure, it is possible for a party to apply to the court to set aside an award on the basis that it contains insufficient reasoning, regardless of any waiver by the parties.

5.2 Can parties waive the right to seek the annulment of the award?

Pursuant to Article 829 of the Code of Civil Procedure, despite any waiver, the parties are always entitled to seek the annulment of the award on the basis of the grounds contained in this provision. See paragraph 5.4 below.

5.2.1 If yes, under what conditions?

See paragraph 5.2 above and 5.4 below.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

When rendering an award in Italy, arbitrators have to keep in mind the difference between *arbitrato rituale* and *irrituale*, which is a particular feature of Italian law.

Arbitrato irrituale (article 808-ter Code of Civil Procedure) aims at resolving a dispute by adopting a binding contractual agreement rather than an award. The decisions rendered at the end of an *arbitrato irrituale* take the form of simple contractual agreements between the parties and therefore are not immediately enforceable.

There are no atypical mandatory requirements for *arbitrato rituale*.

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

No. Pursuant to Article 827 of the Code of Civil Procedure, the only available avenues for challenging an arbitral award are (i) filing for annulment (by a party); (ii) revocation of the award (by the arbitral tribunal), and (iii) third-party opposition.

5.4.1 Annulment

Pursuant to Article 829 of the Code of Civil Procedure, a filing for annulment is allowed in the following cases:

- a) invalidity of the arbitration agreement (provided that this objection was raised in the course of the proceedings);
- b) breach of the rules on the appointment of the arbitrators (provided that this objection was raised in the course of the proceedings) or their ineligibility;
- c) breach of due process;
- d) the award does not contain a brief statement of the reasons or the statement therein contained (i) does not allow the parties to fully understand the Tribunal's reasoning, (ii) is contradictory (iii) fails to decide on the merits where it should have, (iv) fails to decide on some of the parties' claims or defences (and is not an interim or partial award);
- e) the dispositive section of the award is missing;
- f) the award is not signed (the signature of the majority is sufficient);

- g) the award was rendered after expiry of the time limit (provided that the party has given notice to the other parties and the arbitrators during the proceedings);
- h) the arbitrators have breached the formalities prescribed in the arbitration agreement.

The award can also be challenged for breach of substantive provisions of law, but only if:

- the arbitration agreement provides so;
- the award violates public policy;
- the arbitration concerns an employment dispute;
- the breach of substantive law provisions relates to a preliminary matter that cannot be subject to arbitration.

Pursuant to article 808-ter of the Code of Civil Procedure, the grounds for the annulment of a decision rendered in an *arbitrato irrituale* are limited to cases of:

- invalidity of the arbitration agreement;
- breach of the rules relating to the appointment of the arbitrators;
- ineligibility of the arbitrators;
- breach by the arbitrators of the formalities prescribed in the arbitration agreement for the validity of the decision; and
- breach of due process.

5.4.2 Revocation

Pursuant to Articles 831 and 395 of the Code of Civil Procedure, revocation is allowed only if:

- the award is the result of one of the parties' fraud, collusion or corruption;
- the award was rendered on the basis of forged documents or evidence;
- new decisive documents, unavailable during the proceedings, have been discovered after the award was rendered; and/or
- the award is the result of one of the arbitrators' fraud, collusion or corruption and such fraud, collusion or corruption has been established by a definitive judicial decision.

5.4.3 Third-party opposition

Pursuant to articles 404 and 831 of the Code of Civil Procedure, a third-party challenge may be filed by any third parties alleging that their rights are jeopardised by the award.

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

5.5.1 Domestic award

To start enforcement proceedings on the basis of a domestic award, a successful party must deposit a certified copy of the award by a public officer and a copy of the arbitration agreement at the registry of the court of the district where the arbitration was seated. After verification that the arbitration agreement and the arbitral award satisfy all mandatory formality requirements, the court will release a certificate of enforceability, on the basis of which the party will be able to start the enforcement proceedings. Pursuant to

Article 824-*bis* of the Code of Civil Procedure, the local award has the same effects as a judicial decision from the date of its filing with the court.

5.5.2 Foreign award

Article 839 of the Code of Civil Procedure mirrors the provisions of the New York Convention.

The party wishing to enforce a foreign award in Italy must file an application before the president of the Court of Appeal having jurisdiction over the award, providing a certified copy of the award as well as the arbitration agreement (translated into Italian if not already in that language).

The president of the Court will declare the award enforceable in Italy provided that:

- the dispute concerns a subject-matter that can be decided in arbitration; and
- the award does not contain any provision which is contrary to the Italian public order.

This decision may be challenged within 30 days (Article 840 Code of Civil Procedure).

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

No. Pursuant to a general principle of Italian law, any decision issued at first instance is always enforceable even if an appeal or annulment proceeding is initiated.

However, the party seeking the annulment of the award can address a request for suspension to the Court of Appeal if:

- there are, *prima facie*, solid grounds to grant the application for the annulment of the awards (so-called *fumus boni iuris*); and
- the enforcement of the decision is likely to cause an irreparable harm (so-called *periculum in mora*).

In particular, if the award is subject to annulment proceedings at its seat, the party seeking to avoid the enforcement may address to the Italian court a request of suspension of the opposition proceedings until the annulment proceedings pending abroad are not concluded.

In any case, Italian courts enjoy discretion as to whether they should grant such request of suspension.²⁶

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

The annulment of the award at its seat does not *automatically* preclude the enforcement of the award in Italy,²⁷ but it is one of the grounds on which the party against whom the award should be enforced can file by writ of summons an opposition against the decree granting the recognition and/or enforcement of such award (Article 840 § 3 n. 5 Code of Civil Procedure).

5.8 Are foreign awards readily enforceable in practice?

Italian courts tend to look favourably upon foreign awards and recognize their enforceability in most cases.

²⁶ Authoritative doctrine has excluded that the commencement of annulment proceedings at the seat automatically obliges the Italian judge to suspend the procedure for opposition in Italy C. CONSOLO and F.P. LUISSO "*Codice di Procedura Civile Commentato*", Rozzano (MI), 2007, p. 6156.

²⁷ P. MEINERI ET AL. "Il riconoscimento dei lodi annullati: l'emergere di un giudizio di compatibilità tra l'ordinamento nazionale e la sentenza estera di *vacatur*", *Rivista dell'Arbitrato*, 2/2017, pp. 406 *et ff.*

In this respect, the limit of respect of public order set out in articles 839 and 840 Code of Civil Procedure has to be interpreted restrictively; the control has to be limited to the operative part of the decision²⁸ and the judge must refer to the domestic public order only²⁹ assessing compliance with the provisions of the Italian Constitution³⁰ and the core of EU law principles.³¹

6. Funding arrangements

6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

Funding arrangements are not specifically regulated under Italian Law.

That being said, pursuant to Article 106 of the Italian Banking Law (*Testo Unico Bancario*), lending is a regulated activity reserved to banks and financial intermediaries.

6.1.1 If so, what is the practical and/or legal impact of such restrictions?

The abovementioned restriction on lending activities is one of the reasons – together with the fact that court litigation in Italy is relatively inexpensive – why third-party funding remains under-developed in Italy.

7. Is there likely to be any significant reform of the arbitration law in the near future?

On 18 February 2017, the Commission for the Study of Reforms released a report suggesting a series of amendments to the Code of Civil Procedure, in order to favour arbitration over civil court proceedings, namely:

- in the case of a challenge to the award where the ground for annulment is procedural (and not merits-based), the possibility of “skipping” the Court of Appeal and starting proceedings directly before the Supreme Court (*Corte di Cassazione*);
- inclusion of provisions for the arbitration of company matters in the Code of Civil Procedure, in order to guarantee the consistency of the different provisions;
- extension of the possibility of migrating from civil court proceedings to arbitral proceedings for employment-related disputes.

At this stage, it is not clear whether Parliament will follow the Commission’s advice and, if so, what the timeline for any reforms will be.

²⁸ Corte di Cassazione, n. 6947/2004.

²⁹ F. CARPI AND M. TARUFFO “Commentario breve al Codice di Procedura Civile”, 2015, Padova, p. 3055; C. PUNZI, *Disegno sistematico dell'arbitrato*, 2015, Padova, p. 329

³⁰ Corte di Cassazione n. 17349/2002.

³¹ Court of Appeals of Florence, 21 march 2016.

JAPAN

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

SHINICHIRO YOKOTA, SHIHO ONO AND YUKO KANAMARU
OF MORI HAMADA & MATSUMOTO

MORI HAMADA & MATSUMOTO

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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS

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 - a. Framework ●
 - b. Adherence to international treaties ●
 - c. Limited court intervention ●
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3. Legal expertise ●
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5. Accessibility and safety ●
6. Ethics ●

VERSION: 25 MAY 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Japan is an arbitration friendly jurisdiction. Japanese arbitration law is currently regulated by the Arbitration Act (Act No. 138 of 2003), which is based on the 1985 UNCITRAL Model Law, with some additions as specified further below. The main commercial arbitration institution in Japan is the Japan Commercial Arbitration Association ("JCAA"), which has offices in Tokyo and Osaka.

Key places of arbitration in the jurisdiction	Tokyo and Osaka.
Civil law / Common law environment?	Japan is a Civil law environment.
Confidentiality of arbitrations?	The Japanese Arbitration Act (the " Act ") does not provide any specific stipulations in relation to the confidentiality of arbitrations. However, based on the mutual agreement between the parties or the rules of the arbitration institutions involved in the cases, most of the arbitration cases in Japan are held in private, and all records shall be closed to the public. The arbitrators, the arbitration institutions, the parties, their counsel and assistants, and other persons involved in the arbitral proceedings shall usually be subject to confidentiality obligations.
Requirement to retain (local) counsel?	Parties to an arbitration can retain counsel or be self-represented. In relation to the qualification of counsel, under certain conditions a registered foreign lawyer may represent the parties in arbitration proceedings in Japan (in addition to Japanese qualified lawyers) (Article 5-3 of the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers).
Ability to present party employee witness testimony?	It is permissible to present a party employee as a witness in arbitration proceedings and to provide oral testimony.
Ability to hold meetings and/or hearings outside of the seat?	There is no restriction on the ability to hold meetings and/or hearings outside the seat.
Availability of interest as a remedy?	There is no provision in the Act as to whether or not the parties are entitled to recover interest. This issue is usually resolved in accordance with the substantive rules or law, which are applicable to the subject matter of the arbitration.
Ability to claim for reasonable costs incurred for the arbitration?	The costs of the arbitration, including the administrative fee, the arbitrator(s)' remuneration and expenses, and other reasonable expenses incurred with respect to the arbitral proceedings, and the Parties' legal fees, may be allocated by the tribunal between the parties.
Restrictions regarding contingency fee arrangements and/or third-party funding?	There is no restriction on a party's ability to enter into contingency fee arrangements and/or third-party funding arrangements.

Party to the New York Convention?	Japan has been a party to the New York Convention since June 20, 1961.
Other key points to note	In Japan, court proceedings are still more common in comparison to arbitration proceedings, partially because of high respects for and reliance on Japanese courts and judges, and relatively cheaper costs for court proceedings. However, the number of arbitrations is gradually increasing.
WJP Civil Justice score (2018)	0.79

ARBITRATION PRACTITIONER SUMMARY

Date of arbitration law?	The Japanese Arbitration Act (Act No. 138 of 2003) (the “ Act ”) was enacted on August 1, 2003 and implemented from March 1, 2004.
UNCITRAL Model Law? If so, any key changes thereto?	The Act is based on the UNCITRAL Model Law (the “ Model Law ”) and closely follows the Model Law. There are no significant differences, though the Act provides for original provisions related to the court proceedings for arbitration assistance and supervision as suggested in Article 6 of the Model Law, including Article 5 of the Act (Jurisdiction of the Court), as well as Article 7 (Appeal Against Judicial Decision), Article 8 (Participation of the Court in the Case if the Place of Arbitration Has Yet to Be Determined), Article 9 (Inspection of Record of the Case Pertaining to the Proceeding Carried Out by the Court), Article 10 (Application Mutatis Mutandis of the Code of Civil Procedure to the Proceeding Carried Out by the Court), Article 11 (Rules of the Supreme Court) and Articles 35.3-6 (Examination of Evidence by the Court), arbitration cost and expenses (Articles 47-49), and criminal penalty with regard to bribery (Articles 51-55).
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	There is no specialized court or judge in Japan for handling arbitration-related matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	The court may issue an order for a pre-arbitration interim measure and an order for provisional seizure or an order for provisional disposition with regard to a disputed subject matter (such as an order of provisional disposition issued to preserve the right to claim the delivery or surrender of the disputed subject matter) can be <i>ex parte</i> .
Courts’ attitude towards the competence-competence principle?	The court has the right to make the final decision on the authority of arbitrators (Article 44.1(1)(2) of the Act) and shall make such a decision on the basis of its own discretion.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The grounds for the annulment of awards under the Act are substantially the same as those under the New York Convention.
Courts’ attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The court cannot recognise or enforce foreign awards, which are annulled at the seat of the arbitration (Article 45.2(7) of the Act).
Other key points to note (significant idiosyncrasies not covered elsewhere)?	φ

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law?

The Japanese Arbitration Act (Act No. 138 of 2003) (the “**Act**”) was modelled on the UNCITRAL Model Law (the “**Model Law**”). The Act has some provisions which are not included in the Model Law, such as Article 8 (Court Intervention in the Event that the Place of Arbitration Has Not Been Designated) and Articles 47 to 55 (miscellaneous provisions including Remunerations of Arbitrations, Deposit for the Costs of Arbitration Proceedings etc.). The legal implications of certain provisions are different from those in the Model Law but the overall concept is generally the same.

1.2 When was the arbitration law last revised?

The current Act was enacted in August 1, 2003 and implemented on March 1, 2004. Apart from necessary revisions which have been prompted by the revision of other laws, the Act has not been revised since this date.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

In the first instance, the substantive law that has been designated by the parties governs the arbitration agreement. If the parties fail to make such designation, the law of the country at the place of arbitration will govern the arbitration agreement (Article 45.2(2) of the Act).

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

The Act contains express provisions on the severability of arbitration agreements. Article 13.6 of the Act stipulates that even in a case where the provisions of a contract (other than the arbitration agreement) are found to be invalid due to nullity, rescission or for any other reasons, the effect of the arbitration agreement will not *ipso jure* be precluded.

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

An arbitration agreement must be in writing, such as in the form of a document signed by all the parties, letters, telegrams, or other instruments exchanged between the parties (Article 13.2 of the Act).

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

In principle, a third party who is not a signatory to the contract cannot be bound by the arbitration agreement. However, a third party who is considered to be the same entity as the party who signed the arbitration agreement, such as the signatory's successor or assignee, may be bound by the arbitration agreement.

2.5 Are there restrictions to arbitrability?

The Act stipulates the following criteria for arbitrability:

- the subject matter of the arbitration agreement must be a civil dispute (excluding disputes relating to divorce or dissolution of an adoptive relationship) (Article 13.1 of the Act);

- the subject matter of the arbitration agreement should be a matter that can be settled between the parties (Article 13.1 of the Act); and
- the subject matter of the arbitration agreement cannot be a labour dispute with an individual (Article 4 of the by-laws of the Act).

In addition, it is worth noting that an arbitration agreement between a consumer and a business operator can be cancelled by the consumer (Article 3.2 of the by-laws of the Act). In such a case, the consumer may initiate a court proceeding and the court will not dismiss the action brought by the consumer.

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

Japanese courts take a pro-arbitration approach. As a general rule, the Act stipulates that the court “*shall dismiss the action*” upon the petition of the defendant if the dispute is subject to an arbitration agreement (Article 14.1 of the Act). This general rule applies to all cases where the place of the arbitration is either inside or outside of Japan, or where the place of arbitration is not fixed (Article 3.2 of the Act). This provision of Japanese law departs from Article 8 of the Model Law which stipulates that the court shall refer the parties to arbitration. However, Article 14.1 of the Act does not apply in the following circumstances:

- where the arbitration agreement is not valid due to nullity, rescission, etc. (Article 14.1(1) of the Act);
- where it is impossible to carry out arbitration proceedings under the arbitration agreement (Article 14.1(2) of the Act); or
- where the defendant’s petition is filed after the defendant has presented its oral arguments on the merits or made statements in preparatory proceedings of the court (Article 14.1(3) of the Act).

3.2 How do courts treat injunctions by arbitrators enjoining such courts to stay litigation proceedings?

Under the Act, an arbitral tribunal has no authority to grant an injunction directly enjoining the courts to stay litigation proceedings. Instead, an arbitral tribunal may commence or continue the arbitration proceedings and render an arbitral award even if a suit pertaining to the action is pending in the court (Article 14.2 of the Act).

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)

As a general rule, the Japanese courts deal with arbitration where the place of arbitration is within the territory of Japan (Article 3.1 of the Act). The exceptions to this rule under the Act are as follows:

- Article 3.3 of the Act on the recognition and enforcement of arbitral awards applies to arbitration where the place of arbitration is either inside or outside of Japan;
- Article 14.1 of the Act which sets out the grounds under which a court shall dismiss a civil action which is (or is alleged to be) subject to an arbitration agreement, and Article 15 of the Act, which stipulates that parties of an arbitration agreement can file a petition with the court for a provisional order such as provisional seizure and provisional disposition before the commencement or during the course of an arbitration and that the court filed such petitions can make any temporary restraining order, are applicable when the place of arbitration is within Japan, outside of Japan, or where it is not fixed (Article 3.2 of the Act); and

- Articles 16 to 20 of the Act on the appointment of arbitrators, grounds for challenging an arbitrator and petition for dismissal of an arbitrator, apply not only to cases where the place of arbitration is within Japan, but also to cases when the place of arbitration is not decided but likely to be in Japan and the location of the General Venue of either petitioner or respondent is in Japan (Article 8 of the Act).

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

Parties can be represented by outside counsel or be self-represented.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example, does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

An arbitrator must be impartial and independent from the parties. If there are circumstances that give rise to justifiable doubts as to the impartiality or independence of an arbitrator, parties may challenge the arbitrator (Article 18.1 of the Act). Additionally, a person who is approached in connection with a potential appointment as an arbitrator, or an arbitrator after appointment must disclose any and all circumstances that are likely to give rise to justifiable doubts as to his or her impartiality or independence (Articles 18.3 and 18.4 of the Act). An arbitrator's failure to make such disclosure could constitute a ground upon which the court may set aside the arbitral award under Article 44.1(6) of the Act.

It should also be noted that the International Bar Association's 2004 Guidelines on Conflicts of Interest in International Arbitration (updated in 2014) are widely recognised and adhered to in Japan.

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of ad hoc arbitration)?

The Act stipulates that the court shall appoint an arbitrator when:

- there are two parties which have agreed to have three arbitrators, and one party has appointed its arbitrator, but the other party does not appoint its own arbitrator within 30 days from the request by the other party to appoint the same (Article 17.2 of the Act);
- there are two parties which have agreed to have three arbitrators, and both parties have appointed each of their arbitrators, but the appointed two arbitrators do not appoint a third arbitrator within 30 days (Article 17.2 of the Act);
- there are two parties which have agreed to have one arbitrator, but they cannot agree on the appointment of the arbitrator (Article 17.3 of the Act);
- there are three or more parties and they have not reached an agreement regarding the appointment of arbitrators (Article 17.4 of the Act); and
- the procedure for the appointment of arbitrators has been agreed upon between the parties, however the arbitrator cannot be appointed due to a party's failure to act as requested under such procedure or for any other reasons, and a party requests that the court shall assist with the appointment of arbitrators (Article 17.5 of the Act).

4.4 Do courts have the power to issue interim measures in connection with arbitrations?

Article 15 of the Act stipulates that the parties to an arbitration agreement may file a petition for a provisional or interim order with the court, before the commencement or during the course of arbitration proceedings. The procedure for the issuance of the provisional order or interim measure is regulated by the Civil Provisional Remedies Act. If the requested provisional order or interim measure is a provisional

seizure of certain property or a provisional disposition regarding the disputed subject matter (e.g., provisional disposition to prohibit transfer of occupation of a rented house), the court will issue a provisional order by considering and hearing *ex parte* requests. If the requested order is a provisional disposition to temporarily and immediately fix parties' relationship or rights and obligations (e.g., order to temporarily pay salary to an employee who was dismissed, order to stop construction of a tall building which would spoil the scenery, etc.), the courts must have the hearing with both parties in attendance.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

The Act does not contain any provisions in respect of confidentiality. However, arbitration is generally perceived in Japan as a confidential proceeding, in contrast to court litigation which is, in principle, open to the public, and thus, in most arbitration proceedings, arbitrators, the parties, their counsel and assistants, and other persons involved in the proceedings bear confidentiality obligations in accordance with an agreement between the parties and/or applicable institutional arbitration rules.

4.5.1 Does it regulate the length of arbitration proceedings?

The Act does not regulate the length of arbitration proceedings.

4.5.2 Does it regulate the place where hearings and/or meeting may be held?

The Act does not regulate the place where hearings and/or meetings may be held.

4.5.3 Does it allow for arbitrators to issue interim measures?

Article 24.1 of the Act provides that unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary, in respect of the subject matter of the dispute. Article 24.2 of the Act provides that the arbitral tribunal may order any party to provide appropriate security in connection with such interim measure.

4.5.4 Does it regulate the arbitrators' right to admit/exclude evidence?

Article 26.3 of the Act provides that the power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence when the parties fail to agree on the procedure to be followed by the arbitral tribunal in conducting the arbitral proceedings. The Act does not provide any restrictions to the presentation of testimony by a party employee.

4.5.5 Does it make it mandatory to hold a hearing?

In principle, it is not mandatory to hold a hearing under the Act. Article 32.1 of the Act provides that the arbitral tribunal may hold oral hearings for the presentation of evidence or for oral arguments by the parties provided. The Act also stipulates that if a party makes an application requesting an oral hearing, the arbitral tribunal shall hold such oral hearings at an appropriate stage of the arbitral proceedings.

4.5.6 Does it prescribe principles governing the awarding of interest?

There is no provision in the Act as to whether or not the parties are entitled to recover interest and this issue is usually resolved in accordance with the substantive rules applicable to the subject matter.

4.5.7 Does it prescribe principles governing the allocation of arbitration costs?

Article 49 of the Act provides that the allocation of expenses paid by the parties in relation to the arbitration proceedings shall be as specified by the agreement of the parties, and if such an agreement has not been reached, each party should bear its own expenses. In many cases, the costs of the arbitration are

allocated by the tribunal between the parties, taking into account the parties' conduct, the determination on the merits of the dispute, and any other relevant circumstances.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

The Act does not provide any rules arbitrators' immunity from civil liability. In case where there are no provisions regarding immunity to or limitations of civil liability in applicable institutional rules, the liability of arbitrators is subject to the general rules of Japanese civil law, i.e., the arbitrators may be held liable for damages incurred by the parties as a result of the arbitrators' negligence in the performance of their duties.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

The Act provides the following rules regarding potential criminal liability for any of the participants in arbitration proceedings:

- An arbitrator who accepts, demands or promises to accept a bribe in relation to his or her duty shall be punished by imprisonment for up to five years. In such case, when the arbitrator agrees to act in response to a request, imprisonment for not more than a term of seven years shall be imposed (Article 50.1 of the Act).
- When a person to be appointed as an arbitrator accepts, demands or promises to accept a bribe in relation to his or her duty to perform an act in response to a request, imprisonment for up to a term of five years shall be imposed in the event of appointment (Article 50.2 of the Act).
- A person who gives, offers or promises to give a bribe as provided for in Articles 50 to 52 of the Act shall be punished by imprisonment for up to a term of three years or a fine of not more than two million five hundred thousand yen (Article 54 of the Act).

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Article 39.2 of the Act provides that "[a] written arbitral award shall state the reasons thereof; provided, however, that this shall not apply to cases where otherwise agreed by the parties." Therefore, the parties can agree to waive the requirement for an award to provide reasons thereof.

5.2 Can parties waive the right to seek the annulment of the award?

There appears to be no established rule or precedent as to whether or not the parties are allowed to waive the right to seek annulment of an arbitral award in Japan. Given that the source of the law for arbitration is considered to come from, ultimately, the agreement between the parties, the parties might be allowed to agree to waive the right to annul an arbitral award in the arbitration agreement.

However, some grounds for the annulment of arbitral awards as set out in Article 44.1 of the Act are based on those rationales which are beyond the parties' free disposal; e.g., "*the public policy or good morals of Japan*". It is not clear, therefore, whether or not the parties can waive the right to annul the arbitral award by agreement in Japan.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

Article 44.1 of the Act (which stipulates the grounds for setting aside arbitral awards) is in accordance with Article 34.2 of the Model Law.

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

In principle, it is not possible to appeal an arbitral award in Japan. Article 45.1 of the Act provides that “[a]n Arbitral Award [...] shall have the same effect as a final and binding judgment [...]”. The Act does not provide any specific grounds for the parties to appeal an arbitral award (as opposed to the setting aside of the arbitral awards).

However, there appears to be no established rule or precedent in Japan as to whether or not the parties are allowed to enter into an arbitration agreement that would enable the parties to appeal the arbitral award. Therefore, if the right to appeal is provided in the arbitration agreement, it might be possible for the parties to appeal an arbitral award based on such agreement.

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

Japan is a member of the New York Convention (the “NYC”), and the grounds for refusing recognition or enforcement provided in the Act are substantially the same as those under the NYC. A party seeking enforcement based on the arbitral award need to apply to a court for an enforcement decision, and the court shall issue an enforcement decision unless it finds any of the grounds for refusal. The Act does not provide any distinction between local and foreign awards, but it is noteworthy that the party must supply a Japanese translation of the arbitral award if it is not written in Japanese. The Act does not provide any time-limits for recognition or enforcement, but an application for setting aside an award may not be made after three months from the notice of the award or after the aforementioned enforcement decision.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

No, there is no automatic suspension of the exercise of the right to enforce an award after the commencement of annulment or appeal proceedings, but the court may suspend the right to enforce an award. When a petition to suspend or set aside an arbitral award is filed with the judicial body in the country in which the seat of the arbitration is located or where the laws and regulations were applied to the arbitration proceedings, the Japanese court may suspend the procedure for the execution order of such arbitral award if the court finds it necessary. In that case, the court may order the party who requests such a suspension to provide security (Article 46.3 of the Act).

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

The Japanese court may dismiss a petition for the enforcement of an arbitral award when the judicial body of the country in which the seat of the arbitration is located, or the country in which the laws and regulations were applied to the arbitration proceedings suspend, annul or set aside the arbitral award (Article 46.10 of the Act).

5.8 Are foreign awards readily enforceable in practice?

An arbitral award shall have the same effect as a final and binding judgment provided that to enforce such an award, it is necessary to obtain an execution order of the award from the Japanese court (Article 45.1 of the Act). The court will grant the execution order unless the award falls within the following conditions (Articles 45.2 and 46.8 of the Act):

- (i) the Arbitration Agreement is not valid due to the limited capacity of a party;
- (ii) the Arbitration Agreement is not valid on grounds other than the limited capacity of a party pursuant to the laws and regulations designated by the agreement of the parties as those which should be applied to the Arbitration Agreement (if said designation has not been made, the laws and regulations of the country where the place of arbitration is);

- (iii) the party did not receive the notice required under the laws and regulations of the country to which the place of arbitration belongs (if the parties have reached an agreement on the matters concerning the provisions unrelated to public order in such laws and regulations, said agreement) in the procedure of appointing arbitrators or in the arbitration procedure;
- (iv) the party was unable to present its defense in the arbitration procedure;
- (v) the Arbitral Award contains a decision on matters beyond the scope of the Arbitration Agreement or of a petition in the arbitration procedure;
- (vi) the composition of the Arbitral Tribunal or the arbitration procedure is in violation of the laws and regulations of the country to which the place of arbitration belongs (if the parties have reached an agreement on the matters concerning the provisions unrelated to public order in said laws and regulations, said agreement);
- (vii) according to the laws and regulations of the country to which the place of arbitration belongs (if the laws and regulations applied to the arbitration procedure are laws and regulations of a country other than the country to which the place of arbitration belongs, said other country) the Arbitral Award is not final and binding, or the Arbitral Award has been set aside or its effect has been suspended by a judicial body of that country;
- (viii) the petition filed in the arbitration procedure is concerned with a dispute which may not be subject to an Arbitration Agreement pursuant to the provisions of Japanese laws and regulations; or
- (ix) the content of the Arbitral Award is contrary to public policy in Japan.

6. Funding Arrangement

6.1 Are there restrictions to the use of contingency, alternative fee arrangements or third-party funding at the jurisdiction? If so, what is the practical and/or legal impact of such restrictions?

There is no restriction as to the use of contingency or alternative fee arrangements in Japan. Also, there has been no substantial discussion in Japan of whether a third-party funder can pay a part or all of the litigation costs in return for a share of the proceeds of the litigation or arbitration upon its successful results. Although such third-party funding is not specifically prohibited under Japanese law, it should be noted that it is illegal for a person who is not an attorney or a legal professional corporation to act as an intermediary between a client and an attorney in connection with any lawsuits or arbitration for the purpose of obtaining compensation (Articles 72 and 77(iii) of the Attorney Act).

7. Is there likely to be any significant reform of the arbitration law in the near future?

It is unlikely that there will be any significant reform of the arbitration law in the near future. However, it should be noted that the Japan Commercial Arbitration Association, one of the major commercial arbitration institutions in Japan, has amended its arbitration rules to take into account the trends evolving from the modernization of arbitration rules of other arbitral institutions and of the UNCITRAL Arbitration rules. Such amendments include the introduction of expedited procedures and procedure for appointment of emergency arbitrators.

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LATVIA

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

DR INGA KAČEVSKA
OF LAW OFFICE OF INGA KAČEVSKA

»»««
INGA KAČEVSKA
law office

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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

There are 69 registered arbitral institutions in Latvia.¹ Until the adoption of the new Arbitration Law in 2015 (the "**Arbitration Law**"),² the number of arbitral institutions was above 200. Thus, the trust towards arbitration was not, and still is not very high. Notably, Latvia has not adopted the UNCITRAL Model Law, there are no setting aside procedures nor any type of assistance from the courts during the arbitration proceeding. The Arbitration Law applies to both domestic and international arbitration.

Latvia is a party to the European Convention on International Commercial Arbitration and to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**").

Key places of arbitration in the jurisdiction	Riga.
Civil law / Common law environment?	Civil law.
Confidentiality of arbitrations?	The arbitral procedure is confidential. However, if a party applies for the compulsory execution of the arbitral award before State courts, the matter becomes public.
Requirement to retain (local) counsel?	Natural persons may either choose to be represent themselves, or they may choose to be represented by an attorney at law or any authorized representative. Legal entities may choose to be self-representing through its official representative acting within the scope of his/her authorization, or by any authorized representative of the legal entity (including foreigners). Any natural person may act as an authorized representative, except for persons who (i) have not attained the age of legal majority; (ii) are under trusteeship; (iii) have been deprived of the right to conduct the matters of other persons; (iv) are in a relationship of kinship up to the third degree, or in a relationship of affinity up to the second degree with one of the arbitrators; (v) have provided legal assistance to the opposing party in this matter or in another related matter; (vi) have participated in mediation in this matter or in another related matter.
Ability to present party employee witness testimony?	Traditionally, parties are not allowed to present witness testimony in the course of arbitration proceedings. This is due to the fact that arbitral tribunals are not legally entitled to take the oath of witnesses – such right belongs exclusively to State court judges. Therefore, in practice, the person who testifies will formally do so as a representative of the party, and not as a witness.
Ability to hold meetings and/or hearings outside of the seat?	If the parties have not agreed otherwise, the tribunal has the right to freely determine the seat of arbitration, taking into account considerations such as efficiency.

¹ See: Register of Arbitral Institutions at Register of Enterprises (in Latvian): <http://www.ur.gov.lv/skirejtijasas.html>.

² Šķīrējtiesu likums [Arbitration Law], OP No. 2014/194.1 (in English): http://vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Arbitration_Law.pdf.

Availability of interest as a remedy?	The tribunal may grant interest to the winning party for the period prior to the execution of the award, at the rate of 6% per year.
Ability to claim for reasonable costs incurred for the arbitration?	The costs for arbitration are determined by the rules of each arbitral institution. However, the arbitral tribunal shall have the right to determine the costs for arbitration taking into account the amount claimed, the complexity of the dispute, the provisions of the arbitration agreement and other significant circumstances.
Restrictions regarding contingency fee arrangements and/or third-party funding?	There are no restrictions regarding third party funding but in practice, the use of third party founding is not very common yet in Latvia.
Party to the New York Convention?	Yes, the New York Convention is applied directly as the Civil Procedure Law, ³ which only prescribes technical provisions for the submission of the application to recognize and enforce the arbitral award.
Other key points to note	<p>The new Arbitration Law introduced very specific rules concerning arbitral institutions and arbitrators. Every permanent arbitral institution shall be registered with the Enterprise Register and shall satisfy several requirements: (i) it must have separate premises suitable for the operation of a court of arbitration; (ii) it must have the necessary personnel; (iii) it must have a website; (iv) it must have a closed list of arbitrators, including the names of at least 10 arbitrators. Arbitrators shall be trained lawyers, with a good reputation and at least three years of practical legal work experience. In order to verify that an arbitrator's qualifications are in conformity with the requirements of the law, the documents confirming such qualifications must be submitted to the Enterprise Register by the arbitral institution. One arbitrator cannot be included in more than three lists of arbitral institutions. In practice, this creates several issues. First, parties cannot appoint non-lawyers as arbitrators. Second, parties may only appoint arbitrators that are included in the lists of arbitral institutions. Third, due to the small number of arbitrators on the lists of arbitral institution, there is a high risk of conflict of interests among arbitrators and counsels.</p> <p>The Arbitration Law does not forbid the parties to agree on ad hoc arbitration. However, given that law is not favourable to <i>ad hoc</i> arbitration, it would not be recommended. For example, the signature of arbitrators on an <i>ad hoc</i> arbitral award must be approved by a notary public. Most importantly, a party cannot request the domestic court to issue the writ of execution of the <i>ad hoc</i> award, as the law only provides for compulsory execution of institutional awards.</p>
WJP Civil Justice score (2018)	φ

³ Civilprocesa likums [Civil Procedure Law] (in English): <http://vvc.gov.lv/image/catalog/dokumenti/Civil%20Procedure%20Law.docx>.

ARBITRATION PRACTITIONER SUMMARY

Date of arbitration law?	The Arbitration Law became effective as of 1 January 2015. It was revised on 6 October 2016, and this revision became effective since 3 November 2016.
UNCITRAL Model Law? If so, any key changes thereto?	Latvia has not adopted the UNCITRAL Model Law.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No.
Availability of <i>ex parte</i> pre-arbitration interim measures?	<p>The court can grant interim measures but only before the commencement of the arbitration proceedings and, according to case law, the interim measures would not include the freezing/attachment of bank accounts. Given that there are many non-residents' bank accounts in Latvia, this is a real disadvantage, in international cases, in which it is often needed to attach those accounts before commencing the arbitration.</p> <p>If the respondent owns property (not money) in Latvia, or if the respondent is domiciled in Latvia, interim measures can be granted <i>ex parte</i> before the initiation of the arbitration proceedings. However, it is rather expensive: the court fee for securing the claim is 0,5% of the total amount claimed, and the fee is not refunded in the event the claim is not secured. The denial of the request for interim measures cannot be appealed. Therefore, claimant is rarely advised to request for interim measures.</p>
Courts' attitude towards the competence-competence principle?	<p>For a long time, courts have misinterpreted the provision of the law stating: "an arbitration court determines jurisdiction regarding a dispute, even in cases where one of the parties contests the existence or the validity of an agreement". The courts referring to this provision considered that only and exclusively an arbitral tribunal shall decide on its competence and the courts shall not accept claims covered by an arbitration clause at all. One of the courts' arguments was that if the parties have decided to settle their disputes outside the court of general jurisdiction, they should not overload the courts with such applications. This provision of the law was challenged in the Constitutional Court. The applicant to the constitutional claim submitted that in his arbitration case, the arbitration agreement was forged. Despite this fact, the arbitral tribunal considered that it was valid and proceeded with the review of the case. The Constitutional Court decided that this rule shall be interpreted in</p>

	<p>a way that the court also has competence to decide on the validity of the arbitration clause.⁴</p> <p>In practice, the judgment of the Constitutional Court did not solve the problem, as illustrated by the following example. If a party submits an application to the court asking to acknowledge that the arbitration agreement is void and to hear the dispute on the merits; while the other party submits the statement of claim to the arbitral tribunal; despite the first party's challenge, the arbitral tribunal may find that it has jurisdiction and render an award regardless. In this case, even if the court finds that the arbitration agreement is not valid, the award cannot be set aside.</p>
<p>Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?</p>	<p>Pursuant to Article 536 of the Civil Procedure Law, a judge may refuse to issue a writ of execution (for a domestic award issued in Latvia) if:</p> <ol style="list-style-type: none"> 1) the dispute could only be resolved in court; 2) the arbitration agreement has been entered into by a natural person who had restricted capacity to act, or by a minor; 3) the arbitration agreement, in accordance with the applicable law, has been revoked or declared null and void; 4) the party was not notified of the arbitration proceedings in an appropriate manner, or due to other reasons was unable to submit his or her observations, and this has or could have significantly affected the proceedings; 5) the party was not notified of the appointing of an arbitrator in an appropriate manner, and this has or could have significantly affected the arbitration proceedings; 6) the arbitrator does not comply with the requirements of the Arbitration Law, the arbitral tribunal was not appointed, or the arbitration proceedings did not take place in accordance with the provisions of the arbitration agreement or of the Arbitration Law; 7) the dispute that gave rise to the award was not provided for in the arbitration agreement or did not conform to the provisions of the arbitration agreement, or the issues decided by the arbitral tribunal were not within the scope of the arbitration agreement. <p>There is no public policy ground for refusing to issue a writ for compulsory execution of the domestic arbitral awards.</p> <p>If a writ is denied, the party can form an appeal within 10 days. However, the decision to issue a writ may not be appealed. Moreover, the law is silent as to the validity of the arbitral award if the court has denied issuing the writ. Theoretically, the award does not automatically become invalid, and thus could still be recognised abroad.</p>

⁴ The Constitutional Court of the Republic of Latvia judgment in the case No. 2014-09-01 dated 28 November 2014 (in English): http://www.satv.tiesa.gov.lv/wp-content/uploads/2014/03/2014-09-01_Spriedums_ENG.pdf.

Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	φ
Other key points to note?	<p>Courts issue writs of execution on application of the winning party to entail forced execution of the arbitral award. A writ of execution can be obtained only for awards rendered by the permanent arbitral institution, not for awards rendered by <i>ad hoc</i> arbitral tribunals. This is a strong disincentive to the use of <i>ad hoc</i> arbitrations where enforcement in Latvia is sought.</p> <p>The procedure to seek the issuance of the writ of execution of the award rendered by the permanent arbitral institution is written. Application is made by the winning party and the losing party may subsequently object. There is thus no hearing of the parties. The court verifies whether there are procedural grounds to deny the application for the writ. The decision can only be based upon the application and the reply of the parties.</p>

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

The Arbitration Law was adopted on 11 September 2014, and it entered into force on 1 January 2015.⁵ Since its adoption, the Arbitration Law was revised on 6 October 2016, and the amendments became effective as of 3 November 2016. The Arbitration Law is not based on the Model Law. For instance, there is almost no court assistance to arbitration. Therefore, Latvia is a very particular place for arbitration.

The main purpose of this Law was to fight against the multiplication of arbitral institutions in Latvia (before the Arbitration Law, there were more than 200 arbitral institutions in Latvia). These institutions were called “pocket arbitral institutions”, and in most cases, they relied on a biased structure of institution and arbitrators.

Due to the application of stricter requirements for arbitral institutions and arbitrators under the new Arbitration Law, some of the arbitral institutions ceased to exist because they were not able to fulfil those requirements, or because they failed to renew their registration, or because they were excluded from the register by the Enterprise Register. Therefore, the Arbitration Law provides that if the parties have agreed to refer their disputes to a permanent arbitral institution which has been excluded from the register or which has ceased its operations, the parties shall agree on another arbitral institution. If no agreement may be reached, the dispute shall be resolved in court in accordance with ordinary civil procedure (Section 5 of the Transitional Provisions of the Arbitration Law).

2. The arbitration agreement

2.1 How do the courts in jurisdiction determine the law governing the arbitration agreement?

The Arbitration Law is silent regarding the applicable law to the arbitration agreement, and there is no extensive case law in this regard.

For example, in one recent case between Scottish and Latvian parties, there was a dispute regarding the validity of the arbitration agreement. The parties concluded a sale of goods contract governed by English law, with an arbitration agreement referring to a non-existent court of arbitration (“Latvian court of Arbitration”), The claimant (a Scottish party) referred to the general rules contained in the Article 19 of the Civil Law,⁶ providing that: “*if there is no agreement, it shall be presumed that the contracting parties have made their obligation, in accordance with its substance and consequences, subject to the laws of the state where the obligation is to be performed.*”. In this case, the claimant argued that, considering that the parties had made a specific reference to Latvia in their arbitration agreement, it would have to be performed in Latvia. At the time of conclusion of the arbitration agreement, there were two arbitration courts with names similar to that agreed by the parties. However, at the time of the dispute, one of the institutions was liquidated, and the other institution's name in Latvian translated into English did not fully correspond to the one referred by the parties. Therefore, in the claimant’s opinion, the arbitration agreement was not valid. In its judgment, the court stated that there was no dispute between the parties regarding the law applicable to the arbitration agreement, and therefore, the court did not develop this issue. The court determined that the arbitration agreement was not valid and proceeded with the merits of the case.⁷ The court did not apply the New York Convention.

⁵ Šķirējtiesu likums [Arbitration Law]. Available in English at http://vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Arbitration_Law.pdf.

⁶ http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/The_Civil_Law.doc

⁷ Rīgas pilsētas Ziemeļu rajona tiesa lieta Nr. C32370115, 18.05.2017.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

According to Article 13 of the Arbitration Law, if an arbitration agreement has been included in a contract as a separate provision, it shall be considered as independent from the rest of the contract. Therefore, if the underlying contract has expired, or if it is declared null and void, the arbitration agreement shall remain effective. Also, the courts acknowledge this principle stating also that due to the independent character of the arbitration agreement, different laws may apply to the arbitration agreement and to the underlying contract.⁸

2.3 What are the formal requirements for an enforceable arbitration agreement?

According to Articles 10 and 11 of the Arbitration Law, an arbitration agreement is an agreement entered into between any natural person with the capacity to enter into agreements, or a legal entity governed by private law or by public law in the area of private law; which refers a civil legal dispute which has already arisen or may arise in the future to resolution by way of arbitration.

There are specific requirements as regards the form and content of an arbitration agreement. An arbitration agreement shall be in written form but if it is concluded by the electronic means, it shall be recorded with a safe electronic signature (Article 12 of the Arbitration Law). The Arbitration Law also specifies that, in addition, the parties may agree *inter alia* on the type of arbitration, the place of arbitration, the language, the arbitrators, the procedure for covering the costs of arbitration and other conditions (Article 12(3) of Arbitration Law). Given that there are many arbitral institutions in Latvia, and that many of them have similar names, it is common in practice for the arbitration agreement to contain a specific reference to the registration number of the arbitral institution.

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

First, it should be noted that Article 5(1) of the Arbitration Law states that an arbitral tribunal shall not resolve a dispute that may infringe the rights of a third party who is not a party to the arbitration agreement. This rule is very strictly interpreted by State courts. Therefore, third parties cannot be bound by an arbitration agreement in any case. Second, in the case of assignment, only claims may be assigned, not an arbitration clause that was included in the initial contract (Article 13(4) of the Arbitration Law). Therefore, case law shows that parties wishing to avoid arbitration proceedings often decide to assign the agreement containing the arbitration clause.

2.5 Are there restrictions related to arbitrability?

Article 5 of the Arbitration Law explicitly covers both subjective and objective arbitrability. The following disputes cannot be resolved by way of arbitration:

- 1) Disputes which infringe the rights of a third party, or rights, obligations, or interests protected by law;
- 2) Disputes relating to entries made in the Civil Records Register, over the establishment, alteration or termination of property rights regarding immovable property, if a party to the dispute is a person whose rights to acquire the immovable property for ownership, possession or use are restricted by law and the disputes regarding the eviction of natural persons from residential premises;
- 3) Disputes which involve persons who are under guardianship or trusteeship;
- 4) Disputes regarding individual employment relations;
- 5) Disputes regarding the rights and obligations of persons who have entered into insolvency proceedings;

⁸ Rīgas pilsētas Ziemeļu rajona tiesa lieta Nr. C32370115, 18.05.2017. See footnote: 7.

- 6) Disputes where at least one of the parties is a State or local government authority, or an award regarding which by the court of arbitration may infringe the rights of the State or local government authority. The latter disputes are not arbitrable only in domestic cases.

According to the case law of the European Court of Justice, and pursuant to Article 6(3)(7) of the Law on Consumer Rights Protection, a clause included in a consumer agreement which provides for dispute settlement exclusively by means of arbitration is unfair.⁹

Finally, special laws limit the arbitrability of certain disputes, such as patent, copyright, or competition disputes.

3. Intervention of domestic courts

In general, it should be noted that, in Latvia, as a non-UNICTRAL Model Law country, there is limited assistance by the domestic courts in arbitration proceedings. Namely, the courts of general jurisdiction may grant interim measures, but only before arbitral proceedings are initiated (Article 139 of the Civil Procedure Law) and can issue or deny to issue the writ of execution for the compulsory enforcement of domestic arbitral awards (Article 536 of the Civil Procedure Law). However, the Arbitration Law does not provide for any setting aside procedure, and the courts may not provide any assistance in the gathering of evidence, the appointment of arbitrators, etc.

Traditionally, courts used to consider that only arbitral tribunals could rule on their jurisdiction, and therefore refused to accept applications to acknowledge the invalidity of an arbitration agreement in any circumstances (for example, even if one party claimed that the arbitration agreement was forged). However, the Constitutional Court declared that preventing parties from contesting the jurisdiction of arbitral tribunals before courts of general jurisdiction was unconstitutional,¹⁰ and recognized that the competence-competence principle does not exclude the possibility that the jurisdiction of an arbitral tribunal be examined by a court of general jurisdiction. As a result, courts can accept the claim if it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. However, it should be stressed that there is no provision in the Arbitration Law that the party may request the court to rule on the arbitral tribunal's award on jurisdiction. Therefore, in practice, the judgment of the Constitutional Court did not solve the problem. For example, if a party submits an application to the court asking to acknowledge that the arbitration agreement is void and to hear the dispute on the merits; while the other party submits the statement of claim to the arbitral tribunal; despite the first party's challenge, the arbitral tribunal may find that it has jurisdiction and render an award regardless. In this case, even if the court finds that the arbitration agreement is not valid, the award cannot be set aside.

Latvian courts frequently use the mechanism enshrined in Article 4(5) of the European Convention on International Commercial Arbitration, which provides that where the parties have agreed to submit their disputes to a permanent arbitral institution without determining the institution in question and cannot agree thereon, the claimant may request the determination of such institution in conformity to the President of the competent Chamber of Commerce of the place of arbitration. If the place of arbitration is not agreed on, then the claimant is entitled to apply to the President of the competent Chamber of Commerce of the country of the respondent's habitual place of residence or seat at the time of the introduction of the request for arbitration, or to the Convention's Special Committee (Article 4(3)). This provision permits to uphold the validity of an arbitration agreement which would otherwise be null and void under the applicable law for non-existence or ambiguous determination of the arbitral institution to which the dispute should be referred.

⁹ Patērētāju tiesību aizsardzības likums [Consumer Rights Protection Law] (in English): http://vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Consumer_Rights_Protection_Law.pdf.

¹⁰ The Constitutional Court of the Republic of Latvia judgment in the case No. 2014-09-01 dated 28 November 2014 (in English): http://www.satv.tiesa.gov.lv/wp-content/uploads/2014/03/2014-09-01_Spriedums_ENG.pdf.

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

According to Article 223(6) of the Civil Procedure Law, a court shall terminate the court proceedings if the parties have agreed to submit their dispute to arbitration. Thus, if there is a valid arbitration agreement, the court shall not initiate the proceedings at all. The Constitutional court suggested that courts shall retain jurisdiction if it is evident that the arbitration agreement is null and void, inoperative or incapable of being performed. However, the law is silent on such criteria.

3.2 How do courts treat injunctions by arbitrators enjoying such courts to stay litigation proceedings?

Under the Arbitration Law, arbitrators have no power to issue any injunctions. However, courts would most likely disregard such injunctions.

3.3 On what grounds can the courts intervene in an arbitration seated outside of the jurisdiction?

There are no such grounds provided in the law. An interesting provision is included in the Civil Procedure Law, in the section regarding "Recognition and enforcement of foreign arbitral awards": Article 649(2) provides that, when deciding on recognition of the foreign arbitral award, Latvian courts may request additional information from the foreign arbitral institution that has made the award. The Law does not specify what information can be requested and on what grounds. However, there are no cases reported where the Latvian court has used this provision.

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-representing?

The Arbitration Law contains very detailed rules regarding representation of parties in arbitration proceedings. Article 32 states that natural persons may choose to be self-representing, or they may choose to be represented by any authorized representative (including foreigners). Legal entities may choose to be self-representing through their official representative acting within the scope of his/her authorization as provided in the law, articles of association or statutes, or by any authorized representative of the legal entity.

Any natural person may act as an authorized representative, except for persons who (i) have not attained the age of legal majority; (ii) are under trusteeship; (iii) have been deprived of the right to conduct the matters of other persons; (iv) are in a relationship of kinship up to the third degree, or in a relationship of affinity up to the second degree with one of the arbitrators; (v) have provided legal assistance to the opposing party in this matter or in another related matter; (vi) have participated in mediation in this matter or in another related matter.

A person who is or has been or - during the last five years - has been on the list of arbitrators of the relevant permanent arbitral institution may not represent a party, and he or she may not be invited to provide legal assistance in proceedings of this permanent arbitral institution.

Parties may invite advocates to provide legal assistance during arbitration proceedings. There are no restrictions to invite the foreign representative.

4.2 How strictly do courts control arbitrators' independence and impartiality?

In theory, arbitrators and arbitral institutions are controlled not only by the courts, but also by the Enterprise Register, which is in charge of the registration of the permanent arbitral institutions in Latvia. The Arbitration Law in this regard is very strict.

The Arbitration Law provides specific rules regarding the organisational structure of arbitral institutions in Latvia. Every permanent arbitral institution shall be registered with the Enterprise Register and shall satisfy several requirements: (i) it must have separate premises suited for the operation of a court of arbitration; (ii) it must have the necessary personnel; (iii) it must have a website (Article 4); and (iv) it must have a closed list

of arbitrators with at least 10 arbitrators (Article 8). If the arbitral institution does not fulfil those requirements, the Enterprise Register shall exclude it from the register and it will cease to exist.

Namely, the Arbitration Law imposes very specific requirements regarding arbitrators as well. Arbitrators shall be trained lawyers, with a good reputation and at least three years of practical legal work experience. In order to verify that an arbitrator's qualifications are in conformity with the requirements of the law, the documents confirming such qualifications must be submitted to the Enterprise Register by the arbitral institution (Article 14). One arbitrator cannot be included in more than three lists of arbitral institutions. In practice, this creates several issues. First, parties cannot appoint non-lawyers as arbitrators. Second, parties may only appoint arbitrators that are included in the lists of arbitral institutions. Third, due to the small number of arbitrators on the lists of arbitral institution, there is a high risk of conflict of interests among arbitrators and counsels.

In addition, an arbitrator is not allowed to participate in an arbitration if he/she: (i) has been a representative of any of the parties, or an expert or witness in a matter where the same parties have participated; (ii) is in a relationship of kinship to the third degree, or relationship of affinity to the second degree, with any participant in the matter or representatives thereof; (iii) is in a relationship of kinship to the third degree, or relationship of affinity to the second degree, with any arbitrator who is a member of the arbitral tribunal; (v) is in an employment relationship with any participant to the dispute or their representative, or if the arbitrator provides legal assistance to any of the parties; or (vi) if his/her spouse, or kin to the third degree, or business partner, or commercial company, which is a party to the dispute and whose participant, shareholder, member, or member of supervisory, control or executive body is this arbitrator or his or her kin to the third degree, has financial interest in the outcome of the civil legal dispute.

According to Article 536(1)(7) of the Civil Procedure Law, one of the grounds for not issuing the writ of execution is that an arbitrator in the arbitration proceedings did not fulfil the legal requirements. This concerns the qualification (law degree, education and practical experience) of the arbitrators, as well as their independence and impartiality.

The Constitutional Court explicitly stated that, when issuing a writ of execution, the State courts shall determine high standards regarding the legality of the arbitration procedure, including the independence and impartiality of arbitrators. In this sense, the Constitutional Court noted that the lack of independence and impartiality of arbitrators can be observed not only in cases where it has been established, but also in cases where there are justifiable doubts. The structure of the arbitration court, previous relations of the arbitrators with the parties as well as other factors may serve as indicators justifying such doubts.¹¹ The court can deny the issuance of the writ of execution if it finds that such doubts exist.

There is no set aside procedure in Latvia, thus the courts can only control the arbitrator's independence and impartiality when issuing the writ of execution for compulsory enforcement of the arbitral award. As the control of the court is only at the stage of compulsory execution, thus if there is award that does not need execution and a writ of execution then there is no control over such award.

In practice, even if the formal legal requirements are fulfilled by the arbitral institution and arbitrators, understanding of impartiality and independence may vary. For example, the requirement to include 10 arbitrators in the closed list does not guarantee the absence of conflicts of interests and due process.

4.3 On what grounds do courts intervene to assist in the constitution of the arbitration tribunal

The Arbitration Law does not provide for any court assistance in the constitution of the arbitral tribunal. Moreover, Article 17(2) of the Arbitration Law states that if the challenged arbitrator does not resign, the arbitral tribunal or the arbitrator himself/herself shall decide on the removal within five days after receipt of the notice. However, if the sole arbitrator decides not to resign, there are no other available remedies. The

¹¹ Judgment of the Constitutional Court of the Republic of Latvia in the case No. 2004-10-01 dated 17 January 2005.

only possible solution is for the interested party to object it in the court's procedure of issuance of the writ of compulsory execution of the arbitral award.

4.4 Do courts have the power to issue interim measures in connection with arbitration, if so, are they willing to consider ex parte requests

Pursuant to Article 139 of the Civil Procedure Law, courts have the power to issue interim measures. However, they may only do so before the commencement of the arbitration proceedings. In practice, this raises some difficulties. First, this is only applicable in institutional arbitration proceedings, not to *ad hoc* arbitration. Secondly, the application for interim measures shall be submitted to a court based on the location of the debtor or of his/her property. However, the meaning of "property" does not include monies in the bank accounts. Thus it is established in the case law that if the claimant whose domicile is in other country wishes to attach the bank account in Latvia of the respondent, whose domicile is also in other country before the commencement of an arbitration that is not seated in Latvia, the attachment of the bank account will not be granted because the courts separate two concepts: "money" and "property" and the law refers only to "property."¹²

The court shall decide on the application for interim measures within one day, without notice to the parties, taking into account *prima facie* formal legal grounds and proportionality between legal interests of the parties. If the court satisfies the application for interim measures, it also determines the time period within which the claimant shall submit the claim to the permanent court of arbitration. If the court denies the application, the decision is not appealable.

4.5 Other that arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration

4.5.1 Confidentiality

Article 23 of the Arbitration Law states that arbitration proceedings shall be confidential, unless the parties have agreed otherwise. Arbitration hearings shall be closed, and the tribunal shall not disclose to any third parties, or publish information concerning the arbitration proceedings, unless the parties have agreed otherwise. Persons who are not parties to the arbitration proceedings may only be present at the hearing with the consent of the parties.

However, if a party applies for the compulsory execution of the arbitral award before State courts, the matter becomes public.

4.5.2 Length

Specific and imperative deadlines are included in the Arbitration Law (Article 28 of the Arbitration Law). First, the notice of the first hearing shall be sent to the parties through registered mail not later than 15 days in advance, unless the parties have agreed on a shorter time period (Article 31(4)). Secondly, an arbitration tribunal shall render an award not later than 14 days after the dispute is fully decided on the merits of the case (Article 54). The tribunal shall determine other procedural deadlines in accordance with the rules of the permanent arbitral institution.

4.5.3 Place

If parties have not agreed on the place of arbitration, the arbitration tribunal has the right to freely determine the place of arbitration bearing in mind efficiency considerations (Article 25 of the Arbitration Law).

4.5.4 Interim measures

Arbitral tribunals have no rights to grant interim measures under Latvian law.

¹² Decision by Riga Regional court dated 17 June 2010, unpublished.

4.5.5 Admit/exclude evidence

First, it must be noted that under Latvian law, witness testimony is not available in the context of arbitration proceedings. This is due to the fact that arbitral tribunals are not legally entitled to take the oath of witnesses – such right belongs exclusively to State court judges. Therefore, witnesses are not allowed in arbitration proceedings, even if the parties agree to witness testimony. However, parties can submit explanations, documentary evidence (written documents, audio and video recordings, electronic data, etc.), material evidence and expert opinions.

Evidence shall be submitted by the parties and each party shall prove the circumstances used by it to support its claims and objections. Arbitrators shall determine the admissibility and eligibility of evidence (Article 41 of the Arbitration Law). If a party refuses to submit the documentary evidence requested by the arbitral panel within the time period provided by it, without denying that the party possesses such evidence, the arbitral panel may admit as proven the facts, which the opposite party sought to prove by referring to such documentary evidence (Article 43 of the Arbitration Law).

According to the Article 42 of the Arbitration Law an arbitration tribunal shall identify in the reasoning of the award why it has given preference to certain pieces of evidence rather than to others, and why it has found certain facts as proven, and others as not proven.

4.5.6 Mandatory hearing

If the parties have not agreed to resolve their dispute in writing, then the arbitral tribunal shall hold the hearing. However, even if the parties have agreed on a written procedure, if one party requests that a hearing be held, the tribunal must hold a hearing (Article 40 of the Arbitration Law).

4.5.7 Award of interest

The Arbitration Law provides that, in their award, arbitrators shall, *inter alia*, indicate the rights of the winning party to receive interest for the time period prior to the execution of the award (Article 54(7)). Article 1765 of the Civil Law provides for 6% per year as a rate set by the law.

4.5.8 Allocation of arbitration costs

Article 45(2) of the Arbitration Law provides that the amount of costs of arbitration proceedings, as well as the term and procedures for payment thereof shall be determined by the court of arbitration, taking into account the amount claimed, the complexity of the civil legal dispute, the provisions of the arbitration agreement, as well as other significant circumstances. The Law explicitly does not incorporate the principle that “loser pays all costs”, but the Rules of the permanent institution can specify that.

Article 45(3) of the Arbitration Law states that, unless otherwise agreed upon by the parties, in the arbitration agreement, fees for participation of a secretary, interpreter or expert in arbitration proceedings, as well as other costs of arbitration proceedings shall be paid in accordance with the Rules of the arbitral institution, by the party who submitted the request regarding participation of a secretary, interpreter or expert, as well as regarding performance of an expert-examination during arbitration proceedings. If such request has been submitted by both parties, they shall pay the costs equally.

LEBANON

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

ZIAD OBEID AND DR ZEINA OBEID
OF OBEID LAW FIRM



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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS †

1. Law ●
 - a. Framework ●
 - b. Adherence to international treaties ●
 - c. Limited court intervention ●
 - d. Arbitrator immunity from civil liability ●
2. Judiciary ●
3. Legal expertise ●
4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

VERSION: 1 JUNE 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Lebanon is an arbitration-friendly jurisdiction. Its arbitration legislation reflects contemporary practice and embraces well-established principles of international arbitration. In addition, the Lebanese judiciary is generally supportive of the arbitral process and respectful of the parties' choice of arbitration as their method for settlement of disputes.

Key places of arbitration in the jurisdiction	Beirut
Civil law / Common law environment?	Civil law. The civil legal tradition was inherited from the French during their mandate over Syria and Lebanon between 1920 and 1943.
Confidentiality of arbitrations?	Under Lebanese law, there are no provisions dealing with the confidentiality of arbitral proceedings per se. However, in practice, arbitral proceedings are treated as confidential as long as the parties agree to specific confidentiality obligations and no legal proceedings before the local courts are filed (requests for the assistance of the judge of summary proceedings, recourse for annulment of the award, etc.).
Requirement to retain (local) counsel?	There are no restrictions as to the nationality of persons who could act as counsel or arbitrators in international arbitrations seated in Lebanon.
Ability to present party employee witness testimony?	Employee witness testimony is not admissible in domestic arbitrations unless agreed otherwise by the parties. Save where specified otherwise in the applicable procedural rules, arbitral tribunals in international arbitrations seated in Lebanon have the discretion to call a party employee for inquiry and clarification purposes.
Ability to hold meetings and/or hearings outside of the seat?	When a city in Lebanon is selected as the seat of an arbitration, it is permissible to conduct hearings and procedural meetings elsewhere.
Availability of interest as a remedy?	In Lebanon, interest can be applied to the principal claim as well as to costs. The legal interest rate is 9 percent in civil and commercial matters (irrespective of the prevailing interest rate) unless agreed otherwise by the parties. In commercial matters, the parties can freely determine the interest rate in their agreement.
Ability to claim for reasonable costs incurred for the arbitration?	The parties to an arbitration seated in Lebanon can recover legal fees paid and other reasonable costs incurred for the purposes of the arbitration. The arbitral tribunal has discretion to decide whether it will apply the "loser pays" rule.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Lebanese law does not expressly regulate or forbid contingency fee arrangements or third-party funding.

Party to the New York Convention?	Lebanon is a party to the New York Convention, which entered into force in Lebanon on 9 November 1998. Lebanon has made a reciprocity reservation under the Convention, declaring that it will apply the Convention on a reciprocal basis to the recognition and enforcement of awards made only in the territory of another contracting state.
Other key points to note	Lebanon ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (" ICSID Convention ") and the Arab Convention on Commercial Arbitration
WJP Civil Justice score (2017-2018)	0.47

ARBITRATION PRACTITIONER SUMMARY

Date of arbitration law?	The Lebanese Code of Civil Procedure (" LCCP "), which was enacted by Law 90/83 dated 16 September 1983, with amendments resulting from Law No. 440 dated 29 July 2002, devotes an entire chapter (Chapter 2) to arbitration, with a distinction being made between domestic arbitration (Articles 762 to 808 LCCP) and international arbitration (Articles 809 to 821 LCCP).
UNCITRAL Model Law? If so, any key changes thereto?	The provisions on arbitration in the LCCP are based on the old French arbitration law (French decrees No. 80-354 of 14 May 1980 and No. 81-500 of 12 May 1981) and not on the UNCITRAL Model Law.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	There is no specialist court in Lebanon dealing with arbitration matters. The judiciary in the Court of First Instance is however considered as the " <i>juge d'appui</i> " (i.e. the judge acting in support of the arbitration). As such, the Court of First Instance may, for example, hear requests for the appointment of arbitrators and summon recalcitrant witnesses within its jurisdiction.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Lebanese courts can grant provisional relief in support of arbitration when the Arbitral Tribunal is not yet constituted. In this case, an application for interim measures should be filed before the competent judge of summary proceedings.
Courts' attitude towards the competence-competence principle?	Article 785 of the LCCP expressly recognises the principle of competence-competence.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Lebanese law provides no additional grounds to those based on the criteria for the recognition of awards under the New York Convention. The Lebanese arbitration law is, in fact, more favourable than the New York Convention in referring to a violation of 'international public policy' rather than 'public policy' as a ground for annulment of international arbitral awards (see section 5.2 below for further details regarding the grounds for annulment under Lebanese law and the position in domestic arbitrations).
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	An award rendered outside Lebanon and set aside at the seat of arbitration may still be recognised and enforced in Lebanon since local courts have the discretion to independently assess the grounds for annulment when a request for recognition and <i>exequatur</i> of a foreign award is sought.

Other key points to note?

Under Lebanese legislation, the following types of disputes are subject to the exclusive jurisdiction of the state courts *i.e.* are not arbitrable:¹ questions of personal and social status, capacity, fundamental rights, rights of succession, questions of public policy, insolvency, employment contracts and social security.

Furthermore, Lebanese courts have traditionally held that commercial representation disputes are subject to the exclusive jurisdiction of local courts. Recent jurisprudence, however, suggests a more supportive approach towards arbitration in specific cases.

Finally, in administrative contracts, a state and public entity can validly conclude an arbitration agreement subject to prior authorisation by the Council of Ministers upon a recommendation of either the relevant minister or the relevant regulatory authority (*autorité de tutelle*). In international administrative contracts, while the law is silent on the necessity of obtaining a prior approval from the Council of Ministers, it is recommended to systematically obtain such authorisation.

¹ There are exceptions with respect to most of these exclusions; see below (III, 2, d)).

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

As discussed above, the LCCP provisions on arbitration are not based on the UNCITRAL Model Law but on the old French arbitration law.² The second chapter of the LCCP is devoted to arbitration, making the distinction between domestic arbitration (Articles 762 to 808 LCCP) and international arbitration (Articles 809 to 821).

Pursuant to Article 809 LCCP, arbitration is deemed international *'when it involves the interests of international trade'*. The Lebanese courts have interpreted this statutory provision by holding that the international nature of an arbitration is determined by the international character of the economic transaction underlying the arbitration, and to extent to which it involves a cross-border flow of goods, persons or services.³ Factors that are *not* taken into account when determining when an arbitration is international include the nationality of the parties or arbitrators, the place of the arbitration, the residence of the parties or the place where the contract was concluded. Additionally, the application of a foreign law or procedure will have no bearing on the definition of an arbitration as international.⁴

Insofar as international arbitrations seated in Lebanon are concerned, Article 812 LCCP provides that: *'The provisions of Articles 762 to 792 (relating to domestic arbitration) shall only apply in default of specific agreements and subject to the provisions of Articles 810 and 811 (relating to international arbitration).'*

2. The Arbitration Agreement

2.1 Governing law

As provided for under Article 813 LCCP, the Arbitral Tribunal will determine the substantive law of the dispute according to the rules of law chosen by the parties and in the absence of such a choice, according to those which it deems appropriate. While doing so, the Tribunal will take into account prevailing customs and usages of commerce.⁵

2.2 Separability of the arbitration agreement

The doctrine of separability of the arbitration agreement from the main contract is a well-established principle in Lebanon and is recognised by Lebanese courts.⁶

2.3 Formal requirements for an enforceable agreement

Unlike in domestic arbitrations, where the written form of the arbitration agreement is required as a condition for its validity (Article 763 LCCP), there is no particular requirement for an international arbitration agreement to be valid other than the parties having consented to it. Article 814(2) LCCP, however, provides that an agreement in writing is required to obtain exequatur of an award rendered in international disputes.

Insofar as administrative contracts are concerned, one important formal requirement concerns contracts made with the Lebanese state or with other state entities. In domestic administrative contracts, a state or

² French decrees No. 80-354 of 14 May 1980 for domestic arbitration and No. 81-500 of 12 May 1981 for international arbitration

³ Beirut Court of Appeal, Third Chamber, 10 December 2001; Beirut Court of Cassation, Decision No 14/2014, 25 January 2014.

⁴ Arbitration in Lebanon', in Abdul Hamid El Ahdab and Jalal El-Ahdab, *Arbitration with Arab Countries*, Kluwer Law International 2011, pp 337 – 449.

⁵ The determination of the customs and usages of commerce are made on a case by case basis, and is at the discretion of the arbitral tribunal.

⁶ Eg. Beirut Court of Appeal, decision no. 767/2008 dated 20 May 2008, Lebanese Court of Cassation no.14/2014 dated 25 January 2014.

state entity can enter into an arbitration agreement subject to prior authorization by the Council of Ministers upon a recommendation of either the relevant minister or the relevant regulatory authority (*autorité de tutelle*). In international administrative contracts, while the law is silent on the necessity of obtaining a prior authorization from the Council of Ministers, it is recommended to systematically obtain such authorization in respect of arbitration clauses inserted in such agreements.

Although not mandatory, in international arbitration, it is preferable for the arbitration agreement to designate the number of arbitrators and their method of designation, the seat and the language of the arbitration.⁷ In domestic arbitration, the arbitration agreement should be in writing and should designate, subject to nullity, the arbitrator or the arbitrators in person or their qualities or the mechanism for their designation (Article 763 LCCP).

2.4 Third parties

Arbitration agreements are subject to the principle of privity of contracts, thereby only binding the parties that signed them. However, under Lebanese law, a third party to a contract containing an arbitration agreement may be bound by such arbitration agreement in the following circumstances:

- Universal successors and successors by a particular title (Article 225 of the Code of Obligations and Contracts (**COC**));
- Subrogation (Articles 313 and 315 COC);
- Transfer of rights (Article 285 COC);
- Specific merger scenarios in the banking sector (Article 4, para. 1 Law 192 dated 4 January 1993);
- Transfer of contracts (Beirut Court of Appeal 3rd Chamber decision No. 763 dated 2 April 2004, Beirut Court of Appeal, 10th Chamber, decision dated 28 December 2000 '*Société UFFE v. Compagnie de développement des batiments et autres*'); and,
- Third-party beneficiary contracts (*stipulation pour autrui*, Article 230 COC). However, this exception to the principle of non-transmittal of the arbitration clause to the third parties is subject to doctrinal debate.

A third party may also be bound by an arbitration agreement in light of the nature of the relationship it has with one of the signatories to the arbitration clause. For example, in a chain of contracts that has the same objectives and forms an economic unity ("*opération économique unique*").⁸

Ultimately, the extension of the arbitration clause remains a matter to be assessed on a case-by-case basis in light of the specific circumstances of each matter.

Concerning the joinder of a third party, Article 786 LCCP provides that third parties cannot be joined to an arbitration proceeding without the approval of the parties to the arbitration.

As to consolidation, the Lebanese legislation does not recognise the possibility for an Arbitral Tribunal seated in Lebanon to consolidate separate arbitral proceedings under one or more contracts unless the arbitration rules agreed upon by the parties allow such consolidation. By way of example, Article 8 in Appendix II of the Rules of the Beirut Chamber of Commerce and Industry allows consolidation of claims.

⁷ Article 810 LCCP suggests to include such provisions but is not formulated in mandatory terms.

⁸ Beirut Court of Appeal, First Chamber, Decision No 294/2009, 21 July 2010; Beirut Court of Appeal, Third Chamber, Decision No 192/2008, 5 February 2008.

2.5 Arbitrability of disputes

Under Lebanese legislation, the following types of disputes, relating to specific domains, are subject to the exclusive jurisdiction of the state courts – *i.e.*, are not arbitrable:

- Questions of personal status (age, nationality and adoption) and questions of social status (marriage and divorce). However, an exception is allowed by virtue of Article 1037 COC regarding financial compensation arising from personal status matters. In this case, arbitration will be confined to the compensation sought;
- Non-negotiable personal rights such as the right to human dignity, the right to physical integrity, the right to privacy, the right to food (food allowance), etc. However, any dispute relating to monetary compensation in connection with any of those personal rights is capable of being arbitrated;
- Rights of succession. Arbitration over acquired hereditary rights is nevertheless possible if the value of such right is determined;
- Questions of public policy which include all matters considered by law as guaranteeing social, economic or political interests;
- Questions of insolvency. Article 490 of the Code of Commerce provides that state courts have exclusive jurisdiction to deal with insolvency matters;
- Questions of employment contracts and social security. These issues fall under the exclusive competence of the local Labour Arbitration Court; and,
- Contracts for commercial representation (Article 5 of Decree Law No. 34 dated 5 August 1967, although the Lebanese courts have adopted a more permissible stance towards the arbitrability of such disputes in specific circumstance.

3. Intervention of domestic courts

The President of the court of first instance may act as the “*juge d’appui*” (*i.e.*, the judge acting in support of arbitration) if required to do so and can rule notably on applications for interim measures. The *juge d’appui* may also assist, *inter alia*, in the appointment of arbitrators where the parties have failed to designate an arbitrator and/or where designation of an arbitrator is not carried out by the relevant arbitral institution.

Domestic courts are competent to rule on allegations of forgery. Under Article 783 of the LCCP, where a party alleges forgery of one or more document(s) in the course of a domestic arbitration, the arbitrator shall suspend the proceedings pending the competent court’s decision on the issue of forgery.⁹ Pursuant to Article 812 of the LCCP, such principle also applies in international arbitration, unless there is an agreement to the contrary.

4. The conduct of the proceedings

4.1 Requirements regarding counsel or self-representation

In international arbitration, there are no express provisions for mandatory legal representation. Consequently, unless provided otherwise, the parties are free to decide whether or not they wish to be represented by legal counsel, with no conditions of nationality.

⁹ Article 783 LCCP.

4.2 Arbitrators' independence and impartiality

Arbitrators are required to act independently and impartially failing which they might be subject to challenge pursuant to Article 770 LCCP. Moreover, an arbitrator has a duty to disclose to the parties any event which could constitute a ground for challenge as per Article 769 LCCP.

4.3 Courts' intervention to assist in the constitution of the Arbitral Tribunal

Lebanese legislation provides for the assistance of courts in the absence of an agreed set of institutional rules containing a default mechanism for the constitution of an Arbitral Tribunal or a mechanism provided for in the arbitration clause itself. Pursuant to Article 810 LCCP, the most diligent party, when faced with a difficulty in constituting the Arbitral Tribunal, may request the President of the competent Court of First Instance to make the appointment.

4.4 Ability of courts to issue interim measures in connection with arbitrations

Under Articles 589 – 593 LCCP, the Lebanese courts can grant provisional relief in support of arbitration when the Arbitral Tribunal is not yet constituted. In this case, an application for interim measures should be filed before the competent judge of summary proceedings, which can be done on an *ex parte* basis.

After the constitution of the Arbitral Tribunal, subsequent requests for interim measures must generally be submitted directly to the Arbitral Tribunal, which has the power to order any interim and conservatory relief deemed appropriate in accordance with Articles 789 and 859 LCCP. The arbitrators may also request the local judge to sanction witnesses who fail to appear at a hearing or those who refuse to testify, as per Article 779 LCCP.

Finally, a party may seek an interim attachment order from the competent court to freeze the assets of the losing party pending the enforcement of an arbitral award.

4.5 Confidentiality of arbitration proceedings

Under Lebanese law, there are no provisions dealing with the confidentiality of arbitral proceedings *per se*. However, in practice, arbitral proceedings are treated as confidential as long as the parties agree to specific confidentiality obligations and no legal proceedings before the local courts are filed (requests for the assistance of the judge of summary proceedings, recourse for annulment of the award, *etc.*).

4.6 Length and place of arbitration proceedings

In domestic arbitration, arbitrators should render the final award within 6 months from the date at which the last arbitrator accepted his/her appointment unless the parties agree otherwise. Save in circumstances where the applicable arbitration rules provide otherwise, this duration can be extended either by mutual consent of the parties or by the decision of the President of the First Instance Tribunal upon being petitioned by a party or the Arbitral Tribunal (Article 773 LCCP).

This provision only applies to international arbitrations to the extent that the parties have not agreed otherwise (by adopting institutional rules for example).

4.7 Place of hearings and meetings

If Beirut is selected as the seat of arbitration, hearings and procedural meetings can be conducted elsewhere.¹⁰

¹⁰ There is no specific legal text stating that hearings and procedural meetings can be conducted anywhere, although this is a widely accepted principle in Lebanon. Furthermore, it is generally admitted under Lebanese law, that whatever is not expressly forbidden by the law shall be allowed, thus reinforcing the idea that no restrictions exist on the place of hearings and meetings when arbitrations are seated in Lebanon.

4.8 The arbitrators' ability to issue interim measures

In domestic arbitration, Article 789 LCCP (with reference to Article 589) grants Arbitral Tribunals the power to order any interim or conservatory measures they consider necessary in light of the nature of the dispute, and in line with those measures provided under Article 589 LCCP.

These provisions would apply to international arbitrations to the extent parties have not agreed otherwise (by adopting institutional rules for example).

Lebanese legislation does not provide a specific requirement regarding the form that a Tribunal's decision on such measures should take. The Tribunal, therefore, has the discretion to decide whether to issue a procedural order or a partial award in respect of any interim measure sought.

4.9 The Arbitrators' right to admit and exclude evidence

The arbitrators have wide discretion in the conduct of the proceedings including the right to admit and exclude evidence subject to the preservation of due process.¹¹

4.10 Hearing

Holding a hearing is not compulsory in arbitrations seated in Lebanon. However, it is common practice in Lebanon to hold a final hearing on the merits.

4.11 Principles governing the award of interest

Interest can be applied to the principal claim and costs. As a matter of Lebanese law, the legal interest rate is 9 percent in civil and commercial matters unless agreed otherwise by the parties.¹² Arbitral Tribunals can award both simple and compound interest. In commercial matters, the parties can freely determine the interest rate in their agreement.¹³ In civil matters, however, usurious interests is forbidden.¹⁴

4.12 Principles governing the allocation of costs

The parties are able to recover legal fees and costs reasonably incurred, which can include arbitration costs as well as arbitrators' fees and expenses. It is usually left to the Arbitral Tribunal's discretion to decide whether it will apply the "loser pays" rule.¹⁵

There is no provision in the LCCP's arbitration chapter which allows the courts to review the Tribunal's decision on costs.

4.13 Liability

As a matter of Lebanese law, arbitrators are not afforded immunity from suit.

Arbitrators can be civilly but not criminally liable. Article 770 LCCP provides that arbitrators may be challenged on the same grounds as judges for reasons which arise or become known after their appointment and are exclusively listed in Article 120 LCCP. This includes cases of lack of independence or impartiality. Moreover, an arbitrator might be liable for his/her gross fault as it is the case for local judges pursuant to Article 741 LCCP.

¹¹ The comment in footnote 10 above equally applies to arbitrators' wide discretion to conduct the proceedings.

¹² As stated in Article 767 of the COC and in Article 767 of the Lebanese Commercial Code. See also Law of 24 June 1939.

¹³ Lebanese Court of Cassation, Decision No 16, 22 February 1973.

¹⁴ Article 661 of the Lebanese Penal Code. See also Usury Law of 24 June 1939.

¹⁵ The comment in footnote 10 above equally applies to allocation of costs.

5. The award

5.1 Award's validity requirements

Article 790 LCCP provides that the arbitral award should contain the following information:

- The name of the arbitrator(s);
- The date and place of the award;
- The full names and denominations of the parties and their legal counsel;
- A summary of the parties' positions and the evidence provided in support of their respective positions;
- The reasons for the award and the dispositive part; and
- The signature of the arbitrators on the arbitration award rendered. In the event that a dissenting arbitrator refuses to sign the award, the remaining arbitrators should mention such refusal and the award will have the same effect as an award signed by all arbitrators.

This article applies in international arbitrations to the extent the parties have not agreed otherwise (by adopting institutional rules for example).

5.2 Right to seek the annulment of an award

In both domestic and international arbitrations, the parties can seek the annulment of an award through a setting-aside action (Articles 800 and 819 LCCP). Such action is of public order and cannot be excluded by the parties' agreement.

In international arbitration, pursuant to Article 819 LCCP, an award can be annulled based on the grounds set out under Article 817 LCCP which are as follows:

- Where the award has been rendered without an arbitration agreement or on the basis of an agreement which is null or void due to the expiry of the relevant time limit for rendering the award;
- Where the award has been rendered by arbitrators not appointed in accordance with the law;
- Where the arbitrators ruled without complying with the mission conferred upon them;
- Where the award has been delivered in violation of the rights of defense; and,
- Where the award has violated a rule of international public policy.

As mentioned above, the grounds for annulment of international arbitration awards under Lebanese law reflect the grounds for annulment in the New York Convention except that Lebanese law refers to a violation of 'international public policy' rather than 'public policy' as a ground for annulment of international arbitral awards.

In domestic arbitration, the grounds for annulment set out under Article 800 LCCP are as follows:

- Where the award has been rendered without an arbitration agreement or on the basis of an agreement which is null or void due to the expiry of the relevant time limit for rendering the award;
- Where the award has been rendered by arbitrators not appointed in accordance with the law;
- Where the arbitrators ruled without complying with the mission conferred upon them;
- Where the award has been delivered in violation of the rights of defence;

- Where the award does not contain the mandatory requirements related to the relief sought by the parties together with the grounds and means substantiating such relief; the name of the arbitrators; the *ratio decidendi* of the award, the date of the award and the signature of the arbitrators; and
- Where the award has violated a rule of public policy.

5.3 Appeal of an award

International arbitration awards cannot be appealed before the Lebanese courts. A party dissatisfied with the outcome of an international arbitration seated in Lebanon can only seek the annulment of the award as per Article 819 LCCP and under the grounds set out under Article 817 LCCP.

In domestic arbitrations, an award is subject to appeal unless agreed otherwise by the parties in the arbitration agreement. The reverse principle applies if the arbitration was decided *ex aequo et bono*. In such a case, the award is not subject to appeal unless agreed otherwise by the parties in the arbitration agreement. If the award is appealed under these circumstances, the Court of Appeal will also rule on an *ex aequo et bono* basis. (Article 799 LCCP).

5.4 Procedure for recognition and enforcement of an award in Lebanon

The recognition and enforcement of an award in Lebanon is made through *ex parte* proceedings.

The competent court to grant exequatur varies depending on the nature of the dispute. In civil and commercial matters, exequatur requests are filed before the President of the Court of First Instance, either at the place where the award was made if an international award was rendered in Lebanon, or in Beirut if the award was rendered outside Lebanon. In administrative matters, exequatur requests should be filed before the President of the Council of State (Articles 770, 775, 793, 795 and 810 LCCP).

The exequatur application must contain (i) the arbitral award and (ii) the arbitration agreement or a certified copy of these documents, irrespective of whether the award is domestic or foreign. For international or foreign awards, the judge will principally verify (i) the existence of the award and (ii) that recognition of the award does not manifestly violate Lebanese international public policy (Articles 795, 814 and 815 LCCP).

A court decision granting recognition or enforcement of a domestic, foreign or international award rendered in Lebanon is not subject to any recourse (Articles 805 and 819 LCCP).

A court decision denying recognition or enforcement of a domestic award, foreign or international award rendered in Lebanon, is subject to appeal (Articles 806 and 816 LCCP).

The appeal of an award (in domestic arbitrations) or the action for setting aside the award (in both domestic and international arbitrations) *de facto* entails a challenge to the decision granting exequatur and the judge of exequatur will no longer hear the dispute (Articles 805 and 819 LCCP).

5.5 Suspensive effect of annulment or appeal proceedings

Unless the arbitral award is subject to provisional enforcement,¹⁶ its execution is suspended within the 30 days' time-limit in which a challenge against the arbitral award can be submitted (Articles 803 and 820 LCCP).

¹⁶ The provisions on provisional enforcement ("*exécution provisoire*") are set out under articles 570 to 578 LCCP. In general, provisional enforcement is granted by the court upon a party's request which has an interest in commercial matters or when urgency is characterized (Article 572 LCCP). This measure is mandatorily granted by the court upon a party's request with an interest in the following circumstances (Article 571 LCCP):

- If the judgement was rendered on the basis of a previous final judgement or was issued with the provisional enforcement's mention or was rendered to execute this previous judgement.
- If the judgement was rendered on the basis of an official or non-official deed or on the basis of an admission.

The provisional execution can also be conditioned upon providing a guarantee (Article 573 LCCP).

5.6 Effect of annulment on the enforcement of an award in Lebanon

An award rendered outside Lebanon, which is subsequently set aside at the seat of arbitration, may still be recognised and enforced in Lebanon.

6. Funding arrangements

6.1 Are there restrictions on the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

The Lebanese Legal Profession Act provides that legal fees are determined by an agreement concluded between the lawyer and the client. The Act does not provide an indication nor a restriction on the nature of the agreement which remains subject to the parties' contractual free will. Insofar as a third party funding is concerned, a careful structure is required to ensure that such arrangements would not fall under the prohibition of excessive *riba*¹⁷ under Lebanese law.

7. Significant reform of the arbitration law in the near future?

There are discussions to reform the arbitration law in the near future but have not materialized at the time of drafting the report.

¹⁷ See Usury Law of 24 June 1939.

LITHUANIA

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

GIEDRĖ AUKŠTUOLIENĖ
OF ELLEX VALIUNAS



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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS

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VERSION: 28 MAY 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Lithuania has one the most progressive arbitration laws in the region. The law is based on the UNCITRAL Model Law, including the 2006 amendments, and is consistent with pro-arbitration case law on the recognition and enforcement of arbitral awards and set-aside of awards. Lithuanian courts refuse to recognise awards and set aside awards only in very exceptional cases and tend to follow best international practices related to the interpretation and application of the New York Convention and the UNCITRAL Model Law. The latest amendments to the Lithuanian Law on Commercial Arbitration (“Arbitration Law”) came into force in July 2017 and help demonstrate that Lithuania constantly aims to improve its arbitration-related legislation. For example, the Arbitration Law now provides that documents produced in arbitration-related proceedings before the State courts shall remain confidential (the law provides that arbitration is confidential). In addition, the Arbitration Law provides a 90-day limitation for the Court of Appeal of Lithuania to hear a set-aside application (ruling of the Court of Appeal is, however, subject to further appeal before the Supreme Court of the Republic of Lithuania). In addition to its progressive arbitration law, Lithuania and its capital city, Vilnius, have an easy access to by a number of international airlines connecting it to major European airport hubs, offering a number of other advantages for a seat of arbitration: free access from all EU and EFTA countries (Lithuania is a Schengen country), a number of business class hotels offering modern hearing facilities, high safety level (Lithuania ranks 16 in the global Doing Business ranking of the World Bank in 2018) and multi-lingual (English, Russian, French, Polish, German, etc.) arbitration practitioners with vast experience in both international investment and commercial arbitration. Expertise of Lithuanian practitioners is represented by the fact that not only leading Lithuanian professionals in this field are included in the lists of recommended arbitrators by major arbitration institutions (including ICSID) and are often appointed by the parties and global arbitral institutions (including ICC) as arbitrators and / or experts in international proceedings (even having no relation to Lithuania at all), Lithuania has its own representatives in major arbitration institutions (including ICC Court and PCA Court).

Key places of arbitration in the jurisdiction	Vilnius.
Civil law / Common law environment?	Civil law.
Confidentiality of arbitrations?	Confidential by law, but advisable to agree separately.
Requirement to retain (local) counsel?	No.
Ability to present party employee witness testimony?	Yes.
Ability to hold meetings and/or hearings outside of the seat?	Yes.
Availability of interest as a remedy?	Yes.
Ability to claim for reasonable costs incurred for the arbitration?	Yes.
Restrictions regarding contingency fee arrangements and/or third-party funding?	According to very limited regulations, conditional fee arrangements are permitted. There is no regulation regarding third-party funding.

Party to the New York Convention?	Yes.
Other key points to note	φ
WJP Civil Justice score (2017-2018)	φ

ARBITRATION PRACTITIONER SUMMARY

Lithuania became a member of the New York Convention in 1995 and adopted the Arbitration Law in 1996. While the Arbitration Law is based on the UNCITRAL Model Law, the Arbitration Law makes no distinction between international and national arbitration. Changes to the UNCITRAL Model Law in 2006 and best international practices were incorporated into the Arbitration Law in 2012. In addition to modern legislation which allows, for instance, *ex parte* pre-arbitration interim measures and recognition of interim measure rulings, Lithuanian courts follow a strong pro-arbitration tradition and accept all universal arbitration doctrines, including the competence-competence principle, the separability doctrine, and the local courts' prohibition to review an award on its merits in set-aside or recognition proceedings. Lithuanian practitioners are keen to follow the highest international legal standards and the arbitration-related rules and guidelines issued by International Bar Association are being followed by the agreement of the parties and arbitrators as a result.

Date of arbitration law?	1996.
UNCITRAL Model Law? If so, any key changes thereto?	Yes. No distinction between international and national arbitration.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	While there are no specialised courts, if available, judges with relevant or specialised experience are appointed to arbitration-related matters in the Lithuanian Court of Appeal, which has jurisdiction to adjudicate set-aside and recognition applications.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes.
Courts' attitude towards the competence-competence principle?	Accepted.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	No.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	Very pro-arbitration.
Other key points to note?	∅

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law?

Yes, the [Arbitration Law](#) was based on the UNCITRAL Model Law. The new version of the Arbitration Law was adopted in 2012 and sought to reflect changes of the UNCITRAL Model Law on commercial arbitration and incorporate recent developments in the arbitration practice in Lithuania.

1.1.1 If yes, what key modifications if any have been made to it?

In contrast to the UNCITRAL Model Law, the Arbitration Law makes no distinction between international and national arbitration proceedings. This means accordingly that unified regulations apply irrespective of where the place of arbitration is.

1.2 When was the arbitration law last revised?

[Latest amendments](#) to the Arbitration Law came into force in July 2017. Among the changes brought by the amendments, the Arbitration Law now (i) provides that party material introduced in the arbitration related proceedings before State courts (i.e. set-aside or recognition proceedings) shall remain confidential and (ii) sets time limits for bringing set-aside and enforcement proceedings. Pursuant to the amendments, the Court of Appeal of Lithuania now has up to 90 days to hear a set-aside application. A party now has 5 years (calculated from the moment when the award comes into effect) to start enforcement proceedings in Lithuania. Recent case law suggests that this time limit in the case of foreign arbitral awards has to be calculated from the day when the application for recognition and enforcement was granted by the Lithuanian court (see, for instance, Supreme Court ruling of 15 June 2017 in the civil proceedings [No 3K-3-267-611/2017](#)), however, this highly debatable issue is expected to be reviewed in the nearest future.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

The Lithuanian Supreme Court has ruled that where there is no agreement between the parties on the law applicable to the arbitration agreement, usually the state courts shall decide upon the validity of the arbitration agreement by applying the law of the place of arbitration (Supreme Court ruling of 22 November 2013 in civil proceedings [No 3k-3-593/2013](#)). The court noted there are two exceptions to this rule: first, the parties' capacity to enter into the arbitration agreement is governed by the conflict of law rules provided by private international law and, second, state courts shall decide the issue of arbitrability by applying the law of the place of the state court.

Notably, conflict of law rules provided in the Civil Code of the Republic of Lithuania foresees that an arbitration agreement is subject to the law applicable to the principal contract and only in case of invalidity of the principal contract, the agreement shall be subject to the law of the place where the arbitration agreement was concluded; if the place cannot be determined, the arbitration agreement shall be subject to the law of the seat of arbitration ([Article 1.37 \(7\) of the Lithuanian Civil Code](#)).

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Yes, the doctrine of separability is provided for under Article 19(1) of the Arbitration Law and is accepted by state courts (Supreme Court ruling of 18 May 2017 in the civil proceedings [No e3K-3-238-686/2017](#)).

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

Article 10 of the Arbitration Law provides that the parties may agree to solve their dispute by including an arbitration clause in the contract or by concluding a separate arbitration agreement. An arbitration clause or arbitration agreement may be concluded for a particular dispute that already exists or for future disputes.

An arbitration agreement must be made in writing, and is considered to be made in writing if (1) it is executed as a document signed by both parties; (2) it is concluded by exchange of letters, including by means of electronic devices if the authenticity and the completeness of the transferred information can be assured; (3) it is concluded by using electronic devices provided that the authenticity and the completeness of the transferred information is assured and the information stored in such devices is thereafter accessible; (4) it is concluded by exchanging a statement of claim and a statement of defence where the existence of an arbitration agreement is alleged by one party and not denied by the other; or (5) there is other written evidence confirming that the parties have concluded or recognized the conclusion of an arbitration agreement.

The Arbitration Law also provides that a reference in a contract concluded by the parties to a document containing an arbitration clause constitutes an arbitration agreement if that document meets the requirements applicable to arbitration agreements, as set out above.

The Arbitration Law does not specify the content of the arbitration agreement beyond the requirements described above.

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

In general, only signatories are considered to be bound by arbitration agreements. However, recent case law demonstrates that Lithuanian courts recognize exceptions to this rule. The Lithuanian Supreme Court has stated in its ruling dated 2 April 2014 (civil proceeding No. [3K-3-171/2014](#)) that there are certain exceptional cases where a person's behavior allows the court to conclude that the latter has consented to arbitration: first, succession of rights and obligations under a contract containing arbitration clause; second, a person's subsequent behaviour evidencing his agreement to arbitrate; third, conclusion of a contract through a representative who acted within the limits of his authorisation; and fourth, when a company is bound by an arbitration agreement, other closely related companies may be considered as having consented to arbitration as well. Additionally, the Supreme Court has also noted that when considering whether non-signatories can be bound by arbitration, the true intentions and factual circumstances evidencing consent or reasonable expectations of the parties must be analysed.

2.5 Are there restrictions to arbitrability? In the affirmative:

As a general rule, all disputes of a commercial nature may be submitted to arbitration. Article 12 of the Law provides a complete list of nonarbitrable disputes (please see below for particular categories).

Initiating bankruptcy proceedings against a party to the arbitration agreement shall have no impact on the arbitration proceedings, the validity of the arbitration agreement, the possibility to resolve the dispute in arbitration or the competence of the arbitration tribunal to resolve the dispute. However, the Arbitration Law explicitly provides that the party under bankruptcy proceedings cannot conclude a new arbitration agreement (Article 49 of the Arbitration Law).

2.5.1 Do these restrictions relate to specific domains (such as IP, corporate law etc.)?

Disputes arising from constitutional, family, or administrative matters, as well as disputes connected with the registration of patents, trademarks and service marks, cannot be submitted to arbitration. Disputes arising out of employment or consumer contracts may be submitted to arbitration only if the arbitration agreement is concluded after the dispute arises. Case law of the Lithuanian Supreme Court suggests as

well that disputes concerning the price of the contract which has been concluded by way of public procurement are not arbitrable (Supreme Court ruling of 17 October 2011 in the civil proceedings No [3K-7-304/2011](#)).

2.5.2 Do these restrictions relate to specific persons (i.e. State entities, consumers etc.)?

Disputes involving state or municipal enterprises, institutions or organisations, except the Bank of Lithuania, may not be submitted to arbitration without the consent of the founder of such entity. The Government of the Republic of Lithuania or its authorised public authority may, under the general procedure, conclude an arbitration agreement concerning disputes arising from commercial or economic contracts to which the Government or its authorized public authority is a party.

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

Article 11(3) of the Arbitration Law provides that the state court must stay litigation in favour of arbitration in case the court decides it is impossible to proceed with the examination of the court's case until the end of arbitration proceedings. In practice, when analysing requests to stay proceedings the state courts tend to evaluate whether there is potential to cause prejudice, i.e. whether the facts being analysed in arbitration shall have prejudice in the state court proceedings. However, the case law is limited and final conclusions as regards approach adopted by the courts cannot be drawn.

3.1.1 If the place of the arbitration is inside of the jurisdiction?

The Arbitration Law makes no distinction in this regard.

3.1.2 If the place of the arbitration is outside of the jurisdiction?

The Arbitration Law makes no distinction in this regard.

3.2 How do courts treat injunctions by arbitrators enjoining parties to stay litigation proceedings?

Anti-suit injunctions issued by the tribunals were the central issue in a widely discussed *Gazprom v Lithuania* case. Requested to decide application to recognise the SCC arbitral award ordering Lithuania to withdraw state court proceedings, the Supreme Court resorted to ECJ which issued a judgment in the case No C-536/13 stating that the enforcement by the court of a State of arbitral awards that prevent a party from taking the case to a court in that Member State falls outside the scope of EU Brussels Regulation 44/2001 and has to be decided pursuant to the New York Convention. The Supreme Court, following ECJ findings, recognised the award in question accordingly and noted that in essence the arbitral award ordering to refrain from State court proceedings does not amount to anti-suit injunction in a strict sense and has to be regarded as an order to comply with an applicable arbitration agreement (ruling of 23 October 2015 in the civil proceedings No [3K-7-458-701/2015](#)).

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)

Lithuanian state courts are entitled to apply interim measures in support of foreign arbitration proceedings.

In particular, Article 2(1) of the Arbitration Law provides that provisions of the Arbitration Law related to application of interim measures by state court are applicable irrespective of the place of arbitration.

Moreover, Article 147(3) of the Code of Civil Proceedings provides that the courts may apply interim measures even before initiation of the arbitration proceedings outside Lithuania. In case interim measures are requested and applied before initiation of arbitration in foreign jurisdiction, the party is given 30 days

from the date of ruling to submit evidence regarding initiation of arbitration proceedings. If evidence is not submitted, interim measures applied in support of foreign arbitration proceedings cannot be further applied.

Other interference is not allowed and the State courts are obliged to refrain from examining disputes subject to an arbitration agreement. The only exception is provided for in Article 11(2) of the Arbitration Law – provided there are no arbitration proceedings pending, the party is entitled to resort to a State court asking to declare an arbitration agreement null and void (after commencement of arbitration proceedings the issue of invalidity of an arbitration can be decided only by an arbitral tribunal).

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

Yes.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

A person requested to sit as arbitrator must reveal any circumstances likely to give rise to justifiable doubts as to his impartiality or independence and this obligation continues throughout the arbitral proceedings (Art. 15(1) of the Arbitration Law). However, failure to disclose *per se* does not serve as a ground for a successful challenge (ruling of the Court of Appeal dated 29 September 2014 in the civil proceedings No [2T-84/2014](#)).

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

If a party fails to appoint an arbitrator, the Vilnius District Court of the Republic of Lithuania shall make the appointment. If the arbitrators appointed by the parties fail to agree on the appointment of the chairperson of the arbitral tribunal, the Vilnius District Court shall appoint the chairperson of the *ad hoc* arbitral tribunal according to Article 14 of the Arbitration Law.

4.4 Do courts have the power to issue interim measures in connection with arbitrations?

Yes, Article 27 of the Arbitration Law provides explicitly that state courts may request Vilnius District Court to apply interim measures or to order the preservation of evidence before or after the date of commencement of arbitration or before the constitution of the arbitral tribunal.

4.4.1 If so, are they willing to consider *ex parte* requests?

Yes - it is fairly common.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

The parties are free to agree on the conduct of the arbitration. In the absence of such agreement, the arbitrators may conduct the arbitration proceedings in the manner they consider appropriate. The tribunal's discretion is only limited by general principles requiring fair treatment and equal procedural rights (Article 28(1) of the Arbitration Law), autonomy, economy and cooperation (Article 8 of the Arbitration Law).

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

The Arbitration Law provides that one of the arbitration's fundamental principle is confidentiality. However, as the law does not specify the content of this principle, it is recommended to agree on the scope of confidentiality if it is important for the contracting parties.

4.5.2 Does it regulate the length of arbitration proceedings?

No.

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

No.

4.5.4 Does it allow for arbitrators to issue interim measures?

Unless agreed otherwise by the parties, the arbitral tribunal may, at the request of a party and upon informing other parties, grant the following interim measures: (1) a prohibition against concluding agreements or taking certain actions; (2) an obligation of a party to preserve assets related to the arbitration, or to furnish a monetary deposit or bank or insurance guarantee; or (3) an obligation to preserve evidence that might matter to the arbitration. The party may ask the tribunal to issue preliminary ruling on interim measures *ex parte*.

The decision of the tribunal is binding on the parties. If the decision is not observed by a party, the Vilnius District Court shall issue an enforcement order upon the request of the other party.

4.5.4.1 In the affirmative, under what conditions?

The tribunal may apply interim measures aimed at ensuring that a party's request or relief will be enforced or that the evidence of the case will be preserved.

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence?

The parties may agree on rules applicable to evidence. In the absence of such agreement, the tribunal decides on what the applicable rules will be. In practice, the IBA Rules on the Taking of Evidence in International Commercial Arbitration are often followed.

This is the case particularly as the Arbitration Law does not provide any requirements on expert witnesses / reports / testimony and contains only very general rules on evidence: the tribunal can request production of evidence and draw adverse inferences in the case of non-production; the tribunal can refuse to accept evidence provided too late if this would delay the proceedings; and the tribunal has discretion to decide upon the admissibility, relevance and sufficiency of evidence.

4.5.5.1 For example, are there any restrictions to the presentation of testimony by a party employee?

No.

4.5.6 Does it make it mandatory to hold a hearing?

No, however, the tribunal has to hold an oral hearing if at least one of the parties requests it.

4.5.7 Does it prescribe principles governing the awarding of interest?

No. In practice, this issue is dealt with in accordance with the law applicable to the subject matter of the dispute.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

Unless otherwise agreed upon by the parties, the arbitral tribunal shall allocate the arbitration costs between the parties, taking into consideration the circumstances of the case and the conduct of the parties. Thus, arbitrators have wide discretion in the allocation of costs.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

The Arbitration Law contains no provisions on this issue.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

The Arbitration Law contains no provisions on this issue.

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Yes.

5.2 Can parties waive the right to seek the annulment of the award?

The Arbitration Law contains no provisions on this issue.

5.2.1 If yes, under what conditions?

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

None.

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

No.

5.4.1 If yes, what are the grounds for appeal?

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

Lithuania is party to the New York Convention. Therefore, an arbitral award rendered in any State that is a party to the New York Convention can be recognized and enforced in Lithuania according to the provisions of the New York Convention and the Arbitration Law, which incorporates the New York Convention into Lithuanian Law by reference. The grounds for refusal of recognition and enforcement of the arbitral award are not provided in the domestic law of Lithuania. Instead, the grounds established in Article V of the New York Convention shall apply as per reference to the Convention provided in Article 51 of the Arbitration Law.

Applications concerning recognition of foreign arbitral awards are examined by the Court of Appeal of Lithuania through written proceedings. The length of the proceedings should not exceed 90 days. The original or certified copies of an award and arbitration agreement must be attached to the application, along with a Lithuanian translation (certified by interpreter). The ruling of the court shall come into effect from the moment it is made. Once the ruling takes effect, the foreign arbitral award shall be subject to enforcement according to the procedure established in the Code of Civil Procedure. The arbitral award cannot be enforced until the Court of Appeal issues the ruling.

A judgment of the Court of Appeal of Lithuania granting or denying recognition and enforcement of a foreign arbitral award may be appealed to the Supreme Court of Lithuania within one month as the Court of Appeal' decision is handed down. The Supreme Court of Lithuania shall be entitled to suspend the enforcement of a judgment or ruling while the case is heard.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

No.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Case law on the recognition and enforcement of foreign awards set aside at the seat of arbitration is still developing.

5.8 Are foreign awards readily enforceable in practice?

Yes, Lithuanian courts follow a strong pro-arbitration tradition regarding the recognition and enforcement of arbitral awards.

6. Funding arrangements

6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

As regards fee arrangements, regulations and case law are very limited. However, the Law on the Bar of the Republic of Lithuania expressly states that conditional fees allowing an attorney to get an upscale premium are permitted in civil proceedings provided that it does not contradict the principles governing the practice of attorneys. The Law on the Bar provides, in addition, that an agreement on fees has to correspond to the complexity of the case, qualification and experience of the attorney, financial status of the client and other related circumstances. The Lithuanian Supreme Court has ruled in respect of these provisions that attorneys' fees in all cases have to pass the test of reasonableness. These provisions of the Law on the Bar, as well as the Code of Ethics of Lithuanian Attorneys, have to be interpreted in the light of the Code of Conduct for Lawyers in the European Union, which explicitly restricts lawyers from entering into *pactum de quota litis*, which, under the said Code, is an agreement between an attorney and his client entered into prior to the final conclusion of a matter to which the client is a party, by virtue of which the client undertakes to pay the lawyer a share of the result. Thus, contingency fees, allowing the attorney to get a share of the judgment if the client wins and nothing if the client loses, should be considered as forbidden in Lithuania.

As regards third-party funding, it is not prohibited by law but there is no practice yet. Recent case law of the Supreme Court of Lithuania may indicate that the third-party funding is available in Lithuania, as the court has confirmed expressly that the legal costs covered by a non-participating party are recoverable from the losing party.

6.1.1 If so, what is the practical and/or legal impact of such restrictions?

See above.

7. Is there likely to be any significant reform of the arbitration law in the near future?

Taking into account that the Arbitration Law was amended in 2012, no significant reform is likely to take place in the near future.

LUXEMBOURG

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

PIERRE HURT AND NICOLINA BORDIAN
OF LUTGEN + ASSOCIÉS

LUTGEN+ASSOCIÉS

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JURISDICTION INDICATIVE TRAFFIC LIGHTS †

1. Law ●
 - a. Framework ●
 - b. Adherence to international treaties ●
 - c. Limited court intervention ●
 - d. Arbitrator immunity from civil liability ●
2. Judiciary ●
3. Legal expertise ●
4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

VERSION: 12 FEBRUARY 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Several legal, historical and cultural advantages make the Grand-Duchy of Luxembourg a safe and stable seat for conducting arbitration proceedings. A first-class European business centre and home to the world's leading financial and banking institutions, Luxembourg enjoys a high degree of political and regulatory stability.

Located in the heart of Europe, Luxembourg is naturally and historically an arbitration-friendly venue. Given that legal professionals and judges are trained in France, Belgium and, to a lesser extent, Germany, the pro-arbitration law and politics of these neighbouring jurisdictions often influence the arbitration scholarship and case law in Luxembourg. Moreover, multicultural and multilingual local practitioners regularly confront and are comfortable with dealing and solving intricate issues of comparative and private international law.

Key places of arbitration in the jurisdiction	Luxembourg City is the main centre for business and arbitration in the Grand Duchy. The Chamber of Commerce of the Grand-Duchy of Luxembourg established its own Arbitration Centre in 1987 under the patronage of the International Chamber of Commerce (ICC). The Arbitration Centre conducts proceedings under its own arbitration rules. ¹ Additionally, the Arbitration Centre may conduct proceedings under the ICC Rules of Arbitration.
Civil law / Common law environment?	Luxembourg is a civil law country. French and Belgian law and case law have a persuasive value in courts and are taken into account by the legislator during the law-making process. Rules governing arbitration are codified in the New Code of Civil Procedure ("NCPC"), under Part II, Book III, Title I "On Arbitration", Articles 1224 to 1251.
Confidentiality of arbitrations?	Absent specific provisions and case law on confidentiality, scholars consider that parties may provide for confidentiality in the arbitration agreement. Arbitrator confidentiality falls under criminal law rules on professional secrecy (see section 4.5.1 below).
Requirement to retain (local) counsel?	There is no requirement to retain local counsel in proceedings before an arbitral tribunal.
Ability to present party employee witness testimony?	For the conduct of arbitration proceedings, the NCPC (Article 1230) defers to the rules of civil procedure applied before Luxembourg courts. Courts consider that arbitrators do not have to apply these rules strictly, provided that general principles of civil procedure are upheld (<i>i.e.</i> principe du contradictoire, see section 4.5 below). Given that courts often rely on employee testimonies, arbitrators may assume a similar approach.
Ability to hold meetings and/or hearings outside of the seat?	Absent specific rules on the matter, commentators consider that parties may dissociate the legal seat from the place where the hearings have been materially held (see section 4.5.3 below).

¹ Accessible on the chamber's website at: <http://www.cc.lu/services/avis-legislation/centre-darbitrage>.

Availability of interest as a remedy?	Availability of interest as a remedy would depend on the applicable law. Interest is available as a remedy under Luxembourg law, if applicable.
Ability to claim for reasonable costs incurred for the arbitration?	Nothing precludes arbitrators from awarding reasonable costs. Under recent Luxembourg case law legal fees may be recovered as part of the loss suffered.
Restrictions regarding contingency fee arrangements and/or third-party funding?	There are no restrictions regarding contingency fee arrangements and/or third-party funding.
Party to the New York Convention?	Party to the New York Convention since 1983.
Other key points to note	∅
WJP Civil Justice score (2018)	∅

ARBITRATION PRACTITIONER SUMMARY

Luxembourg is a first-class European business centre and home to the worlds' leading financial and banking institutions. This feature has a twofold impact to the arbitration practice in Luxembourg, rendering Luxembourg practitioners and judges highly attuned to the practice of arbitration:

- i. Where the Luxembourg corporate law is applicable to shareholder agreements and international financial contracts containing arbitration clauses, parties to arbitration proceedings need to seek Luxembourg corporate and private international law specialists.
- ii. Luxembourg is, de facto, an unavoidable venue for enforcing foreign arbitral awards.

Moreover, preeminent arbitration specialists are associated in the Think Tank for the Development of Arbitration in Luxembourg. The Think Tank has been working for the past years on a draft bill aiming at a complete overhaul of the Luxembourg rules on arbitration, which are currently codified in the New Code of Civil Procedure ("**NCPC**"), under Part II, Book III, Title I "On Arbitration", Articles 1224 to 1251. The draft has been influenced by the recent French arbitration reform and the UNCITRAL Model Law as applied and interpreted in Belgium. It is hoped that the bill will be passed in the next 2 to 3 years.

Date of arbitration law?	Luxembourg rules on arbitration date back to the enactment of the NCPC in 1806, with reforms made in 1939 and 1981.
UNCITRAL Model Law? If so, any key changes thereto?	Arbitration rules do not follow the UNCITRAL Model Law. However, the Model Law is one of the influencing instruments in the upcoming reform bill prepared by the Think Tank for the Development of Arbitration in Luxembourg.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	There are no specialised judges. However, the judges are highly familiar with the principles of arbitration law for the reasons explained above.
Availability of <i>ex parte</i> pre-arbitration interim measures?	<i>Ex parte</i> interim measures are available for the constitution of the arbitral tribunal. Otherwise, the admissibility of <i>ex parte</i> applications for interim measures is subject to the applicant demonstrating the existence of exceptional circumstances.
Courts' attitude towards the competence-competence principle?	Subject to either of the parties raising the issue, the principle is analysed and upheld by the courts, unless the arbitration agreement is null and void.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The Luxembourg rules on arbitration follow closely the New York Convention grounds for annulment, while also providing additional grounds. Annulment proceedings may last from 6 to 11 months subject to appeals and the complexity of the case. One unusual feature of Luxembourg law is that, to seek annulment of a Luxembourg award, one must first request its exequatur before the District Court via an <i>ex parte</i> application to the President of the competent District Court which is usually expedited under one to two weeks.

<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>Following in the footsteps of French judges, Luxembourg courts have enforced arbitral awards annulled in the seat of arbitration. However, in 2015, Luxembourg departed from this position by deciding to stay exequatur proceedings in Luxembourg to await the result of annulment proceedings at the seat of the arbitral award.</p>
<p>Other key points to note?</p>	<p>∅</p>

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

The arbitration law is not based on the UNCITRAL Model Law. The Part II, Book III, Title I of the *Nouveau code de procédure civile* (the Luxembourg New Code of Civil Procedure, “**NCPC**”) codified the rules governing arbitration in Luxembourg in Articles 1224 to 1251.

Luxembourg ratified the New York Convention by virtue of the Law of 20 May 1983.² Luxembourg is also party to the European Convention, which it ratified by virtue of the Law of 26 November 1981.³

The latest major reform was introduced by the Grand-Ducal Regulation of 8 December 1981.⁴

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

Luxembourg judges eagerly recognise that the parties may choose to apply a different law to the arbitration clause than the law applicable to the rest of the agreement.⁵ Absent a specific case law on instances where parties have not chosen the law applicable to the arbitration clause, Luxembourg rules of choice of law concerning contracts should apply.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Arbitration clauses are considered as a contract that is “accessory” to the contract in which the clause is set forth,⁶ which denotes a certain (but not entire) degree of severability from the main contract. Luxembourg case law has not gone as far as proclaiming complete autonomy of the arbitration clause from the main contract. If the main contract is null and void, in most cases, so will the arbitration clause be.⁷

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

Luxembourg law distinguishes between the arbitration clause (*clause compromissoire*) (Article 1227 NCPC) and the arbitration agreement (*compromis*) (Article 1226 and 1227 NCPC).

There are no formal requirements for an enforceable arbitration clause.

The arbitration agreement must state the subject matter of the dispute and names the arbitrator(s) (Article 1227 NCPC). Moreover, an arbitration agreement may be concluded in form of minutes before the arbitral tribunal, in front of a public notary or in a private document, i.e. contract (Article 1226 NCPC).

² Luxembourg made the reciprocity reservation to the New York Convention, whereby it “*is applied on the basis of reciprocity to the recognition and enforcement of only those arbitral awards made in the territory of another Contracting State.*”, Law of 20 May 1983 approving the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, Mémorial A - n°43 of 21 June 1983, p. 996.

³ Law of 26 November 1981 approving the European Convention on International Commercial Arbitration and its Annex, signed in Geneva on 21 April 1961, and the Agreement on the Application of the European Convention on International Commercial Arbitration, signed in Paris on 17 December 1962, Mémorial A - n°94 of 19 December 1981, p. 2283.

⁴ Grand-Ducal Regulation of 8 December 1981 amending and supplementing certain provisions of the single title entitled “On Arbitration” in Book III of Part Two of the Code of Civil Procedure, Mémorial A - n°91 of 16 December 1981, p. 2194.

⁵ Luxembourg District Court, 26 July 2005, case n°27789, Para. 33, p. 117; BJL, 2006, p. 165.

⁶ Court of Appeal, 12 March 2003, Para. 32, p. 399.

⁷ G. HARLES, *National Report for Luxembourg (2017)* in I. PAULSSON and L. BOSMAN (eds), *ICCA International Handbook on Commercial Arbitration*, Jan 1984, p. 7, citing Court of Appeal, 12 March 2003, *loc. cit.*

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

Absent a specific provision on the matter, courts traditionally uphold the arbitration clauses in contracts that have been transferred to new assignees.⁸ Additionally, in 2012, persuaded by French case law and scholarship on the theory of groups of contracts, the Luxembourg District Court⁹ accepted to extend the arbitration clause contained in a framework agreement to third parties that have signed implementation agreements based on the framework agreement.

2.5 Are there restrictions to arbitrability? In the affirmative:

2.5.1 Do these restrictions relate to specific domains (such as IP, corporate law etc.)?

The general arbitrability rule is provided by Article 1224 NCPC, which states that “*all persons may arbitrate in respect of their rights of which they can freely dispose*”.¹⁰

More specifically, Article 1225 NCPC provides that the parties may not submit the following issues to arbitration: “*status and legal capacity of persons, conjugal relations, requests for divorce and separation, the representation of persons without legal capacity, disputes concerning such persons without legal capacity and persons who are missing or presumed missing cannot be subject to arbitration.*”

Moreover, matters related to employment law, consumer¹¹ and most insurance contracts¹² may not be submitted to arbitration in an arbitration clause. However, the parties can resort to arbitration in an arbitration agreement, once the dispute has already arisen.¹³

According to case law, an arbitrator may apply *ordre public* provisions and disputes involving issues of *ordre public* are arbitrable.¹⁴

2.5.2 Do these restrictions relate to specific persons (i.e. State entities, consumers etc.)?

The prohibition of arbitration clauses in employment, consumer and insurance contracts stems from the lower bargaining power attributed to employees, consumers and the insured persons. As mentioned above, these parties may enter into arbitration agreements once the dispute has already arisen.

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

3.1.1 If the place of the arbitration is inside of the jurisdiction?

Yes. See question 3.1.2 below.

⁸ P. KINSCH, La législation luxembourgeoise en matière d'arbitrage, Bull. Cercle François Laurent, 1997, Vol. II, p. 1, para. 64, citing Luxembourg District Court, 20 May 1987, case n°297/87 (I) ; and Luxembourg District Court, 29 April 1988, case n°186/88 (II).

⁹ Luxembourg District Court, 1 June 2012, cases n° 124736, 124737, 124773, 126435 and 126576, commented by F. TREVISAN and L.-H. GAICIO, *Luxembourg: Extended benefits*, in *The 2012 Guide to Litigation & Dispute Resolution*, IFLR, 2012, p. 17, available at: <http://www.iflr.com/IssueArticle/3083690/Supplements/Luxembourg-Extended-benefits.html?supplementListId=86540>.

¹⁰ All translations of the NCPC quoted herein are adapted from the translations provided by the Handbook on Commercial Arbitration, Kluwer Law International, 1984, Supplement No. 65, July 2011.

¹¹ Article L.211-3 para 13 of the Consumer Code (*Code de la Consommation*).

¹² Article 47 of the law of 27 July 1997 on insurance contracts, as amended, first published in Mémorial A – n°65 of 3 September 1997, p. 2048. Pursuant to Article 3(3) of this law, this restriction does not apply to insurance contracts pertaining to coverage of large or exceptional risks.

¹³ Court of Appeal, 9 February 2000, Pas. 31, p. 301.

¹⁴ Court of Appeal, 9 February 2000, Pas. 31, p. 301.

3.1.2 If the place of the arbitration is outside of the jurisdiction?

Yes. However, where none of the parties raise the issue of the arbitration agreement the courts will retain their jurisdiction. This issue must be raised *in limine litis*,¹⁵ i.e. before responding on the subject matter of the case at hand.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

There is no case law on the matter in Luxembourg. Should the jurisdiction of a Luxembourg court be challenged, the judges will solely examine the issue under the lenses of their jurisdiction over the dispute and only if one of the parties raises the issue (see point 3.1.2 above). If the challenge is successful, the courts will simply decline jurisdiction and dismiss the case.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)

Luxembourg courts do not issue anti-suit injunctions. Otherwise, they may grant interim measures in support of foreign arbitration proceedings or enforce foreign awards (see point 4.4 and 4.5.4 below).

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

In the absence of specific provisions on the matter, commentators consider that lawyers and non-lawyers alike may represent the parties in arbitration.¹⁶ No rule prohibits self-representation.

4.2 B. How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

Arbitrator independence and impartiality standards are the same as those governing judges under Article 521 NCPC. A party may challenge an arbitrator if he/she:

- is a relative, partner or spouse of one of the parties;
- has been involved in a litigation against or is a creditor/debtor of one of the parties;
- is an administrator, manager,¹⁷ presumptive heir, guardian or curator of one of the parties;
- has advised, pleaded or written on the dispute;
- has previously known judge or arbitrated the dispute at hand;
- has requested, recommended or contributed to the costs of the proceedings;
- has testified as a witness; or
- has shared a meal or a drink with one the parties in their house, or received presents from such party.

¹⁵ Luxembourg District Court, 2 February 1934, Para. 14, p. 209; Luxembourg District Court, 24 April 2007, no. 1115/2007 (VIII), cited in G. HARLES, *op. cit.*, at p. 7, footnote 7.

¹⁶ P. KINSCH, *loc. cit.*, at p. 90.

¹⁷ Luxembourg District Court, 31 July 1959, Para. 18, p. 97; Luxembourg District Court, 10 February 1960, Para. 18, p. 101.

Moreover, a party may challenge an arbitration if there is a fundamental enmity between him/her and one of the parties or in case of oral or written assaults, insults or threats have been made since the beginning of the proceedings or within the six months preceding the proposed challenge.

Article 1235 NCPC restricts challenges of arbitrators to causes that have arisen since the conclusion of the arbitration agreement.

There is no specific case law on failure to disclose or whether the mere existence of such failure would suffice for the challenge to succeed. The cited rule indicates that the challenge may succeed only where an arbitrator's failure to disclose a cause for challenge is discovered after the conclusion of the arbitration agreement.

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of ad hoc arbitration)?

Luxembourg courts will intervene where i) an uncooperative party does not appoint its arbitrator or delays such appointment; ii) where the two party-appointed arbitrators do not agree on the president of the tribunal and/or iii) there is a challenge to the impartiality of one of the arbitrators.

In the first case, a party may make an *ex parte* application for the appointment of an arbitrator to the President of the competent District Court (Article 1227 NCPC). The decision of the President appointing an arbitrator will be notified to the other party and to the appointed arbitrator. It may not be appealed.¹⁸

The more diligent party may request the President of the District Court to appoint the third arbitrator (Article 1227 NCPC). The proceedings are contradictory and may be appealed.

An interested party may challenge an arbitrator's impartiality before the District Court. This is an *ex parte* procedure,¹⁹ which is identical to the challenge of a judge under article 521 NCPC.²⁰ In practice, *ex parte* proceedings are expedited under one to two weeks in Luxembourg.

4.4 Do courts have the power to issue interim measures in connection with arbitrations?

Yes. Traditionally, Luxembourg courts (*juge des référés*)²¹ have considered that they have the power to order interim measures in support of arbitration proceedings.²² This position has been set back in a 2009 decision in which the Court of Appeal²³ considered that judges do not have jurisdiction to issue interim measures where the arbitration clause refers "all disputes relating to the agreement" to arbitration. The commentators, however, consider that this decision should not be regarded as a precedent. In the matter at hand, the claimant sought an interim measure that was tantamount to asking the judge to rule on the merits of the case, which the arbitration clause covered.²⁴

4.4.1 If so, are they willing to consider ex parte requests?

Yes. Some of the proceedings concerning interim measures may be *ex parte* before a specialised judge (the *juge des référés*). Interim measures would be granted on the condition that the applicant demonstrate the

¹⁸ Court of Appeal (Ch. Vac.), 2 august 2013, case n°40133, JTL, 2009, n°30, p. 160.

¹⁹ Luxembourg District Court, 10 February 1960, *loc. cit.*

²⁰ Cf. point 4.2 above regarding the grounds for a challenge.

²¹ The *juge des référés* is a specialised judge that has the jurisdiction to issue interim orders.

²² See, for instance, Court of Appeal, 30 January 1989, case n° 1989. This case has not been published in a review, as first instance and appeal civil and commercial law cases are not yet publicly accessible. However, one may request them from a dedicated department of the Ministry of justice (*Service de documentation juridique*) by writing at the following address: credoc@justice.etat.lu. For more information on the available services, available at <http://www.justice.public.lu/fr/aides-informations/credoc/index.html>.

²³ Court of Appeal, 21 October 2009, JTL, 2010, p.72.

²⁴ See, case comments by P. KINSCH in JTL, 2010, p. 73.

existence of exceptional circumstances, justifying that the judges forgo the principle of an adversarial process.²⁵

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

Article 1230 NCPC governs the general rules on the procedure that arbitrators need to follow. The said article provides that, unless the parties have otherwise agreed, the arbitrators shall follow the deadlines and forms followed by State courts. Early on,²⁶ the courts adopted a flexible view, considering that the procedure prescribed by Article 1230 NCPC is not to be rigorously required, but should be adapted and reconciled with the flexible nature of arbitration. The only restriction to the matter is the respect of general rules of civil procedure (*i.e.*, *audi alteram partem* principle or *principe du contradictoire*).

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

Luxembourg law does not contain provisions on confidentiality, and the courts have not had the opportunity to rule on the issue to date. Commentators consider however that parties may provide for confidentiality in the arbitration clause/agreement.

Article 458 of the Criminal Code defines unlawful disclosure of professional secrets as an offence sanctionable by 6 months imprisonment and a fine of EUR 500 to EUR 5,000. Scholars consider that arbitrators would be bound to confidentiality under this provision.

One needs to keep in mind the fact that, should one of the parties decide to appeal the award before the courts, the judgement issued on award would be a matter of public record.

4.5.2 Does it regulate the length of arbitration proceedings?

Yes. Under Article 1228 NCPC, absent agreement of the parties on the matter, the arbitral tribunal must render the award within a 3 months period from the date of the conclusion of the arbitration agreement. If arbitrators issue an award after the expiry of this time-limit, they are considered to have extended the scope of their powers, which would constitute a basis annulment.²⁷ The tribunal does not have the authority to extend this time limit.²⁸ According to case law,²⁹ where the parties did not choose an initial time limit, they may agree to extend this very short deadline by 3 months increments. The parties' agreement to extend the duration of the proceedings may be explicit or implied from their conduct.³⁰ A party that refuses to extend the time limit without reasonable grounds may be considered in breach of the arbitration agreement/clause; such breach may be a cause for the rescission of the arbitration agreement and allow the judge to retain jurisdiction over the matter.³¹

Despite the above, in an *obiter dictum*, the Luxembourg Court of Appeal seems to acknowledge a common practice whereby parties waive the requirement for a specific period within which an award may be rendered.³²

²⁵ T. HOSCHEIT, *Le droit judiciaire privé au Grand-Duché du Luxembourg*, Ed. Paul Bauler, 2012, p. 637 ff.

²⁶ Court of Appeal, 22 July 1904, paras. 6, 517.

²⁷ Court of Appeal, 2 April 2014, Para. 161, p. 164

²⁸ Luxembourg District Court, 5 July 2006, BJJ, p. 140.

²⁹ Court of Appeal, 2 April 2014, *loc. cit.*

³⁰ Luxembourg District Court, 5 July 2006, *loc. cit.*, p.141.

³¹ Luxembourg District Court, 15 January 2009, JTL, 2009, p. 134.

³² Court of Appeal, 2 April 2014, *loc. cit.*

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

No. Nevertheless, the Luxembourg case law and scholarship considers an award “made” in Luxembourg as Luxembourgish,³³ even if the parties choose to apply the law of another jurisdiction to the procedure. This further means that annulment proceedings are available in Luxembourg. According to commentators, the parties should still be able to dissociate the legal seat from the place where the hearings have been materially held.³⁴

4.5.4 Does it allow for arbitrators to issue interim measures?

Although not expressly provided for in the NCPC, arbitrators may grant interim measures. However, to enforce them, where necessary, one should first need to proceed through an *exequatur* proceeding before the President of the District Court in the jurisdiction of which the arbitration proceedings take place. It is a general understanding that the arbitral tribunal may not issue interim measures against third parties.³⁵

4.5.5 Does it regulate the arbitrators’ right to admit/exclude evidence?

There is no specific requirement on this point. The only restriction is that general rules of civil procedure be upheld (*i.e.*, *audi alteram partem* principle or *principe du contradictoire*, as explained under point 4.5 above).

Should the arbitrator follow general procedural provisions applicable to courts, such testimony would be admissible. Theoretically, judges should weigh the credibility of such testimony against the employee/employer relationship. In practice, however, the reliance on employee testimony in court is widespread.

4.5.6 Does it make it mandatory to hold a hearing?

No. There is no legal requirement regarding this matter. The only restriction to the matter is the respect of *due process principles* (as explained under point 4. above). Commentators consider that where a party requests a hearing, the arbitrator should grant it, as there would be a high risk that the issued award will be successfully challenged on the above-mentioned ground.³⁶

4.5.7 Does it prescribe principles governing the awarding of interest?

No. Should Luxembourg law apply, interest would be awarded.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

No. Under Luxembourg general procedural law principles, if applicable, arbitrators would have discretion in the allocation of costs.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

No. Absent case law on the matter, arbitrators’ civil liability should be examined under contract law principles.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

To our knowledge, there have been no prosecutions linked to a participation in an arbitration proceeding.

³³ Cf. Section 5(E) below.

³⁴ KINSCH, *loc. cit.*, at p. 115.

³⁵ HARLES, *op. cit.* p. 14.

³⁶ HARLES, *op. cit.* p. 13.

Should arbitrators disclose any information communicated to them for the purposes of the arbitration proceedings, they may be prosecuted under Article 458 of the Criminal Code (*Code pénal*).

Conducting or participating in fraudulent or fictitious arbitration proceedings may fall under prosecutable offences, such as forgery (Articles 193 *et seq.* Criminal Code), fraud (articles 489 *et seq.* Criminal Code) or money laundering (Articles 506-1 *et seq.* Criminal Code).

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Yes. Article 1244 NCPC provides that, unless parties agree otherwise, an award rendered in Luxembourg may be annulled if the award is not reasoned. Given that grounds for declining enforcement of foreign awards are less strict than grounds for annulment of Luxembourg awards (see point 5.5 below), one may infer that this option is also open to arbitrations seated abroad.

5.2 Can parties waive the right to seek the annulment of the award?

There is no provision on the matter and it is uncertain whether such waiver would be upheld by courts.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

Other than the requirements relating to time limits (see point 5.5 below), all arbitrators must sign the award. The law requires that dissent is mentioned in the award if a minority of arbitrators refuses to sign it followed by the signature of the rest of the arbitrators (Article 1237 NCPC).

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

No. Parties may however agree on an appellate proceeding before an otherwise composed arbitral tribunal.

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

Luxembourg law and case law attribute "*nationalities*" to awards, distinguishing between awards "*made*"³⁷ or "*rendered*"³⁸ in Luxembourg (or Luxembourg awards) and awards "*made*" or "*rendered*" abroad (or foreign awards).³⁹ Early case law⁴⁰ seemed to apply a purely territorial criterion, *i.e.*, the physical place where the award was rendered as transpiring from the text of the award itself (*i.e.*, where the award was signed). According to commentators, this case law should be interpreted in the sense that the place where the award is made is the agreed seat of arbitration and should not preclude parties from dissociating the legal seat from the place where the hearings have been materially held.⁴¹ Moreover, the fact that a proceeding followed foreign arbitration rules does not affect the nationality of the award.⁴²

Consequently, recognition and enforcement of Luxembourg awards (a) differ from those of foreign awards (b). One can further distinguish the foreign awards issued or not in a signatory state of the New York Convention (c).

The arbitration section of the NCPC does not provide for a time limit for enforcement of awards. However, one may apply *mutatis mutandis* its Articles 2224 and 2262 prescribing that Luxembourg judgements must

³⁷ The criterion is borrowed from Article 1 of the New York Convention; KINSCH, *loc. cit.*, at p. 113.

³⁸ This term is implied from the wording of Article 1250 NCPC.

³⁹ Court of Appeal, 2 April 2014, *loc. cit.*

⁴⁰ Court of Appeal, 24 November 1993, case n°14983, commented by KINSCH, *loc. cit.*, at p. 113.

⁴¹ KINSCH, *loc. cit.*, at p. 115.

⁴² KINSCH, *loc. cit.*, at p. 115.

be enforced within a 30 years' time limit. It is debated whether these provisions should apply to foreign awards.⁴³

5.5.1 Enforcement of Luxembourg awards.

The applicant may enforce a Luxembourg award following an *ex parte* application with the President of the District Court of the seat of arbitration⁴⁴. Prior to the application, the applicant should file the original of the award with the clerk of the District Court. The judge does not have jurisdiction to review the award on the merits, having the possibility to refuse enforcement for *ordre public* reasons.⁴⁵

In the event the court refuses to enforce the award, the applicant may challenge the decision before the Court of Appeal.⁴⁶

The enforcement debtor may challenge the decision granting leave for enforcement in an annulment proceeding, on the grounds provided for in Article 1244 NCPC if:

- (1) *the award is against public order;*
- (2) *the dispute may not be settled by arbitration;*
- (3) *there was no valid arbitration agreement;*
- (4) *the arbitral court exceeded its competence or powers;*
- (5) *the arbitral court failed to decide on one or several points of the dispute and if the omitted points cannot be separated from the points that were decided;*
- (6) *the award was made by an irregularly constituted arbitral tribunal;*
- (7) *there was a violation of due process [i.e. principle of an adversarial process or *droits de la défense* in the French text];⁴⁷*
- (8) *the award is not reasoned, unless the parties expressly exempted the arbitrators from giving reasons;*
- (9) *the award contains contradictory dispositions;*
- (10) *the award was obtained by fraud;*
- (11) *the award is based on evidence that has been declared false by a final judicial decision or on evidence that is admitted to be false;*
- (12) *since the award has been rendered, a document or other element of proof is discovered which would have had a decisive influence on the award and which was withheld by the action of the adverse party."*

One unusual feature of Luxembourg law is that to seek annulment of a Luxembourg award, one must first request its *exequatur* before the District Court (Article 1246 NCPC). This preliminary *exequatur* proceeding is expedited quickly.

If based on paras. (1) to (9) of Article 1244 NCPC, the annulment proceedings must be commenced within the month of the notifications of the enforcement decision. Applications for annulment under paras. (10) to (12)

⁴³ C. MEDERNACH, "Report for Luxembourg" in ICC Bulletin – 2012 special supplement, p. 249.

⁴⁴ There are two District Courts in Luxembourg, one for the District of Diekirch and the other for the District of Luxembourg.

⁴⁵ HARLES, *op. cit.*, at p. 22.

⁴⁶ HARLES, *op. cit.*, at p. 22, under footnote 31, citing Court of Appeal, 26 March 2009, case n°33236.

⁴⁷ Our note.

must be filed within the month when the applicant has been made aware or should have been aware of the respective issue affecting the award.

5.5.2 Enforcement of foreign awards.

In order to enforce a foreign award in Luxembourg, an application must be made before the President of the District Court of either i) the domicile (or residence) of the party against which the enforcement is sought or ii) the place where the award is to be enforced (Article 1250 NCPC). These are *ex parte* proceedings that mirror the *exequatur* proceedings of a foreign judgement under Article 680 *et seq* NCPC.

As a prerequisite, the applicant must provide the judge with, either originals or certified copies of the award and the arbitration clause or arbitration agreement (Article 1250 para. 4). Although this is only a requirement for awards seated in a country that is a signatory of the New York Convention, it is recommended to provide the judge with a certified translation of the award into either French, German or Luxembourgish.

Article 1252 lists grounds for refusal of *exequatur* by reference to paras. 3 to 12 of Article 1244 NCPC (see above). Under Article 1251 NCPC, the judge will refuse the enforcement if:

- "(1) *the award can still be appealed before arbitrators and if the arbitrators have not ordered the provisional enforcement of the award notwithstanding appeal;*
- (2) *the award or its execution is against public order or if the dispute could not be settled by arbitration;*
- (3) *it is established that there are grounds for annulment as provided in Art. 1244(3) to (12)".*

The court will notify the enforcement debtor on the decision granting leave for enforcement. Said party may challenge it before the Court of appeal.⁴⁸ A recourse on a point of law is available before the Luxembourg Supreme Court in civil and commercial matters (*Cour de Cassation*).

5.5.3 Enforcement of foreign awards seated in a signatory state of the New York Convention.

The procedure for enforcement of arbitral awards seated in a signatory country to the New York Convention is identical to that for the regular foreign awards. In terms of grounds for refusal of enforcement, the Luxembourg courts will strictly apply only the provided in the New York Convention⁴⁹, and not the grounds mentioned for regular foreign awards under 1251 NCPC. Hence, an interested party may challenge awards rendered in a signatory country to the New York Convention solely on grounds listed under its Article V of the New York Convention.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

Following in the footsteps of French judges,⁵⁰ Luxembourg courts have considered, for a time that annulment proceedings at the seat do not preclude enforcement of such award in Luxembourg.⁵¹ Luxembourg judges have departed from this position in 2013,⁵² by denying an applicant's right to exercise freezing orders in

⁴⁸ Court of Appeal, 26 July 2005, *loc. cit.*; Court of Appeal, 26 March 2009, *loc. cit.*, cited in HARLES, *op. cit.*, at p. 24, under footnote 34.

⁴⁹ Court of Appeal, 25 June 2015, Para. 37, p. 383.

⁵⁰ French Cour de Cassation, Civ 1^{re}, 23 March 1994, *Hilmarton* case n° 92-15137, Rev. Arb. 1994, p. 327, commented by Ch. JARROSSON; French Cour de Cassation, Civ 1^{re}, 29 June 2007, *Putrabali* case n° 05-18053, Rev. Arb. 2007, p. 517, commented by E. Gaillard.

⁵¹ Court of Appeal, 28 January 1999, case n° 27789, Para. 31, p. 95.

⁵² Court of Appeal, 18 December 2013, case n° 40145 and 40147, JTL, 2014, p. 51.

Luxembourg. In 2015, the Court of Appeal confirmed the departure from the earlier precedents⁵³ in a case where judges decided to stay *exequatur* proceedings in Luxembourg to await the result of annulment proceedings at the seat of an arbitral award.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Yes. The rationale behind the answer to question 6, is that annulment of an award at the seat of arbitration would constitute a ground for refusing *exequatur* in Luxembourg.⁵⁴

5.8 Are foreign awards readily enforceable in practice?

Even prior to commencing *exequatur* proceedings, one may seek authorisations from the courts to proceed to freeze movable or immovable assets in Luxembourg based on the non-exequated award alone.⁵⁵ Once the court grants a leave for enforcement through the traditional *exequatur* proceeding, the courts may confirm the decision on freezing the asset that then becomes final.

6. Funding arrangements

6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

Rules governing the legal profession in Luxembourg prohibit contingency fees. A certain degree of proportionality is allowed where it constitutes an additional means of remunerating the lawyer's services, *i.e.*, where a certain proportion of the claim is billed in addition to time-based billing. There is no provision prohibiting third-party funding.

6.1.1 If so, what is the practical and/or legal impact of such restrictions?

In the absence of arbitration-related case law on the matter, one should consider that these rules are applicable to lawyers registered with the Luxembourg bar only.

7. Is there likely to be any significant reform of the arbitration law in the near future?

Yes. The *Think Tank for the Development of Arbitration in Luxembourg* has been working for the past years on a draft bill aiming at a complete overhaul of the NCPC section on arbitration. The draft is a synthesis of the recent French arbitration reform and the UNCITRAL Model Law, as applied and interpreted in Belgium. The Luxembourg Ministry of Justice is currently reviewing the bill. It is hoped that the bill will be passed in the next 2 to 3 years.

⁵³ Court of Appeal, 25 June 2015, *loc. cit.*, commented by G. CUNIBERTI, "L'exécution au Luxembourg des sentences annulées dans l'Etat du siège de l'arbitrage", at p. 387.

⁵⁴ Court of Appeal, 25 June 2015, *loc. cit.*, at p.386.

⁵⁵ Reference is made to the *saisie-arrêt* proceedings under Articles 693 NCPC *et seq.*

MALTA

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

DR MARISA VELLA, DR KRISTINA RAPA MANCHE AND
DR MARTINA CAMILLERI
OF CAMILLERI PREZIOSI

CAMILLERI PREZIOSI
ADVOCATES

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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS

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VERSION: 25 MAY 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Historically, Malta has always been considered a civil law jurisdiction with the main civil, commercial and criminal laws having been based and structured around the continental European system. However, 160 years of British rule have influenced an increasing number of laws particularly in the administrative, financial, fiscal and corporate law fields, which are largely influenced by the common law system. This has led to the general body of Maltese Law resulting in a mixed or 'hybrid' system influenced by both common law and civil law.

Key places of arbitration in the jurisdiction	Valetta.
Civil law / Common law environment?	Mixed system.
Confidentiality of arbitrations?	Yes, for domestic arbitrations; not specified for international arbitrations
Requirement to retain (local) counsel?	No.
Ability to present party employee witness testimony?	Yes.
Ability to hold meetings and/or hearings outside of the seat?	Yes.
Availability of interest as a remedy?	Yes, but compound interest is not permitted.
Ability to claim for reasonable costs incurred for the arbitration?	Yes.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Not allowed.
Party to the New York Convention?	Yes.
Other key points to note	ϕ
WJP Civil Justice score (2016)	ϕ

ARBITRATION PRACTITIONER SUMMARY

Arbitration in Malta is regulated by the Arbitration Act, Chapter 387 of the Laws of Malta (“the Act”).¹ The Act lays down a separate regime for domestic and international arbitration. Domestic arbitrations must be conducted with and under the rules of the Malta Arbitration Centre (“MAC”), under pains of nullity. As for international arbitration, the Act is largely based on the UNCITRAL Model Law.

Date of arbitration law?	It came into force on 23 February 1998 and was last amended in 2015.
UNCITRAL Model Law? If so, any key changes thereto?	The legal regime for international arbitration is largely based on the Model Law, with the following main changes: <ul style="list-style-type: none"> • the procedure for obtaining the recognition and enforcement of foreign awards; and • parties can choose to exclude the application of the Model Law, in which case the provisions applicable to domestic arbitration shall apply unless the parties have chosen different rules.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No, save inasmuch as the Chairman of the Board of Governors of the MAC is the competent authority designated for the purposes of Article 6 of the Model Law.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes, before the First Hall, Civil Court. Where interim measures are granted prior to the commencement of arbitration proceedings, the party requesting such a measure must proceed to file the arbitration proceedings within twenty days from such request.
Courts’ attitude towards the competence-competence principle?	Respected, unless for domestic arbitration if the court considers that any party will suffer irreparable harm if the court does not itself determine the issue (see Article 32 of the Act).
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	No. For domestic arbitral awards, it is possible to appeal them on a point of law (and on points of fact as well in the case of mandatory domestic arbitrations).
Courts’ attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	Maltese courts have not so far expressed any views on this issue, but under the Act the courts could refuse to recognise such awards.

¹ Available at <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8854>.

Other key points to note?	The power of arbitral tribunals to grant interim measures does not extend to those such measures known under Maltese law as precautionary acts, namely the warrant of description, warrant of seizure, warrant of seizure of commercial going concern, garnishee order, warrant of impediment of departure, warrant of arrest of sea vessels, warrants of arrest of aircraft and the warrant of prohibitory injunction. If a court issues a precautionary act, it shall remain in force until the final determination of the dispute between the parties by the arbitral tribunal, or until the same court issues a counter-warrant.
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JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law?

Arbitration in Malta is partially based on the UNCITRAL Model Law. Arbitration in Malta is governed by the Arbitration Act, Chapter 387 of the Laws of Malta (“the Act”),² which provides for a different regime for domestic and international arbitration. While international arbitration is indeed governed by the Model Law (incorporated at Article 55 of the Act and subject to the modifications discussed below), domestic arbitration is governed by a different set of provisions contained in the Act. Generally speaking, a domestic arbitration is defined as one not falling within the scope of the Model Law.³

Domestic arbitration in Malta entails two particular characteristics: (i) the arbitration must be conducted under the rules of arbitration of the Malta Arbitration Centre (“MAC”), in Valletta, under pain of nullity of the procedure and any ensuing award,⁴ and (ii) arbitration is mandatory for the resolution of condominium disputes, certain motor traffic disputes, disputes concerning water and electricity services, and Paying Agency disputes (“mandatory arbitrations”).⁵

1.1.1 If yes, what key modifications if any have been made to it?

The Act makes two main changes to the UNCITRAL Model Law:

- Article 59 of the Act provides that Chapter VIII of the Model Law regarding the recognition and enforcement of foreign arbitration awards is replaced by Part VII of the Act. In practice, the only change relates to the procedure for obtaining the recognition and enforcement of foreign arbitral awards, and not to the basis upon which the recognition or enforcement of an award may be granted or refused.
- Within the area of application of the Model Law, it can be displaced by agreement of the parties, in which case (i) the provisions laid down in the Act for domestic arbitrations shall apply, unless the parties have chosen different rules for this purpose,⁶ and (ii) the award may be appealed on a point of law.⁷

1.2 When was the arbitration law last revised?

The law was last revised on 30 October 2015 through Act No. XXX of 2015. This made slight amendments to the Act to reflect changes to the Consumer Affairs Act.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

If there is no specific governing law stipulated in the arbitration agreement, the arbitral tribunal applies the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal then applies Maltese law including the rules of Maltese law relative to the conflict of laws. The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorised the arbitral tribunal to do so. In all cases, the arbitral tribunal decides in accordance

² Available at <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8854>.

³ Article 14 of the Act.

⁴ Article 17 of the Act.

⁵ Article 15(11) of the Act and Fourth Schedule to the Act.

⁶ Article 60 of the Act.

⁷ Article 69 of the Act.

with the terms of the contract and if relevant, takes into account the usages of the trade applicable to the transaction.⁸

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

An arbitration clause in a contract is treated by the tribunal as an agreement independent of the other terms of that contract. Therefore, a decision by the arbitral tribunal that the contract, or part thereof, is null and void does not entail *ipso jure* the invalidity of the arbitration clause.⁹

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

An arbitration agreement must be in writing. An arbitration agreement is in writing if it is contained in a document transmitted from one party to the other party, or by a third party to both parties, and no objection is raised thereto within thirty days of the receipt of that document. Reference in a written contract to a document containing an arbitration clause constitutes an arbitration agreement, provided that the reference is such as to make that clause part of the contract.¹⁰ An arbitration agreement is also concluded by the issuance of a bill of lading, if the latter contains an express reference to the arbitration clause in a charter party.¹¹ Moreover the agreement needs to reflect the intention of the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

The rights of third parties depend on the terms of the arbitration clause and the nature of the dispute involving a third party. If the arbitration clause provides for submission to arbitration any disputes between the main parties arising in connection to the contract, the third party might be bound by the arbitration clause if it is involved in a dispute which can be said to arise from the contract.

2.5 Are there restrictions to arbitrability?

Yes.

2.5.1 Do these restrictions relate to specific domains (such as IP, corporate law etc)?

Disputes concerning questions of personal civil status, including those relating to personal separation, divorce or annulment of marriage, are not capable of settlement by arbitration, although questions relating to the division of property between spouses may be referred to arbitration subject to the approval by the competent court of the arbitration agreement and of the arbitrator to be appointed.¹²

2.5.2 Do these restrictions relate to specific persons (i.e. state entities, consumers etc)?

There is no outright restriction to specific persons submitting themselves to arbitration. However, any submission to arbitration of a dispute by an administrator, agent or attorney is not valid unless such person is authorised to submit disputes to arbitration and the submission refers to an issue which falls within the powers granted to such person.¹³

⁸ Article 45(3) of the Act.

⁹ Article 32(2) of the Act.

¹⁰ Article 2(b) of the Act.

¹¹ Article 2(c) of the Act.

¹² Article 15(6) of the Act.

¹³ Article 15(7) of the Act.

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

3.1.1 If the place of the arbitration is inside of the jurisdiction?

If any party to a domestic arbitration agreement commences any legal proceedings in a court against any other party to that arbitration agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may, at any time before delivering any pleadings or taking other steps in the proceedings, apply to that court to stay the proceedings. The court shall stay those proceedings, unless it is satisfied that the arbitration agreement has become inoperative or cannot proceed. A party against whom court proceedings have been brought may make an application to stay the proceedings, notwithstanding that the arbitration agreement states that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures. Where such court proceedings have been brought, arbitral proceedings may still be commenced or continued, provided that the arbitral tribunal does not take any steps in the arbitration until the Court decides on the application (to stay court proceedings). Exceptions are cases in which failure by the arbitral tribunal to provide a remedy will result in irreparable harm to any party to the arbitral proceedings. Upon the decision of the Court, of which the arbitral tribunal must be notified by the applicant, the arbitral tribunal will be bound by the decision of the Court on the issues determined in the application and must act accordingly.¹⁴

In light of Article 14 of the Act,¹⁵ an international arbitration may also be seated in Malta, in which case Article 8(1) of the Model Law (which is the same as Article 15(3) of the Act) is applicable. Article 8(2) of the Model Law¹⁶ is not reflected in the Act regulating domestic arbitration although it is likely that it is still followed in practice.

3.1.2 If the place of the arbitration is outside of the jurisdiction?

Although Regulation 1215/2012 (Brussels I recast) does not apply to arbitration, it states that nothing in that regulation should prevent the courts of a Member State, when seized of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.¹⁷ On this basis, and subject to the provisions of Brussels I recast, the court would likely stay proceedings, even in situations where the place of arbitration is located outside of the jurisdiction.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

Although the arbitral tribunal may, at the request of a party, order any party to take interim measures of protection,¹⁸ this is not usually done in practice as such measures are generally issued by the courts.

¹⁴ Article 15(3) of the Act.

¹⁵ This states that a domestic arbitration agreement is an arbitration agreement which does not fall under the Model Law.

¹⁶ This states that where an action is brought before a court in a matter which is the subject of an arbitration agreement, arbitral proceedings may nevertheless be commenced or continued and an award may be made, while the issue is pending before the court.

¹⁷ Preamble no. 12 of EU Regulation No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF>).

¹⁸ Article 38(6) of the Act.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (relates to the anti-suit injunction but not only)

As a general rule, the Maltese courts cannot intervene in arbitration proceedings which have been instituted outside of their jurisdiction.

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

The parties to arbitration proceedings may be represented or assisted by persons of their choice, including outside counsel. The names and addresses of such persons need to be communicated in writing to the other party and such communication must specify whether the appointment is being made for the purpose of representation or assistance. A legal practitioner or a person not qualified under the Laws of Malta may also act on behalf of a party to an arbitral proceeding to which this Act applies, including appearing before the arbitral tribunal. Such representation will not be deemed to be in breach of the rules regulating the practice of the legal profession in Malta.¹⁹

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

In the case of domestic arbitration, a person who is approached as a prospective arbitrator is required to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, must disclose to the parties such circumstances, unless the parties have already been informed by him of these circumstances.²⁰ An arbitrator may be challenged if circumstances exist that give rise to justifiable doubt as to the arbitrator's impartiality or independence. A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.²¹ In case the arbitrator breaches his duty of independence because of an undisclosed conflict of interest or because of irregular communication or otherwise, with one of the parties or any person on behalf of a party, the Registrar of the MAC (the "**Registrar**") makes a written report to the Board of Governors (the "**Board**") copied to the arbitrator and to the parties, and it is up to the Board to decide what actions are to be taken.²²

Similarly, in the case of international arbitration, the Model Law provides that an arbitrator may be challenged if circumstances exist that give rise to justifiable doubt as to the arbitrator's impartiality or independence or if he does not possess qualifications agreed to by the parties.²³

In terms of the challenge procedure, in domestic arbitration, a party may challenge an arbitrator by giving notice of his challenge within fifteen days of receiving notification that the challenged arbitrator has been appointed, or within fifteen days of becoming aware of the particular circumstances forming the basis of the challenge.²⁴ Notice of the challenge is given to the Registrar, to the other party, to the arbitrator who is challenged, and to the other members of the arbitral tribunal; the written notice must state the reasons for the challenge.²⁵ When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. However, such a withdrawal

¹⁹ Article 18(2) of the Act.

²⁰ Article 23 of the Act.

²¹ Article 24 of the Act.

²² Article 72(4) of the Arbitration Rules (Subsidiary Legislation 387.01 of the Laws of Malta) <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=10502&l=1>.

²³ Article 12(2) of the Model Law.

²⁴ Article 25 of the Act.

²⁵ Article 25 of the Act.

does not imply acceptance of the grounds for the challenge.²⁶ If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made by the chairman of the Board of Governors of the MAC (the “**Chairman**”), whose decision is final and binding; when the Chairman sustains a challenge, he must appoint a substitute arbitrator.²⁷

In international arbitration, the parties are free to agree on a procedure for the determination of challenges.²⁸ This includes the situation where they have agreed to submit their arbitration to the rules of an arbitral institution.

Failing such agreement, a challenge must in the first instance be brought before the arbitral tribunal.²⁹ If the challenge is not successful, then the challenging party may apply to the authority designated for the purposes of Article 6 of the Model Law, namely in this instance the Chairman.³⁰

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

The Act does not provide for court intervention in the selection of arbitrators.

In an *ad hoc* international arbitration, where the parties fail to reach agreement on the designation of an arbitrator, the appointing authority pursuant to Articles 11(3) and 11(4) of the Model Law is the Chairman.³¹

Similarly, for domestic arbitration, the Chairman is given the authority to appoint the arbitrator(s) if the chosen method for selecting arbitrators fails.³² Where there are multiple parties to the arbitration proceedings and all parties are unable to agree to a method for the constitution of the arbitral tribunal, the Chairman may, upon request of either party, appoint each member of the arbitral tribunal and shall designate one of them to act as presiding arbitrator.³³

4.4 Do courts have the power to issue interim measures in connection with arbitrations?

Unless otherwise agreed by the parties, any party may request the First Hall, Civil Court to issue interim measures or precautionary acts. These remain in force until they are revoked or until an award is issued by the arbitral tribunal ordering the party issuing the precautionary act to withdraw the same and issue the relative counter-warrant. The most commonly used precautionary acts available under Maltese law are the warrant of seizure of movables and the garnishee order. The warrant of seizure of movable property allows for the seizure from the debtor of the articles indicated by the creditor whereby a consignee must be appointed for the articles seized. The warrant of seizure of immovable property is only available once the creditor has obtained an executive title against the debtors. The garnishee order is used by a creditor in order to safeguard the payment of a debt owing to him by attaching in the hands of a third-party monies or movable property due or belonging to his debtor. Any such monies or movable property are then deposited for safe keeping at the court registry, until the dispute subjected to arbitration is conclusively determined.

Other interim measures available under Maltese law are the precautionary acts including the warrant of description, warrant of seizure of a commercial going concern, warrant of impediment of departure, warrant of arrest of sea vessels, warrant of arrest of aircraft, and the warrant of prohibitory injunction.³⁴

²⁶ Article 25 of the Act.

²⁷ Article 26 of the Act.

²⁸ Article 13(1) of the Model Law.

²⁹ Article 13(2) of the Model Law.

³⁰ Article 13(3) of the Model Law and Article 57(a) of the Act.

³¹ Article 57(a) of the Act.

³² See Articles 20-21 of the Act.

³³ Article 21A of the Act.

³⁴ Article 830(1) of Chapter 12 of the Laws of Malta.

Such measures are available to the creditor either before the commencement of arbitration proceedings, or whilst proceedings are pending. If proceedings have not yet been filed, the party requesting the issue of a precautionary act must file arbitration proceedings within twenty days of filing the judicial act requesting the issue of the precautionary act.³⁵ Such action is deemed to have been taken when the arbitration proceedings are commenced. The party at whose request a precautionary act has been issued must, within twenty days, file a note in the records of the proceedings for the issue of the said precautionary act together with a certificate by the Registrar showing that he has commenced arbitration proceedings.

4.4.1 If so, are they willing to consider *ex parte* requests?

Interim measures are generally only granted by the attendance of both parties to a dispute.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

In the context of international arbitration, Article 19(1) of the Model Law allows the parties to agree on a procedure regulating the conduct of the proceedings. In the absence of such agreement however, Article 19(2) allows the arbitral tribunal to conduct the arbitration in the manner it considers appropriate. Such power of the tribunal includes the determination of admissibility, relevance, materiality and weight of any evidence.

In domestic arbitration, the Arbitration Rules (Subsidiary Legislation 387.01 of the Laws of Malta) (the "Rules") include significant disciplinary provisions aimed at ensuring proper conduct of the arbitration.³⁶ Article 71(1) of the Rules provides that the arbitral tribunal is primarily responsible for exercising discipline over the arbitral proceedings, and confers all the necessary powers to issue orders to the parties in relation thereto. To this end, Article 71(2) confers powers on the arbitral tribunal to impose penalties for non-compliance with orders, for failure to observe time-limits and for failure to attend hearings or cancellation thereof without valid reasons.

The Rules also aim to keep in check the powers of the arbitrators. They provide that where there is evidence of disproportionate use of the powers of the arbitral tribunal relative to the action of a party, this is a valid ground of challenge of an arbitrator. The burden of proving disproportionality rests with the party claiming it and arbitrators are *prima facie* presumed to have acted within their powers.³⁷

In case of breach of duty by an arbitrator in relation to the management of the arbitration proceedings, the Registrar may issue orders in writing to the arbitrator who is bound to comply as soon as possible with such order. The Board may request the Registrar to issue any such orders to any arbitrator if, when reviewing progress in any arbitration, the Board notes that any provisions of the Act, the Rules or any guidelines are not being observed or that the arbitrator is failing to manage the arbitration process efficiently. When an arbitrator fails to observe the orders of the Registrar issued in accordance with this rule, the Registrar may report on such circumstances to the Board and the Board then determines what disciplinary action to take against the arbitrator after giving the arbitrator the opportunity of being heard and after considering such other evidence as may be appropriate. In such cases the Board has the power to issue orders in relation to the proceedings, order the removal of the arbitrator from the panel, and impose a disqualification to act as an arbitrator in Malta for a maximum period of three years.³⁸

³⁵ Article 38 of the Act, article 742(4) of Chapter 12 of the Laws of Malta.

³⁶ See <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=10502&l=1>.

³⁷ Article 71(5) of the Rules.

³⁸ Article 72 of the Rules.

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

In international arbitration, there is a presumption in favour of confidentiality, although no clear authority on this.

In domestic arbitration, every person who participates in the arbitration proceedings in whatever capacity must maintain the confidentiality of the arbitration. The existence of arbitration proceedings, the filing of the arbitration notice, and the award will not be publicised or otherwise be publicly acknowledged by the MAC or the parties. The MAC treats all documents filed with it as confidential, except to the extent as authorised by the parties or otherwise necessary to implement the provisions of the Act. The hearings are held in private chambers and no person – other than the parties, their assistants or representatives, and the Registrar – are usually permitted to attend. Exceptions for persons supporting the proceedings may be ordered by the arbitral tribunal.³⁹ There are, however, exceptions to the confidentiality of proceedings. These include (a) where the parties expressly consent to the publication of the proceedings; (b) where any party seeks recourse in terms of the arbitration agreement or the Act and limitedly to such extent or otherwise requires to divulge the information to protect his own interests; and (c) in the case of mandatory arbitrations.⁴⁰

Finally, the confidentiality of the proceedings is also sought to be maintained where an appeal has been lodged against an award of the arbitral tribunal. In such cases, the Court of Appeal preserves the confidentiality of the arbitration by only revealing such facts as may be necessary to make the same intelligible and enforceable by the parties.⁴¹

4.5.2 Does it regulate the length of arbitration proceedings?

The law does not provide any specific time frame for the arbitration proceedings. However, in the context of domestic arbitration proceedings, Article 25(2) of the Rules states that the time-limits fixed by the arbitral tribunal shall be as short as reasonably possible and the same applies to any extensions it may grant. The arbitral tribunal must also try to conduct the proceedings as expeditiously as possible.

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

Unless the parties agree otherwise, domestic arbitrations are to be held at the premises provided by the MAC. However, the arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents.⁴² Similarly, the place of arbitration shall be determined by the arbitral tribunal in the case of international arbitrations unless the parties agree otherwise.⁴³

4.5.4 Does it allow for arbitrators to issue interim measures? In the affirmative, under what conditions?

Arbitrators in both domestic and international arbitrations may issue interim measures (including security),⁴⁴ save for precautionary measures (see above) which may only be granted by the courts.⁴⁵ The court may, on the application of any party, enforce any measure ordered by the tribunal and shall have all ancillary powers to amend or revoke such orders after hearing the parties and the arbitral tribunal as it deems necessary.⁴⁶

³⁹ Article 47 of the Rules.

⁴⁰ Article 48 of the Rules.

⁴¹ Article 70(5) of the Act.

⁴² Article 54 of the Act.

⁴³ Article 20 of the Model Law.

⁴⁴ Article 38(6) of the Act and article 17 of the Model Law.

⁴⁵ Article 38(1) of the Act.

⁴⁶ Article 38(7) of the Act.

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?

The Act, in the context of domestic arbitration allows the MAC to make rules setting down the terms within which evidence is to be produced and the manner of its production, and the parties may agree that the evidence of witnesses is to be produced within such times and in such manner as may be determined by them provided that such agreement may not be incompatible with any rule made by the Centre and declared by it to be inderogable.⁴⁷ The arbitral tribunal may appoint one or more experts to report, in writing, on specific issues to be determined by the tribunal.⁴⁸ The arbitral tribunal is free to determine the manner in which witnesses are examined,⁴⁹ and the admissibility, relevance, materiality and weight of the evidence offered.⁵⁰

For international arbitrations, the tribunal has the power to decide whether to hold oral hearings for the presentation of evidence or for oral arguments or whether the proceedings shall be conducted on the basis of documents and other materials.⁵¹ Similar to domestic arbitration, the tribunal in international arbitrations can also appoint experts to report on specific issues.⁵²

4.5.6 Does it make it mandatory to hold a hearing?

There are very limited circumstances in which a hearing can be dispensed with. 'Documents Only' procedures may take place when the parties agree that the subject matter of the dispute is such that the arbitrator may determine the dispute by means of reviewing only the documents and submissions submitted by the parties, and a hearing shall not be required.⁵³ In any case, it is highly unlikely to have situations where no hearing is held.

4.5.7 Does it prescribe principles governing the awarding of interest?

In both domestic and international arbitration,⁵⁴ an arbitral tribunal may, when making an award for the payment of money – whether on a claim for a liquidated or an unliquidated amount – include interest on (i) the whole or any part of the money; and (ii) for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.⁵⁵ Unless otherwise agreed by the parties, the interest rate will be that of the applicable law and, in domestic arbitration, the default interest rate is 8%.⁵⁶

The power of tribunals to award interest, however, does not extend to compound interest.⁵⁷ Nor does the power apply in relation to any amount upon which interest is payable as of right, whether by virtue of an

⁴⁷ Article 36(2) of the Act.

⁴⁸ Article 39 of the Act.

⁴⁹ Article 37(4) of the Act.

⁵⁰ Article 37(5) and 45(4) of the Act.

⁵¹ Article 24(1) of the Model Law.

⁵² Article 26(1) of the Model Law.

⁵³ For international arbitration, see Article 24 of the Model Law; for domestic arbitration, see First Schedule, Part A, Article 3 of the Rules.

⁵⁴ Article 83 of the Act.

⁵⁵ Article 63(1) of the Act.

⁵⁶ Article 986(2) and 1852 of the Civil Code, Chapter 16 of the Laws of Malta <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8580&l=1>. However, in the case of commercial transactions, the interest rate as per the Late Payments Directive and the Commercial Code (Chapter 13 of the Laws of Malta) shall be applied.

⁵⁷ Article 63(2)(a) of the Act.

agreement or otherwise,⁵⁸ nor does it affect damages that may be recoverable as a result of a bill of exchange being dishonoured.⁵⁹

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

In both international⁶⁰ and domestic arbitration, the arbitral tribunal has the power to fix the costs of arbitration in its award.

The types of recoverable costs are exhaustively listed in the Act as follows: the fees of the arbitral tribunal to be stated separately as to each arbitrator, the travel and other expenses incurred by the arbitrators, the costs of expert advice and of other assistance required by the arbitral tribunal, the travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal, the costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent deemed reasonable, and any fees and expenses payable to the MAC.⁶¹ Such fees and costs are determined by the tribunal in accordance with current rules and guidelines, and are subject to review.⁶²

In principle, the costs of arbitration (except for the costs of legal assistance of the successful party) are borne by the unsuccessful party. However, the arbitral tribunal may apportion such costs between the parties if it determines that apportionment is reasonable; taking into account the particular circumstances of the case.⁶³ With respect to the costs of legal representation and assistance, the tribunal, taking into account the particular circumstances of the case, is free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.⁶⁴

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

An arbitrator is not liable in damages for negligence in anything done or omitted to be done by him as arbitrator. However, an arbitrator is liable in respect of anything wilfully done or omitted to be done by him as arbitrator where his action or omission constitutes an intentional or grossly negligent breach of duty or is attributable to malice or fraud on his part.⁶⁵ This applies to both domestic and international arbitrations.⁶⁶

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

Criminal liability may arise in the case of any participant in arbitration proceedings who acts fraudulently or commits perjury.

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Yes, with respect to both domestic and international arbitrations, the parties can choose to waive the requirement for the award to include reasons as per article 44(3) of the Act and article 31(2) of the Model

⁵⁸ Article 63(2)(b) of the Act.

⁵⁹ Article 63(2)(c) of the Act.

⁶⁰ Article 65 of the Act.

⁶¹ Article 50 of the Act.

⁶² Article 51 of the Act.

⁶³ Article 52(1) of the Act.

⁶⁴ Article 52(2) of the Act.

⁶⁵ Article 20(5) of the Act; article 50 of the Rules.

⁶⁶ Article 66 of the Act renders Article 20(5) applicable also to international arbitrations.

Law. In such case, in domestic arbitrations, neither party may then appeal from the award on the basis of such matter.⁶⁷

5.2 Can parties waive the right to seek the annulment of the award? If yes, under what conditions?

Maltese law does not provide for the possibility of waiving such right to seek annulment. On that basis, it is questionable whether any such waiver would be acceptable in terms of Maltese law.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

There are no atypical mandatory requirements.

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

With respect to domestic arbitrations, an appeal before the Court of Appeal may lie on a point of law arising out of a final award made in the proceedings,⁶⁸ unless the parties have excluded such a right in the arbitration agreement or otherwise in writing, or where the parties had expressly agreed that no reasons are to be given in the award.⁶⁹ As regards mandatory arbitrations, appeals are allowed on both points of law and fact.⁷⁰

In the case of international arbitrations, an appeal on a point of law is permissible only if expressly agreed by the parties.⁷¹

5.4.1 If yes, what are the grounds for appeal?

The Court of Appeal shall only consider the appeal if it is satisfied that the determination of the point of law will substantially affect the rights of one or more of the parties; the point of law is one the tribunal was asked to determine or otherwise relied on in the award; the decision of the arbitral tribunal on the point of law is, on the basis of the findings of fact, prima facie open to serious doubt; and the appeal does not appear dilatory or vexatious.⁷²

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

Pursuant to Article 61 of the Act, foreign awards are deemed to be valid. For the purposes of enforcing the same, foreign awards must be registered with the MAC.⁷³

The applicant for the registration of a foreign arbitration award needs to present the following documents to the Registrar of the MAC: (a) the duly authenticated original award or a duly certified copy thereof; (b) when the award is not in the English language a certified translation of the award into English; (c) the original arbitration agreement between the parties which resulted in the arbitration proceedings and the relative award; (d) a sworn declaration by the applicant or his authorised attorney that no recourse has been taken and is pending against the award and that the award is final; (e) the name, address and all other known

⁶⁷ Article 70A (1)(b) of the Act.

⁶⁸ In its judgment dated 17 June 2016 in the case EuroShops Limited et v. Attard & Co Limited, the Court of Appeal (Inferior Jurisdiction) rejected an appeal from an arbitral award (in voluntary arbitration proceedings) because it was not based on a point of law. This reasoning was also applied by the Court of Appeal (Inferior Jurisdiction) on 29 May 2009 in the case of Lennart and Suzannah Depasquale v. Saviour Zammit, and again by the same court on 16 September 2009 in the case of James Grima v. Noel Buhagiar.

⁶⁹ Article 70A of the Act.

⁷⁰ Article 70C of the Act.

⁷¹ Article 69A(3) of the Act.

⁷² Article 70A(3) of the Act; Lay Lay Company Limited v. L-Ghajn Construction Company Limited decided by the Court of Appeal on 28 June 2011.

⁷³ Articles 61(7), 69A(1), 74(1) and 75(2) of the Act.

communication details of the respondent and if he is not resident or otherwise present in Malta or his representative or another person who has some connection to him in Malta together with a description of the connection to him or his property in Malta.⁷⁴

On receipt of any such application with attachments, the Registrar will proceed to serve the same on the respondent and the respondent has 10 working days to state in writing whether there are any reasons why the Registrar should not proceed with the registration of the award. On receipt of the response to the application for registration or on the lapse of the period for filing a response, the Registrar shall refer the application and the response to the Chairman for determination. The Chairman determines the issue in a final manner on the basis of the documents presented but may at his discretion order a hearing of the parties and their representatives if he considers that the arguments merit further discussion or evidence.⁷⁵

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

An award which has been appealed or demanded to be annulled is not covered with *res judicata* and its enforcement is therefore suspended until it becomes *res judicata*.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

The Act incorporates the Geneva Convention on the Execution of Foreign Arbitral Awards, which allows the courts of its signatory states to refuse the recognition and enforcement of a foreign award if such award has been annulled in the country in which it was made.⁷⁶

5.8 Are foreign awards readily enforceable in practice?

Yes, a party to a foreign arbitral award may register the award with the MAC for the purposes of enforcement, provided that the applicable fees are paid. Once the award is successfully registered, that award would be enforceable in the same manner as a domestic award and would constitute an executive title and may be enforced through the issuance of executive warrants in accordance with the rules provided for in Chapter 12 of the Laws of Malta, similarly to the enforcement of a judgment handed down by the Maltese courts.

6. Funding arrangements

6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

In terms of the Code of Ethics for lawyers, advocates are not to enter into any agreement with (i) any other professional who is not another advocate;⁷⁷ or (ii) any person who gives or receives any share of the fees or other remuneration earned in respect of professional work. The Code of Ethics also stipulates that advocates shall not, either directly or indirectly, enter into any agreement or stipulation *quotae litis*.⁷⁸ Article 83 of Chapter 12 also prohibits stipulations *quotae litis*.

6.1.1 If so, what is the practical and/or legal impact of such restrictions?

Representatives of the Maltese Chamber of Advocates have recently remarked that whilst conditional fee agreements and other similar agreements are not directly prohibited by Maltese legislation and/or Codes of

⁷⁴ Article 54 of the Rules.

⁷⁵ Article 55 of the Rules.

⁷⁶ Part II of the Second Schedule to the Act, Article 2(2).

⁷⁷ Code of Ethics and Conduct for Advocates, Chapter 4, Rule 4.

⁷⁸ Code of Ethics and Conduct for Advocates, Chapter 4, Rule 3. <http://www.legal-malta.com/law/adv-ethics> This prohibition is also reflected in Article 24 of the Legal Profession (Advocates) Regulation Act (Bill 123 of 2012). <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=23966&l=1>

Ethics, any advocate charging a conditional fee would be scrutinised nonetheless by the Committee for Advocates and Legal Procurators, set up under the auspices of the Commission for the Administration of Justice. This level of uncertainty in a field so intrinsically linked to access to justice is naturally highly undesirable.

7. Is there likely to be any significant reform of the arbitration law in the near future?

No plans for reform are currently underway.

MAURITIUS

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

DR JAMSHEED PEEROO
OF PEEROO CHAMBERS

Chambers of
A.R.M.A. PEEROO SC GOSK

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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS

1. Law ●
 - a. Framework ●
 - b. Adherence to international treaties ●
 - c. Limited court intervention ●
 - d. Arbitrator immunity from civil liability ●
2. Judiciary ●
3. Legal expertise ●
4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

VERSION: 11 MAY 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Mauritius is a stable, accessible, reliable, efficient and neutral arbitration seat. It is a welcoming and inclusive bilingual place which benefits from both civil law and common law legal cultures and which possesses all infrastructural and logistical requirements for the efficient conduct of arbitral proceedings.

While it has a separate domestic arbitration regime, its international arbitration law, set forth in the International Arbitration Act 2008, is based on the UNCITRAL Model Law, which is widely acknowledged as representing the best standards in the field worldwide. In addition, its law contains provisions which further enhance arbitral autonomy, confidentiality in appropriate cases, and above all, neutrality.

Local courts have a reduced role in relation to international arbitration proceedings. Only in very exceptional cases will the courts verify arbitration clauses before or during arbitration proceedings, thus avoiding parallel proceedings. Arbitrator appointments or challenges are decided upon by the Permanent Court of Arbitration of The Hague. Interim measures must normally be requested from arbitrators directly and the courts will order such measures strictly in support of arbitral proceedings. Any case relating to an international arbitration that is put to a local court is heard expeditiously by a panel of three specialised judges and parties have a direct right of appeal to the Judicial Committee of the Privy Council (UK).

Key places of arbitration in the jurisdiction	Port Louis.
Civil law / Common law environment?	Mauritius has a combination of both common law and civil law so that lawyers from both jurisdictions will be at least familiar with its legal system.
Confidentiality of arbitrations?	Confidentiality clauses will be upheld and arbitration-related cases before domestic courts may be heard in private.
Requirement to retain (local) counsel?	Parties are free to choose foreign or non-legal counsel for arbitration proceedings.
Ability to present party employee witness testimony?	Party employee witness testimony is not prohibited.
Ability to hold meetings and/or hearings outside of the seat?	Hearings and meetings may be held outside the seat as the arbitral tribunal considers appropriate.
Availability of interest as a remedy?	Interest may be awarded.
Ability to claim for reasonable costs incurred for the arbitration?	Reasonable costs incurred for the arbitration may be claimed.
Restrictions regarding contingency fee arrangements and/or third-party funding?	No restrictions exist on contingency fee arrangements and/or third-party funding.
Party to the New York Convention?	Yes.
Other key points to note	Awards in French and English do not have to be translated in order to be enforced.
WJP Civil Justice score (2018)	ϕ

ARBITRATION PRACTITIONER SUMMARY

The Mauritian legal system comprises a combination of common law and civil law principles. Its international arbitration law is modern and efficient. Intervention by the local courts has been drastically reduced, and the autonomy of arbitration proceedings has been considerably enhanced. For instance, the International Arbitration Act 2008, which is based on the UNCITRAL Model Law, additionally includes the negative effect of the principle of competence-competence. In relation to interim measures, only in cases of urgency, or where all parties agree or the arbitral tribunal so permits, will applications for such measures be entertained by the courts, and so only to the extent that the arbitrator(s) cannot act effectively. Further, key judicial functions, such as the appointment of arbitrators or resolving difficulties encountered in the setting up of the arbitral tribunal, and challenge to arbitrators, are carried out by the Permanent Court of Arbitration in the Hague, rather than by domestic courts. Arbitration-related cases before the courts are submitted to a three-judge panel of specialised judges, with a sole and final possibility of appeal to the Judicial Committee of the Privy Council (UK).

Mauritius has distinct legal regimes for domestic and international arbitrations, but parties may choose to apply the international arbitration law to arbitrations which would otherwise be considered as domestic. Therefore, in order to ensure that parties benefit from the highly efficient and more up-to-date regime, arbitration clauses should specify that the arbitration will be governed by the International Arbitration Act 2008.

Date of arbitration law?	The International Arbitration law is dated 2008 and was revised in 2013.
UNCITRAL Model Law? If so, any key changes thereto?	It is based on the UNCITRAL Model Law, with enhancements such as: <ul style="list-style-type: none"> • the negative effect of the principle of competence-competence; and • the priority of the arbitral tribunal to order interim measures.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Arbitration-related cases are heard by a panel of three specialised judges. In the light of their recent judgments, the panel of specialised arbitration judges can be said to be arbitration-friendly.
Availability of <i>ex parte</i> pre-arbitration interim measures?	<i>Ex parte</i> interim measures are available in case of urgency.
Courts' attitude towards the competence-competence principle?	The competence-competence principle is applied.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Two additional grounds for annulment of an award can be relied on, namely: <ul style="list-style-type: none"> • where its making was induced or affected by fraud or corruption; and • where there has been a breach of natural justice during the arbitral proceedings or in connection with the making of the award, by which the rights of any party have been or will be substantially prejudiced.

Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	It is arguable that awards annulled at the seat may be enforced in Mauritius in exceptional cases.
Other key points to note?	<ul style="list-style-type: none">• There is a time-limit of three months to seek annulment, triggered by receipt of the award by the party seeking annulment.• Awards in French and English do not have to be translated to be enforced.• Arbitration-related proceedings before the courts are fast and efficient.

JURISDICTION DETAILED ANALYSIS

1. Is the arbitration Law based on the UNCITRAL Model Law?

The International Arbitration Act 2008 (“IAA 2008”) is based on the UNCITRAL Model Law. Its Section 2B, makes clear that in applying and interpreting the IAA 2008, consideration should be given to the origin of the Model Law as well as to the general principles on which it is based. Recourse may also be had to international materials relating to the Amended Model Law such as UNCITRAL reports, doctrinal commentaries and relevant case law from other Model Law jurisdictions.

It should be noted that Mauritius has separate legislation governing domestic arbitrations. However, parties may expressly agree to apply the IAA 2008 irrespective of whether the arbitration would otherwise have been considered as being a domestic one. The answers below refer to the IAA 2008 and do not apply to domestic arbitration.

1.1 If yes, what key modifications, if any have been made to it?

Various key modifications have been made to the Model Law in enacting the IAA 2008:

The IAA 2008 contains the negative effect of the principle of competence-competence. Whenever a party to an action before any Court contends that the matter brought before that Court is the subject matter of an arbitration agreement, the matter is automatically transferred to the Mauritian Supreme Court before a panel of three designated arbitration judges who will, in accordance with Section 5 of the IAA 2008, only verify on a prima facie basis whether there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed. Short of finding, prima facie, a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed, they will refer the parties to arbitration. It is only if prima facie the Supreme Court finds that there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed, that the Supreme Court is allowed to determine whether the agreement is actually null and void, inoperative or incapable of being performed. This is therefore to be contrasted with Article 8 of the UNCITRAL Model Law, which directly allows national courts to determine whether the agreement is null and void, inoperative or incapable of being performed.

Section 8 of the IAA 2008 expressly allows arbitration involving a consumer, provided that the relevant arbitration clause is confirmed after the dispute has arisen by means of a separate written agreement of the parties.

Section 18 of the IAA 2008 makes the parties jointly and severally liable to pay the reasonable fees and expenses of arbitrators.

Under Section 23(5) of the IAA 2008, save in circumstances of urgency, the Supreme Court can order interim measures only if the applicant has obtained the permission of the arbitral tribunal or written agreement of the other parties. In all cases, the Supreme Court can act only if and to the extent that the arbitral tribunal and any other arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively. This is to be contrasted with the Article 17 J of the UNCITRAL Model Law which does not limit the court’s power to issue interim measures.

In relation to the annulment (setting aside) of arbitral awards, in addition to the grounds contained in Article 34(2)(b) of the UNCITRAL Model Law, two further grounds for seeking annulment have been included in Section 39(2)(b) of the IAA 2008, namely, where the making of the award was induced or affected by fraud or corruption, and where there has been a breach of natural justice during the arbitral proceedings or in connection with the making of the award by which the rights of any party have been or will be substantially prejudiced.

Section 39A of the IAA 2008 provides for that in addition to issuing an order to set aside an arbitral award, the Supreme Court may also give such other directives as it considers appropriate. These directives may relate, for example, to the remittance of the matter to the arbitral tribunal or to the commencement of a new arbitration.

1.2 When was the Arbitration Law last revised?

The IAA 2008 was last revised and amended in 2013.

2. The Arbitration Agreement

2.1 How do Courts in the jurisdiction determine the law governing the arbitration agreement?

The only judgment involving this question was given in the case of *Cruz City 1 Mauritius Holdings v Unitech Limited & Anor* (2014 SCJ 100), where the Courts appear not to have applied the rules of conflict of laws in order to determine any law applicable to the arbitration clause.

In that case, the Court simply “considered the factual scope of the jurisdictional challenge”. It further commented: “For us the issue is a factual one which depends on the common intention of the parties”.

Therefore, there is reason to believe that Mauritian Courts will apply an arbitration clause factually without attempting to find the law governing the arbitration clause.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Under Section 20(2) of the IAA 2008, for the purposes of the arbitral tribunal ruling on its own jurisdiction, including on any objection with respect to the existence or validity of the arbitration agreement, the arbitration agreement is to be treated as being an agreement independent of the other terms of the contract.

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

According to Section 4(1) of the IAA 2008, an arbitration agreement must be in writing. Section 4(2) of the IAA 2008 lists the different situations where the arbitration agreement is deemed to be in writing, such as where the agreement is concluded orally, but has been recorded in electronic form. Section 4(3) of the IAA 2008 provides that the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement in writing.

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by the said arbitration agreement?

There is currently no clear answer to the question of the extension of an arbitration clause to a third party under Mauritian law as it has not yet been decided upon by the Supreme Court.

3. Are there restrictions to arbitrability?

There are no specific restrictions in our arbitration law in relation to arbitrability.

In the case of *Cruz City 1 Mauritius Holdings v Unitech Limited & Anor* (2014 SCJ 100), it was held that under the Constitution, an individual is free to dispose of his or her rights or property which by law are available to him or her to dispose of as he or she wishes. In our view, matters which would normally lie outside the purview of freely disposable rights, for example, divorce, would theoretically not be arbitrable. It is expected that the courts may determine any issue of arbitrability on a case by case basis.

Further, it is unlikely that disputes for which the law grants exclusive jurisdiction to the courts or other judicial bodies, for example, a domestic taxation dispute with the relevant authority, will be held to be arbitrable.

4. Intervention of domestic courts

4.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

There is a specific procedure governing this issue under Section 5(1) and (2) of the IAA 2008, which provides that an action before any court shall be transferred to the designated arbitration judges of the Supreme Court, if:

- a party contends that the action is the subject of an arbitration agreement; and
- that party requests that the matter be so transferred not later than when submitting his first statement on the substance of the dispute.

Upon such a transfer, the Supreme Court will refer the parties to arbitration unless a party shows, on a prima facie basis, that there is a very strong probability that the arbitration agreement is null and void, inoperative or incapable of being performed. If the party succeeds in satisfying this stringent test, the Supreme Court will then carry out an in-depth verification of the arbitration clause. If it then finds that the clause is null and void, inoperative or incapable of being performed, it will transfer the matter back to the court which made the transfer. If it finds that the arbitration clause is valid, the Supreme Court will refer the parties to arbitration.

4.1.1 If the place of the arbitration is inside of the jurisdiction?

Yes. Under Section 3A(2) of the IAA 2008, the above procedure applies to every international arbitration, whether or not its juridical seat is in Mauritius.

4.1.2 If the place of the arbitration is outside of the jurisdiction?

Yes. See above.

4.2 How do courts treat injunctions by arbitrators enjoining such courts to stay litigation proceedings?

No precedent has been found where an arbitrator has ordered the stay of court proceedings in Mauritius. Given that Section 5 of the IAA 2008 in effect provides for the negative effect of the principle of competence-competence, it is unlikely that such a situation will arise.

4.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunctions but not only)

Normally, courts will not intervene in arbitrations seated outside the jurisdiction. For instance, under Section 23(2A), the Supreme Court can only exercise its power to issue interim measures in such a manner as to support, and not to disrupt, arbitration proceedings seated in Mauritius or abroad.

In an exceptional case, *Hurry v Leedon* (2009 SCJ 270), the parties had initially submitted to the jurisdiction of the Bankruptcy Division of the Supreme Court and, following its decision, one of the parties had commenced arbitration in order to relitigate the same issue which had already been decided by the courts. The Supreme Court issued an anti-suit injunction restraining that party from pursuing arbitration proceedings on the basis, inter alia, that this would be an abuse of the process of the Court and would be vexatious and oppressive.

5. The conduct of the proceedings

5.1 Can parties retain counsel or be self-represented?

Section 31 of the IAA 2008 provides that, unless otherwise agreed by the parties, parties may be represented in the arbitral proceedings either by a law practitioner or other any person chosen by them, who need not be qualified to practise law in Mauritius or in any other jurisdiction.

In our view, parties can therefore retain counsel or choose to be self-represented in arbitral proceedings.

5.2 How strictly do courts control arbitrators' independence and impartiality? For example, does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

Please note that the courts have no jurisdiction to determine challenges under the IAA 2008. Section 14(3) of the IAA 2008 provides that where a party has not successfully challenged the arbitrator before the arbitral tribunal or through any other procedure agreed between the parties, it may within 30 days of having been notified of a decision regarding that challenge, request the Permanent Court of Arbitration having its seat at The Hague, acting through its Secretary-General ("PCA") to decide on the challenge.

5.3 The grounds for challenge under the IAA 2008 are identical to those contained in the Model Law, and therefore it is our view that an arbitrator's failure to disclose suffices.

No challenge under the IAA has so far been submitted to the PCA.

5.4 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of ad hoc arbitration)?

Here also, pursuant to Section 12 of the IAA 2008, it is the PCA which can assist in the constitution of the arbitral tribunal or in the appointment of arbitrators. The circumstances in which the PCA may intervene are wide and include, for instance, where any party fails to appoint an arbitrator or fails to act in accordance with an appointment procedure agreed between the parties; where any third party, including an institution, fails to act; or in the event of any other failure to constitute the arbitral tribunal which cannot be resolved under any agreement between the parties on the appointment procedure.

5.5 Do courts have the power to issue interim measures in connection with arbitrations?

Under Section 23 of the IAA 2008, the Supreme Court is empowered to issue interim measures in relation to arbitration proceedings. Its power is limited as follows:

- the power must be exercised in such a way as to support, and not to disrupt, the existing or contemplated arbitration proceedings, and
- the Supreme Court shall only act if or to the extent that the arbitral tribunal or any other arbitral or other institution or person vested with power in that regard, has no power or is unable for the time being to act effectively.

5.5.1 If so, are they willing to consider ex-parte requests?

Under Section 23(3) of the IAA 2008, the Supreme Court may consider ex-parte requests where the matter is one of urgency.

5.6 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

5.6.1 Does it provide for the confidentiality of arbitration proceedings?

The IAA 2008 does not expressly provide for a general rule of confidentiality of arbitration proceedings. It is however understood that parties may do so contractually.

As far as hearings before the Supreme Court in relation to international arbitration are concerned, the Supreme Court may, upon the application of a party, exclude from the proceedings persons other than the parties and their legal representatives, where all the parties so agree or where it considers it necessary or expedient, taking into account "the specific features of international arbitration, including any expectation of

confidentiality the parties may have had when concluding their arbitration agreement or any need to protect confidential information” [Section 42(1B) of the IAA 2008].

5.6.2 Does it regulate the length of arbitration proceedings?

There is no such provision in the IAA 2008. Under Section 24(1)(b) of the IAA 2008, it is the duty of every arbitral tribunal to adopt procedures suitable to the circumstances of the case and avoid unnecessary delay and expenses so as to provide a fair and efficient means of resolving the dispute.

5.6.3 Does it regulate the place where hearings and/or meetings may be held?

Under Section 10(2) the IAA 2008, unless otherwise agreed by the parties, the arbitral tribunal may meet at any geographical location it considers appropriate for meetings or hearings.

5.6.4 Does it allow for arbitrators to issue interim measures?

Pursuant to Section 21 of the IAA 2008, unless otherwise agreed by the parties, arbitrators may, at the request of a party to the arbitral proceedings, grant interim measures.

5.6.4.1 In the affirmative, under what conditions?

Under Section 21(2) and (3) of the IAA 2008, the party requesting an interim measure should satisfy the arbitral tribunal that:

- harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
- there is a reasonable possibility that the requesting party will succeed on the merits of the claim.

5.6.5 Does it regulate the arbitrators' right to admit/exclude evidence?

Parties are free to agree on the procedure to be followed by the arbitral tribunal. Failing such agreement, the arbitral tribunal may determine all procedural and evidential matters, including the admissibility of evidence [Section 24(3) of the IAA 2008].

5.6.5.1 For example, are there any restrictions to the presentation of testimony by a party employee?

There is no such restriction under the IAA 2008.

5.6.6 Does it make it mandatory to hold a hearing?

The IAA 2008 does not make it mandatory to hold a hearing. Section 26(1) of the IAA 2008 provides that unless otherwise agreed by the parties, it is for the arbitral tribunal to decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials.

However, under Section 26(2) of the IAA 2008, unless otherwise agreed by the parties, the arbitral tribunal must hold a hearing at an appropriate stage of the proceedings, if so requested by a party. Only where there is such a request will it be mandatory to hold a hearing.

5.6.7 Does it prescribe principles governing the awarding of interest?

Section 33(1)(d) of the IAA 2008 provides that, unless otherwise agreed by the parties, the arbitral tribunal may award simple or compound interest for such period and at such rate as it considers meets the justice of the case.

5.6.8 Does it prescribe principles governing the allocation of arbitration costs?

Section 33(2) of the IAA 2008 prescribes the general principles that the arbitral tribunal should apply in the allocation of arbitration costs, unless the parties have otherwise agreed. The general principles are the following:

- costs should follow the event except where it appears to the arbitral tribunal that this rule should not be applied or not be fully applied in the circumstances of the case; and
- the successful party should recover a reasonable amount reflecting the actual costs of the arbitration, and not only a nominal amount.

5.7 Liability

5.7.1 Do arbitrators benefit from immunity to civil liability?

Under Section 19(1) of the IAA 2008, arbitrators benefit from immunity to civil liability for anything done or omitted in the discharge of their functions as arbitrator unless the act or omission is shown to have been in bad faith.

5.7.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

There are no such concerns.

6. The award

6.1 Can parties waive the requirement for an award to provide reasons?

Yes, under Section 36(4) of the IAA 2008, parties may agree that the arbitral award give no reasons.

6.2 Can parties waive the right to seek the annulment of the award?

The IAA 2008 does not provide for such a waiver.

6.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

No atypical mandatory requirements have been identified.

6.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

There is no possibility of appealing against an arbitral award.

6.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

Mauritius is a party to the New York Convention which governs the recognition and enforcement of arbitral awards pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001 ("NYC Act").

Under Section 4B of the NYC Act, there is no limitation or prescription period applicable to the recognition and enforcement of an arbitral award under the Act.

The NYC Act applies to all foreign awards as well as to arbitration awards deemed to have been made in Mauritius under the IAA 2008. Different rules apply in domestic arbitration.

6.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award in the jurisdiction?

No. Under Article VI of the New York Convention, domestic courts have a discretion to adjourn proceedings for the recognition and enforcement of arbitral awards if annulment proceedings have been initiated. It follows that the introduction of annulment proceedings before the Supreme Court will not automatically suspend the exercise of the right to enforce an award.

6.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Pursuant to Article V(1)(e) of the New York Convention, which Mauritius is a party to, the Supreme Court may refuse the recognition and enforcement of the foreign arbitral award at the request of the party against whom it is invoked, where the foreign arbitral award has been set aside by a competent authority of the seat of arbitration.

Although this point has not yet been decided by Mauritian courts, on the basis of the reasoning of the Supreme Court in *Cruz City 1 Mauritius Holdings v Unitech Limited & Anor* (2014 SCJ 100), it is our view that enforcement of a foreign award which has been annulled at its seat may remain possible in exceptional cases.

6.8 Are foreign awards readily enforceable in practice?

Yes. Once the application for the enforcement of a foreign arbitral award has been granted by the Supreme Court, the arbitral award has the same executory effect as that of a judgment of the courts.

7. Funding arrangements: Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

If so, what is the practical and/or legal impact of such restrictions?

There is no provision restricting the use of contingency or alternative fee arrangements or third-party funding of arbitration proceedings under the IAA 2008.

8. Is there likely to be any significant reform of the arbitration law in the near future?

No significant reform of the IAA 2008 is expected in the near future. Domestic arbitration law may however need to be significantly reformed.

THE NETHERLANDS

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

CHRISTOPH JELOSCHKE AND VEERLE VAN DRUENEN
OF KENNEDY VAN DER LAAN

Kennedy Van der Laan

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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS

1. Law ●
 - a. Framework ●
 - b. Adherence to international treaties ●
 - c. Limited court intervention ●
 - d. Arbitrator immunity from civil liability ●
2. Judiciary ●
3. Legal expertise ●
4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

VERSION: 30 MAY 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

The Netherlands have been always at the heart of international trade. With its location and infrastructure (including English as a working language), The Netherlands have also become a hub for financial services. This has led to a thriving cross-border industry that, given its nature, requires suitable means of resolving disputes.

Accordingly, arbitration has become widely accepted and is commonly used to settle disputes in the Netherlands, both where it concerns international as well as complex domestic disputes. To facilitate arbitration even further, the Dutch Arbitration Act ("DAA") has been updated and modernized in 2015. With its highly-specialized and internationally-trained lawyers, the Dutch legal profession manages to deliver high-quality work at competitive rates.

Key places of arbitration in the jurisdiction	Amsterdam, The Hague and Rotterdam.
Civil law / Common law environment?	Civil law
Confidentiality of arbitrations?	While there are no Dutch statutory rules regarding confidentiality, it is generally assumed - and confirmed in legislative history - that arbitration proceedings are, as a rule, confidential.
Requirement to retain (local) counsel?	There is no requirement to retain local legal counsel in arbitrations. Parties can represent themselves or have themselves represented by an attorney or other representative.
Ability to present party employee witness testimony?	No restrictions apply with respect to the possibility to present party employee witness testimonies.
Ability to hold meetings and/or hearings outside of the seat?	Meetings and/or hearings can be held outside of the seat of arbitration.
Availability of interest as a remedy?	Φ
Ability to claim for reasonable costs incurred for the arbitration?	While the DAA does not contain rules with respect to the allocation of arbitration costs, this is typically addressed in the arbitration rules (e.g., the rules of the Dutch arbitration institute provide that the losing party will be ordered to pay legal fees in full as long as they are reasonable and were necessary).
Restrictions regarding contingency fee arrangements and/or third-party funding?	Dutch law does not restrict the use of contingency or alternative fee arrangements. However, restrictions apply with respect to 'no cure no pay' arrangements to attorneys who are admitted to the Dutch Bar. There are no prohibitions on the use of third-party funding.
Party to the New York Convention?	Φ
Other key points to note	Annulment is only possible based on a narrowly defined and exhaustive list of annulment grounds (art. 1065 DCCP).
WJP Civil Justice score (2017-2018)	0.85

ARBITRATION PRACTITIONER SUMMARY

In addition to dealing with disputes relating to international trade, The Netherlands have also become a hub for financial services. This has led to a thriving cross-border industry (with English as a working language) that, given its nature, requires suitable means of resolving disputes. Accordingly, arbitration has become widely accepted and is commonly used to settle disputes in the Netherlands, both where it concerns international as well as complex domestic disputes. To facilitate arbitration even further, the Dutch Arbitration Act (“DAA”) has been updated and modernized in 2015.

Date of arbitration law?	The DAA entered into force in 1986. A substantial revision aimed at modernizing and improving the DAA entered into force on 1 January 2015.
UNCITRAL Model Law? If so, any key changes thereto?	The UNCITRAL model law has served as an inspiration for the original DAA and has also been drawn upon as part of the 2015 revision of the DAA.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	The competent courts in the key seats within the Netherlands are the District Court of, respectively, Amsterdam, The Hague and Rotterdam that are experienced in dealing with arbitration-related matters. There are no specialized courts that have special jurisdiction over arbitration matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Dutch courts can grant <i>ex parte</i> conservatory measures, such as pre-judgement attachment of assets. Other interim measures are generally granted only after the other party has been heard.
Courts’ attitude towards the competence-competence principle?	The competence-competence principle is applied in the Netherlands. Accordingly, arbitrators decide on their own jurisdiction. Control is exercised through annulment proceedings after the award has been rendered.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Annulment is only possible in case of (i) absence of a valid arbitration agreement, (ii) irregular constitution of the arbitral tribunal, or if (iii) the arbitration tribunal has exceeded its mandate, (iv) the award has not been signed or motivated, (v) the award or the manner in which it has been established violates public order (art. 1065 DCCP).
Courts’ attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	In the absence of a treaty, the annulment of foreign awards in the jurisdiction where the seat of arbitration is located will mean that the award can no longer be enforced in The Netherlands (art. 1076 (1)(A)(e) DCCP). With respect to foreign awards to which a treaty is applicable, the rules of the latter will apply. In the context of the New York Convention, the Dutch Supreme Court recently ruled that the national courts must be considered to have some discretion with respect to the recognition and enforcement of arbitral awards, also if the grounds for refusal

	under article V(1) apply. ¹ This discretion should, however, be applied restrictively.
Other key points to note?	<u>Assistance of the Dutch courts</u> : The Dutch courts can assist in matter such as (i) constitution of the arbitral tribunal, (ii) challenge of arbitrators, (iii) granting provisional or conservatory measures, and (iv) taking evidence in cross-border settings.

¹ Supreme Court 24 November 2017, ECLI:LN:HR:2017:2992 (*X / OJSC Novolipetsky Metallurgichesky Kombinat*).

JURISDICTION DETAILED ANALYSIS

1. The legal framework

Arbitration in the Netherlands is governed by the Dutch Arbitration Act (the “DAA”), which is incorporated in Book IV of the Dutch Code of Civil Procedure (the “DCCP”). The DAA is applicable if the seat of arbitration is located in the Netherlands (art. 1073(1) DCCP). If the parties have not determined the place of arbitration and the place of arbitration has not been determined yet (e.g. by an arbitration institute), the appointment or the challenge of an arbitrator or secretary may take place on the basis of the DAA if one of the parties is domiciled or has his actual residence in the Netherlands (art. 1073(2) DCCP). The DAA also contains a number of provisions that relate to arbitrations with a seat outside the Netherlands (art. 1074 ff. DCCP). These provisions relate, for example, to the competence of the Dutch courts in cases where the parties have provided for arbitration with a seat outside the Netherlands and the possibility to enforce arbitral awards rendered in arbitrations with a seat outside the Netherlands. Most of these provisions are of a mandatory nature.

The DAA provides for a so-called monistic system, *i.e.*, the same provisions apply to both national and international arbitration. A part of the statutory provisions in the DAA is of a mandatory nature, such as the provisions that set out which types of disputes can be resolved through arbitration (art. 1020 (3) DCCP), the requirement that the arbitral tribunal consists of an uneven number of arbitrators (art. 1026 DCCP) and the provisions that safeguard the principles of a due process (e.g., art. 1033(1) and 1036 (2) DCCP). The majority is, however, of a default nature and can therefore be deviated from by agreement. The parties therefore have substantial freedom to shape the arbitration proceedings in the manner they deem fit. A deviation from the statutory rules can also take place by way of agreeing on the applicability of certain arbitration rules, which are considered to form part of the arbitration agreement (art. 1020 (6) DCCP). The procedural rules that apply to an arbitration are therefore determined to a large extent by the selected arbitration rules (if any) and the specific procedural rules issued by the arbitral tribunal in question, rather than merely by the provisions of the DAA. This is obviously different in case of ad hoc-arbitration, where the parties have generally not agreed on detailed arbitration rules. In addition to the DAA and the relevant arbitration rules (where applicable) and specific procedural rules issued by the tribunal, Dutch case law plays an important role. In most cases, case law provides guidance on how the statutory rules should be applied. Some topics are only regulated in case law. The regime that applies to the liability of arbitrators, for example, follows exclusively from case law.

International arbitration institutes, such as the ICC and ICDR, are commonly used in the Netherlands. Important Dutch arbitration institutes include the Netherlands Arbitration Institute (the “NAI”), as well as some branch specific arbitration institutes such as the Stichting Geschillenoplossing Automatisering (“SGOA”) for IT-related disputes and the Arbitration board for the building industry (Raad van Arbitrage voor de Bouw or “RvA”).

The DAA initially entered into force in 1986. Several arbitration laws including the UNCITRAL Model Law served as an inspiration for the DAA. A substantial revision of the DAA entered into force on 1 January 2015. This revision was aimed at modernising Dutch arbitration law and at improving effectiveness and flexibility of arbitration proceedings with a seat in the Netherlands. As part of this revision, more provisions that were in whole or in part inspired by the UNCITRAL Model Law have been incorporated into the DAA.²

In the context of the recognition and enforcement of foreign arbitral awards in the Netherlands it is important to note that the Netherlands is a party to the New York Convention on the Recognition of Foreign Arbitral Awards (the “New York Convention”). The Netherlands has made a reciprocity reservation and therefore only

² Parliamentary Documents II 2012-2013, 33 611, no. 3, Explanatory Memorandum to the Act, p. 2.

recognizes and enforces awards from other contracting states. With respect to recognition and enforcements of arbitral awards from non-contracting states, the DAA contains specific provisions.

2. The arbitration agreement

2.1 Law governing the arbitration agreement

The law that governs the material validity of the arbitration agreement is determined on the basis of article 10:166 of the Dutch Civil Code (the "DCC"). Article 10:166 of the DCC provides that an arbitration agreement is valid if the agreement is valid under *either* (i) the applicable law as agreed by the parties, (ii) the laws of the seat of the arbitration or, (iii) if the parties have not agreed on the applicable law, the laws applicable to the legal relationship to which the agreement to arbitrate applies. Article 10:166 DCC applies the favoured-nation principle, meaning that it is sufficient if the arbitration agreement is valid in *one* of the jurisdictions referred to in article 10:166 DCC. No hierarchy applies between these jurisdictions.

When determining whether the parties have agreed on a choice of law for the arbitration agreement, a distinction must be made between the law that applies to the principal agreement and the law that applies to the arbitration agreement. In practice, parties rarely make an explicit choice of law with respect to the arbitration agreement as such. Whether the parties intended to reach an agreement on the law applicable to the arbitration agreement, to the legal relationship or both will be a matter of interpretation, which ultimately takes place before and by the court.³

As explained above, the parties can also rely on the validity under the laws of the seat of arbitration, provided that the latter can already be determined. It is not clear from the wording of article 10:166 DCC whether it is sufficient that the seat of arbitration *can* be determined on the basis of the rules of the arbitration institute chosen (if any) or that an explicit reference in the agreement is required. From the parliamentary history, however, it seems to follow that the latter is the case and that an explicit reference to the seat of arbitration is required.⁴

The applicable law governing the legal relationship between the parties must be determined based on the applicable choice-of-law rules. The reference to the 'legal relationship' in art. 10:166 DCC implies that a tort or wrongful act can also be resolved by arbitration, if the parties have concluded an arbitration agreement with respect to such a tort or wrongful act.

2.2 Separation of the arbitration agreement from the principal agreement

Under Dutch law, the arbitration agreement is considered and decided upon as a separate agreement (art. 1053 DCCP). As a consequence, arbitrators can rule on the validity of the principal agreement without undermining their own authority if they conclude that the principal agreement is invalid.⁵

2.3 The formal requirements for an enforceable arbitration agreement

No form requirements apply to arbitration agreements. If, however, the existence of the arbitration agreement is disputed, the arbitration agreement must be proven by an instrument in writing or by electronic data which meets certain requirements (art. 1021 DCCP). It is sufficient if the instrument in writing provides for arbitration or refers to standard conditions providing for arbitration, as long as this instrument is expressly or implicitly accepted by or on behalf of the other party. The acceptance as such does not have to be evidenced in writing. Strictly legally speaking, article 1021 DCCP does not affect the validity of the arbitration agreement, but stipulates a mere requirement of proof.⁶ In practice, however, an arbitration

³ [Parliamentary documents II 2013-2014, 33 611, no 6](#), Memorandum of alterations to the Act, p. 7.

⁴ [Parliamentary documents II 2013-2014, 33 611, no 6](#), Memorandum of alterations to the Act, p. 7.

⁵ [Parliamentary documents II 1983-1984, 18 464, no. 3](#), p. 22 and [Parliamentary documents II 2012-2013, 33 611, no. 3](#), p. 29.

⁶ [Parliamentary documents II 1983-1984, 18 464, no. 3](#), p. 6.

agreement must be in writing (electronic data included) in order for the arbitration agreement to be enforceable.

In the European Union, arbitration agreements that are concluded with consumers are subject to strict scrutiny. Under Dutch civil law, for example, a consumer can declare any arbitration agreement that is included in general terms and conditions void, if he is not provided with the possibility to choose for dispute resolution by a regular court within one month after the arbitration agreement is invoked (art. 6:236 (n) DCC).

A party that is bound by an arbitration agreement can, in principle, no longer effectively initiate proceedings at the Dutch courts. Being bound by an arbitration agreement therefore limits that party's right of effective access to a court, as laid down in article 6 of the European Convention on Human Rights and article 17 of the Dutch Constitution. The European Court of Human Rights has assumed that a waiver of this right is possible, provided that such rights are waived at the own free will of the party and in an unequivocal manner.⁷ Any arbitration agreement must also comply with these requirements.

2.4 Third-parties and arbitration agreement

As explained above, an arbitration agreement limits a party's right to effective access to a court, which can only be waived at a party's own free will. As a consequence, only the parties to the arbitration agreement are bound by such an agreement.

There are some exceptions to this rule. First of all, a third-party beneficiary can become a party to the principal agreement (under Dutch law on the basis of article 6:254 DCC). In that case, the third party is also bound by the arbitration agreement that is applicable to that agreement, unless agreed otherwise. A third party may also be bound by – or be able to invoke – an arbitration agreement if he is jointly and severally liable for a claim in relation to which another joint and several debtor has concluded an arbitration agreement with the creditor (art. 6:10 – 6:12 DCC). Other circumstances in which a third party can be bound by an arbitration agreement are assignment (art. 6:145 in conjunction with 6:142 DCC), subrogation (article 6:150 in conjunction with article 6:145 and 6:142 DCC), debt transfer (article 6:157 DCC), and a contract takeover (article 6:159 DCC).⁸ The same applies in the context of, *inter alia*, certain types contracts (such as "surety contracts") to which specific statutory provisions apply.

2.5 Restrictions to arbitrability

In principle, any type of dispute can be arbitrated. An arbitration agreement may, however, not serve for determining legal consequences that may not freely be determined by the parties (art. 1020 (3) DCCP). This limitation relates to cases concerning public order. Important examples are family law matters, such as matters relating to custody of children, marriage and divorce, declarations of bankruptcy and annulments of decisions of an entity. It is also accepted that certain intellectual property disputes (in particular disputes relating to the validity of trademarks or patents) cannot be arbitrated.

In addition to dispute resolution, arbitration can be used for the determination of the quality or conditions of goods, the determination of the quantum of damages or a monetary debt or the filling of lacunae of the legal relationship between the parties (art. 1020(4) DCCP). Most of the procedural rules that are set out in the DAA do not apply to this type of arbitration (art. 1047 DCCP). In these cases, the procedure will take place in the manner determined by the parties or, in absence thereof, by the arbitral tribunal (art. 1047 DCCP). While these proceedings formally qualify as arbitration, they show more resemblance to procedures such as binding expert determination.

⁷ See, for instance, [ECHR 27 February 1980, no. 6903/75 \(Deweert s. Belgium\)](#), [ECHR 10 February 1983, no. 7299/75 and 7496/76 \(Albert and Le Compte v. Belgium\)](#); [ECHR 25 February 1992, no. 10802/84 \(Pfeiffer and Plankl v. Austria\)](#).

⁸ See, also, [Supreme Court 20 January 2006, ECLI:NL:HR:2006:AU4523 \(ASB Grünland en ASB Greenworld/Sagro\)](#), par. 3.4.

3. Intervention of the domestic courts

3.1 Consequences of a valid arbitration agreement for litigation initiated at the ordinary courts

A Dutch court will declare itself incompetent to rule on a matter if a party initiates proceedings that are covered by a valid arbitration agreement and a party invokes the arbitration agreement before putting forward any other defences (article 1022 DCCP). This also applies if the place of arbitration is located in another jurisdiction, provided that the arbitration agreement is not invalid under the law that is applicable to the arbitration agreement (article 1074 DCCP). In such cases, the court renders a final judgement in which it declares itself incompetent, which can be appealed at the Dutch court of appeals and, on matters of law, at the Supreme Court as the last and final instance.

The requirement that the arbitration agreement is invoked before putting forward any other defences means that the competence of the Dutch court must be challenged in the first written or – in absence thereof – the first oral pleadings.⁹ The competence of the Dutch court can also be challenged by way of a separate preliminary motion that only deals with this topic.

If a party does not, or does not timely, invoke the arbitration agreement, the Dutch court will *not* at its own motion declare itself incompetent to rule on the matter based on the arbitration agreement. In such cases, the parties are generally considered to have made an implicit choice to have the Dutch courts rule on the matter.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

Injunctions by arbitrators enjoining such courts to stay litigation proceedings are rare in the Netherlands. As explained above, a Dutch court will respect an arbitration agreement and declare itself incompetent if the arbitration agreement is invoked. This applies irrespective of whether the seat of arbitration is in the Netherlands or abroad, provided, however, that in the latter case the arbitration agreement is not invalid under the law that is applicable to the arbitration agreement.

In the event of litigation pending in the ordinary courts at the same time as arbitration proceedings, the Dutch court will therefore, in principle, stay the proceedings before it until the arbitral tribunal has decided whether it is competent to rule on the matter.¹⁰ If the arbitral tribunal declares itself competent to hear the case, the Dutch court will deny jurisdiction. The only available remedies are reversal or revocation of the final arbitral award. If the arbitral tribunal declines jurisdiction, litigation before the Dutch courts will be continued.

3.3 Interventions by the Dutch courts in arbitrations outside the Netherlands

Dutch courts do not have the competence to intervene in arbitrations outside the Netherlands.

The DCCP does not contain provisions which prevent parties from requesting an anti-suit injunction. It can therefore be argued that an anti-suit injunction can be obtained under Dutch law. Anti-suit injunctions are, however, uncommon under Dutch law and there is little guidance on this topic. Moreover, on 10 February 2009, the European Court of Justice (“ECJ”) ruled in the *Allianz/West Tankers* case that an injunction by a court of an EU member state that prevents a party from initiating or continuing proceedings in another member state on the basis that such proceedings are in breach of an arbitration agreement, is incompatible with the Brussels I Regulation.^{11,12} It has not been decided whether the same applies under the Brussels I Recast,

⁹ Supreme Court 29 April 1994, NJ1994/488 (*Edelsyndicaat/Van Hout*).

¹⁰ See, for a recent example, District Court Amsterdam 27 September 2017, ECLI:NL:RBAMS:2017:7265.

¹¹ [Council Regulation \(EC\) 44/2001](#) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

¹² [ECJ 10 February 2009, C-185/07](#) (*Allianz/West Tankers*).

which entered into force on 10 January 2015.¹³ This is, however, expected by some legal scholars.¹⁴

4. The conducts of the proceedings

4.1 Representation of the parties

Parties can either represent themselves in the arbitration or have themselves represented by an attorney or by another representative (who does not need to be an attorney) if the representative is expressly authorized in writing for this purpose by the party involved (art. 1038 DCCP). This provision is mandatory and cannot be deviated from by agreement.

4.2 Intervention of the courts to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)

The arbitrator or arbitrators are appointed by the method agreed upon by the parties. In most cases, this method is agreed upon by choosing for the arbitration rules of a particular arbitration institute. Under the rules of the Netherlands Arbitration Institute, sole arbitrators are appointed through a list procedure, unless the parties agree on a joint appointment (art. 13(1) and 14 NAI Rules). Arbitral tribunals that consist of three arbitrators, are generally appointed by the appointment of one arbitrator by each of the parties, whom will jointly appoint a chair of the arbitral tribunal (art. 13(2) NAI Rules). Under the NAI Rules, arbitrators are not precluded from appointment by reason of their nationality (art 11(1) NAI Rules).

If the parties have not agreed upon a method of appointment, the arbitrator or arbitrators are appointed jointly by the parties (art. 1026(1) DCCP). If the appointment is not made within three months of the commencement of the arbitration, the arbitrator or arbitrators will, upon request of the first party making this request, be appointed by the interim relief judge (art. 1207(2) and (3) DCCP).¹⁵ The other party will be given the opportunity to be heard about the request (1027(3) DCCP).

If the parties have not agreed on the number of arbitrators or the agreed method of determining that number of arbitrators is not carried out, either of the parties can request the provisional relief court determine such number (art. 1026(2) DCCP).

4.3 How strictly do courts control arbitrators' independence and impartiality?

An arbitrator can be challenged if there are *justifiable doubts* regarding his independence or impartiality, but only for reasons that became known to the challenging party after the appointment of the arbitrator (art. 1033 DCCP). The party that challenges the arbitrator can do so by providing a timely written notice to the arbitrator concerned, the other arbitrators (if any) and the other party (art. 1035(1) DCCP). If the arbitrator does not resign at its own motion within two weeks after such notice, the provisional relief judge will upon request of the party requesting such a decision decide whether the challenge is well-founded (art. 1035(2) DCCP). While the right to challenge an arbitrator cannot be excluded, the parties can agree that a challenge will be dealt with by a third party other than the provisional relief judge (art. 1035(7) DCCP). This can, for example, be done through a mechanism that is set out in the rules of the chosen arbitration institute.¹⁶

¹³ [Council Regulation \(EU\) 1215/2012](#) on jurisdiction and recognition of judgments in civil and commercial matters (also referred to as the Brussels I-bis Regulation).

¹⁴ F. de Ly, *Herschikking van de EEX-Verordening en arbitrage – Deel I, TVA (Magazine for Arbitration)*, 2015/67.

¹⁵ An extended period of time applies in case the parties are in dispute about the number of arbitrators.

¹⁶ The arbitration rules of the Netherlands Arbitration Institute (the "NAI"), an important arbitration institute in the Netherlands, for example, provide that such challenge of arbitrators is dealt with by a committee of the NAI (Art 19 (5) NAI arbitration rules). That such a committee can qualify as the third party referred to in Article 1035(7) of the DCCP has recently been confirmed by the interim relief judge of the District Court of Rotterdam in: [District Court Rotterdam 28 September 2017, ECLI:NL:RBROT:2017:7456](#). The legislator has furthermore indicated that the institutional regimes of the ICC and the Permanent Court of Arbitration provide sufficient safeguards in this context. See: Meijer & Van Mierlo, *Parliamentary History Arbitration Act*, Deventer: Kluwer 2015, p. 69.

Lack of independence or impartiality can also lead to a reversal of the arbitration award. An arbitral award may be set aside if the award or the manner in which the award was made violates public policy (art. 1065(1)(e) DCCP). A lack of independence and impartiality of an arbitrator can qualify as such. The threshold for setting aside an award on this basis is, however, higher than for a recusal. An award will only be set aside on this basis if facts or circumstances have come to light based on which it must be assumed that the arbitrator *was in fact* not independent or impartial or if there are such serious doubts regarding the independence and impartiality of the arbitrator that it would in light of all the circumstances of the case be unacceptable to require from the party that was ruled against that he acquiesces in the award.¹⁷

An award will not be set aside based on facts or circumstances that the requesting party was or should have been aware of already during the proceedings. In such cases, the requesting party has had the option of challenging the arbitrator during the proceedings.¹⁸ If a party does not object against a breach that it becomes aware of – or should have become aware of – such a breach cannot be invoked at a later stage in the arbitration proceedings or before an ordinary court.

4.4 The power of courts to issue interim measures in connection with arbitrations

A valid arbitration agreement does not prevent a party from (1) requesting a court in the Netherlands to grant conservatory measures (such as the right to attachment of assets prior to a judgement), (2) initiating interim relief proceedings in the Netherlands; and/or (3) requesting the court in the Netherlands to order preliminary witness hearings, a preliminary expert report, a preliminary examination and viewing, or an inspection, copy or extract from specific documents (art. 1022a and 1022b DCCP, see also art. 1074a and 1074b DCCP).

If, however, a party timely invokes the arbitration agreement in such cases (*i.e.*, no later than in its first written or – in the absence thereof – oral pleadings), the court will *only* declare itself competent to rule on the matter if the requested decision cannot or cannot in a timely manner be obtained in arbitration (art. 1022c and 1074d DCCP).¹⁹ Whether the parties have agreed on interim relief in the arbitral proceedings is not decisive. If this is the case, however, it is more likely that the ordinary courts will have no jurisdiction to issue interim measures.²⁰ If the parties have not agreed on interim arbitral relief, it is relevant whether the arbitration on the merits has already been initiated and whether the arbitrators have already been appointed. If this is not the case, the regular courts are more likely to be competent to issue an interim measure.

An arbitration agreement which provides that the seat of arbitration is outside of the Netherlands, does not prevent a party from requesting the ordinary courts to appoint a delegated judge in case a witness that has his residence or is factually residing in the Netherlands does not voluntarily appear in the arbitration proceedings (art. 1074c DCCP).

4.5 Regulations regarding the conduct of arbitration, other than the arbitrators' duty to be independent and impartial

4.5.1 Confidentiality of the arbitration proceedings

The DAA does not contain provisions regarding the confidentiality of arbitration proceedings (including the documents submitted, the hearing and the final award that is rendered). Such a provision was included in the preliminary proposal for the revised DAA²¹ and including such a provision has been advocated by several

¹⁷ Supreme Court 18 February 1994, ECLI:NL:HR:1994:ZC1266 (Nordström/Van Nievelt Goudriaan & Co).

¹⁸ See, also, article 1048a of the DCCP, which provides – in short – that a party should protest against the breach of (i) any of the procedural rules in the DAA, (ii) the arbitration agreement or (iii) any decision or order of the arbitral tribunal without undue delay.

¹⁹ Conservatory measures can only be granted by a regular court. With respect to such requests, the Dutch court will therefore in principle declare itself competent.

²⁰ [Parliamentary Documents II, 2013-2014, 33611, no. 6, p. 9.](#)

²¹ Preliminary proposal revised DAA, Article 1069A.

Dutch legal scholars. While this has not led to the inclusion of an *explicit* provision on confidentiality in the DAA, the minister of Justice and Security clarified during the debate of the legislative proposal in the Dutch Senate that arbitration proceedings are – with the exception of arbitrations that pertain to public law such as investment arbitrations – in principle confidential, also under the revised version of the DAA.²² In the view of the minister of Justice and Security codification of this principle would have more cons than pros, as there is no consensus on whether and how this principle should be codified and including such a provision may create more discussion (e.g., with respect to the scope) than it provides clarity. For that reason, this principle has not been included in the DAA. While the principle of confidentiality is not codified in the DAA, confidentiality is therefore the starting point in the Netherlands. Still, it is recommended to explicitly agree on confidentiality if this is important for the parties involved.

4.5.2 The length of arbitration proceedings

The DAA does not regulate the length of the arbitration proceedings in the sense that a maximum duration is not provided for by law. The arbitral tribunal and the parties to the arbitration do, however, have an obligation to respectively refrain from and prevent unreasonable delaying the proceedings (art. 1036(3) DCCP). The arbitral tribunal can, at its own motion or the request of the parties, take measures against such unreasonable delay (art. 1036(3) DCCP). While the provision itself does not contain any sanctions in case parties breach this provision, the arbitral tribunal may impose sanctions (such as not taking into consideration certain information).

If an arbitral tribunal is, taking all circumstances of the case into consideration and despite reminders, carrying out its mandate in an unacceptably slow manner, the tribunal can be relieved from its mandate by a third party designated by the parties or, in absence thereof, by the provisional relief judge (art. 1029(3) DCCP).

4.5.3 The place where hearings and/or meetings may be held

There are no restrictions with respect to the place where hearings or meetings relating to the arbitration may take place. The arbitral tribunal can hold hearings, deliberate and hear witnesses and experts at any place it considers appropriate, independent of whether this is within or outside the Netherlands (art. 1037(2) DCCP).

4.5.4 Interim measures by the arbitrators

During pending arbitration proceedings on the merits, the arbitral tribunal may at the request of any of the parties, grant provisional relief (art. 1043b DCCP). These measures must be related to any of the claims in the arbitral proceedings. An arbitral tribunal cannot take the far-reaching conservatory measures that a Dutch court can take, such as a prejudgement attachment.

The parties can agree on the possibility to initiate arbitral proceedings for interim relief (art. 1043b DCCP). This is mostly done by way of a reference to arbitration rules which provide for emergency arbitration proceedings.

4.5.5 The right of arbitrators to admit/exclude evidence

Unless the parties have agreed otherwise, the tribunal is free to determine the rules of evidence, the admissibility of evidence, the allocation of the burden of proof and the assessment of evidence (art. 1039(1) DCCP).²³ The ordinary Dutch rules on evidence applied by Dutch courts do not apply in arbitration and the tribunal can choose to admit or exclude evidence, as long as this does not constitute a breach of the principle of hearing both sides of the argument (*audi alteram partem*) as laid down in article 1036(2) DCCP.

²² [Parliamentary Documents I, 2013-2014, 33 611, C](#), p. 2 (Memorandum of Reply).

²³ Note that this does not apply to the arbitration agreement which, in case disputed, must be proven by an instrument in writing (including electronic data that meets certain requirements) (art. 1021 DCCP).

The arbitral tribunal may furthermore, unless the parties have agreed otherwise, at the request of any party or of its own motion:

- order the inspection of, a copy or an extract from specific documents related to the dispute from the party which has these documents at its disposition (art. 1040 DCCP);
- order parties to furnish evidence by hearing witnesses and experts (art. 1041 DCCP);
- appoint one or more experts (art. 1042 DCCP);
- carry out an inspection, outside the Netherlands (art 1042a DCCP); and/or
- order the parties to appear in person, for the purpose of providing information (or attempting to arrive at a settlement (art. 1044 DCCP)).

We note that, in the Dutch legal culture, the focus is less on evidence and more on legal argumentation. This also follows from the Dutch procedural rules that apply to litigation before the courts. For example, the Dutch rules of evidence do not provide for disclosure obligations and witnesses are not heard by default. Document-production requests are permissible, but only to a limited extent. While the Dutch rules on evidence are – as explained above – not directly applicable in arbitration and the parties are free to agree on a more Anglo-American style of proceedings, this can impact the manner in which evidence is approached by, for example, Dutch arbitrators.

4.5.6 Is it mandatory to hold a hearing

If the parties have not agreed otherwise, the tribunal will provide the parties with the opportunity to explain their case at an oral hearing (art. 1038b DCCP). The tribunal can also order a hearing at its own motion if deemed necessary. Holding a hearing is, however, not mandatory.

4.5.7 Principles governing the awarding of interest and allocation of arbitration costs

The DAA does not contain specific principles with respect to the awarding of interest and/or the allocation of arbitration costs. Such principles are typically agreed upon in the applicable arbitration rules. With respect to legal fees incurred by the parties, the rules of Dutch arbitration institutes generally provide that the losing party will be ordered to pay them in full, as long as they are reasonable and were necessary.²⁴

4.6 Liability of arbitrators and the parties to the arbitration

Like the UNICTRAL Model Law, the DAA does not contain any provisions regarding the civil liability or immunity of arbitrators. The preliminary proposal for the revised DAA did contain such a provision,²⁵ but this provision was not taken over in the legislative proposal for the revised DAA and, consequently, also not in the revised version of the DAA that was adopted in 2014.

This does not mean that civil liability of arbitrators is *unlimited* in the Netherlands. In the landmark case *ASB/Greenworld* from 2009, the Dutch Supreme Court held that arbitrators can only be held liable in exceptional circumstances for arbitral awards that are reversed after a legal remedy has successfully been invoked.²⁶ The Dutch Supreme Court specified that this will only be the case if wilful misconduct or gross negligence is found in the context of the reversed award, or when the arbitrators have acted with a gross misjudgement of what a proper performance of their duty would entail. This is currently still the prevailing doctrine. This has recently been confirmed by the Dutch Supreme Court in its *Qnow/B* ruling.²⁷ In this case, it was clarified that the criterion set out in the *ASB/Greenworld* case does not only apply if an arbitral award is

²⁴ See, for instance, Article 56 of the rules of the Netherlands Arbitration Institute.

²⁵ Preliminary proposal for the revised DAA, Article 1069B.

²⁶ Supreme Court 4 December 2009, ECLI:NL:HR:2009:BJ7834 (*ASB / Greenworld*).

²⁷ Supreme Court 30 September 2016, ECLI:NL:HR:2016:2215 (*Qnow / B*), par. 3.4.3. In this ruling, the Supreme Court also provides a more detailed explanation on how the *Greenworld*...

reversed based on the substantive arguments, but also if such a reversal takes place based on a breach of procedural rules (such as the absence of a signature of the arbitrators). The aforementioned Greenworld case *only* applies to cases where the arbitral award is reversed. This high threshold for liability does not apply in case of “operational faults” (*bedrijfsfouten*), such as – for example – causing documents to be lost. Such faults cannot lead to a reversal of the arbitral award and do moreover not relate to the judicial task of the arbitrator.²⁸

Therefore, while full immunity for arbitrators does not apply in the Netherlands, there is a high threshold for holding arbitrators personally liable for errors in their awards. In practice, civil liability of arbitrators is rare in the Netherlands. There is only a very limited number of cases in which civil liability of an arbitrator was assumed for the damages suffered by the party as a consequence of his behaviour.²⁹

An arbitrator can in the Netherlands be subject to criminal liability, for example if he or she accepts bribes (art. 364 Criminal Code). Arbitrators are in this context considered equivalent to judges (art. 84(2) Criminal Code). The same applies to parties that are involved in bribery of an arbitrator (art. 178 Criminal Code). Criminal prosecution in the context of arbitration is, however, rare.

5. The Award

5.1 The possibilities for waiving the requirement for an award to provide reasons

The arbitration award should, in principle, contain the reasons for the decision given in the award (art. 1057(4) DCCP). The parties can agree that no reasons for the decision have to be given, but only *after* the arbitration has commenced (art. 1057(5)(c) DCCP). Moreover, no reasons for the decision have to be included if (i) the award only concerns the determination of the quality or condition of goods or (ii) the award only contains a recording of a settlement (art. 1057(5)(a) and (b) DCCP).

5.2 The possibilities for waiving the right to have the award set aside

Article 1064 of the DCCP provides that the only remedies against arbitral awards are reversal and revocation. Given that this provision is of a mandatory nature, it is argued that the parties can *not* waive the right to such remedies under Dutch arbitration law.³⁰

In the Cukurova/Sonera-case the Dutch Supreme Court has ruled that it is not incompatible with article 6 European Convention of the Human Rights to waive the right to challenge an award before a regular court beforehand.³¹ Further, the European Court of Human Rights confirmed in the *Tabanne/Switzerland* case that such a right can indeed be waived, provided that the waiver is made freely and unequivocal.³² It does, however, not follow from this case law that such a waiver is also valid under *Dutch arbitration law*.³³

5.3 Is it possible to appeal an award (as opposed to seeking annulment)

Appealing an award in an arbitral appeal is only possible if this has been agreed upon by the parties (art. 1061b DCCP). The majority of the provisions regarding arbitration in first instance are also applicable in case of an arbitral appeal. Arbitral appeal is generally agreed upon in the arbitration rules. In practice, however, arbitral appeal rarely takes place. The Netherlands Arbitration Institute, for example, does not provide for arbitral appeal. Arbitral appeal is therefore relatively uncommon. A notable exception are the rules of the

²⁸ Ibid., par. 3.4.4.

²⁹ See, also, P. Ernste and G. Meijer, De rol van de vernietiging van een arbitraal vonnis bij de aansprakelijkheid van arbiters, *Ars Aequi* 2017/9, p. 682 and the case law referred to there.

³⁰ Meijer, Commentary to article 1064 under 1, in A.I.M. van Mierlo and C.J.J.C. van Nispen, *Tekst & Commentaar Burgerlijke Rechtsvordering* (Commentary to the DCCP), Deventer: Kluwer 2016.

³¹ Supreme Court 1 May 2015, ECLI:NL:HR:2015:1194 (*Cukurova/Sonera*).

³² ECHR 1 March 2016, no. 41069/12 (*Tabanne v. Switzerland*).

³³ Meijer, Commentary to article 1064 under 1, in A.I.M. van Mierlo and C.J.J.C. van Nispen, *Tekst & Commentaar Burgerlijke Rechtsvordering* (Commentary to the DCCP), Deventer: Kluwer 2016.

Dutch Arbitration Board for the Building Industry ("*Raad van Arbitrage voor de Bouw*"), an important arbitration institute that is commonly used for disputes in the construction industry. The rules of this arbitration institute do provide for arbitral appeal (art. 22(1) of the arbitration rules).

5.4 Recognition and enforcement of arbitral awards

In the DAA, a distinction is made between enforcement of local arbitral awards (*i.e.*, awards that have been rendered in an arbitration with a seat in the Netherlands) and foreign arbitral awards.

5.4.1 Enforcement of local awards

A local arbitral award can be executed after a leave for such execution (a so-called *exequatur*) has been obtained from the provisional relief judge (art. 1061 DCCP). This can be obtained quite easily by submitting a request to that end and without the other party having been heard (*i.e.*, *ex parte*). A leave for enforcement can only be refused based on limited grounds. If the time-limit for setting aside the award has not yet expired, the enforcement can be refused if it is, in the opinion of the provisional relief judge after a summary investigation, plausible that the award will be set aside or revoked (art. 1063(1) DCCP) or if a penalty for non-compliance has been awarded in breach of the provisions regarding penalties. In that case, enforcement will only be refused with respect to the penalty. If the time-limit for setting aside the award has expired without being used, the request may only be refused if it appears plausible that the award is contrary to public order (art. 1063(2) DCCP). Note that – aside from cases where an arbitral appeal has been agreed upon – this will rarely be the case, as a second time-limit for setting aside the award starts running on the date that a leave for enforcement is served on a party.

An appeal can be lodged against a refusal of enforcement at the court of appeals (art. 1063(4) DCCP). If the leave is also refused in appeal, a party can lodge an appeal in cassation at the Dutch Supreme Court (art. 1064(5) DCCP). If the leave is granted, no appeal of that decision is possible. In that case, the only remedy for the other party is having the award set aside or revoked.

5.4.2 Recognition and enforcement of foreign arbitral awards

With respect to foreign awards a distinction is made between awards rendered in states to which a treaty regarding the recognition and enforcement of arbitral awards applies and states to which such a treaty does not apply.

Given that the Netherlands is a party to the New York Convention, the first category is by far the most important. It is important to note that the Netherlands has made a "reciprocity reservation", meaning that the Netherlands only recognizes and enforces awards from other contracting states.

If an arbitral award is rendered in a state which falls within the first category, such an award is recognized and can be enforced in the Netherlands (art. 1057 DCCP). The procedure for recognition and enforcement will be determined on the basis of the relevant treaty. Insofar as the treaty does not contain any specific provisions, articles 985 through 991 of the DCCP apply, except that instead of the district court the court of appeals is competent to rule on the matter (art. 1075(2) DCCP). The procedure set out in these provisions is similar to the one that applies in case of enforcement of a local arbitral award, except that the parties will be heard (art. 987 DCCP).

Arbitral awards can also be recognized and enforced if no treaty applies. Also in this case, a leave for enforcement is required. The procedure is similar to the one that applies with respect to awards in the first category. The award will be recognized and can be enforced, upon submission of the original or a certified copy of the arbitration agreement and the arbitral award, except if:

- i. The party against whom recognition is sought, asserts and proves that:
 - a. No valid arbitration agreement under the law applicable thereto exists (unless the party has appeared in the arbitration proceedings and has, in short, not argued that no valid arbitration agreement was concluded);
 - b. The arbitral tribunal was composed in violation of the applicable rules (unless the party invoking this ground has – in short – cooperated in the composition of the arbitral tribunal or has not timely argued that the composition was in violation of the applicable rules;
 - c. The arbitral tribunal did not comply with its mandate;
 - d. The arbitral award is open to appeal to the arbitrators or the courts in the country where the award was made; or that
 - e. The arbitral award was set aside by the competent authority of the country in which the awarded.
- ii. The court finds that the recognition or enforcement would be contrary to public policy.

5.5 Consequences of the induction of reversal or appeal proceedings for exercising of the rights to enforce an award

Initiation of reversal or revocation proceedings in the Netherlands does not automatically suspend the exercise of the right to enforce the award (art. 1066(1) and 1068(2) DCCP). The right to enforce the award can, however, be suspended by the court that rules on the reversal or revocation upon request of one of the parties (art. 1066(2) and 1068(2) DCCP). A Dutch court that is requested to recognize or enforce a foreign arbitral award can suspend the enforcement of such an award if reversal proceedings are initiated in the relevant jurisdiction (art. 1076(8) DCCP, see also Article VI of the New York Convention).

5.6 Annulment of foreign awards in the jurisdiction of the seat of arbitration

If no treaty is applicable, the annulment of foreign awards in the jurisdiction where the seat of arbitration is located will have as a consequence that the award can no longer be enforced in The Netherlands (art. 1076(1)(A)(e) DCCP).

With respect to foreign awards to which a treaty is applicable, the rules of the relevant treaty will apply in principle. In a recent case, the Dutch Supreme Court had to determine whether under art. V(1)(e) of the New York Convention enforcement of an arbitral award in the Netherlands *must* or *can be* rejected by a Dutch court.³⁴ The Dutch Supreme Court considered that the answer to this question can neither be deducted from the wording of the Convention, nor from the *travaux préparatoires*. The manner in which Article V(1)(e) of the Convention is interpreted in other jurisdictions is, moreover, according to the Dutch Supreme Court, not unambiguous. The Dutch Supreme Court eventually concluded that, based on the rationale of the Convention, the national courts must be considered to have some discretion with respect to the recognition and enforcement of arbitral awards, also if the grounds for refusal under article V(1) apply. This discretion should, however, be applied restrictively. The party that desires that an arbitral award is recognized or enforced despite the fact that one of the grounds for refusal applies, therefore bears the burden of proof of all facts and circumstances that justify that the ground of refusal are not considered. If, in other words, the New York Convention applies, a Dutch court *can* under very specific cases recognize and allow enforcement of an arbitral award which has been reversed in the jurisdiction of the seat of arbitration.

³⁴ Supreme Court 24 November 2017, ECLI:LN:HR:2017:2992 (*X / OJSC Novolipetsky Metallurgichesky Kombinat*).

5.7 Enforceability in practice

In practice, enforcement of foreign awards is relatively easy in the Netherlands. Courts generally grant requests for a leave to enforce an arbitral award, especially if none of the parties objects to such enforcement.

6. Funding Arrangements

6.1 Restrictions to the use of contingency or alternative fee arrangements or third-party funding

Dutch law does not restrict the use of contingency or alternative fee arrangements, or third-party funding. It must, however, be noted that article 25 of the Rules of Professional Conduct for Dutch attorneys prohibits attorneys admitted to the Dutch bar from working on a full 'no cure no pay' basis, except in personal injury claims.³⁵

7. Reforms expected in the near future

A substantial reform of the DAA has taken place in 2015. No significant reforms are expected in the near future.

³⁵ Willem van Boom, *Third-Party Financing in International Investment Arbitration* (2011) p. 32.

NIGERIA

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

ISAIAH BOZIMO
OF BRODERICK BOZIMO & COMPANY

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Nigerian arbitration law is embodied both in common law (case law) and statute. Three statutory instruments regulate commercial arbitration in Nigeria: The Arbitration and Conciliation Act (the “ACA”),¹ the Lagos State Arbitration Law 2009,² and the 1914 Arbitration Law,³ which is applicable in the other thirty-five States of the Federation.

Key places of arbitration in the jurisdiction	The key places of arbitration within Nigeria are Lagos State and Abuja, the Federal Capital Territory.
Civil law / Common law environment?	Common law.
Confidentiality of arbitrations?	Under Nigerian law, it is an implied term of the arbitration agreement that the arbitral proceedings are private and confidential and, therefore, subject to privilege.
Requirement to retain (local) counsel?	Parties may choose to retain counsel in arbitral proceedings. Where the arbitration rules in the first schedule to the ACA apply, this has been interpreted to mean counsel qualified to practice in Nigeria. Parties may circumvent these rules in international arbitration.
Ability to present party employee witness testimony?	There are no restrictions as to the presentation of witness testimony. The ACA allows the arbitrators to determine the admissibility, relevance, materiality and weight of any evidence placed before it.
Ability to hold meetings and/or hearings outside of the seat?	Unless the parties agree otherwise, the tribunal may meet at any place it considers appropriate.
Availability of interest as a remedy?	Interest may be awarded based on the parties’ agreement.
Ability to claim for reasonable costs incurred for the arbitration?	Parties may claim reasonable costs incurred for the arbitration.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Funding agreements that include the provision of funding an arbitration in return for a proportion of any recoveries are potentially, although not necessarily, champertous.
Party to the New York Convention?	Nigeria is a party to the New York Convention.
Other key points to note	A comprehensive Bill to repeal and re-enact the ACA is awaiting third reading at the Senate of the Federal Republic of Nigeria.
WJP Civil Justice score (2017-2018)	0.44

¹ Enacted in 1988 and republished as Cap. A18, Laws of the Federation of Nigeria, 2004. The ACA governs international and inter-state commercial arbitration.

² Lagos State Arbitration Law No. 18 of 2009. The Law governs arbitration where all elements arise within Lagos State, unless the parties agree otherwise.

³ The 1914 Law is modelled on the English Arbitration Act of 1889 and governs commercial arbitration where all elements arise within the respective States.

ARBITRATION PRACTITIONER SUMMARY

The Arbitration and Conciliation Act 1988 (the 'ACA') governs arbitration in the Federal Republic of Nigeria. The ACA came into force on 14th March 1988 and applies to all arbitration proceedings commenced on or after that date.

The ACA incorporates the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the 'New York Convention') and is modelled on the 1985 version of the UNCITRAL Model Law with minor additions as it concerns domestic arbitration.

Date of arbitration law?	The ACA entered into force in 1988.
UNCITRAL Model Law? If so, any key changes thereto?	The ACA is modelled after the 1985 UNCITRAL Model Law with minor additions with respect to domestic arbitration.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	The ACA designates the High Courts of the respective States and the Federal High Court to handle arbitration-related matters. The Lagos State High Court has a commercial division to which arbitration matters are generally assigned. The High Court of the Federal Capital Territory, Abuja also proposes to introduce a commercial division. It currently designates an 'ADR Judge', to whom arbitration matters are generally assigned.
Availability of <i>ex parte</i> pre-arbitration interim measures?	In appropriate cases (such as cases of genuine urgency), <i>ex parte</i> pre-arbitral interim measures are available from the courts.
Courts' attitude towards the competence-competence principle?	Recent judicial policy recognises and gives deference to the competence-competence principle.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The grounds for annulment mirror the criteria for refusal of recognition and enforcement of foreign awards set out in the New York Convention.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The annulment of a foreign award at its seat constitutes a ground for refusal of recognition or enforcement of that award in Nigeria. Under the current judicial policy, these awards will not be recognised or enforced in Nigeria.
Other key points to note?	<p>Partial and Interim Awards are enforceable under the ACA.</p> <p>A comprehensive Bill to repeal and re-enact the ACA is awaiting third reading at the Senate of the Federal Republic of Nigeria. The Bill is modelled on the 2006 version of the UNCITRAL Model Law with some notation additions. These include the introduction of emergency arbitrator provisions and the introduction of an appellate review tribunal if parties elect to circumvent the national courts for annulment proceedings. The Bill also introduces time limits in arbitration related matters before the Courts.</p>

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the Jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law?

The Arbitration and Conciliation Act 1988⁴ (the 'ACA') governs arbitration in the Federal Republic of Nigeria.⁵ The ACA came into force on 14th March 1988 and applies to all arbitration proceedings commenced on or after that date.

The ACA incorporates the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the 'New York Convention') and is modelled on the 1985 version of the UNCITRAL Model Law (the '1985 Model Law') with minor additions.

Most notably, the ACA draws a distinction between domestic and international arbitration. Under Section 57(2) of the Act, an arbitration is international if the parties have their places of business in different countries; or if the arbitral seat or place of contractual performance, or place of the subject matter of the dispute is outside the country in which the parties have their businesses.⁶ Section 57(2) also prescribes opt-in provisions, so that an arbitration will be deemed to be international if the parties have expressly agreed that the subject matter of the arbitration agreement relates to one country or if they expressly agree to treat the dispute as an international arbitration. An arbitration will be domestic where none of the criteria in Section 57(2) of the ACA is met.

As it concerns domestic arbitration, Part I of the Act will generally supply the governing law. As it concerns international arbitration, Part III of the Act provides additional provisions applicable to the proceedings.⁷

On account of the lack of a distinct body of law governing international arbitration, practitioners should be mindful that precedent established in domestic arbitration may supply principles equally applicable in international arbitration, and *vice versa*. For example, Section 32 of the Act does not give the court any guidance as to the grounds for refusing recognition or enforcement of a domestic award. Section 52, on the other hand, sets out a laundry list of grounds for refusal of recognition or enforcement of an international award. Commentators have observed that the grounds listed in Section 52 should guide the court in their application of Section 32.⁸

⁴ The Arbitration and Conciliation Act was republished as Cap. A18 Laws of the Federation of Nigeria, 2004.

⁵ Section 58 of the ACA states that the Act shall apply throughout the Federation. There is, however, some debate as to the Constitutionality of this provision as it concerns the National Assembly's competence to make laws for the States on commercial arbitration. Commenting on this issue, The National Committee on the Reform and Harmonization of Arbitration and ADR Laws in Nigeria (the 'Orojo Committee') found that the Constitution limits the National Assembly to legislate on international and inter-state Arbitration and Conciliation, but not on intra-state Arbitration and Conciliation, which are within the constitutional legislative capacity of the States.

⁶ Section 57(3) of the ACA makes two important clarifications. First, if a party has more than one place of business, the place with the closest relationship to the arbitration agreement prevails. Secondly, if a party does not have a place of business, reference is made to its habitual residence.

⁷ Part III of the Act includes provisions on the appointment, challenge and replacement of arbitrators; rules applicable to the substantive dispute; grounds for setting aside an international award, provisions on costs; recognition and enforcement of an international award and the grounds for refusing recognition or enforcement; and party autonomy concerning the rules applicable to the proceedings.

⁸ J.O. Orojo and M.A. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Myebi & Associates, Lagos 1999) at 300-301.

1.2 When was the arbitration law last revised?

Given Nigeria's Federal structure, legislative powers are shared between the Federal Government (through the National Assembly)⁹ and the States (through the respective State Houses of Assembly).¹⁰

At the Federal level,¹¹ the last revision of the arbitration law occurred in 1988, with the enactment of the ACA.¹² As for the States, the Lagos State House of Assembly enacted the Lagos State Arbitration Law, No. 18 of 2009 on 18 May 2009 (the 'LSAL').¹³ The stated aim of the LSAL is the principle that "*The object of arbitration is to obtain the fair resolution of disputes by an impartial Tribunal without unnecessary delay.*"¹⁴ The Law is modelled on the 2006 version of the UNCITRAL Model Law and, except where the parties agree otherwise, applies to domestic arbitration where all the elements emanate within Lagos State.¹⁵

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

The Nigerian Court of Appeal has stated that the proper law of the arbitration agreement is determined in accordance with the Nigerian general principles of the conflict of laws, namely, the law chosen by the parties or, in the absence of such choice, the law of the country with which the agreement is most closely connected.¹⁶

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Section 12 (2) of the ACA states that an arbitration clause which forms part of a contract is independent of the other terms of the contract, and a decision by the arbitral tribunal that the contract is null and void does not affect the validity of the arbitration clause.

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

To constitute an arbitration agreement to which the ACA applies:

- an arbitration agreement must be in writing or evidenced in writing;¹⁷
- the parties to the arbitration agreement must have legal capacity under the law applicable to them;
- the terms of the arbitration agreement must be precise and unequivocal;¹⁸

⁹ Section 4(1) of the 1999 Constitution vests federal legislative powers in the bicameral National Assembly, consisting of a Senate and a House of Representatives.

¹⁰ Section 4(7) of the 1999 Constitution vests the legislative powers of a state in a unicameral State House of Assembly.

¹¹ Nigeria is a constitutional democracy and federation with thirty-six states and a Federal Capital Territory. As is conventional in a federation, legislative powers are shared between the federal government and the federating states.

¹² At the time of writing, a Bill to repeal and re-enact the ACA is awaiting third reading before the Senate of the Federal Republic of Nigeria.

¹³ The 1914 Arbitration Law operates in the other thirty-five States of the Federation.

¹⁴ Lagos State Arbitration Law 2009, Section 1(a).

¹⁵ Lagos State Arbitration Law 2009, Section 2.

¹⁶ *Statoil Nigeria Limited v. Federal Inland Revenue Service* (2014) LPELR-23144(CA).

¹⁷ Under the ACA, the requirement of writing is satisfied if the agreement is contained in: (a) a document signed by the parties; (b) an exchange of letters, telex, telegrams or other means of communication which provide a record of the arbitration agreement; or (c) an exchange of points of claim or defense in which the existence of an arbitration agreement is alleged by one party and not denied by the other. The Lagos State Arbitration Law has a more progressive definition of writing and includes data that provides a record of the Arbitration Agreement or is otherwise accessible so as to be useable for subsequent reference. The Bill to repeal and re-enact the ACA also has a more progressive definition of writing, mirroring the definition set out in Option I, Article 7 of the UNCITRAL Model Law.

- the agreement should be mutual, i.e., it should give both parties the same right to refer disputes to arbitration; and
- the agreement must relate to a commercial dispute capable of settlement by arbitration under Nigerian law, i.e., an arbitrable dispute.

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement.

Section 52 of the ACA defines a party as meaning “a party to the arbitration agreement or to conciliation or any person claiming through or under him.”

Whilst the Nigerian courts have not ascribed meaning to the phrase: “a person claiming through or under him” , the courts of other common law jurisdictions have provided useful and persuasive guidance, stating that the phrase includes a person seeking to enforce or a person seeking to resist the enforcement of an alleged contractual right.¹⁹

To be bound by a contractual agreement (including an arbitration clause), the Nigerian courts will require cogent evidence of a capacity to contract and an intention to be bound by the agreement.

Practitioners should, therefore, be aware that where a non-signatory to the arbitration agreement seeks either to enforce or resist the enforcement of an alleged contractual right on behalf of a signatory, it could be bound by the said agreement.

Practitioners should also be aware that, in limited circumstances, a third party could intervene to challenge an arbitral tribunal's jurisdiction before the national courts, in circumstances where powers conferred on that third party by the Constitution or by statute are contravened or in need of interpretation.²⁰

2.5 Are there restrictions to arbitrability?

To be arbitrable under Nigerian law, the general test is whether the dispute or difference can be compromised lawfully by way of accord and satisfaction.²¹

Recently, the Court of Appeal found that disputes which solely concern the operation of tax legislation (and which do not have their basis in contract) are not arbitrable under Nigerian law.²² Likewise, criminal matters, illegal and void contracts or matters leading to a change of the status of the parties are not arbitrable under Nigerian law.

¹⁸ The courts will find that the arbitration agreement satisfies this requirement where the reference to arbitration is mandatory: *Frontier Oil Limited v. Mai Epo Manu Oil Nigeria Limited* (2005) 2 CLRN 148; *Fidelity Bank Plc. v. Jimmy Rose Co. Limited* (2012) 6 CLRN 82.

¹⁹ Decision of the High Court of Australia in *Tanning Research Laboratories Inc. v O'Brien* [1990] HCA 8. Nigerian courts have held that where no relevant precedents on a particular matter are available domestically, foreign decisions are not only persuasive but are relevant in the determination of the issue (*Agbaje v. Fashola* (2008) All FWLR (Pt. 443) 1302; *Yahaya v. State* (2002) 2 S.C. (PT. II) 1).

²⁰ *Statoil Nigeria Limited v. Federal Inland Revenue Service* (2014) LPELR-23144(CA).

²¹ *Kano State Urban Development Board v. Fanz Construction Ltd.* (1990) 4 NWLR (Pt. 142) 1; *United World Ltd Inc. v. MTS* (1998) 10 NWLR (Pt. 568) 106.

²² *sso Petroleum & Production Nigeria Ltd. & Anor. v. Nigeria National Petroleum Corporation* (2016) 6 CLRN 25.

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

The Nigerian Supreme Court has held that where parties have agreed to refer their dispute to arbitration, the court has a duty to enforce the agreement of the parties by staying any proceedings commenced in court contrary to the arbitration agreement.²³

More recently, the Chief Justice of Nigeria has requested all Heads of Courts to introduce Practice Directions in the following terms:²⁴

- That no court shall entertain an action instituted to enforce a contract or claim damages arising from a breach thereof, in which the parties have, by consent, included an arbitration clause, without first ensuring that the clause is invoked and enforced.
- The courts must insist on enforcement of the arbitration clause by declining jurisdiction and awarding substantial costs against parties that introduce proceedings in breach of arbitration agreements.²⁵
- A party who institutes an action in court to claim breach of contract containing an arbitration clause without first invoking the clause is, himself, in breach of the said contract and ought not to be encouraged by the courts.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

The Nigerian courts have not had cause to determine this question. Nevertheless, questions of jurisdiction will inevitably arise where an arbitral tribunal enjoins a court to stay its proceedings. Under Nigerian law, a court or tribunal cannot issue injunctive or other reliefs against non-parties.

It would be more prudent for the arbitrators to enjoin the parties to the arbitral proceedings from pursuing litigation before the Nigerian Courts.²⁶

3.3 On what ground(s) can the courts intervene in arbitrations seated outside the jurisdiction?

The following provisions of the ACA apply even where the arbitration is seated outside Nigeria:

- Section 4 – the courts can stay proceedings commenced in breach of an arbitration agreement, where a so party requests before submitting its first statement on the merits of the dispute;
- Section 23 – a court or judge may require a witness within Nigeria to appear and give oral testimony or produce documents before an arbitral tribunal;
- Section 51 – the Nigerian courts are conferred with discretion to recognise and enforce arbitral awards, irrespective of the country in which it was made; and

²³ *M.V Lupex v. N.O.C. & S. Ltd* (2003) 15 NWLR (Pt. 844) 469; *Esso Exploration and Production Nigeria Limited & Anor. v. Federal Inland Revenue Service & Anor* – at the time of writing, unreported judgment of the Court of Appeal in CA/A/402/2012, delivered on 10th March 2017.

²⁴ The request was contained in a letter dated 26 May 2017 addressed to all Heads of Court.

²⁵ This requirement reinforces Section 4 of the ACA by emphasising the negative effect of competence-competence. It should, however, be noted that an arbitration clause does not oust the court's jurisdiction under Nigerian law. *BSG Energy Holdings Ltd. v. Spears* (2013) 4 CLRN 49.

²⁶ Section 29 of the Lagos State Arbitration Law provides for the recognition and enforcement by the court of interim measures issued by an arbitral tribunal. The ACA does not contain similar provisions. The tribunal should, therefore, issue such measures as Interim or Interlocutory Awards, which are capable enforcement before the Nigerian courts.

- Section 52 – likewise, the Nigerian courts may refuse to recognise and enforce arbitral awards, irrespective of the country in which it was made.

4. The conduct of proceedings

4.1 Can parties retain outside counsel or be self-represented?

The applicable rules will depend on the nature of the dispute. As a rule, domestic arbitration is conducted in accordance with the procedure contained in the Arbitration Rules set out in the first schedule of the ACA (the 'Arbitration Rules').²⁷ Article 4 of the said Rules provide that the parties may be represented by legal practitioners of their choice.

The Court of Appeal has interpreted this provision to mean a legal practitioner licenced to practice law in Nigeria.²⁸ Given the discretionary language used in Article 4, this should not fetter a party's choice to be self-represented, or to be represented by persons other than legal practitioners.²⁹

As it concerns international arbitration,³⁰ the parties may circumvent Article 4 of the Arbitration Rules by designating any international rules of procedure acceptable to them.³¹

Practitioners should, nevertheless, be aware that Section 51 of the Nigerian Oil and Gas Industry Content Development Act enjoins all operators, contractors and other entities engaged in any business or transaction in the Nigerian oil and gas industry to retain only the services of a Nigerian legal practitioner of a firm of Nigerian legal practitioners whose office is located in any part of Nigeria.

4.2 How strictly do courts control arbitrators' independence and impartiality?

The courts may set aside or refuse recognition or enforcement of an award in circumstances where an arbitrator fails to disclose any circumstance that might give rise to justifiable doubts to their independence or impartiality.³²

However, the Supreme Court has held that a party who has knowledge of, but fails to raise a jurisdictional plea (presumably including a challenge to an arbitrator's independence or impartiality) before the arbitral tribunal cannot raise it for the first time before the court.³³

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in the case of ad hoc arbitration)?

At a party's request, and as a last resort, a court may intervene to assist in the constitution of the arbitral tribunal where, under the appointment procedure agreed by the parties:

- a party fails to act as required under the procedure; or
- the parties or two party-appointed arbitrators are unable to reach agreement as required under the procedure; or

²⁷ ACA, Section 15(1).

²⁸ Unreported Judgment of the Court of Appeal in *CA/A/208/2012 Shell Nig. Exploration and Production v. Federal Inland Revenue Service*. The Bill to repeal and re-enact the ACA allows parties to be represented or assisted by any person they may choose.

²⁹ This presumably includes lawyers qualified in jurisdictions outside Nigeria, who (except where also qualified in Nigeria) are not recognised as 'legal practitioners' under Nigerian law.

³⁰ Under Section 57(2)(d) of the ACA, the parties may agree to treat a domestic arbitration as international.

³¹ ACA, Section 53.

³² In a domestic arbitration, an arbitrator's failure to disclose could amount to misconduct. In international arbitration, the failure to disclose would be contrary to the rules that govern the arbitration. The arbitral procedure would, therefore, not be in accordance with the parties' agreement.

³³ *NNPC v. Klifco Nigeria Limited* (2011) 10 NWLR (Pt. 1255) 209.

- c. a third party, including an arbitral institution, fails to perform any duty imposed on it under the procedure.³⁴

4.4 Do the courts have the power to issue interim measures in connection with arbitrations?

A court is entitled to issue interim relief under Article 26 of the Arbitral Rules. The Rules provide that such a request will not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement. The courts may, in appropriate circumstances (e.g. in matters of genuine urgency) consider *ex parte* requests.³⁵

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

The ACA does not contain any provisions on the confidentiality of arbitral proceedings. However, the Arbitration Rules make provision for the proceedings to be private, unless the parties agree otherwise.³⁶ It is also an implied term of the arbitration agreement that the arbitral proceedings are private and confidential and, therefore, subject to privilege.

4.5.2 Does it regulate the length of arbitration proceedings?

The ACA does not regulate the length of arbitration proceedings.³⁷

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

Unless the parties agree otherwise, the tribunal may meet at any place it considers appropriate.³⁸

4.5.4 Does it allow for the tribunal to issue interim measures?

The Arbitration Rules allow an arbitrator to grant preliminary or interim relief by way of an interim award.³⁹ This may be a conservatory order, order for sale of perishable goods or order to provide security for costs. A party in whose favour an interim award has been made may approach the court to enforce the said award.⁴⁰

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence?

Section 15(3) of the ACA confers power on the arbitral tribunal to determine the admissibility, relevance, materiality and weight of any evidence placed before it.

4.5.6 Does it make it mandatory to hold a hearing?

The ACA does not make it mandatory to hold a hearing. Subject to the parties' agreement, the tribunal determines the format of the proceedings.⁴¹

³⁴ ACA, Section 7(3).

³⁵ The Bill to repeal and re-enact the ACA contains Emergency Arbitrator provisions, and provisions for court or tribunal issued interim measures of protection.

³⁶ Article 25(4) of the Rules contained in the first schedule to the ACA.

³⁷ There is, however, a presumptive forty-five-day time limit for the parties to communicate any written statements (including pleadings). The tribunal may extend this time in appropriate circumstances.

³⁸ ACA, Section 16(2).

³⁹ Articles 26 and 32 of the Arbitration Rules in the first schedule to the ACA.

⁴⁰ ACA, Section 31.

⁴¹ ACA, Section 20.

4.5.7 Does it prescribe the principles governing the award of interest?

The ACA is silent as it concerns the award of interest.⁴² Interest can, nevertheless, be awarded based on the parties' agreement.

4.5.8 Does it prescribe the principles governing the allocation of arbitration costs?

Costs generally follow the event. This means that the costs of the arbitration will, in principle, be borne by the unsuccessful party except where the parties agree otherwise. However, the tribunal may exercise its discretion to apportion costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.⁴³

4.6 Liability

4.6.1 Do the arbitrators benefit from immunity to civil liability?

The ACA does not confer immunity on arbitrators.⁴⁴ However, the Lagos State Arbitration Law grants statutory immunity to arbitrators unless they act in bad faith.⁴⁵

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

Under Nigerian law, there is no criminal liability for any of the participants in an arbitration proceeding.

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Section 26(3)(a) of the ACA allows the parties to waive the requirement for an award to provide reasons.

5.2 Can the parties waive the right to seek the annulment of the award?

Strictly speaking, the parties may agree to exclude their right of recourse against an award. However, any such agreement is likely to be unenforceable. Under Nigerian law, access to the judicial system is a constitutional right that cannot be waived.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

No atypical mandatory requirements apply to the rendering of a valid award rendered under the ACA or the Lagos State Arbitration Law.

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

There are no grounds to appeal against an arbitral award under Nigerian law. However, a party to a domestic arbitration may apply to the high court to challenge the award on grounds that:

- the tribunal exceeded its jurisdiction;⁴⁶
- the tribunal was guilty of misconduct;⁴⁷ or
- the award was fraudulently procured.⁴⁸

⁴² The Bill to repeal and re-enact the ACA contains express provisions governing the award of interest.

⁴³ Article 40 of the Arbitration Rules in the first schedule to the ACA.

⁴⁴ The Bill to repeal and re-enact the ACA contains provisions that confer immunity on arbitrator and arbitral institutions.

⁴⁵ Lagos State Arbitration Law, Section 18.

⁴⁶ *KUSDB v. Fanz Construction Ltd* (1990) 4 NWLR (Pt. 142) 1.

⁴⁷ *Taylor Woodrow of Nigeria Ltd. v Suddeutsche Etna-Werk GMBH* (1993) 4 NWLR (Pt. 285) 127.

As it concerns international arbitration, the court may, where the seat of arbitration was in Nigeria, set aside an award if the applicant can establish that:

- a party to the arbitration agreement was under some legal incapacity;
- the arbitration agreement is invalid under the law chosen by the parties, or failing such an indication, that the arbitration agreement is invalid under Nigerian law;
- the aggrieved party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
- the award addresses matters that are beyond the scope of the submission to arbitration;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the parties' agreement;
- where there is no agreement between the parties as to the arbitral tribunal or the arbitral procedure, the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the Arbitration and Conciliation Act;
- the subject matter of the dispute is incapable of settlement by arbitration under Nigerian law; or
- the award is against Nigerian public policy.

5.5 What procedures exist for the recognition and enforcement of awards, what time limits apply and is there a distinction between local and foreign awards?

The procedures for the recognition and enforcement of international awards rendered in or outside Nigeria are modelled on the UNCITRAL Model Law. To establish a *prima facie* case, the enforcing party must apply in writing to the High Court⁴⁹ and must supply the original award or a duly certified copy of it; and the original arbitration agreement or a duly certified copy of it.⁵⁰

Neither the ACA nor the Lagos State Arbitration Law prescribe a time limit for the recognition or enforcement of an award. However, the implication of the Supreme Court's decision in *City Engineering Nigeria Limited v Federal Housing Authority*⁵¹ is that the accrual of cause of action, the arbitration proceedings, the award and the enforcement of the award must all occur within six years.⁵² Nevertheless, the Supreme Court recently clarified that where a limitation period is prescribed, time will stop running against the Claimant from the moment an action is commenced.⁵³ This presumably includes the commencement of arbitral proceedings.

⁴⁸ *Aye-Fenus Enterprises Ltd. v. Saipem (Nig.) Ltd.* (2009) 2 NWLR (Pt. 1126) 483.

⁴⁹ Applications are typically brought by an Originating Motion.

⁵⁰ In addition, if the award is not made in English, the party must supply a duly certified translation of the award into English.

⁵¹ (1997) 9 NWLR (Part 520) 224.

⁵² In assessing of the period of time for commencing enforcing proceedings under the Lagos State Arbitration Law, the period between the commencement of the arbitration and the date of the award is excluded. The Bill to repeal and re-enact the ACA contains a similar provision.

⁵³ *Sifax Nigeria Limited v. Migfo Nigeria Limited* (2018) 9 NWLR (Part 1623) 138.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

Annulment proceedings do not automatically suspend the exercise of the right to enforce an award. It is customary for the courts to consolidate annulment and enforcement proceedings that are issued or that exist simultaneously.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Under the ACA and the Lagos State Arbitration Law, the annulment of a foreign award at its seat constitutes a ground for refusal of recognition or enforcement of that award in Nigeria.⁵⁴

5.8 Are foreign awards readily enforceable in practice?

Foreign awards are readily enforceable in Nigeria through the following means:

- under Section 51 of the ACA, which provides for the recognition and enforcement of international awards;
- under the provisions of the New York Convention;
- under the Convention on the Settlement of Investment Disputes between States and Nationals of other States; and
- by a common law action on the award.

Enforcement proceedings in Nigeria can be very time consuming. Award debtors typically appeal against decisions to enforce an award. The Bill to repeal and re-enact the ACA attempts to mitigate this by prescribing time limits for arbitration related applications. The idea has also been mooted to confer the Court of Appeal with original jurisdiction in enforcement proceedings.⁵⁵

6. Funding Arrangements

6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

The common law torts of maintenance and champerty still operate in Nigeria. As a result, funding agreements that include the provision of funding an arbitration in return for a proportion of any recoveries are potentially, although not necessarily, champertous.⁵⁶

This rule has been relaxed in the context of the legal profession. The Rules of Professional Conduct for Legal Practitioners (the 'RPC') allows contingent fee agreements.⁵⁷ Whilst the RPC precludes a lawyer from entering into an agreement to pay for or bear the expenses of his client's litigation, the lawyer may, in good faith, advance expenses as a matter of convenience and subject to reimbursement.⁵⁸

7. Is there likely to be any significant reform of the arbitration law in the near future?

Yes. At the time of writing, the Senate of the Federal Republic of Nigeria has passed a comprehensive Bill to repeal and re-enact the ACA. This Bill is awaiting third reading at the House of Representatives. The Bill

⁵⁴ Section 52(2)(a)(viii) of the ACA.

⁵⁵ Conferring original jurisdiction on the Constitution is a long-term solution that will require a Constitutional Amendment.

⁵⁶ It must be shown that the funding party is wrongfully intermeddling to encourage the proceedings, in order to be given a share in the proceeds. *Egbor v. Ogbemor* (2015) LPELR-24902(CA).

⁵⁷ RPC, Rule 50.

⁵⁸ RPC, Rule 51.

is modelled on the 2006 version of the UNCITRAL Model Law and seeks to introduce a number of provisions designed to make Nigeria a more attractive arbitral seat. These include (but are not limited to):

- A more progressive definition of “writing” to include a record of the arbitration agreement in any form.
- The introduction of Emergency Arbitration Provisions.
- The introduction of provisions concerning interim measures and preliminary orders.
- The introduction of provisions on joinder and consolidation.
- The introduction of the concept of third party funding.
- The introduction of an Award Review Tribunal if the parties do not wish to bring challenge proceedings before the Courts.
- The introduction of immunity provisions.
- The right of parties to be assisted or represented by any person of their choice.
- The introduction of time limits in arbitration related matters before the Courts.

NORWAY

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

KAARE ANDREAS SHETELIG AND TOMMY THOMSEN
OF **WIKBORG REIN**

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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS

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6. Ethics ●

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Most disputes in Norway are resolved before the ordinary courts. Nonetheless, arbitration plays an important role in the country's dispute resolution system. It is of importance in large and complex cases and is often used in the oil and gas sector, offshore and onshore construction and the shipbuilding and maritime sector. Arbitration is often chosen as the dispute resolution mechanism in contracts because of the possibility to set a panel of arbitrators with the desired professional background.

Key places of arbitration in the jurisdiction	Oslo
Civil law/common law environment?	Norway is primarily a civil law jurisdiction, but generally has more common law features than many other civil law countries. As Norway is a member of the European Economic Area (EEA), Norwegian laws are substantially influenced by regulation from the European Union, including (but not limited to), for instance, competition law.
Confidentiality of arbitrations?	If no agreement regarding confidentiality exists, the arbitral proceedings and the award are as a starting point not confidential. The parties are, however, free to agree on confidentiality arrangements for the dispute which has materialized. It is commonly presumed that the courts may accept an agreement on confidentiality in the arbitration clause as well.
Requirement to retain (local) counsel?	There is no requirement to retain (local) counsel.
Ability to present party employee witness testimony?	The parties may present witness testimony from employees of a party.
Ability to hold meetings and/or hearings outside of the seat?	Although the seat of arbitration is Norway, there are no restrictions to conduct meetings or hearings outside of Norway as part of the arbitral proceedings.
Availability of interest as a remedy?	The arbitral tribunal may award interest in accordance with the law applicable to the dispute.
Ability to claim for reasonable costs incurred for the arbitration?	The parties are jointly liable for the tribunal's costs. The arbitral tribunal may order security for its own costs, but not for the parties' costs. The arbitral tribunal may order a party to pay the other party's costs to the extent it deems appropriate.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Conditional fee is permitted in Norway. Contingency fees for attorneys are permitted only to a limited extent. The Code of Ethics for Lawyers contains a general prohibition against percentage share fees; a fee based on a share of the outcome or subject matter of the action is not permitted, while non-excessive success fees are accepted.
Party to the New York Convention?	Yes

Other key points to note	φ
WJP Civil Justice score (2017-2018)	Norway's Civil Justice score is 0.89 and ranks as number 2.

ARBITRATION PRACTITIONER SUMMARY

In Norway, ad hoc arbitral tribunals are, by far, the most commonly used. In cases of institutional arbitration, the parties often opt for the SCC or ICC rules. The Oslo Chamber of Commerce has an institute for arbitration and alternative dispute resolution, which recently gained some attraction. The status of international arbitration in Norway has remained mostly unchanged in recent years. With the international trend of an increasing number of cross-border contractual relationships and the increased costs associated with the large arbitration institutions, the number of international arbitrations in Norway may increase in the years ahead.

Date of arbitration law?	The Arbitration Act 2004 was enacted on 14 May 2004 and governs arbitration seated in Norway.
UNCITRAL Model Law? If so, any key changes thereto?	The Arbitration Act is based on the UNCITRAL Model Law with some adjustments. The Arbitration Act governs both international and domestic arbitration.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	There are no specialised courts in Norway handling arbitration-related matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Norwegian courts may decide on interim measures even though the dispute is governed by an arbitration clause.
Courts' attitude towards the competence-competence principle?	The tribunal has competence to decide on its own jurisdiction and any objections to the existence or validity of the arbitration agreement. In case the tribunal renders a decision on jurisdiction before the final award, that decision may be brought before the ordinary courts
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The Arbitration Act upholds the pro-enforcement bias, as set out in the New York Convention. Enforcement of the award may be refused on the same grounds as set out in the New York Convention which essentially are the same grounds that would render an award invalid. In addition, enforcement may be refused if the award is not yet binding on the parties or the award has been overturned by a court in the state where the award was rendered.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	In case legal action is taken before the ordinary courts regarding the validity of an arbitral award, Norwegian courts have a discretionary power to stay enforcement of the award. In practice, the courts will evaluate the allegations and submissions regarding the invalidity of the award when assessing whether staying enforcement is appropriate.
Other key points to note?	The main rule in Norway is that the parties jointly nominate all three arbitrators. If the parties cannot agree on a panel, the parties will choose one arbitrator each, and the two chosen arbitrators then appoint the third arbitrator who acts as the chairperson of the arbitration

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model law?

The arbitration law is based on the UNCITRAL Model Law of 1985 with some adjustments. The subsequent amendments to the UNCITRAL Model Law, which were adopted in 2006, have however not been implemented.

1.1.1 If yes, what key modifications if any have been made to it?

Contrary to the Model Law, the Arbitration Act applies to both domestic and international disputes. Another modification that has been made in relation to the UNCITRAL Model Law is that in case the parties to a dispute failed to designate the applicable law, the tribunal may apply Norwegian conflict of laws rules. Where the Arbitration Act deviates from the provisions of the UNCITRAL Model Law, the parties are free to agree upon alternative solutions which are in line with the Model Law.

1.2 When was the arbitration law last revised?

The Arbitration Act has not been revised since it came into force on 1 January 2005.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

The main rule is that the tribunal shall apply the rules of law chosen by the parties. In the absence of such agreement, the tribunal will apply the conflict of laws rules, set out in Norwegian private international law. These rules generally are not provided for in statutes but follow from case law. The rules in Norwegian private international law are influenced by the rules governing the choice of law issued by the European Union (*e.g.*, the Rome Regulations). As a result, Norwegian private international law includes mandatory rules of law to protect certain interest, for example, consumers.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

The parties may enter into an arbitration agreement by producing a written arbitration agreement, either in a separate document or within the agreement from which the dispute arises. Although not recommended, an arbitration agreement may also in principle be made orally. An arbitration agreement may be incorporated by reference to one of the parties' general terms and conditions, provided that the other party has accepted them explicitly or implicitly.

The doctrine of separability is codified in Section 18 of the Arbitration Act. Arbitration agreements are regarded as separate agreements, independent from other parts of the contract. An arbitral tribunal may declare the contract void without any automatic influence on the arbitration agreement even though the arbitration agreement is included in the contract.

2.3 What are formal requirements (if any) for an enforceable arbitration agreement?

There are no formal requirements for an arbitration agreement to be enforceable under Norwegian law. The party submitting a dispute to arbitration must nevertheless be able to substantiate that arbitration has been agreed between the parties. The dispute must be within the parties' contractual autonomy.

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

A non-signatory party to the contract containing an arbitration clause cannot as a starting point be bound by it. A party may bring a non-signatory to the proceedings if the arbitration agreement so prescribes or by consent from both parties. Even if a party is not a party to the arbitration agreement, that party, based on the circumstances, may be held to have impliedly consented to be bound by the contract. In addition, and unless otherwise prescribed, the arbitration agreement will follow the assignment of the main contract.

2.5 Are there restrictions to arbitrability?

In general, the parties may subject a dispute to arbitration if they are free to settle the matter through an agreement. Parties may not arbitrate a matter of criminal law or of public administrative law. In matters regarding family law, the contractual autonomy is more limited. You cannot arbitrate questions like divorce, parenthood and child custody, but you may arbitrate economical settlement following a divorce. The same applies to IP rights. You cannot arbitrate the validity of IP rights, but you may arbitrate claim for compensation for alleged IP infringements. The contractual autonomy regarding labour disputes is also limited compared to Norwegian civil law. There is, however, a possibility to submit a dispute concerning dismissal of a company's chief executive to arbitration.

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

If there is a valid arbitration agreement covering the dispute – regardless of the seat of the arbitration – the courts shall dismiss the lawsuit that is subject to arbitration, provided that a party raises the existence of the arbitration agreement at the latest when addressing the merits of the case. Conversely, where a party fails to request dismissal in due time, the court will have jurisdiction to resolve the dispute notwithstanding the valid arbitration clause. Where the arbitral proceedings have been initiated and a party requests the dismissal of the case, the court will continue the proceedings only if it finds the arbitration agreement invalid or if the arbitration cannot be conducted for other reasons.

Even though the dispute is subject to arbitration and without depriving the arbitral tribunal of any competence in these respects, the courts have power to grant preliminary or interim relief. The ordinary courts may also assist in securing evidence.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

The courts will not stay proceedings because arbitrators enjoin the parties to do so. However, it is within the power of the parties to invoke before the courts that legal action before the ordinary courts shall be dismissed because the case is subject to arbitration.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction?

It follows from the Arbitration Act that the courts shall only have jurisdiction over disputes subject to arbitration to the extent provided by the Arbitration Act. Thus, the courts may not intervene in arbitrations seated outside of Norway.

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

There are no provisions in the Arbitration Act regarding qualifications or other requirements for legal representatives. Parties may, but are not obliged to, retain attorneys or other counsel to act on their behalf during the proceedings.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example, does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

The Arbitration Act requires arbitrators to be independent and impartial. The Arbitration Act requires the arbitrators to *ex officio* disclose any circumstances which may be likely to give rise to doubts as to the arbitrators' impartiality or independence.

A challenge of an arbitrator shall, unless otherwise agreed by the parties, be submitted to the arbitral tribunal. The arbitral tribunal decides on the challenge.

In case a challenge is not successful, the challenging party may, unless otherwise agreed, bring the issue before the courts within one month. The court shall determine the issue by way of an interlocutory order. The order cannot be appealed. The fact that an arbitrator has failed to disclose relevant information may be considered relevant, but not decisive, by the court. Such challenge may not subsequently constitute a basis for invalidity or an objection in respect of recognition and enforcement of the award.

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

If the arbitral tribunal cannot be constituted pursuant to the agreement or the parties fail to appoint the arbitrators, each of the parties may request that the courts make the outstanding arbitrator appointment or appointments.

4.4 Do courts have the power to issue interim measures in connection with arbitrations?

Courts have the power to issue interim measures in connection with the arbitration.

4.4.1 If so, are they willing to consider *ex parte* requests?

The courts may consider requests from the parties.

4.5 Other than arbitrator's duty to be independent and impartial, does the law regulate the conduct of the arbitration?

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

Arbitral proceedings are not subject to confidentiality, unless the parties agree otherwise when the dispute has materialized. The parties may enter into an agreement on confidentiality when the dispute has materialized. It is commonly presumed that the courts may accept an agreement on confidentiality in the arbitration clause as well.

4.5.2 Does it regulate the length of arbitration proceedings?

The Arbitration Act has no regulations on the length of arbitration proceedings. Please note that subject to the arbitration agreement fundamental rules of legal proceedings (e.g. fair trial requirement pursuant to article 6 of the European Convention on Human Rights as well as other rules pursuant to the Norwegian Civil Procedure Act considered to be of fundamental nature) apply which indirectly offer tools against a party (or a tribunal) that are blocking the process.

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

As regards the place of arbitration, this is determined by the parties in the arbitration agreement. Failing an agreement on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal itself.

Irrespective of the seat of arbitration, the arbitral tribunal may, unless otherwise agreed by the parties, meet wherever the tribunal considers appropriate to deliberate among its members, to examine witnesses, experts or parties, or to assess evidence.

4.5.4 Does it allow for arbitrator to issue interim measures? In the affirmative, under what conditions?

Unless the parties agree otherwise, the arbitral tribunal may, upon a party's request, order any party to take such interim measures as the arbitral tribunal considers necessary based on the subject matter of the dispute. There are no specific limitations as to the nature of the measure. An interim measure imposed by the arbitral tribunal is however not enforceable. Furthermore, the arbitral tribunal is empowered to order security for potential liability which the relief may cause.

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?

The parties may submit any evidence they wish. Unless the parties agree otherwise, the arbitral tribunal may reject evidence that obviously has no significance for the case. Moreover, the arbitral tribunal may limit the production of evidence based on proportionality. In addition, as the arbitral tribunal shall ensure fundamental rules of legal proceedings, the tribunal may rely on principles and rules in the general Norwegian law if it deems appropriate in the case at hand.

4.5.6 Does it make it mandatory to hold a hearing?

The Arbitration Act does not make it mandatory to hold an oral hearing. The arbitral tribunal can decide whether the proceedings are to be oral or written, but each party is entitled to request an oral hearing during the proceedings. Oral hearing is commonly used in arbitrations in Norway.

4.5.7 Does it prescribe principles governing the awarding of interest?

The arbitral tribunal may award interest in accordance with the law applicable to the dispute. If the dispute involves a monetary claim, the prevailing party is entitled to penalty interest pursuant to the Interest on Late Payment Act. The penalty interest rate is currently 8.5% as of 1 January 2018 and is subject to adjustment twice a year. This applies when the dispute is governed by Norwegian law. If the dispute is governed by another law, interest must be based on this law.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

Unless otherwise agreed between the parties, the arbitral tribunal determines its own remuneration. The parties are in principle jointly liable for the tribunal's costs, unless the tribunal deems that the losing party should cover all the costs related to the arbitral tribunal. According to the Arbitration Act, the tribunal may order a party to pay the other party's costs to the extent it deems appropriate. The main rule is that the party who has lost the dispute will be ordered to cover the other party's legal costs and the tribunal's remuneration and costs. In case a party only partially has succeeded, the tribunal may determine that the party is only to be awarded partial costs.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

Arbitrators do not benefit from immunity to civil liability. Arbitrators must perform their tasks pursuant to their appointment agreements. The agreements are subject to the general principles of contract law; thus, arbitrators may be held liable for breach of contract.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

On a general note, there are no concerns regarding criminal liability for any of the participants. However, in extreme circumstances, criminal liability cannot be excluded in cases of, for instance, fraud and corruption.

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

The parties may waive the requirement for an award to provide reasons.

5.2 Can parties waive the right to seek the annulment of the award? If yes, under what conditions?

The parties may not waive the right to seek the annulment of the award. This is based on securing the parties a minimum of legal protection during the arbitration proceedings.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

The arbitral award shall be put in writing and shall be signed by all arbitrators. The award must specify the date and place where it has been rendered. Furthermore, the arbitral tribunal shall send one signed copy of the arbitral award to the District Court for filing in the archives of the Court.

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

Parties may, at any point, agree to appeal an arbitral award to another arbitral tribunal, but not to the national courts. This opportunity to appeal has, however, hardly ever been used.

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

Both Norwegian and foreign awards are recognisable and enforceable in Norway through the ordinary enforcement authorities. The enforcement request must be sent to the local enforcement authorities or to the local district court, depending on whether the arbitral award is Norwegian or foreign. There are no particular time-limits, however the general statute of limitation applies. A party must provide the original arbitral award or a certified copy thereof. Unless the arbitral award has been made in the Norwegian, Swedish, Danish or English language, the party shall also provide a certified translation hereof.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

If a legal action for setting aside an arbitral award has been brought before a court, the court may postpone the ruling on recognition or enforcement if it deems such action to be appropriate.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

A foreign award that has been annulled at its seat will not be enforced in Norway.

5.8 Are foreign awards readily enforceable in practice?

A foreign award shall be recognized and shall be enforceable in Norway regardless of the seat of arbitration.

6. Funding arrangements

6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

There are no restrictions on third-party funding, while there are some restrictions to contingency fees for attorneys (see point a. below).

6.2 If so, what is the practical and/or legal impact of such restrictions?

Conditional fee is permitted in Norway. Contingency fees for attorneys are, however, permitted only to a limited degree. The Code of Ethics for Lawyers contains a general prohibition against percentage share fees; a fee based on a share of the outcome or subject matter of the action is not permitted, while non-excessive success fees are accepted.

7. Is there likely to be any significant reform of the arbitration law in the near future?

The legislator has not indicated any reform of the Arbitration Act.

PAKISTAN

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

UMER AKRAM CHAUDHRY, ANEESA AGHA AND ASAD LADHA
OF RAJA MOHAMMED AKRAM & CO. (RMA&CO)

RMA&CO.
RAJA MOHAMMED AKRAM & CO.
ADVOCATES AND LEGAL CONSULTANTS

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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS

1. Law ●
 - a. Framework ●
 - b. Adherence to international treaties ●
 - c. Limited court intervention ●
 - d. Arbitrator immunity from civil liability ●
2. Judiciary ●
3. Legal expertise ●
4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

In Pakistan, the 1940 Arbitration Act ("**Arbitration Act**"), a colonial era legislation, is the main law governing the arbitration agreements, procedures, and awards. Pakistan has recently implemented the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 2011 as the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act (the "**New York Convention Act**"). The law and practice of arbitration in Pakistan is in a state of flux, and various judges, lawyers, and academics have strongly suggested updating the arbitration laws and procedures prevailing in the country. At present, there are no major centres/institutions for arbitration in Pakistan.

Key places of arbitration in the jurisdiction	Lahore, Karachi, and Islamabad.
Civil law / Common law environment?	Common law jurisdiction.
Confidentiality of arbitrations?	Not expressly prescribed under the Arbitration Act; once the arbitral award is filed in court for enforcement, the confidentiality of the award is lost because court proceedings are open to the public.
Requirement to retain (local) counsel?	Not expressly provided.
Ability to present party employee witness testimony?	Not restricted.
Ability to hold meetings and/or hearings outside of the seat?	Permitted, unless the parties agreed otherwise.
Availability of interest as a remedy?	Section 29 of the Arbitration Act provides that where and insofar as an award is for the payment of the money, the court may in the decree order interest, from the date of the decree at such rate as the court deems reasonable, to be paid on the principal sum as adjusted by the award.
Ability to claim for reasonable costs incurred for the arbitration?	Permitted.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Contingency fee arrangement is not permitted. Third party funding is not <i>per se</i> illegal and permitted where the funding arrangement is not against public policy, lead to vexatious litigation, or extortionate.
Party to the New York Convention?	Yes.
Other key points to note	ϕ
WJP Civil Justice score (2017-2018)	0.39

ARBITRATION PRACTITIONER SUMMARY

Date of arbitration law?	The Arbitration Act was introduced in 11 March 1940. The New York Convention Act was promulgated on 15 July 2011 (and applies to foreign arbitral awards issued after 14 July 2005).
UNCITRAL Model Law? If so, any key changes thereto?	No.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Jurisdiction under the Arbitration Act rests with the ordinary civil courts. Jurisdiction under the New York Convention Act is with the High Courts, which are constitutional courts one tier below the Supreme Court (which is the highest court).
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes.
Courts' attitude towards the competence-competence principle?	The courts generally accept that the arbitral tribunal may decide on its own jurisdiction, but there is no specific legislation to this effect.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	No. The grounds for annulment of awards under the Arbitration Act are wide and include questions relating to the misconduct of the arbitral proceedings and the legality of the award apparent on the face of the award.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The courts in Pakistan have not addressed this issue.
Other key points to note?	φ

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law?

Pakistan's Arbitration Act is not based on the UNCITRAL Model Law. The Arbitration Act is a colonial era law and provides for conducting arbitration through the following three mechanisms:

- (a) Arbitrations without court intervention (Chapter II, Sections 3-19);
- (b) Arbitration with intervention of the court where there is no suit pending (Chapter III, Section 20); and
- (c) Arbitration in suits pending before the court (Chapter IV, Sections 21-25).

The Arbitration Act is the general legislation that governs, among other things, the interpretation of arbitration agreements, appointment and removal of arbitrators, powers of the courts in relation to arbitration proceedings, and setting aside and enforcement of arbitral awards. The Arbitration Act does not apply to foreign awards.

Apart from the Arbitration Act, the 1958 New York Convention is incorporated into the laws of Pakistan by way of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 ("**New York Convention Act**"). The New York Convention Act applies the Convention to the recognition and enforcement of foreign awards (i.e., awards issued in the States that are party to the New York Convention) in Pakistan.

The New York Convention Act and the Arbitration Act follow different enforcement procedures. The Arbitration Act empowers the civil courts, which are the courts of general first instance jurisdiction, to recognize and enforce arbitral awards. On the other hand, Section 3 of the New York Convention Act provides the exclusive jurisdiction to the High Courts (which are constitutional courts and one tier below the Supreme Court, the court of ultimate jurisdiction) to adjudicate and settle matters arising from the New York Convention Act. Further, Section 7 of the New York Convention Act limits the grounds on which recognition and enforcement of a foreign award can be refused and states that "*the recognition and enforcement of a foreign arbitral award shall not be refused except in accordance with Article V of the Convention.*"

The International Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1966 (the "**ICSID Convention**") has also been implemented in Pakistan through the Arbitration (International Investment Disputes) Act, 2011 ("**ICSID Convention Act**").

1.2 When was the arbitration law last revisited?

The arbitration law was last revisited in 2011, when the New York Convention was incorporated into the law of Pakistan through the New York Convention Act.

The last major amendment to the Arbitration Act was promulgated in 1981 and requires arbitrators or umpires to state the reasons of their awards in sufficient detail so as to enable a court to consider any questions of law arising out of the award (Section 26-A of the Arbitration Act).

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

Pakistani courts have cited with approval the three-stage enquiry formulated in the English case of *Sulamerica v Ensea* [2012] EWCA Civ 638 to determine the law governing the arbitration agreement. Pursuant to this three-step test, the courts must determine: first, whether the parties expressly chose the law of the arbitration agreement; second, whether an implied choice by the parties has been made; and, last, in the absence of express or implied choice, the system of law with which the arbitration agreement has the closest and the most real connection (*Abid Associated Agencies v Areva* 2015 MLD 1646).

If there is no express agreement between the parties as to the law governing the arbitration agreement, the courts have held that the law which governs the main agreement shall also govern the arbitration agreement if the arbitration clause is stipulated as a part of the main agreement (*Hitachi Limited v Rupali Polyester* 1998 SCMR 1618).

In the event that the parties have executed a stand-alone arbitration agreement, the courts are likely to follow the three-step inquiry, as set out in *Abid Associated Agencies v Areva* 2015 MLD 1646, to determine the law of arbitration agreement, though there are no cases to this effect.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

The arbitration agreement, even if it is embedded in the main contract, is considered to be separable and severable from the main contract and is not affected by frustration or repudiation of the main contract. Although there is no express statutory provision giving effect to the principle of separability, the Sindh High Court in *Lakhra Power v Karadeniz* 2014 CLD 337 held that the principle pursuant to which an arbitration agreement clause stipulated in a contract is deemed to be a separate agreement and remains operative and unaffected by any factor that vitiates the main contract is “well settled in Pakistan and of long standing”.

However, the Supreme Court of Pakistan’s judgment in *HUBCO v WAPDA* PLD 2000 SC 841 has cast some doubt on the principle of separability. In this case, the Supreme Court of Pakistan held that disputes relating to corruption and criminal acts, relating to the very existence of a valid contract, are not disputes under a contract and cannot be referred to arbitration according to public policy. The Supreme Court’s decision has been criticized by international arbitration practitioners.¹ Since this judgment has not been expressly overruled, it leaves some doubt on the status of the principle of separability under the law of Pakistan.

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

Section 2(a) of the Arbitration Act defines the arbitration agreement as “a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not”. Thus, the arbitration agreement must be in writing and must refer either to present or future disputes to arbitration.

The law does not prescribe any particular form for an arbitration agreement. For example, an arbitration agreement may be a clause in a contract between the parties or it may be a separate agreement to refer an existing dispute to arbitration. It is more common for the arbitration agreement to be stated as a clause in an underlying contract between the parties.

¹ See, e.g., Toby Landau, *International Arbitration and Pakistan’s State Responsibility: Redefining the Role of the Court*, available at <http://www.supremecourt.gov.pk/ijc/Articles/8/3.pdf>.

The New York Convention, as implemented in Pakistan, also requires that the arbitration agreement shall be in writing. Such writing can take various forms, including *"an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."*

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

There are no reported cases in which the obligations of third parties to the contract (i.e., non-signatories) in relation to the arbitration agreement has been discussed. Notwithstanding the absence of clarity, the courts may be persuaded by arguments based on common law doctrines, such as agency, assignment, etc., for binding third parties to arbitration agreements.

2.5 Are there restrictions to arbitrability?

Pakistani courts have held that criminal matters cannot be referred to arbitration and that the Arbitration Act applies only to civil disputes (*Ali Muhammad v Bashir Ahmad* 1991 SCMR 1928). In *HUBCO v WAPDA* PLD 2000 SC 841, the Supreme Court found that the agreements were *prima facie* obtained through fraud and bribery, and, because they were marred by corruption and criminal actions, could not be referred to arbitration. The Supreme Court held that:

"The allegations of corruption in support of which the... circumstances do provide prima facie basis for further probe into [the] matter judicially and, if proved, would render these documents as void, therefore, we are of the considered view that according to the public policy such matters, which require finding about alleged criminality, are not referable to Arbitration."

Further, the courts have held that proceedings in relation to minority oppression under the 1984 Companies Ordinance ("**Companies Ordinance**")² cannot be stayed in light of an arbitration agreement (*WAPDA v Kot Addu Power Company Ltd* 2002 MLD 829). In *ORIX Leasing Pakistan v Colony Thal Textiles Ltd* PLD 1997 Lahore 443, the Lahore High Court held that the winding-up of a company cannot be the subject-matter of arbitration proceedings and stated that *"by its very nature the winding-up is a matter which has to be decided by [the] Court in exercise of its special statutory jurisdiction and cannot be subject matter of arbitration nor can order of winding-up be passed by [the] arbitrator"*. These decisions relied on the exclusive jurisdiction of the courts to decide the matters in relation to minority oppression and winding-up of a company and to grant relief under the relevant provisions of the Companies Ordinance (or the 2017 Companies Act, which has repealed and replaced the Companies Ordinance).

Although the courts have not developed a clear test of arbitrability, it is most likely that certain disputes would be considered non-arbitrable in line with the jurisprudence in other common law countries (such as India and the United Kingdom), which are persuasive authority for the courts of Pakistan.

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

3.1.1 If the place of arbitration is inside of the jurisdiction?

If the place of arbitration is inside Pakistan, the arbitration is likely to be conducted under the Arbitration Act.

Pursuant to Section 34 of the Arbitration Act, the courts have the discretion to stay litigation if there is a valid arbitration agreement covering the dispute. For a stay to be granted under this provision, a party seeking the stay must apply for the stay *"at any time before filing a written statement [i.e., a statement of defense] or taking any other steps in the proceedings..."* In *Rana Muhammad Ikram v Punjab* 2005 CLC 206, the

² Companies Ordinance, 1984 was the general law applicable to the operation and regulation of companies in Pakistan. The Companies Ordinance, 1984 has been repealed and replaced by the Companies Act, 2017.

Lahore High Court held that the words “or taking any other steps in the proceedings...” mean “steps which are indicative of the intention of a party to the proceedings that the party was not going to raise objection to the jurisdiction of the Court or was not ready to refer the dispute to the Arbitrator or was willing to contest the suit before the learned Court through his act and conduct, express or implied.”

In *Uzin Export Import Enterprises v M Iftikhar & Company Ltd* PLD 1986 Karachi 1, the Sindh High Court endorsed the view that for the stay to be granted under Section 34 of the Arbitration Act, the following conditions must be met:

- (a) The proceedings must have been commenced by a party to an arbitration agreement against any other party to the agreement;
- (b) The legal proceedings sought to be stayed must be in respect of a matter agreed to be referred to arbitration;
- (c) The applicant for a stay must be a party to the legal proceedings and he must, as stated above, have taken no step after appearance in the legal proceedings. The applicant must also satisfy the court that he is (and was at the commencement of the proceedings) ready to properly conduct an arbitration;
- (d) The court must be satisfied that there is not sufficient reason why the matter should not be referred to an arbitration in accordance with the arbitration agreement.

In *K-Electric Limited v Pakistan* PLD 2014 Sindh 504, the Karachi High Court found a sufficient reason for not referring the dispute to arbitration because a constitutional question was directly and substantially in issue in the suit. Inconvenience to the parties to travel and present evidence may also be a sufficient reason for not referring a dispute to arbitration (*Eckhardt & Co v Muhammad Hanif* PLD 1993 SC 42).

3.1.2 If the place of the arbitration is outside of the jurisdiction?

If the place of arbitration is outside Pakistan, the court’s approach may vary depending on whether the governing law of the arbitration agreement is the law of Pakistan or a foreign law.

Where the governing law of the arbitration agreement is that of a country outside Pakistan and the place of arbitration is also outside Pakistan, the courts have held that the litigation must be stayed under Section 4 of the New York Convention Act (*Far Eastern Impex v Quest International* 2009 CLD 153).

The position is not entirely clear in cases where the arbitration agreement is governed by the laws of Pakistan and the place of arbitration is outside Pakistan. Before the promulgation of the New York Convention Act, courts had exercised their jurisdiction in relation to a stay of proceedings on a discretionary basis even where the place of arbitration was outside Pakistan under Section 34 of the Arbitration Act (*Uzin Export v M. Iftikhar* 1993 SCMR 866). Since certain provisions of the Arbitration Act are held to be applicable where the arbitration agreement is governed by the laws of Pakistan, the courts may apply Section 34 of the Arbitration Act to such agreements. This position is yet to be clarified by the courts of Pakistan.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

There are no reported cases where the courts have had to deal with injunctions by arbitrators to stay litigation proceedings. There are no legislative provisions empowering the arbitrators to issue injunctions to stay court proceedings. Despite the lack of clarity on this issue, it is likely that the courts would hold that the arbitrators do not have power to issue injunctions to stay court proceedings.

3.3 On what ground(s) can the courts intervene in arbitration seated outside of the jurisdiction? (Relates to anti-suit injunction but not only)

Courts in Pakistan have, at times, interfered in arbitration proceedings seated outside Pakistan. In *SGS v Pakistan* 2002 SCMR 1694, the Supreme Court of Pakistan restrained a party from taking any step, action, or measure to pursue, participate in or continue to pursue or participate in an ICSID arbitration. This judgment was based on the ground, amongst others, that the disputes between the parties had been referred to arbitration in Pakistan under the Arbitration Act.

In another case, a party to the litigation pending before the Supreme Court of Pakistan initiated two parallel proceedings before the ICC and the ICSID. The Supreme Court ordered that party to make a request to the ICC and the ICSID not to take further steps in the proceeding and to extend the period for the nomination of the arbitrator so that the Supreme Court of Pakistan, which was adjudicating the matter regarding the validity of the agreement between the parties, may dispose of that matter finally. The Supreme Court did not make specific orders in relation to the arbitral proceedings (*Maulana Abdul Haq Baloch v Government of Pakistan (Reko Diq case)* 2012 SCMR 402).

4. The Conduct of the Proceedings

4.1 Can parties retain outside counsel or be self-represented?

Parties can retain outside counsel or be self-represented. However, as is the case in litigation, the parties usually retain outside counsel for arbitrations rather than be self-represented.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify his outcome?

Pursuant to Section 11 of the Arbitration Act, the courts can remove an arbitrator where the arbitrator fails to use all reasonable dispatch in proceeding with the arbitration and making the arbitral award or where the arbitrator has misconducting himself or the proceedings (which include bias and partiality). The courts have held that allegations of bias, whether actual or possible, must be based on clear and cogent evidence, which has to be judged from a reasonable point of view and not on mere apprehension of any whimsical person (*Pak UK Association v Jordan* 2017 CLC 599).

In some cases, the courts have held that the mere fact that an officer or director of one party has been expressly chosen as arbitrator in the arbitration agreement is not a ground in and of itself to refer to the parties to arbitration (*Surriya Rehman v Siemens Pakistan* PLD 2011 Karachi 571). In other cases, the courts have disapproved of nomination by a party of its auditor as an arbitrator without disclosure of this fact to the other party (*Bata Shoe Co v Pakistan* PLD 1970 Karachi 784).

The Arbitration Act does not include any provisions requiring the arbitrators to make any disclosures to parties in relation to the conflicts of interest at the time of appointment.

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

Courts can intervene to assist in the constitution of the arbitral tribunal under Section 8 of the Arbitration Act in the following cases:

- (a) Where an arbitration agreement provides for arbitration by one or more arbitrators to be appointed by consent of parties, and all the parties do not, after disputes have arisen, concur with the appointment(s);

- (b) Where an appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be filled, and the parties or the arbitrators, as the case may be, do not fill a vacancy;
- (c) Where the parties or arbitrators are required to appoint an umpire and do not appoint him.

Before seeking court intervention, a party must serve a written notice to the other parties or the arbitrators, as the case may be, to concur in the appointment or appointments or in filling the vacancy. An application to the court can be made after fifteen days following service of this notice. The court may appoint the arbitrator(s) after giving the other party(ies) an opportunity to be heard. Section 8 of the Arbitration Act does not specify the timelines in which the court may appoint the arbitrator(s).

4.4 Do Courts have the power to issue interim measures in connection with arbitrations?

Pursuant to Section 41 of the Arbitration Act, courts have the power to issue interim measures. Courts in which the proceedings are pending are held to be competent and vested with the jurisdiction to pass interim orders as could be passed in a regular civil suit in the form of a temporary injunction or otherwise (*SGS v Pakistan* 2002 SCMR 1694).

4.4.1 If so, are they willing to consider *ex parte* requests?

Courts are willing to consider *ex parte* requests and issue injunctions on an *ex parte* basis under Section 41 of the Arbitration Act read with Order 39 Rules 1 and 2 of the Civil Procedure Code, 1908.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

4.5.1 Does it provide for the confidentiality of the arbitration proceedings?

The law of Pakistan does not provide for confidentiality of arbitration proceedings.

4.5.2 Does it regulate the length of arbitration proceedings?

Section 3 of the Arbitration Act provides that an arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule of the Arbitration Act. The First Schedule requires that the arbitrators shall make their award "*within four months after entering on reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the court may allow*".

The failure to make an award within the statutory period does not operate as a revocation of an arbitrator's authority. Pursuant to Section 28 of the Arbitration Act, the court has the discretion to extend the time for issuing the award from time to time as it thinks fit, irrespective of whether the time to issue the award has expired or not and whether the award has been issued or not.

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

The Arbitration Act does not state any express requirements in relation to the place where hearings and/or meetings may be held.

4.5.4 Does it allow for arbitrators to issue interim measures?

The Arbitration Act does not empower the arbitrator to issue interim measures.

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence?

The 1984 Qanun-e-Shahadat Order, which sets out the law of evidence in Pakistan, does not apply to arbitration proceedings (Section 1(2) of the 1984 Qanun-e-Shahadat Order).

The Arbitration Act also does not regulate the arbitrators' right to admit/exclude evidence in any detail. The First Schedule of the Arbitration Act provides that the parties shall be deemed to have agreed to:

- (a) Submit themselves to be examined by the arbitrator(s) on oath or affirmation in relation to the matters in the arbitration;
- (b) Produce before the arbitrator(s) all books, documents, papers, accounts, writings, and documents within their power and possession; and
- (c) Do all other things which the arbitrator(s) may require during the arbitration proceedings (within the limits of the rules of natural justice).

Pursuant to Section 43 of the Arbitration Act, the courts are empowered to issue a summons to parties or witnesses whenever the arbitrators desire to examine them. A summons may be issued for the examination of a witness or production of documents. Failure to comply with the summons can result in the same penalties and punishments that would result as if the offence was committed against the courts.

4.5.6 Does it make it mandatory to hold a hearing?

There is no explicit provision in the Arbitration Act that mandates holding a hearing. However, the principles of natural justice (including the right to be heard) apply to an arbitration by virtue of which a hearing would be conducted, unless waived by the parties.

4.5.7 Does it prescribe principles governing the awarding of interest?

An arbitrator can award interest on just and equitable grounds even in the absence of a specific contract between the parties (*Pakistan Steel Mills v Mustafa Sons* PLD 2003 SC 301). Further, Section 29 of the Arbitration Act provides that where and insofar as an award is for the payment of the money, the court may, in its decree, order interest, from the date of the decree at such rate as the court deems reasonable, to be paid on the principal sum as adjusted by the award and confirmed in the decree.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

Section 38(3) of the Arbitration Act states that the court may make such orders as it deems reasonable regarding the costs of an arbitration where any question arises about such costs and the award contains no sufficient provision concerning them.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

If an arbitrator has committed some misconduct related to his performance or the proceedings, a party may apply to the court for the removal of the arbitrator under Section 11 of the Arbitration Act.

Courts have held that, as a general principle, no action, and particularly no action of criminal nature, can be initiated against the arbitrators. However, where the arbitrators have misused the property retained by him as security and has overstepped his authority, a party can file a suit for damages (*Haq Nawaz v the State* 2005 YLR 1850).

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

Generally, there are no concerns arising from potential criminal liability for any of the participants in an arbitration proceeding.

The presence of an arbitration agreement, however, does not bar criminal liability of the parties (*M. Aslam Zaheer v. Shah Muhammad* 2003 SCMR 1691). Where the same set of facts gives rise to both civil and criminal liability, a party may press criminal charges against the other party in a separate proceeding.

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Section 26-A of the Arbitration Act states that the arbitrators shall "*state in the award the reasons for the award in sufficient detail to enable the Court to consider any question of law arising out of the award*". This implies that the parties cannot waive the requirement for an award to provide reasons.

In the event that the award does not state the reasons in sufficient detail, Section 26-A(2) of the Arbitration Act provides that the court shall remit the award to the arbitrators and fix the time within which the arbitrator or umpire shall submit the award together with the reasons in sufficient detail.

5.2 Can parties waive the right to seek the annulment of the award?

Parties cannot waive the right to seek the annulment (or setting aside) of the arbitral award. Such a waiver would contravene Section 28 of the Contract Act, 1872, which provides that an agreement in restraint of legal proceedings is void save for, amongst others, a contract to refer disputes to arbitration.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

There are no atypical mandatory requirements that apply to the rendering of a valid arbitral award in Pakistan.

Section 14 of the Arbitration Act provides that an arbitral award must be signed and filed with the competent court. Section 14(1) states that the arbitrators shall sign the award once they have made it and shall give notice in writing to the parties of the making and signing thereof. Under Section 14(2), the arbitrators shall cause the award or a signed copy of it to be filed with the court upon the request of any party to the arbitration agreement or at the direction of the court, and the court shall thereupon give notice to the parties of the filing of the award.

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

A party cannot appeal an arbitral award. Pursuant to the Arbitration Act, the party may seek three remedies against the arbitral award, which are as follows:

- (a) First, the court may order the modification or correction of an award under Section 15 of the Arbitration Act where:
 - (i) Part of the award rendered a decision on matters not referred to arbitration, is separable from the other parts of the award, and does not affect the decision of matters referred to arbitration;
 - (ii) The award is imperfect in form or contains obvious errors, which can be amended without affecting the decision; or
 - (iii) The award contains clerical mistakes or errors arising from an accidental slip or omission.
- (b) Second, the court may remit the award for the reconsideration of the arbitral tribunal under Section 16 of the Arbitration Act where:
 - (i) The award has not rendered a decision on a matter referred to arbitration;
 - (ii) The award has rendered a decision on a matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred;
 - (iii) The award is indefinite and incapable of execution; or

- (iv) The objection to the legality of the award is apparent on the face of the award.
- (c) Third, the award can be set aside under Section 30 of the Arbitration Act on the grounds amongst others, “that an arbitrator has misconducted himself or the proceedings” or that “an arbitral award has been improperly procured or is otherwise invalid”.

The Supreme Court has held that a court while hearing objections against an award in proceedings under Section 30 of the Arbitration Act could not sit as a court of appeal against an award and interfere on the merits (*President of Pakistan v Tasneem Hussain* 2004 SCMR 590).

Lastly, since Pakistan is a party to the New York Convention, the recognition and enforcement of a foreign arbitral award made in a state that is party to the Convention shall not be refused except in accordance with Article V of the New York Convention.

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

Different principles and procedures apply to the recognition and enforcement of local and foreign awards, as discussed below.

For local awards, pursuant to Section 14 of the Arbitration Act, once the award has been made, the arbitrators must sign the award and notify the parties in writing of the making of the award. Further, the arbitrators shall, at the request of any party, cause the award or signed copy of it to be filed in the Civil Court. The Court shall then give notices to the parties of the filing of the award.

Pursuant to Section 17 of the Arbitration Act, the court shall proceed to issue a judgment according to an award provided that the following conditions are satisfied:

- (a) The court sees no cause to remit the award or any of the matters referred to in arbitration for reconsideration to the arbitral tribunal;
- (b) No application for setting aside the arbitral award has been made within 30 days of the service of notice of filing of the award; and
- (c) If any application for setting aside the arbitral award has been made, it has been refused by the court.

After the court pronounces a judgment recognizing the award under Section 17 of the Arbitration Act, a decree shall follow and “*no appeal shall lie from such decree except on the ground that it is in excess of, or no otherwise in accordance with, the award*”.

For foreign awards, pursuant to the New York Convention Act, the High Court has the jurisdiction over matters covered by the New York Convention Act. A party applying for recognition and enforcement of a foreign arbitral award under the New York Convention Act shall, at the time of the application, furnish the following documents to the High Court in accordance with Article IV of the New York Convention:

- (a) Duly authenticated original award or a duly certified copy thereof;
- (b) Original arbitration agreement or a duly certified copy thereof;
- (c) Translation of the documents above, if required.

The New York Convention Act does not state the period of limitation for the enforcement of foreign arbitral awards. Thus, the general limitation period of six (6) years under the laws of Pakistan may apply to an application for recognition and enforcement of a foreign arbitral award. The courts in Pakistan have not yet ruled over this issue.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

The law does not provide for automatic suspension of the exercise of the right to enforce an award.

While there is no automatic suspension of the right to enforce an award, the court may suspend enforcement proceedings as an interim measure.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

There are no reported judgments in Pakistan on this issue. This issue has not been addressed in legislation or academic literature.

5.8 Are foreign awards readily enforceable in practice?

Pakistan's courts have endorsed the pro-enforcement bias of the New York Convention (*Abdullah v CNAN* PLD 2014 Sindh 349). Thus, in theory, foreign arbitral awards are readily enforceable in practice in Pakistan under the New York Convention Act. However, foreign awards have been enforced in Pakistan in limited cases (see, e.g., *FAL Oil Company Ltd v Pakistan State Oil Company Ltd* PLD 2014 Sindh 427).

6. Funding Arrangement

6.1 Are there restrictions to use of contingency or alternative fee arrangements or third party funding at the jurisdiction?

Contingency fee arrangements are not permitted in Pakistan under the 'Canons of Professional Conduct and Etiquette of Advocates'. Fixed or flat fees and hourly billings are permissible and widely used by lawyers in Pakistan.

The agreements to finance legal proceedings are not *per se* illegal in Pakistan (for being against the public policy of Pakistan). In *Muhammad Ramzan v Shamas-ud-din* 2012 CLC 1541, the Lahore High Court held that:

"Every agreement to finance litigation per se is not opposed to public policy rather there may be a case in which it would be in the furtherance of law, equity, justice and necessary to resist oppression... Such agreements are to be carefully scrutinized and when found to be unconscionable, unjust and inequitable, for improper object, against law, oppressive or leading to vexatious litigation, the same should be treated as against the public policy."

In a case where it was found that the agreement to finance litigation was extortionate, the Karachi High Court declared that the agreement was void and unenforceable (*Riaz Ahmed v Dr Amtul Hameed Koser* 1996 CLC 678).

7. Is there likely to be any significant reform of the arbitration law in the near future?

The following significant reforms of the arbitration law are being considered at present:

- (a) The Arbitration and Conciliation Bill, which is based on the UNCITRAL Model Law, was introduced in the Senate of Pakistan in January 2016.

The Arbitration and Conciliation Bill is based on the Arbitration and Conciliation Act, 1996 of India (before the amendments introduced to the Indian legislation in 2015). The Arbitration and Conciliation Bill aims to bring the arbitration law in Pakistan in line with the UNCITRAL Model Law and repeal the Arbitration Act, 1940.

The Arbitration and Conciliation Bill has not seen any significant movement and has been pending in the Senate since January 2016.

- (b) In June 2017, the Law and Justice Division of the Ministry of Law and Justice invited proposal, suggestions, and comments from the legal fraternity and stakeholders in relation to the revamping of the arbitration laws of Pakistan. However, it appears that no legislative proposal has yet been submitted by the Law and Justice Division before the legislature.
- (c) The Trade Dispute Resolution Organization has introduced the Trade Dispute Resolution Bill, which relates to 'Trade Disputes', which are disputes or complaints concerning, relating to, or arising out of the international export and import of goods and services conducted wholly or partially in, or otherwise conducted with, the territory of Pakistan.

The Trade Dispute Resolution Bill is presently being discussed by the National Assembly Standing Committee on Commerce and Textiles.

Apart from the above, several reforms by provincial legislatures are also being suggested in relation to amending the current arbitration law.

The Arbitration Act is usually considered by practitioners and judges as an outdated piece of legislation.³ The main objective of nearly all of the legislative proposals has been to update the arbitration laws of Pakistan in accordance with international best practices.

³ See, Faisal Naqvi, *Arbitration: a lost cause?*, The News (3 May 2017) available at: <https://www.thenews.com.pk/print/202077-Arbitration-a-lost-cause>.

PARAGUAY

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

PABLO DEBUCHY, SIGFRIDO GROSS BROWN AND CAMILA BASILI
OF GROSS BROWN ESTUDIO JURÍDICO



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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS +

1. Law ●
 - a. Framework ●
 - b. Adherence to international treaties ●
 - c. Limited court intervention ●
 - d. Arbitrator immunity from civil liability ●
2. Judiciary ●
3. Legal expertise ●
4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

VERSION: 14 JUNE 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

In Paraguay, the practice of having in-house counsel is mostly reserved to large corporations (e.g., banks, telecommunication companies, etc.). Companies usually work with law firms as well as with their own in-house counsel.

Key places of arbitration in the jurisdiction	Asunción.
Civil law / Common law environment?	Civil law.
Confidentiality of arbitrations?	<p>The Paraguayan Arbitration and Mediation Act (the “Arbitration Act”) does not provide for the confidentiality of arbitration proceedings.</p> <p>Accordingly, parties to arbitration proceedings are not bound by any legal duty to keep the proceedings confidential. Parties have the right to enter into a confidentiality agreement, except for procedures to which the State is a party, which are public.</p> <p>It is an accepted practice that arbitrators must refrain from disclosing any information regarding cases in which they act. This obligation applies to all aspects of an arbitration, including the details of the dispute, the information disclosed by the parties during the proceedings and the deliberations. Arbitrators remain bound by this obligation after the award has been rendered.</p>
Requirement to retain (local) counsel?	There is no specific requirement for a party to hire local counsel to be represented in arbitral proceedings seated in Paraguay.
Ability to present party employee witness testimony?	Parties are entitled to produce this type of evidence based on the broad scope of the parties’ autonomy to determine the rules of procedure pursuant to Article 22 of the Arbitration Act. It falls to the arbitral tribunal to determine the admissibility, relevance and weight of a witness’s testimony, provided that the arbitral tribunal takes into account the applicable arbitration rules, and the parties’ agreement in this respect.
Ability to hold meetings and/or hearings outside of the seat?	<p>Under Article 23 of the Arbitration Act, parties have the right to agree upon the place of arbitration. Absent such an agreement, the arbitral tribunal has the power to determine the place of the arbitration. In doing so, it must take into account the circumstances of the case, including the options that would be most convenient for the parties.</p> <p>In addition, unless otherwise agreed by the parties, the arbitral tribunal may meet at any place it deems appropriate to hold deliberations, to hear witnesses, experts or parties, or to examine goods or documents.</p>
Availability of interest as a remedy?	Paraguayan law does not restrict the right of arbitrators to award interest.

<p>Ability to claim for reasonable costs incurred for the arbitration?</p>	<p>Arbitrators have the power to allocate the costs that the parties have incurred for the arbitration. In general, arbitrators tend to apply the “costs follow the event” principle pursuant to which the losing party shall bear all or part of the costs which the winning party has had to incur for the arbitration. However, arbitrators may also depart from that rule, for example, in deciding that each party shall bear its own costs. Such decision must be reasoned.</p>
<p>Restrictions regarding contingency fee arrangements and/or third-party funding?</p>	<p>Paraguayan law does not restrict the parties’ right to agree upon contingency fee arrangements with their counsel. Nor does it prohibit third-party funding. In fact, the Paraguayan law contains no provision on third-party funding. However, as things currently stand, third-party funding is not a common practice in Paraguay.</p>
<p>Party to the New York Convention?</p>	<p>Paraguay is a party to the New York Convention, pursuant to Law No. 948/1996. Since 1976, it is also a party to the inter-American convention on extraterritorial validity of foreign judgments and arbitral awards (“Panama Convention”). The Panama Convention is a convention of the Organization of American States regulating the enforcement of judgements and arbitral awards in other member states. It has entered into force in Paraguay on 16 August 1985 and aims at facilitating the recognition and enforcement of arbitral awards rendered in a member-State in the other member States.</p>
<p>Other key points to note</p>	<p>∅</p>
<p>WJP Civil Justice score (2017-2018)</p>	<p>∅</p>

ARBITRATION PRACTITIONER SUMMARY

With the enactment of the Arbitration Act in 2002, Paraguay adopted almost entirely the UNCITRAL Model Law of 1985. This allowed a significant increase in the practice of commercial arbitration.

Date of arbitration law?	The Arbitration Act was enacted on 24 April 2002.
UNCITRAL Model Law? If so, any key changes thereto?	<p>The Arbitration Act has adopted almost entirely the UNCITRAL Model Law. The few key deviations are briefly set out below:</p> <ul style="list-style-type: none"> • First, Article 11 of the Arbitration Act deviates from Article 8(2) of the Model Law. Article 11 of the Arbitration Act adds the phrase identified in red at the end of the text of Article 8(2) of the Model Law: <p style="margin-left: 40px;"><i>Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court, provided that the parties, before an award is rendered, desist from the instance.</i></p> <p>Accordingly, arbitrators cannot render an award while a dispute which may fall within the scope of the arbitration agreement is still pending before Paraguayan domestic courts.</p> • Article 19 of the Arbitration Act deviates from Article 16 of the Model Law, by adding that the arbitral tribunals may not render its award while a matter pertaining to the arbitral tribunal's jurisdiction is pending before Paraguayan domestic courts. • Article 40 subsection b) of the Arbitration Act deviates from Article 36 of the Model Law regarding the grounds for refusal of enforcement, by providing that a violation of "international public policy" (as opposed to the reference to the State's public policy in Article 36 of the Model Law) shall give rise to a denial of enforcement. <p>These differences are further developed below.</p>
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Pursuant to Article 9 of the Arbitration Act, the authority responsible for handling arbitration-related matters is the First Instance Court for Civil and Commercial matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	<p>Pursuant to Article 20 of the Arbitration Act, prior to the constitution of the Arbitral Tribunal, interim measures can only be requested from the First Instance Court for Civil and Commercial matters.</p> <p>Interim measures granted by such courts will expire seven days after the constitution of the Arbitral Tribunal.</p>

	Both courts and arbitrators can grant interim measures <i>ex parte</i> .
Courts' attitude towards the competence-competence principle?	<p>Pursuant to Article 19 of the Arbitration Act, the arbitral tribunal has the power to rule upon its own jurisdiction, including in cases where a party has objected to its jurisdiction, based on the existence or validity of the arbitration agreement. For this purpose, arbitration clauses are considered independent from the rest of the contract. The nullity of the contract will not entail ipso jure the nullity of the arbitration clause.</p> <p>However, even though the competence-competence principle is enshrined in Article 19 of the Arbitration Act, arbitral tribunals cannot render an award while an issue of jurisdiction is pending before domestic courts. Although there are not many cases dealing with the competence-competence principle, the general trend shows that domestic courts respect this principle, and decline to exercise jurisdiction in the presence of arbitration clauses.</p>
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Grounds for annulment under the Arbitration Act are substantially the same as those set forth in the New York Convention.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	Pursuant to Article 46 of the Arbitration Act, the annulment of an award at the place of arbitration constitutes a ground for denying enforcement in Paraguay. However, there is no relevant case law where this exception has been applied.
Other key points to note?	Besides Article 248 of the National Constitution of the Republic of Paraguay (the " National Constitution ") -which grants a jurisdictional nature to arbitration- (developed below), all the most salient characteristics of the Paraguayan jurisdiction are detailed in the analytical framework.

JURISDICTION DETAILED ANALYSIS

1. The Legal Framework of the Jurisdiction

1.1 Is the Arbitration Law based in the UNCITRAL Model Law?

The Arbitration Act is an almost verbatim adoption of the UNCITRAL Model Law. Some noteworthy variations which are described below:

First, the Arbitration Act applies to private, national and international arbitration, unlike the Model Law, which only applies to international commercial arbitration. Therefore, Paraguay incorporated this option to modernize its internal arbitration legislation.

Second, unlike the Model Law, which outlines the character of arbitration as commercial, the Arbitration Act applies to civil and commercial disputes, since Paraguayan private law has unified civil and commercial obligations in its current Civil and Commercial Code.

Third, Article 11 of the Arbitration Act deviates from Article 8(2) of the Model Law. Indeed, Article 8(2) of the Model Law provides that:

Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Article 11 of the Arbitration Act adds the following phrase at the end of that text: *"provided that the parties, before an award is rendered, desist from the instance."* Accordingly, arbitrators cannot render an award if a matter falling under the scope of the arbitration agreement is still pending before Paraguayan domestic courts.

Fourth, the most significant deviation from the Model Law is found at Article 19 of the Arbitration Act. While Article 16 of the Model Law authorizes arbitral tribunals to render an award while a jurisdictional matter is pending before ordinary courts, Article 19 of the Arbitration Act expressly limits that power. Pursuant to that provision, and in line with Article 11 referred above, arbitral tribunals may continue the arbitral proceedings, but may not render an award while a matter pertaining to the arbitral tribunal's jurisdiction is pending before domestic courts.

Fifth, the time limit to challenge an arbitrator under Paraguayan law is shorter than that under the Model Law. Although the procedure for disqualification under the Arbitration Act is based on the Model Law, the time limit to challenge an arbitrator before the Paraguayan judge has been reduced from 30 to 15 days. Unlike under the Model Law, arbitrators have to stay the arbitral proceedings for such time as the challenge is pending.

The Arbitration Act also contains a certain number of innovations.

For example, an important innovation compared with the Model Law is that Article 40 of the Arbitration Act provides that an award may be set aside if "according to Paraguayan law, the subject of the dispute is not capable of settlement by arbitration or that the award is contrary to *international public policy* or that of the Paraguayan State ". By contrast, the Model Law only refers to "public policy".

The Arbitration Act expressly refers to the costs of arbitration. Not only does the Arbitration Act define what qualifies as the costs of the arbitration, but also allows the parties to choose the rules governing their allocation, including by reference to a set of arbitration rules. In the absence of an agreement, the provisions of the Arbitration Act shall control. (See Chapter IX of the Arbitration Act).

Very much like the Model Law, the Arbitration Act provides that the nationality of the person shall not preclude anyone from acting as arbitrator. In practice, foreign arbitrators sitting in Paraguay will be admitted

in the country as non-resident foreigners, for a period of six months, which may be extended for similar periods. Arbitrators will receive compensation for the work performed. (See Article 13(a) of the Arbitration Act).

Also, while the Model Law does not consider rules referring to the computation of deadlines, the Arbitration Act provides that, the deadlines set forth therein, shall start running on the day following that on which a notification, note, communication or proposal has been received. If the last day of that period is a holiday in the place where the recipient resides or where its business is established, the time limit shall expire on the next business day. Official holidays and non-business days are included in the calculation of the period of time.

The Arbitration Act requires the arbitration agreement to be in writing. However, this requirement is construed more narrowly than under the Model Law. Indeed, the Arbitration Act provides that an arbitration agreement is "in writing" only when it is "*consigned in a document signed by the parties or in an exchange of letters or telegrams collated, in which said agreement is recorded*".

1.2 When was the Arbitration Law last revised?

There have been no revisions or amendments to the Arbitration Act since its enactment in 2002.

2. The Arbitration Agreement

2.1 How do the Courts in the Jurisdiction determine the law governing the arbitration agreement?

In accordance with Article 32 of the Arbitration Act, the arbitral tribunal has an obligation to apply the rules of law on which the parties have agreed. Under Paraguayan law, the parties' reference (in their contract) to a specific law to govern their contract is deemed to refer to the substantive law of that State, to the exclusion of its conflict of laws rules. This is of course subject to any express provision to the contrary in the parties' agreement.

The parties' agreement in respect of the applicable law carries significant weight in Paraguay, not least because Paraguay has recently enacted Law 5393/2015 on the law applicable to international contracts, which sets forth the general rule of recognition and enforceability of the parties' choice of law.

By contrast, if the parties have not agreed upon the law governing their agreement, the arbitral tribunal shall determine the same pursuant to a conflict of laws analysis.

Although Article 32 of the Arbitration Law relates to the determination of the law governing the merits of the dispute, the same principles should apply to determine the law governing the arbitration agreement.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Article 19 of the Arbitration Act provides for the separability of the arbitration agreement from the main contract in which it is set forth. Accordingly, a decision by the Arbitral Tribunal that the contract is void will not entail *ipso jure* the nullity of the arbitration clause and will therefore not affect its jurisdiction. However, to date, no judicial decision applying this principle has been rendered.

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

In line with the New York Convention, Article 10 of the Arbitration Act provides that the arbitration agreement must be in written form, meaning that it must be contained in a document signed by the parties, in an exchange of letters or certified telegrams; or in an exchange of writs of claim and answer in which the existence of an agreement and its terms is affirmed by one party, without being denied by another. The reference made in a contract to a document containing an arbitration clause is a valid arbitration agreement provided that the contract is in writing and the reference implies that this clause forms part of the contract.

Accordingly, Article 10 is more restrictive than Article 7 of the Model Law in that it does not adopt Article 7.3 and 7.4 which respectively provide:

“An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means”.

“The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference”.

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

There is no legislative provision or case-law in Paraguay addressing whether an arbitration agreement may bind third parties.

2.5 Are there restrictions to arbitrability? In the affirmative:

2.5.1 Do these restrictions relate to specific domains (such as IP, corporate law, etc?)

Pursuant to Article 2 of the Arbitration Act, all rights over which parties are entitled to conclude settlement agreements (*i.e.*, over which the parties can negotiate), and those which are of patrimonial nature may be submitted to arbitration, provided that a final and enforceable judgment on the matter has not already been rendered.

Agency, representation or distribution contracts can be arbitrated, provided that the arbitration is seated in Paraguay.

Conversely, public policy issues that require the intervention of the Public Ministry are non-arbitrable.

2.5.2 Do these restrictions relate to specific persons (i.e. State entities, consumers, etc?).

Although the Arbitration Act recognizes the ability of the State to submit its disputes to arbitration, such right is subject to certain exceptions. In particular, in accordance with Article 2 of the Arbitration Act, the State, its decentralized entities, its autocratic entities, its public companies, and its municipalities, can submit their disputes with private entities (corporations and individuals) to domestic or international arbitration, whenever they arise from legal acts or contracts governed by private law.

Paraguayan law does not contain provisions on class-action arbitration, nor is there case law on the topic.

Further, Law 1334/98 forbids clauses providing for arbitration in contracts between professionals and consumers. Such clauses are deemed null and void.

3. Intervention of Domestic Courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

3.1.1 If the place of arbitration is inside of the jurisdiction?

In accordance with Article 11 of the Arbitration Act, a local judge faced with a claim that is covered by an arbitration agreement will enforce the arbitration agreement if and when a party raises the invokes this agreement, and unless it can be shown that the arbitration agreement is null, void or unenforceable. However, if a party presents its case on the merits and fails to invoke the arbitration agreement before the court, it will be deemed to have waived the arbitration agreement.

3.1.2 If the place of the arbitration is outside of the jurisdiction?

Since the law does not make any reference to the place of the arbitration, but only to the agreement itself, the above also applies to arbitrations seated outside Paraguay.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

In order to answer this question, we have to refer to Articles 11 and 19 of the Arbitration Act.

First, Article 11 provides that if a party that has been dragged into court proceedings objects to the jurisdiction of the Paraguayan court on the basis of the arbitration agreement (as previously mentioned in point 3.a.), the arbitration may proceed until an award, provided that the parties desist from the procedure pending before the court, prior to the rendering of any award.

Article 19 also recognizes the competence-competence principle, by empowering the Arbitral Tribunal to decide on its jurisdiction, including with respect to the validity of said agreement. However, Article 19 of the Arbitration Act provides that, pending a jurisdictional challenge brought before Paraguayan domestic courts, the Arbitral Tribunal may continue its proceedings, but has no power to render an award.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Related to anti-suit injunction but not only)

The Arbitration Act does not allow for courts to intervene in arbitrations seated outside of the jurisdiction.

As a general rule, Article 8 of the Arbitration Act excludes judicial intervention from any matter regulated by said law.

Article 9 further states that only for certain assistance and supervision tasks, and when required, would ordinary courts be entitled to intervene in arbitration proceedings. No *numerus clausus* list is provided in that regard.

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

The Arbitration Act does not contain any limitation in this regard.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

Pursuant to Article 14 of the Arbitration Act, arbitrators must disclose all circumstances that may raise justifiable doubts as to their independence and impartiality. This obligation equally applies throughout the arbitration proceedings. An arbitrator who would lack such characteristics may be challenge. The arbitral tribunal is competent to rule on that challenge.

Pursuant to Article 15 of the Arbitration Act, if the tribunal rejects a challenge, the challenging party may ask (within 15 days following the rejection of the challenge), that the challenge be resolved by the local court within seven days, through a decision which shall not be subject to appeal.

4.3 On what grounds do courts intervene to assist in the constitution of the Arbitral Tribunal (in case of ad hoc arbitration)?

Pursuant to Article 13 of the Arbitration Act, the parties may request the intervention of domestic courts in cases of failure to appoint arbitrators, and in cases where there is no agreement upon the appointment process.

If the parties have agreed upon such appointment procedure, the courts may also intervene at the request of a party, provided that the other party or the arbitrators in place fail to abide by this process, or, if the parties and/or the arbitrators fail to agree in the context of this agreed process.

4.4 Do courts have the power to issue interim measures in connection with arbitrations? If so, are they willing to consider *ex parte* requests?

Pursuant to Article 20 of the Arbitration Act, unless otherwise agreed by the parties, the arbitral tribunal may, a party's request, order the interim measures it deems necessary with respect to the subject matter of the dispute. The Arbitral Tribunal shall require from the applicant an appropriate security in relation to those measures.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

The Arbitration Act does not expressly provide that arbitration proceedings are confidential. When the State is a party to an arbitration, there is no confidentiality and this arbitration is public.

For example, under Law N° 5102/13, which relates to public-private partnerships in Paraguay, even though arbitration is an option for the parties, Regulatory Decree N° 1350 explicitly states that the procurement documents and the contract must provide (and that the parties therefore consent) that the arbitration shall be public, irrespective of the arbitration rules on which the parties have agreed.

4.5.2 Does it regulate the length of arbitration proceedings?

It does not.

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

Pursuant to Article 23 of the Arbitration Act, the parties may freely determine the place of arbitration. Absent such agreement, the arbitral tribunal will determine the same, taking into account the circumstances of the case, including the convenience of the parties.

Notwithstanding the foregoing, unless the parties agree otherwise, the Arbitral Tribunal may, meet at any place it deems appropriate to hold deliberations among its members, to hear the witnesses, the experts or the parties, or to examine goods or other goods or documents.

4.5.4 Does it allow for arbitrators to issue interim measures? In the affirmative, in which conditions?

Article 20 of the Arbitration Act allows arbitrators to issue interim measures. However, they can only do so at the request of a party.

The condition for granting interim measures remains the same as in the 1985 version of the Model Law. Under Article 20 of the Arbitration Act, arbitrators may order any interim measure deemed necessary in respect of the subject-matter of the dispute. In turn, the Arbitral Tribunal shall require from the petitioner an appropriate security in relation to those measures, which in practice must be sufficient to cover possible damages to the other party arising from the granting of such interim measures.

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?

Article 22 of the Arbitration Act grants broad powers to arbitrators for conducting the arbitration, only subject to the principle of party autonomy and the Arbitration Act. Unless otherwise agreed by the parties, the arbitral has the power to determine the admissibility, relevance and value of the evidence. No further specification is made in this regard.

4.5.6 Does it make mandatory to hold a hearing?

Article 27 of the Arbitration Act provides that, unless otherwise agreed by the parties, the arbitral tribunal will decide if hearings will be held for the presentation of evidence or pleadings, or if the award will be based solely on documents and other evidence.

4.5.7 Does it prescribe principles governing the awarding of interest?

It does not.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

Chapter IX of the Arbitration Act sets forth a few principles regarding the costs of the arbitration which are summarized below:

- The parties may agree on costs allocation. Absent any such agreement, the Arbitration Act shall apply.
- The Arbitral Tribunal's costs must be reasonable, taking into account the amount of the dispute, the complexity of the matter, the time spent resolving the dispute, and other circumstances which it may deem relevant.
- The Arbitral Tribunal's costs will be fixed in the final award.
- The Arbitral Tribunal will request a deposit to cover the arbitrators' costs, travel expenses and other expenses. Each party shall bear the deposit in equal shares. In practice the costs are awarded to the winning party, although arbitrators also have the power to order parties to cover their respective costs, on justified grounds.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

There is no explicit legislation or relevant case-law regarding this topic.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

There is no explicit legislation or relevant case-law regarding this topic.

5. The Award.

5.1 Can parties waive the requirement for an award to provide reasons?

Pursuant to Article 36 of the Arbitration Act, the award should state the reasons upon which it is based, unless the parties have agreed that no reasons shall be given.

Otherwise, the parties may ask for an award by consent, which is provided for under article 34 of the Arbitration Act.

5.2 Can the parties waive the right to seek the annulment of the award? If yes, under which conditions?

They cannot, since this would go against public policy rules. Judicial review is ultimately in the hands of the Supreme Court of Justice, since it entrusted with the review of the constitutionality of decisions from any kind of jurisdictional authority, pursuant to Article 256 of the National Constitution. Accordingly, since arbitral awards are granted equivalent jurisdictional authority as judicial decisions, they are always subject to review by the judicial authorities, notwithstanding the existence of a parties' agreement to the contrary.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

There are no atypical mandatory requirements.

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)? If yes, what are the grounds for an appeal?

Pursuant to Article 40 of the Arbitration Act, it is only possible to seek the annulment of an award.

5.5 What procedure exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

Once the request for recognition and enforcement of an award has been filed, the judge shall serve a copy to the defendant, within five days from the registration of the application pursuant to the requirement of "judicial notification". The defendant is required to present its defense against the application in full, together with all relevant evidence in support of its case, including in particular all documentary evidence. If it does not have certain documents which are relevant to its defense, it may request an order from the judge that they be produced by the applicant or a third party, provided that the defendant indicates to the judge the content of the missing documents, their place, file, public office or person in whose power they are. The affected party may only resist enforcement on the grounds set forth in Article 46 of the Arbitration Act, which are set out below:

- (a) 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 country where the award was made; or
- (b) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (c) the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the arbitration agreement, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- (d) the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;
- (e) the award has not yet become binding to the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
- (f) If the judge finds that, under the Paraguayan Law, the subject-matter of the dispute is not capable of settlement by arbitration, or the recognition or enforcement of the award would be contrary to international public policy or that of the Paraguayan State.

If none of these grounds is satisfied, the judge will decide on whether the award is enforceable within five days from the response by the defendant (or lack thereof). The judge may order the defendant to comply with the award and the seizure of assets. In case of an objection to the recognition or enforcement, the procedure for incidents provided for in the Code of Civil Procedure shall apply. The judgment on recognition and enforcement of the award shall not be subject to any appeal. If the enforcement of the requested award is ordered, such enforcement will proceed in accordance with the legal provisions on enforcement of national judgments provided for in the CPC.

The enforcement process, which is filed before the same judge who decided on the recognition of the award, may be initiated once all the parties have been duly notified and no actions for annulment have been filed or, had there been any actions for annulment filed, once they have been rejected.

The enforcement process is based on the principle of equality and adequate defense. Payment can be obtained through a direct payment from the affected party, or the seizure and the auction of assets.

Arbitral awards issued by foreign Arbitral Tribunals shall be enforceable and effective in Paraguay, as per the treaties concluded with the State from which they come. In the absence of treaties, awards will be enforceable if, they have the same authority as judgments of judicial courts in their country of origin.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

No. While the courts have discretion to order suspension stay of enforcement, it is not mandatory for them to do so.

In this regard, Article 47 of the Arbitration Act provides that if a request for setting aside or for a stay of the enforcement of an award has been made before a court of the country in which, or under the law of which, that award was issued, the court where recognition or enforcement of the award is sought may adjourn its decision until the jurisdiction at the place of arbitration have decided on the application, and may also order the other party to provide appropriate security.

Additionally, pursuant to Article 43 of the Arbitration Act, in the presence of a request for annulment of an award, the Court of Appeals may suspend the annulment proceedings, at a party's request and provided that it finds this appropriate.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Pursuant to Article 46 of the Arbitration Act, annulment of an award at the seat of arbitration is one of the ground under which enforcement may be refused in Paraguay.

5.8 Are foreign awards readily enforceable in practice?

Foreign arbitral awards are indeed readily enforceable in practice, in light of the fact that the law provides sufficient tools to enforce the awards. National courts have generally enforced foreign arbitral awards without additional requirements other than those applicable to the enforcement of domestic awards.

6. Funding Arrangements.

6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding in the jurisdiction? If so, what is the practical and/or legal impact of such restrictions

There are no restrictions regarding funding arrangements in the Paraguayan legislation. Such arrangements, however, are not common market practice.

7. Is there likely to be any significant reform to the arbitration law in the near future?

There are no ongoing efforts or projects to replace, amend or otherwise update the Arbitration Act in the near future.

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DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

JOSÉ DANIEL AMADO, CRISTINA FERRARO AND JOSE LUIS REPETTO
OF MIRANDA & AMADO, ABOGADOS

MIRANDA
& AMADO

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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS

1. Law ●
 - a. Framework ●
 - b. Adherence to international treaties ●
 - c. Limited court intervention ●
 - d. Arbitrator immunity from civil liability ●
2. Judiciary ●
3. Legal expertise ●
4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

VERSION: 11 JUNE 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

During the last two decades, Peru has adopted free-market policies to promote private investment. Several relevant changes were made in the Peruvian legal framework to implement those policies, which included the arbitration framework. After approximately 12 years of existence, in 2008, the 1996 General Arbitration Act ("**Law 26572**") based on the 1985 UNCITRAL Model Law was replaced by Legislative Decree 1071 based on the 2006 UNCITRAL Model Law. The current Peruvian Arbitration Law ("**PAL**") introduced several improvements in order to secure independence of the tribunal by limiting judicial intervention, expediting the setting aside, recognition and enforcement procedures, and providing an efficient set of rules applicable unless the parties agreed otherwise.

Key places of arbitration in the jurisdiction	Lima.
Civil law / Common law environment?	Civil law.
Confidentiality of arbitrations?	Arbitrations are confidential unless otherwise is agreed.
Requirement to retain (local) counsel?	No restrictions to use of foreign counsel.
Ability to present party employee witness testimony?	Yes.
Ability to hold meetings and/or hearings outside of the seat?	Yes.
Availability of interest as a remedy?	Yes.
Ability to claim for reasonable costs incurred for the arbitration?	Yes.
Restrictions regarding contingency fee arrangements and/or third-party funding?	No restrictions.
Party to the New York Convention?	Yes, without the reciprocity and commercial reservation.
Other key points to note	φ
WJP Civil Justice score (2017-2018)	0.52

ARBITRATION PRACTITIONER SUMMARY

The Peruvian Arbitration Law ("**PAL**") is based on the 2006 UNCITRAL Model Law and applies to both international and domestic arbitration. The PAL has a modern approach on arbitration. The rules applicable protect the arbitration agreement limit the intervention of the courts during the course of the arbitration and the grounds for annulment are restrictive following the approach of the 2006 UNCITRAL Model Law. As all Peruvian state procurement contracts are referred to arbitration, there is a large volume of arbitration cases in Peru, thus a specialized arbitration culture has developed which is constantly evolving and improving.

Date of arbitration law?	The PAL entered into force on 1 September 2008.
UNCITRAL Model Law? If so, any key changes thereto?	Yes. No material changes have been introduced.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Yes, the Superior Court of Lima has two chambers specialized in commercial matters, which are competent for set-aside applications and award recognition actions. Please note that these chambers are not exclusively dedicated to arbitration-related matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes.
Courts' attitude towards the competence-competence principle?	Courts are favorable to the competence-competence principle. It has been recognized as a principle by the Peruvian Constitutional Tribunal.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	No.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	There is no case-law on this issue.
Other key points to note?	Under Peruvian law, all procurement contracts executed by the Peruvian State must be submitted to arbitration.

JURISDICTION DETAILED ANALYSIS

Arbitration in Peru is governed by Legislative Decree 1071 or Peruvian Arbitration Law (“**PAL**”), issued in 2008 and based on the 2006 UNCITRAL Model Law. The provisions of the PAL are subsidiary to any special applicable law or international treaty.¹ The main rules governing any domestic or international arbitration with seat in Peru are summarized below.

1. Scope of Application

The PAL applies to both domestic and international arbitrations seated in Peru.² In addition, certain specific provisions of the PAL are applicable to arbitrations seated outside Peru (for example, provisions on judicial cooperation, arbitration agreement and its scope, recognition and enforcement of interim measures, and recognition and enforcement of awards, among others).³ For example, as set forth Article 8(2), Peruvian courts will be competent to adopt interim measures in arbitrations seated abroad if the measure must be enforced in Peru. In the same sense, according to Articles 8(1) and 45 of the PAL, Peruvian courts will be competent to assist in evidence matters (such as taking the testimony of a witness or experts) in arbitrations seated abroad in case the assistance is needed in Peru. In contrast to the UNCITRAL Model Law, the application of the PAL is not limited to commercial arbitration, including for example investment disputes, tax or legal stabilization agreements, among other issues.

2. International and Domestic Arbitration

Following generally Article 1 of the UNCITRAL Model Law, an arbitration seated in Peru is considered international when:

- The parties to the arbitration agreement have their domiciles in different States at the time of the execution of that agreement;
- The seat of the arbitration (determined in, or pursuant to, the arbitration agreement) is situated outside the State in which the parties have their domiciles; and
- The parties are domiciled in Peru, and the place where a substantial part of the obligations of the legal relationship is to be performed or the place with which the subject matter is most closely connected, is outside Peru.

As set forth in Article 5 of PAL, if one of the parties has more than one domicile, the domicile for this purpose is that which has the closest relationship to the arbitration agreement.⁴

3. Arbitrability

In Peru, only disputes related to rights that can be freely surrendered or waived by the parties may be submitted to arbitration. In addition, any dispute may be submitted to arbitration if authorized by law or an international treaty, even if it relates to rights that cannot be waived or surrendered. Disputes related to rights that can be waived typically include disputes on contractual matters and commercial matters, and typically exclude criminal matters, legal capacity matters and family law matters.

Considering the above, corporate law matters can be subject to arbitration. Competition Law issues, however, cannot be referred to arbitration. Also, please note that the Peruvian State may submit its disputes to arbitration.

¹ PAL, Article 1.

² PAL, Article 1.1.

³ PAL, Article 1.2.

⁴ PAL, Article 5.

4. Form and Content of Arbitration Agreements

With respect to the definition of “arbitration agreement”, Article 13 of the PAL closely follows the definition contained in Article 7 (option I) of the 2006 UNCITRAL Model Law. Article 13.1 defines the arbitral agreement as the agreement in which the parties submit to arbitration all or certain disputes that have arisen or may arise between them with respect to a defined legal relationship, whether contractual or not.

As to the formalities of the arbitration agreement, Article 13.2 states that the agreement shall be in writing and may be in the form of a clause included in a contract or in the form of a separate agreement. Article 13.3 states that an agreement will be deemed to be in “in writing” if it is recorded in any way.

Moreover, Article 13.4 states that the written nature of the agreement is met if an electronic communication is sent and the information contained therein is accessible for subsequent reference. An “electronic communication” will be such communication made through data messages, and “data message” refers to information sent, received or stored by electronic, magnetic, optical or similar means, including but not limited to electronic data interchange, electronic mail, telegram, telex or telecopy. Continuing with the formal aspect of the agreement to arbitrate, Article 13.5 states that an arbitration agreement will be “in writing” if it is contained in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party, and not denied by the other.

Finally, pursuant to Article 13.6 the agreement will also be considered “in writing” when a contract refers to any document containing an arbitration agreement, if the reference implies that clause is part of the contract.

Moreover, Peru has regulated the extension of the arbitration agreement to non-signatory parties. According to Article 14 of the PAL, the arbitration agreement binds all those whose consent to submit to arbitration is determined in good faith by their active and decisive participation in the negotiation, execution, performance or termination of the contract that contains the arbitration agreement or to which the agreement is related. It also binds all those who seek to attain any rights or benefits from the contract, pursuant to its terms. This provision is fundamental to determine who is a party to the arbitration agreement in accordance with the PAL.

Article 13.7 of the PAL –also applicable to arbitration procedures seated outside Peru⁵- has a similar content. Indeed, pursuant to Article 13.7, the agreement to arbitrate will be valid if it meets the requirements set: i) by the law applicable to the agreement; or, ii) by the law applicable to the merits; or, iii) by Peruvian (Arbitration) Law.

5. Enforcement of Arbitration Agreements

Pursuant to Article 16 of the PAL, if a judicial claim is filed and the claim relates to matters falling within the scope of an agreement to arbitrate, the court shall dismiss the claim and refer the parties to arbitration. This is the general rule for arbitral procedures seated in Peru. Pursuant to Article 16.4, a similar rule is available if the arbitration is (or will be) seated abroad.

If the arbitral procedure has not yet begun and a judicial claim -over the same subject matter- is brought before Peruvian courts, the party seeking to uphold the agreement to arbitrate will have to: i) file a motion to dismiss before the court where the judicial claim has been filed; and, ii) provide evidence of the existence of the agreement to arbitrate. On the other hand, the party wishing to settle the dispute before the court (thus avoiding the arbitration procedure) will have to prove that the agreement to arbitrate is manifestly invalid, in which case the court will retain jurisdiction over the case.

⁵ This article will be applied to arbitration proceedings seated abroad in the context of a judicial claim filed before the Peruvian courts.

Article 16.4 of the PAL establishes that if the agreement to arbitrate abroad meets the requirements set by: i) the law applicable to the arbitral agreement; or, ii) the law applicable to the merits; or eventually, iii) the PAL; Peruvian courts shall dismiss the claims brought before them.

If an arbitral procedure is seated outside Peru, Peruvian courts should uphold the agreement to arbitrate if the formal requirements set in the PAL (described in the previous paragraphs) are met. With this provision, if a party files a judicial claim before Peruvian courts, the party wishing to maintain the agreement to arbitrate abroad is allowed to argue the validity of the agreement under Peruvian Law (which is almost identical to Option I of Article 7 of the UNCITRAL Model Law). This rule seeks to promote efficiency insofar as it would give the option to Peruvian courts to consider the validity of the agreement under Peruvian Law, and not under a foreign law that would be subject to proof and would lead to delays in the decision and further costs. This is due to the fact that under Peruvian Law parties have the burden of proving the existence and interpretation of foreign law.

The court has limited discretion and shall endorse the agreement to arbitrate abroad and refer parties to arbitration, unless the court finds that the agreement is manifestly invalid. In order to make such determination, the court will have to analyze the agreement to arbitrate under: i) the rules applicable to the agreement; or, ii) the rules applicable to the merits. Nonetheless, if the arbitration agreement meets the formal requirements set in the PAL (pursuant to Article 13), Peruvian courts will then have the duty to grant the motion to dismiss, thus upholding the agreement to arbitrate abroad. This means that the formalities that must be met by the agreement pursuant to the PAL will also be relevant in the context of arbitration procedures seated outside Peru.

In the event that the arbitration procedure has already begun, and the parties find themselves facing parallel procedures in which the arbitral procedure seats abroad, while the judicial procedure seats in Peru, Peruvian courts will dismiss the judicial claim. The only exception to this rule is that the party acting as claimant before the courts is able to prove that the subject matter manifestly violates international public policy.⁶

Article 16.4 of the PAL is consistent with Article II.3 of the New York Convention as well as with Article 8 of the 2006 UNCITRAL Model Law, but also sets a higher threshold in favor of the enforcement of the agreement to arbitrate. Neither the Convention nor the Model Law include an explicit provision stating that only in manifest cases of invalidity, the agreement to arbitrate will not be enforced. The PAL, in order to prevent local courts from making a full review of the agreement to arbitrate, makes explicit reference to the manifest nature of the invalidity, thus excluding the agreement's "inoperativeness" and "inability of being performed" as grounds for refusing to enforce the arbitration agreement.⁷

6. Independence of the tribunal and extent of court intervention

Following Article 5 of the UNCITRAL Model Law, Article 3 of PAL establishes that no court shall intervene in the matters governed by the PAL except where so provided therein. Additionally, to reinforce the independence of arbitration, Article 3.2. of PAL establishes that the arbitration tribunal is independent and not subject to any order or decision that may affect its vested powers. No order or decision, except for a decision in setting aside procedure, may suppress the effects of an award as set forth Article 3.4 of PAL. Any judicial intervention directed to control an arbitral tribunal or interfere in the arbitration before the award is rendered is subject to liability. The main objective of these new provisions in the PAL is to protect arbitration from any sort of intervention (from any authority, including the judiciary). Judicial control is done *ex post* through a set aside application.

⁶ PAL, Article 16.4.

⁷ Pursuant to Article II.3 of the New York Convention, the court of a contracting State will not refer the parties to arbitration if it finds that the agreement is "null and void", but also, if it finds that the agreement is "inoperative" or "incapable of being performed".

7. Arbitrators

Following Article 10 of the UNCITRAL Model Law, PAL states the parties are free to determine the number of arbitrators. Failing such determination, the number of arbitrators will be three. Nationality is not an obstacle to act as an arbitrator, unless otherwise agreed by the parties. State officers cannot be arbitrators. In domestic arbitration that shall be decided according to law (as opposed to arbitrations in which the tribunal decides *ex aequo et bono*), the arbitrators must be lawyers unless otherwise agreed to. There is no need for the lawyer to be a member of any national or international bar or association. In international arbitrations, being a lawyer is not a requirement to be an arbitrator.

Article 32 of PAL provides a limitation to the civil liability of arbitrators stating that they will only be liable in case of willful or grossly negligent conduct.

7.1 Appointment

Article 22.3 establishes that the parties may appoint the arbitrators or delegate the appointment to an institution or a third party, who may consult with the parties any necessary information to comply with the appointment. The parties are free to agree on a procedure of appointing the arbitrator or arbitrators or choose to apply the procedures provided by any institutional rules. However, Article 23 of PAL provides that the parties shall comply with the principle of equal treatment. If the arbitration agreement favours one party in the appointment of arbitrators, such appointment procedure is void.⁸ In case the parties fail to agree on the procedure for the appointment of an arbitrator or arbitrators, the parties will have 15 days to appoint the sole arbitrator counted from the date when the appointment is requested; or in arbitrations with three arbitrators, each party will appoint an arbitrator within 15 days and the two arbitrators appointed shall appoint the third arbitrator within 15 days. In case the parties fail to appoint the arbitrators according to this procedure, the appointment will be made by the Chamber of Commerce of the seat of the arbitration or the place of execution of the arbitration agreement if the seat has not been determined. In international arbitrations, if the parties fail to appoint the arbitrators, the appointment is made by the Chamber of Commerce of the seat of the arbitration or the Chamber of Commerce of Lima.

7.2 Independence and impartiality

Article 28.1. provides that arbitrators must be independent and impartial throughout the arbitral proceedings. The person who is proposed as an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.⁹ Once appointed, the arbitrator must disclose without delay any new circumstances that may give rise to justifiable doubts as to his or her ability to be impartial and independent.¹⁰

7.3 Challenges

An arbitrator may be challenged only if circumstances that give rise to justifiable doubts as to his or her impartiality or independence exist, or if the arbitrator does not possess qualifications agreed to by the parties or required by law. The parties can waive the reasons to challenge an arbitrator known to them, and in such case, they may not later challenge the arbitrator or apply for setting aside for such same reasons.¹¹ The waiver can be express or implied. A party may challenge an arbitrator appointed by them, or in whose appointment it has participated, only for reasons of which it becomes aware after the appointment has been made.¹²

⁸ PAL, Article 26.

⁹ PAL, Article 28.1.

¹⁰ PAL, Article 28.2.

¹¹ PAL, Article 28.4.

¹² PAL, Article 28.5.

The parties are free to agree on a procedure for challenging an arbitrator or agree to apply any institutional rules. Failing such agreement, the PAL regulates the applicable challenge procedure. The challenge must be made as soon as the circumstances that give rise to the challenge are known. The party making the challenge must justify the reasons for it and produce the documents supporting the challenge. The challenged arbitrator and the other party may submit the statements they deem convenient regarding the challenge within 10 days of being notified. If the other party agrees to the challenge, a substitute arbitrator must be appointed. If the other party does not agree to the challenge and the arbitrator denies the reasons for the challenge or remains silent:

- In case of a sole arbitrator, the arbitration institution that appointed the arbitrator decides on the challenge. If no institution appointed the arbitrator, the corresponding Chamber of Commerce decides on the challenge;
- If the tribunal has more than one arbitrator, the other arbitrators decide on the challenge by absolute majority without the vote of the challenged arbitrator¹³; and
- If more than one arbitrator is challenged on the same grounds, the corresponding Chamber of Commerce decides on the challenge.

According to Article 31 of PAL, the decision on a challenge is not subject to appeal. If the challenge is rejected, the challenging party may only contest the decision with a setting aside application.

8. Competence-Competence and Separability

As set forth on Article 41 of the PAL, only the arbitral tribunal can rule on its own jurisdiction, including any objections to the arbitration with regard to the existence, nullity or validity of the arbitration agreement. According to Article 41 of PAL, the arbitration agreement that forms part of a contract will be treated as an independent agreement, therefore disputes subject to arbitration may be referred to the annulment of the contract containing the arbitration agreement without affecting the validity of the arbitration agreement itself.

9. Court Assistance

In the context of arbitrations seated in Peru, the arbitral tribunal or a party (with the approval of the arbitral tribunal) may request assistance in taking evidence from a competent court. This rule is contained in Article 45 of the PAL, which closely follows Article 27 of the UNCITRAL Model Law. Article 45 of the PAL also extends to arbitration procedures seated abroad. If certain pieces of evidence are located in Peru, and the arbitration takes place abroad, the arbitral tribunal as well as the parties (authorized by the tribunal) can request the assistance of Peruvian courts in order to secure the taking of evidence.

Pursuant to Article 45.2, judicial assistance by Peruvian courts in the taking of evidence can be performed directly or indirectly. Direct assistance in the taking of evidence means that the competent court, upon request of the foreign tribunal or party, may have broad discretion to take the evidence in the manner it deems more effective. Indirect assistance in the taking of evidence means that the competent court, upon request of the foreign tribunal or party, may adopt specific measures with the purpose of allowing the arbitral tribunal to take the evidence directly. In other words, under the second option, Peruvian courts would place the evidence at the tribunal's disposal.

¹³ In case of tie, the President of the Tribunal will issue the decisive vote. However, if the President is the challenged arbitrator and there is a tie, the decision will be adopted by the arbitral institution (in case of administered arbitrations or the appointing authority) or the corresponding Chamber of Commerce (in case of ad-hoc arbitrations without appointing authority).

Article 45.3 of the PAL states that Peruvian courts lack the authority to establish the admissibility on the merits of the taking of evidence. The only grounds which may allow the courts to deny assistance are: i) if the request is contrary to public policy; or, ii) if the request is contrary to express prohibitive laws.

10. Interim Measures by Arbitrators

According to Article 47 of the PAL, the arbitral tribunal may, at the request of a party, grant interim measures. An interim measure is any temporary measure issued before the award by which the arbitral tribunal orders a party to:

- Maintain or restore the *status quo* pending determination of the dispute;
- Take action that would prevent current or imminent harm or prejudice to the arbitral process itself, or refrain from taking action that is likely to cause such harm or prejudice to the arbitration process;
- Provide means of preserving assets that shall be needed for a subsequent award to be satisfied; or
- Preserve evidence that may be relevant and pertinent to the resolution of the dispute.

11. Interim Measures by the court

Pursuant to Article 47.4 of the PAL (applicable to arbitration procedures seated in Peru), it is possible to obtain interim relief from the courts prior to the constitution of the arbitral tribunal. Indeed, Article 47.4 of the PAL –consistent with Articles 9 and 17 J of the UNCITRAL Model Law– states that it is compatible with an arbitration agreement: i) for a party to request the courts for an interim measure before the beginning of an arbitration procedure; and, ii) for the courts to grant such measure. Typically, Peruvian courts issue interim measures *ex parte*.

The rule contained in Article 47.4 is not included, however, amongst the list of provisions that, according to Article 1.2 of the PAL, are applicable to arbitration proceedings seated abroad. This may lead to the interpretation that in the context of arbitration procedures to be seated abroad, it would not be possible to request Peruvian courts for an interim measure before the arbitral tribunal is constituted. In other words, interim relief would only be available during the course of the proceedings taking place abroad, if the arbitral tribunal grants it. Said interpretation, however, has not been generally adopted by Peruvian courts.

Some Peruvian trial courts have interpreted that it is indeed possible to obtain interim measures (for example, attachments over assets located in Peru) before the beginning of an arbitration procedure that will seat abroad. This means that Peruvian courts make no distinction between the interim relief that may be available to parties in an arbitration seated in Peru and an arbitration procedure seated abroad.

If the court grants interim relief and the tribunal is later constituted (parties have the burden of making this information available), the court will forward the relevant documents to the arbitral tribunal, and the tribunal will then decide to ratify or reverse the decision.

Through this interpretation, Peruvian courts attempt to promote efficiency by allowing the requesting party to obtain temporary protection –during the period in which arbitrators are being appointed– from situations that may likely cause current or imminent harm affecting the requesting party, the arbitral process itself, or both.

12. Recognition of foreign interim relief

Article 48.4 of the PAL expressly states that measures granted by arbitral tribunals seated abroad shall be recognized and enforced by Peruvian courts. The measure will be enforced upon application and Peruvian courts lack discretion to review the merits of the decision. Peruvian courts, however, have the discretion to require the party that seeks the enforcement of the measure, to provide appropriate security if the arbitral

tribunal has not ruled on this issue or when such security is necessary to protect the rights of third parties potentially affected by the interim measure.¹⁴

As to the formalities, the party who is seeking recognition and enforcement of the interim measure rendered by a foreign arbitral tribunal has the duty to submit an original or a duly authenticated copy of the decision (under the laws of the country in which the decision is issued).¹⁵ According to Article 9.3 of the PAL, if the decision is drafted in a language other than Spanish, the party will have to submit a translated version of the decision. The judicial authority may request an official translation of the document only if necessary.¹⁶

The grounds for refusal of recognition or enforcement of a foreign decision on interim measures by Peruvian courts are the same as those applicable for the recognition and enforcement of foreign arbitral awards.

13. Evidence and Experts

The arbitral tribunal can determine the admission, relevance, production and weight of evidence and order parties to produce the evidence deemed necessary. According to Article 44 of PAL, the arbitral tribunal may rely on expert opinion on specific issues relevant to the dispute. Experts can be appointed at the tribunal's discretion or upon request by a party. Parties shall provide information or access to any documents that may be considered necessary.¹⁷

14. Award

According to Article 54 of the PAL, the tribunal decides the dispute in one award or in as many partial awards as it deems necessary, unless otherwise agreed by the parties. The award is final, not subject to appeal and mandatory for the parties once notified. Arbitral tribunals may have the authority to enforce the award if agreed by the parties, for example by ordering the Public Registry to register the transfer of property, unless public force is needed. In such scenario, the interested party may request the Judiciary to enforce the award. Under Article 56 of the PAL, the award has to state reasons unless otherwise agreed by the parties. Please note, however, that Peruvian courts have found that a proper reasoning is required under the constitutional right to due process. Thus, it is uncertain whether an award that fails to state reasons based on the agreement of the parties may be challenged under these constitutional due process grounds.

15. Set-Aside

Under Article 62 of the PAL, the application for setting aside is the only recourse against the award. However, as will be mentioned below, an "*amparo*" constitutional action is another possible recourse against the award.

15.1 Grounds

The grounds for setting aside are that:

- (a) The arbitration agreement does not exist or is not valid;
- (b) A party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present his case;
- (c) The composition of the tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the applicable arbitration rules, unless such agreement of rule is contrary to the mandatory provision of the PAL;
- (d) The award deals with a matter that was not submitted to the tribunal's decision;
- (e) In a domestic arbitration, the subject matter of arbitration is manifestly impossible of settlement by arbitration according to law;

¹⁴ PAL, Article 48.4.d.

¹⁵ PAL, Article 48.4.b.

¹⁶ PAL, Article 9.

¹⁷ PAL, Article 43, 44.

- (f) In an international arbitration, the subject matter of arbitration is impossible of settlement by arbitration under the laws of Peru or the award is in conflict with international public policy; and
- (g) The dispute was solved exceeding the deadlines the parties agreed to or stipulated in the applicable institutional rules.

Grounds (a), (b), (c) and (d) can be the subject of an application for setting aside only if they were raised during the arbitration by the affected party and were dismissed. In the case of grounds (d) and (e), the setting aside decision will only affect the matters that were included in the tribunal's decision but had not been submitted to the arbitration or those that cannot be settled through arbitration, as long as they can be separated. If it is not possible to separate them, the award will be set aside in its entirety. Ground (g) can only be invoked if the affected party raised such violation during the arbitration and it is not contrary with its own conduct in the arbitration.

The PAL does not prohibit parties from agreeing to allow for the possibility of appeal against the award. However, there is no case-law regarding this issue.

If both parties to the arbitration are not domiciled in Peru and do not have assets in Peru, they can expressly waive their right to request the setting-aside of the award in Peru.

15.2 Procedure

The Superior Court decides on the application for setting aside. The Superior Court has 10 days to admit the application which must indicate the grounds for setting aside. Once admitted, the other party will be given 20 business days to respond. At the hearing, the Superior Court may decide to suspend the judicial procedure for setting aside and grant the arbitral tribunal six months in which the tribunal may adopt any measures necessary to eliminate the grounds for setting aside. If the judicial procedure is not suspended, the court must decide in 20 business days. Only if the Superior Court decides to set aside the award totally or partially, such decision is subject to a cassation recourse, which is an extraordinary remedy decided by the Supreme Court that can only be based on the failure or errors in applying the law. In our experience, the proceedings before the Superior Court usually take between 6 months and a year. An additional period of between 6 months and a year usually applies to Supreme Court proceedings.

The application for setting aside an award may stay the enforcement of the award when the party that applies for setting aside specifically requests the stay and submits a security agreed to by the parties or established in the applicable arbitration rules. If this requirement is met, the Superior Court will issue a decision to stay the enforcement the effects of the award. If there is no security agreed to by the parties, the applicant must submit a letter of credit for the amount the party is ordered to pay in the award. If the payment of an amount is not ordered in the award, the arbitral tribunal or the Superior Court shall establish a reasonable amount for the letter of credit.

PAL expressly forbids the Superior Court from ruling on the merits of the case when deciding on the request for setting aside.

15.3 Amparo

Under case-law by the Constitutional Tribunal, an arbitration award may be exceptionally challenged through a constitutional action or "*amparo*". Before 2011, the setting-aside application had turned into a previous stage for initiating an *amparo* action in which violations to constitutional rights by the arbitration award were discussed.

In the *Maria Julia* decision,¹⁸ the Constitutional Tribunal confirmed that arbitration cannot be understood as a mechanism that replaces the judiciary, nor as its substitute; instead, it should be understood as an

¹⁸ Constitutional Tribunal, Sociedad Minera de Responsabilidad Ltda. *Maria Julia v. Superior Court of Justice of Lima* (Third Civil Chamber), Docket No. 00142-2011-PA/TC, September 21, 2011.

alternative that complements the judicial system.¹⁹ It also established that the application for setting aside will be, as a general rule, a sufficient and adequate process for protecting the rights of a party that may have been affected by an arbitration award.²⁰ The court limited the grounds for challenging an arbitral award through an *amparo* action to three exceptional cases:

- When the award disregards a previous mandatory precedent of the Constitutional Tribunal;
- When the arbitration tribunal has decided a law is unconstitutional²¹ even though the Constitutional Tribunal had declared it constitutional previously; and
- When the party initiating the *amparo* was not party to the arbitration agreement (a third party), and his or her constitutional rights are affected by the award.

The *amparo* action may only result in the annulment of the award but never in the revision of the award by the court.

Since the *Maria Julia* decision, it is clear under Peruvian law that the application for setting aside generally excludes the possibility of later initiating a constitutional action against the award.

16. Recognition and Enforcement of Foreign Arbitral Awards

16.1 Applicable law

Article 74.1 of the PAL states that awards issued outside of the Peruvian territory are considered foreign arbitral awards for the purposes of the law. It also states that foreign arbitral awards will be recognized and enforced according to the rules set: i) in the New York Convention; ii) in the Panama Convention; and, iii) under any other treaty dealing with the recognition and enforcement of arbitral awards. The time limit to request the recognition of foreign award in Peru is 10 years (counted from the date when the award was issued).

Article 74.2 states that unless the parties have agreed otherwise, the applicable treaty will be the one most favorable to the party requesting the recognition and enforcement of the foreign arbitral award. Treaties are, therefore, the default source of law when it comes to recognizing/enforcing foreign arbitral awards. Article 75 of the PAL will be applicable in the absence of a treaty or, if the provisions set forth in Article 75 are more favorable to the recognition and enforcement of the foreign award, when compared to an applicable treaty.

16.2 Grounds

Article 75 of the PAL does not allow Peruvian courts to review the merits of the award, and closely follows the grounds for refusal set in Article V of the New York Convention.

Generally, validly-issued foreign arbitral awards should be recognized in Peru. Pursuant to Article 75 of PAL, recognition of a foreign arbitral award may be refused only if the opposing party is able to provide proof of any of the following circumstances:

¹⁹ Constitutional Tribunal, *Sociedad Minera de Responsabilidad Ltda. Maria Julia v. Superior Court of Justice of Lima (Third Civil Chamber)*, Docket No. 00142-2011-PA/TC, September 21, 2011.Par. 22.

²⁰ Constitutional Tribunal, *Sociedad Minera de Responsabilidad Ltda. Maria Julia v. Superior Court of Justice of Lima (Third Civil Chamber)*, Docket No. 00142-2011-PA/TC, September 21, 2011, Par. 20. Also Avendaño, Juan Luis and Velasquez Raffo, "El Nuevo Precedente Constitucional sobre arbitraje, sobre la revisión judicial solicitada por terceros", *Anuario Latinoamericano de Arbitraje, Aplicación del convenio arbitral a partes no signatarias*, p. 195.

²¹ Under Peruvian Law, arbitrators have the authority to decline the application of a legal provision they find unconstitutional.

- (a) The parties to the agreement were under some incapacity (according to the law applicable to them), or if said agreement is not valid (according to the law applicable to the agreement or, if no indication is made, to the law of the country in which the award was made).²²
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the proceedings or was otherwise unable to present its case.²³
- (c) The award deals with a controversy not contemplated by or not falling within the scope of the arbitration agreement, or it contains decisions on matters beyond the scope of the agreement to arbitrate.²⁴
- (d) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the parties' agreement, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.²⁵
- (e) The award has not yet become binding on the parties, or has been set aside or its enforcement stayed by a competent authority of the country in which, or under the law of which, that award was made. There is no case law regarding the recognition of annulled foreign awards.

Article 75.8 states that if a request to set aside or stay the enforcement of the award is filed before the competent courts of the country in which, or under the law of which, the award was issued; the Superior Court in charge of adjudicating the recognition request is entitled to delay its decision. Moreover, if the party seeking recognition so requires it, the court may order the opposing party to provide security.

According to Article 75.3 (similar to Article V.2 of the New York Convention), a court may refuse –“*ex officio*”– the recognition of a foreign arbitral award if the court finds that:

- (a) The subject matter of the difference is not capable of settlement by arbitration under Peruvian law.
- (b) The award is contrary to international public policy.

It seems that in some cases this “*ex officio*” analysis by the courts may have been extended beyond of what it is established in the PAL. For instance, in case 00161-2013-0-1817-SP-CO-02²⁶ where the defendant had not opposed the application for recognition by the claimant, the court analyzed whether during the arbitral proceedings the former had been notified correctly. Unless the court was indeed ascertaining whether the award was not contrary to public policy (which was not explicitly said in the decision), the aforementioned analysis could have only been made if the defendant had raised the issue during the enforcement procedure.

It is important to consider that the PAL has recognized the more-favorable-right provision of Article VII of New York Convention, in Article 78.1. According to this provision, the court is allowed to apply, in cases of recognition of arbitral award, the PAL if it favors recognition.

²² Article 75.4 of PAL states that none of the circumstances reflected in Article 75.2.a. will lead to refusing recognition of the award if the opposing party was also part of the arbitral procedure and failed to raise those objections or if the arbitration agreement is valid according to Peruvian law.

²³ Article 75.5 of PAL states that none of the circumstances reflected in Article 75.2.b. will lead to refusing recognition of the award, if the opposing party was also part of the arbitral procedure and failed to raise those objections.

²⁴ Article 75.6 of PAL states that none of the circumstances of Article 75.2.c. will lead to refusing recognition of the award if the matters submitted to arbitration are independent and separable from those not submitted. The result of this may be partial recognition and enforcement of the award.

²⁵ Article 75.7 of PAL states that none of the circumstances stated established in Article 75.2.d. will lead to refusing recognition of the award if the opposing party was also part of the arbitration procedure and failed to challenge the jurisdiction of the arbitral tribunal expressly based on the objections described above.

²⁶ Superior Court of Lima (Second Chamber), *Ecom USA Inc. v. Corporación Textil S.A.*, Decision No. 3, Docket No. 00161-2013-0-1817-SP-CO-02, March 4, 2012.

16.3 Recognition Procedure

Article 76 of the PAL addresses the procedural issues of a request for recognition of a foreign arbitration award. The Superior Court (which in Peru has the function of a court of Appeals) will have jurisdiction over the procedure, instead of a trial court.²⁷

According to Article 76.1 of the PAL, the party seeking recognition shall present with its claim an original or a copy of the award complying with the requirements of Article 9 of the PAL. Article 9 of the PAL for its part, requires that any foreign document shall be authenticated in conformity with the law of the country of origin of the document and shall be certificated by Peruvian diplomatic agents or similar.²⁸ Furthermore, if the document is not in Spanish, a simple translation shall be provided unless the judicial authority considers that an official translation is necessary.

The party opposing recognition has 20 business days to object, and within 20 additional business days, a hearing will take place to discuss the grounds for refusing recognition. The Superior Court then has the power to issue a ruling immediately after the hearing, or to do so within 20 business days after the hearing. In our experience, the proceedings before the Superior Court usually take between 6 months and a year.

Unlike the procedure for seeking recognition and enforcement of foreign judgments (subject to several levels of review), the decisions made by the court in the context of a recognition request will only be subject to appeal if the Superior Court denies the request for recognition. In other words, if the Superior Court recognizes the award, the decision will be final.

16.4 Enforcement Procedure

Articles 77 and 68 of the PAL address the procedural issues regarding the enforcement of a foreign arbitration award. If the award debtor does not fulfill the obligations contained in the award issued abroad, and Peruvian courts have recognized the award, the award creditor is entitled to file a claim seeking the enforcement of the arbitration award.

According to Article 8 of the PAL, the judge specialized in commercial matters, or failing the latter, the civil judge of the place of the arbitration or the place where the award should display its effects, is the competent judge to decide upon application for enforcement of an arbitral award.²⁹ It is important for the claimant to distinguish between recognition and enforcement of awards for purposes of filing before the competent court. The Superior Court of Lima in a decision rendered on March 29, 2012 declared that the application for enforcement raised by the claimant before the aforementioned court was inadmissible since it is the judge specialized in commercial matters the competent one to decide upon enforcement of arbitral awards.³⁰

The party applying for enforcement shall present before the court a copy of the arbitral award and any revision, interpretation, integration or exclusion of the latter rendered by the arbitral tribunal; as well as any enforcement measures taken by the arbitral tribunal.³¹ The judge will immediately order the debtor to satisfy the award within a 5 business-day deadline.³²

²⁷ PAL, Article 8.5.

²⁸ However, where the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents ("Apostille Convention") is applicable the aforementioned requirement will be substituted by the apostille.

²⁹ PAL, Article 8.3 See also, PAL, Articles 77 and 68.

³⁰ Superior Court of Lima (First Civil Chamber), *Consortio VAR Contratistas Generales SAO Ingenieros ERL v. El Ministerio de Educación Unidad Ejecutiva UE29*, Decision No.1 Docket 00110-2011-0-1817-SP-CO-01, March 29, 2011,

³¹ PAL, Article 68.1.

³² PAL, Article 68.3. According to Article 12 of the PAL time limits fixed by days should be interpreted as referring to business days.

Within the same deadline, pursuant to Article 68.3 of the PAL, the debtor can oppose to the enforcement by providing: i) evidence that a stay enforcement of the award has been ordered; or, ii) evidence that the award is vacated; or, iii) evidence that the award was satisfied. Additional arguments are not allowed.

According to Article 68.3 of the PAL, if the trial court rules in favor of the opposing party, the decision can be subject to appeal, and the appeal will suspend the effects of the decision made by the trial court.

17. Funding arrangements

Under the PAL, there are no restrictions to use contingency or alternative fee arrangements or third-party funding.

THE PHILIPPINES

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

RICARDO MA. P.G. ONGKIKO AND JOHN CHRISTIAN JOY A. REGALADO
OF SYCIP SALAZAR HERNANDEZ & GATMAITAN

SYCIP
SALAZAR
& HERNANDEZ
& GATMAITAN

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Arbitration in the Philippines is primarily governed by Republic Act No. 9285 (“RA 9285”). It is also known as the Alternative Dispute Resolution Act of 2004. RA 9285 primarily adopted (1) Republic Act No. 876 (otherwise known as the Arbitration Law), which was enacted on June 19, 1953 to govern domestic arbitration, and (2) the UNCITRAL Model Law to govern international commercial arbitration.

RA 9285 was enacted as part of the State’s policy to actively promote party autonomy in the resolution of disputes. Thus, parties are free to agree on, among other things: (a) the seat of arbitration, (b) the law governing the arbitration agreement, (c) the place where arbitration hearings shall be held, (d) the language of the arbitration, (e) the procedure for the appointment of arbitrators, and (f) the procedure for the arbitration proceedings. The Philippines is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Key places of arbitration in the jurisdiction	Metro Manila is the key place of arbitration in the Philippines.
Civil law / Common law environment?	Civil law
Confidentiality of arbitrations?	Arbitration proceedings are confidential.
Requirement to retain (local) counsel?	There is no requirement to retain counsel or local counsel in the arbitration proceedings.
Ability to present party employee witness testimony?	ϕ
Ability to hold meetings and/or hearings outside of the seat?	The parties are free to agree on the place where the arbitration hearings may be held.
Availability of interest as a remedy?	Interest may be awarded in cases involving breach of contract. The present legal rate of interest is 6% <i>per annum</i> .
Ability to claim for reasonable costs incurred for the arbitration?	Generally, arbitration costs shall 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.
Restrictions regarding contingency fee arrangements and/or third-party funding?	There are no restrictions or regulations on the use of contingency or alternative fee arrangements or third-party funding for arbitration conducted in the Philippines.
Party to the New York Convention?	ϕ
Other key points to note	The principles of party autonomy, competence-competence, and separability of the arbitration agreement are recognized by Philippine law. Parties are not prohibited from waiving their right to seek the setting aside of an arbitral award.
WJP Civil Justice score (2017-2018)	0.47

ARBITRATION PRACTITIONER SUMMARY

Arbitration in the Philippines is primarily governed by Republic Act No. 9285 (“RA 9285”). It is also known as the Alternative Dispute Resolution Act of 2004. RA 9285 primarily adopted (1) Republic Act No. 876 (otherwise known as the Arbitration Law), which was enacted on June 19, 1953 to govern domestic arbitration, and (2) the UNCITRAL Model Law to govern international commercial arbitration.

Parties are free to agree on, among other things: (a) the seat of arbitration, (b) the law governing the arbitration agreement, (c) the place where arbitration hearings shall be held, (d) the language of the arbitration, and (e) the procedure for the appointment of arbitrators and the proceedings.

Philippine courts also provide support to parties to an arbitration agreement and arbitration proceedings. For example, Philippine courts have the power to (1) suspend court proceedings and refer the parties to arbitration once it is notified of the existence of an arbitration agreement between the parties, (2) issue interim measures of protection when necessary, and (3) provide assistance in the taking of evidence. An arbitral award may not be appealed, and may only be set aside or refused enforcement in accordance with the grounds set out in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which the Philippines is a party to.

Date of arbitration law?	RA 9285 was enacted on February 4, 2004, and it has not yet been amended.
UNCITRAL Model Law? If so, any key changes thereto?	The Philippines adopted the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on June 21, 1985. It has not yet adopted the 2006 Model Law.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	φ
Availability of <i>ex parte</i> pre-arbitration interim measures?	Arbitrators may issue interim measures of protection. Philippine courts have the power to issue interim measures of protection, including temporary orders of protection that they can issue <i>ex parte</i> .
Courts’ attitude towards the competence-competence principle?	The principle of competence-competence is recognized by Philippine law. Philippine courts will generally stay court proceedings if there is a valid arbitration agreement covering the dispute.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The Philippines has adopted the grounds to refuse the recognition and enforcement of an arbitral award set out in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
Courts’ attitude towards the recognition and enforcement of foreign awards annulled at the seat	φ

of the arbitration?	
Other key points to note?	<p>The law does not regulate the arbitrator's right to admit or exclude evidence.</p> <p>A domestic arbitral award or international commercial arbitral award may not be appealed.</p> <p>The petition to recognize and enforce an arbitral award may be filed anytime from receipt of the award, but it must be filed within 10 years from receipt of the award. However, if a timely petition to set aside an arbitral award is filed (which must be filed within three months from the receipt of the award), the opposing party must file therein and in opposition thereto the petition for recognition and enforcement of the same award within fifteen (15) days from receipt of the petition to set aside.</p> <p>A foreign arbitral award is presumed to have been made and released in due course of arbitration and is subject to enforcement by the court.</p> <p>It is a crime for an arbitrator to have any interest in the property disputed in the arbitration proceedings wherein he acted as an arbitrator. However, there does not appear to be any arbitrator who has been convicted of this crime.</p>

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Law governing the arbitration agreement – if based on the UNCITRAL Model Law, what key modifications if any have been made to it? If not, what form does the arbitration law take?

Arbitration in the Philippines is governed principally by Republic Act No. 9285, otherwise known as the Alternative Dispute Resolution Act of 2004 (“RA 9285” or the “ADR Act”). RA 9285 was enacted on February 4, 2004 and primarily adopted: (1) Republic Act No. 876, otherwise known as the Arbitration Law (“RA 876”), which was enacted on June 19, 1953 to govern domestic arbitration, and (2) the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on June 21, 1985 (“Model Law”) to govern international commercial arbitration. Some provisions of the Model Law were also made applicable to domestic arbitration.

Under RA 9285, an arbitration is considered an international commercial arbitration if (a) it involves any party whose place of business is outside the Philippines (at sec. 3(p)), and (b) it covers matters arising from all relationships of a commercial nature, whether contractual or not (*e.g.*, any trade transaction for the supply or exchange of goods or services; distribution agreements; construction of works; commercial representation or agency; factoring; leasing; consulting; engineering; licensing; investment; financing; banking; insurance; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road) (at sec. 21).

Further, pursuant to Sec. 34 of RA 9285, disputes arising from, or connected with, contracts entered into by parties involved in construction in the Philippines are governed by Executive Order No. 1008, otherwise known as the Construction Industry Arbitration Law (“EO 1008”), which was enacted on February 4, 1985. The discussion below will not consider the rules for construction arbitration under EO 1008.

1.2 When was the arbitration law last revised

RA 9285 has not been amended to date.

2. The arbitration agreement

2.1 How do courts in the jurisdiction determine the law governing the arbitration agreement?

There is no express law setting out the rules on the law governing the arbitration agreement. However, it is the policy of the law to promote party autonomy in the resolution of disputes or the parties’ freedom to make their own arrangements to resolve their disputes (see RA 9285, sec. 2). Thus, the law governing the arbitration agreement will depend on the choice-of-law provision of the parties in said arbitration agreement. Generally, Philippine courts shall apply the law agreed upon by the parties, provided that there is a substantive relationship between the choice of law and the contract or transaction, here the arbitration agreement. In the absence of such agreement, Philippine courts shall apply the law which they determine to have the most substantive relationship with such contract or transaction, *i.e.*, the arbitration agreement.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Yes, the arbitration agreement is considered to be independent from the rest of the contract in which it is set forth. A.M. No. 07-11-08-SC, otherwise known as the Special Rules of Court on Alternative Dispute Resolution (“Special ADR Rules”), recognizes the principle of separability of the arbitration clause, which means that such clause shall be treated as an agreement independent of the other terms of the contract of which it forms part. Accordingly, a decision that the contract is null and void shall not render the arbitration agreement invalid.

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

Department of Justice Circular No. 98, otherwise known as Alternative Dispute Resolution Act of 2004 Implementing Rules and Regulations (“ADR Act IRR”), requires that the arbitration agreement be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, provided that the contract is in writing and the reference is such as to make that clause part of the contract.

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

Under Article 1311 of the Civil Code of the Philippines, contracts take effect only between the parties, their assigns and heirs. Thus, a third party who is not a party to the arbitration agreement shall not be bound by the arbitration agreement.

2.5 Are there restrictions to arbitrability? In the affirmative:

2.5.1 Do these restrictions relate to specific domains (such as IP, corporate law etc.)? Do these restrictions relate to specific persons (i.e. State entities, consumers etc.) ?

Yes, there are restrictions to arbitrability. The following disputes may not be referred to arbitration under Philippine law: (a) labor disputes; (b) the civil status of persons; (c) the validity of a marriage; (d) any ground for legal separation; (e) the jurisdiction of courts; (f) future legitime; (g) criminal liability; (h) questions on the validity of legal separation; and (i) future support.

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

3.1.1 If the place of the arbitration is inside of the jurisdiction? If the place of the arbitration is outside of the jurisdiction?

The Philippines is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), which provides, among others, that the “*court of a Contracting State, when seized of an action in a matter of respect of which the parties have made an agreement [to submit the dispute to arbitration], shall, at the request of one of the parties, refer the parties to arbitration...*” (at Article II(3)).

In this regard, Philippine courts will generally stay litigation if there is a valid arbitration agreement covering the dispute. Sec. 24 of RA 9285 provides that a court before which an action is brought in a matter which is the subject matter of an arbitration agreement shall, if at least one party so requests not later than the pre-trial conference, or upon the request of both parties thereafter, refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. Court proceedings may be set aside if the proceedings continue despite the court having been notified of the existence of an arbitration agreement between the parties (see *Koppel, Inc. v. Makati Rotary Club Foundation, Inc.*, G.R. No. 198075, September 4, 2013).

The Special ADR Rules further provide that an order referring a dispute to arbitration is immediately executory and cannot be the subject of a motion for reconsideration, appeal or a petition for certiorari.

The law makes no distinction between an arbitration agreement providing for arbitration inside or outside of the Philippines.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

Philippine courts are not bound by any injunction issued by an arbitrator enjoining the conduct of litigation proceedings. Philippine courts, not being a party to the arbitration, are not bound by injunction orders that may be issued by the arbitrator. However, as mentioned above, a party may request a Philippine court, not later than the pre-trial conference, to refer the parties to arbitration. Moreover, pursuant to Rule 5.6 of the Special ADR Rules, Philippine courts may assist in the enforcement of interim measures of protection issued by arbitral tribunals, such as injunction orders, which the latter cannot enforce effectively. This is consistent with the current policy promoting arbitration (*i.e.*, the arbitration agreement provides (directly or by reference to arbitration rules) the procedural rules applicable between the parties. The parties have an obligation to abide by the arbitration agreement in good faith).

3.3 On what grounds(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)

Philippine courts do not have the authority to directly intervene in arbitrations seated outside the Philippines. However, a party to an arbitration agreement may petition a Philippine court under the Special ADR Rules to issue an interim measure of protection in aid of arbitration to compel any appropriate act. This may include an order enjoining the other party from proceeding with the arbitration proceedings if the arbitration proceedings were not commenced in accordance with the arbitration agreement.

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

There is no prohibition for a party to be self-represented or be represented by outside counsel, *i.e.*, foreign counsel, in either a domestic or an international commercial arbitration. Under Sections 22 and 33 of RA 9285, a party may be represented by any person of his choice in an arbitration conducted in the Philippines. However, should the party decide to retain outside counsel, such outside counsel 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, unless admitted to the practice of law in the Philippines.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

When a person is approached in connection with his possible appointment as an arbitrator, he must disclose any circumstance likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings shall, without delay, disclose any such circumstance to the parties unless they have already been informed of them by him. The ADR Act IRR provides that an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications on which the parties have agreed. A party may challenge an arbitrator which it has appointed or in whose appointment it has participated, only for reasons which have arisen or of which it becomes aware after the appointment. Thus, the failure to disclose by itself, will not justify an acceptance of a challenge. It must be shown that there are justifiable doubts as to his impartiality or independence.

The challenge must first be referred to the arbitral tribunal for resolution. If the challenge is not successful, the aggrieved party may request the appointing authority to decide on the challenge. Should the appointing authority fail or refuse to act on the challenge within the relevant period, then the aggrieved party, pursuant to Rule 7.2 of the Special ADR Rules, may renew the challenge through a petition filed with a Regional Trial Court.

4.3 On what ground(s) do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

In general, should the appointing authority refuse to act within thirty (30) days from receipt of the request to appoint arbitrators, a party may submit an application to the court.

Rule 6.1 of the Special ADR Rules provides that a court shall act as appointing authority in all instances where arbitration is *ad hoc* and the parties fail to provide a method for appointing or replacing an arbitrator, or substitute arbitrator, or the method agreed upon is ineffective, and the National President of the Integrated Bar of the Philippines (“IBP”) or his duly authorized representative fails or refuses to act within such period as may be allowed under the pertinent rules of the IBP or within such period as may be agreed upon by the parties, or in the absence thereof, within thirty (30) days from receipt of such request for appointment. It should be noted that in *ad hoc* arbitration, the default appointment of arbitrators is made by the National President of the IBP or his duly authorized representative.

4.4 Do courts have the power to issue interim measures in connection with arbitrations?

4.4.1 If so, are they willing to consider *ex parte* requests?

Yes, Philippine courts have the power to issue the following interim measures of protection: (a) preliminary injunction directed against a party to an arbitration, (b) preliminary attachment against property or garnishment of funds in the custody of a bank or third person, (c) appointment of a receiver, (d) detention, preservation, delivery, or inspection of property, or (e) assistance in the enforcement of an interim measure of protection granted by the arbitral tribunal, which the latter cannot enforce effectively. Any such interim measure of protection may be issued in order to: (i) prevent irreparable loss or injury; (ii) provide security for the performance of any obligation; (iii) produce or preserve any evidence; and (iv) compel any other appropriate act or omission.

In cases where the court finds that there is an urgent need to either (a) preserve property, (b) prevent the respondent from disposing of, or concealing, the property, or (c) prevent the relief sought from becoming illusory because of prior notice, the court shall issue an immediately executory temporary order of protection *ex parte* and require the petitioner to post a bond to answer for any damage that respondent may suffer as a result of its order. The *ex parte* temporary order of protection shall be valid only for a period of twenty (20) days from the service on the party required to comply with the order.

4.5 Other than arbitrator’s duty to be independent and impartial, does the law regulate the conduct of the arbitration?

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

Yes, the law provides for the confidentiality of arbitration proceedings. Under Section 23 of RA 9285, the arbitration proceedings, including the records, evidence, and the arbitral award shall be considered confidential and shall not be generally published. Publication of the information obtained through the proceedings may be allowed: (1) where there is consent of the parties, or (2) for the limited purpose of disclosing to the court relevant documents in cases where resort to the court is allowed. However, these exceptions do not extend to information containing secret processes, developments, research, and other information (*i.e.*, business or trade secrets) where it is shown that the applicant shall be materially prejudiced by an authorized disclosure thereof.

In this connection, pursuant to Rule 10 of the Special ADR Rules, a party, counsel or witness who disclosed or who was compelled to disclose information during the arbitration proceedings under circumstances that would create a reasonable expectation, on behalf of the source, that the information shall be kept confidential, may petition a Regional Trial Court to issue a protective order to prevent such information from being further disclosed without the express written consent of the source or the party who made the disclosure.

4.5.2 Does it regulate the length of arbitration proceedings?

No, the law does not regulate the length of arbitration proceedings.

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

Section 30 of RA 9825 provides that the parties are free to agree on the place of arbitration. If the parties fail to agree on the place of arbitration, then the place of arbitration shall be in Metro Manila, unless the tribunal, having regard to the circumstances of the case including the convenience of the parties, shall decide on a different place of arbitration. Further, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts, or the parties, or for inspection of goods other party or documents.

4.5.4 Does it allow for arbitrators to issue interim measures?

Yes, Section 28 of RA 9285 provides that arbitrators may issue interim measures of protection, under the following conditions:

- (a) After the 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.
- (b) The following rules on interim or provisional relief shall be observed:
 - (i) Any party may request that provisional relief be granted against the adverse party;
 - (ii) Such relief may be granted to prevent irreparable loss or injury, provide security for the performance of any obligation, produce or preserve any evidence, or compel any other appropriate act or omission;
 - (iii) The order granting provisional relief may be conditioned upon the provision of security or any act or omission specified in the order;
 - (iv) 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 evidence supporting the request;
 - (v) The order shall be binding between the parties;
 - (vi) Either may apply with the Court for assistance in implementing or enforcing an interim measure ordered by an arbitral tribunal;
 - (vii) A party who does not comply with the order shall be liable for all damages resulting from non-compliance, including all expenses, and reasonable attorney's fees, paid in obtaining the order's judicial enforcement.

4.5.5 Does it regulate the arbitrator's right to admit/exclude evidence?

No, the law does not regulate the arbitrator's right to admit or exclude evidence. In this regard, Article 19 of the Model Law, which applies to both international commercial arbitration and domestic arbitration, provides that the arbitral tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence. Further, with respect to domestic arbitration, Section 15 of RA 876 provides that the arbitrators shall be the sole judge of the relevancy and materiality of the evidence offered or produced, and shall not be bound to conform to the Rules of Court pertaining to evidence.

4.5.6 Does it make it mandatory to hold a hearing?

No. Article 4.24, Rule 5, Chapter 4, of the ADR Act IRR, which applies to international commercial arbitration and adopts the language of Article 24 of the Model Law, states that subject to any contrary agreement by the parties, the arbitral tribunal shall decide (1) whether to hold oral hearings for the presentation of evidence or for oral argument, or (2) whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held,

the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

In domestic arbitration, Section 12 of RA 876 provides that subject to the terms of the contract between the parties, the arbitrators selected shall, within the relevant periods set out in the law, set a time and place for the hearing of the matters submitted to them, and shall notify each of the parties of the same. The parties may resort to other processes in lieu of a hearing. In this regard, Section 18 of the RA 876 recognizes the right of the parties to agree to submit their dispute to arbitration through the submission of agreed statement of facts and written arguments.

4.5.7 Does it prescribe the principles governing the awarding of interest?

No, the law does not prescribe principles governing the awarding of interest. Having said that, under the Philippines law, interest may be awarded in cases involving breach of contract (Civil Code of the Philippines, Art. 2210). Further, if the obligation consists in the payment of a sum of money and the debtor incurs delay, interest shall be awarded based on the rate agreed upon or, in the absence of stipulation, the legal rate of 6% per annum (Civil Code of the Philippines, Art. 2209; See, also, BSP Circular No. 799 series of 2013).

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

Generally, arbitration costs in both international commercial arbitration and domestic arbitration shall 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. With respect to the costs of legal representation (the costs of expert advice and of other assistance required by the arbitral tribunal), the arbitral tribunal shall be free to determine which party shall bear such costs or it may apportion such costs between the parties if it determines that appointment is reasonable, taking into account the circumstances of the case (ADR Act IRR, Arts. 4.46(d) and 5.46 (e)).

Further, in domestic arbitration, arbitrators have the power to assess the expenses of any party against another party, when such assessment is deemed necessary (RA 876, Sec. 20).

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

Pursuant to Section 5 RA 9285, in relation to Section 38(1), Chapter 9, Book I of the Administrative Code of 1987, arbitrators shall not be civilly liable for acts done in the performance of their duties, unless there is a clear showing of bad faith, malice, or gross negligence.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in arbitration proceeding?

Article 216 of the Revised Penal Code, which penalizes possession of prohibited interest by a public officer, may penalize arbitrators who, directly or indirectly, shall take part in any contract or transaction connected with the property subject of the arbitration proceedings. This provision seems to prohibit an arbitrator from having any interest in the property disputed in the arbitration proceedings wherein he acted as an arbitrator. This crime is punishable by a fine and/or imprisonment. Having said that, there does not appear to be any arbitrator who has been convicted of this crime.

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Yes, the parties can waive the requirement for an award to provide reasons. Under Article 31(2) of the Model Law (which, pursuant to RA 9285, applies to international commercial and domestic arbitrations), the

award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given (ADR Act IRR, Articles 4.31(b) and 5.31(b)).

5.2 Can parties waive the right to seek the annulment of the award?

The Philippine arbitration laws do not prohibit parties from waiving their right to seek the setting aside of an arbitral award. In this regard, Article 2044 of the Civil Code provides that any stipulation that the arbitrators' award or decision shall be final, is valid, except when there is, among others, mistake, fraud, violence, intimidation, undue influence, or falsity of documents. Nonetheless, it may be argued that the right to seek the annulment of the award, when its recognition or enforcement would be contrary to public policy, may not be waived by the parties. This issue, however, has not been resolved by the Philippine Supreme Court.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

There are no atypical or unusual requirements that must be complied with to ensure the validity of the arbitral award. Under Article 31(1) of the Model Law (which, pursuant to RA 9285, applies to international commercial and domestic arbitrations), the award must be in writing and signed by the arbitrator or majority of all the members of the tribunal in case of arbitral proceedings with more than one arbitrator (ADR Act IRR, Articles 4.31(a) and 5.31(a)).

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

No, the law does not provide for an appeal of an award. A petition to vacate a domestic award, and a petition to set aside or refuse the recognition of the international commercial and foreign arbitral award, based on the grounds prescribed by law, are the exclusive recourse against the award. Thus, a party to an arbitration is precluded from filing an appeal or a petition for certiorari questioning the merits of an arbitral award (Special ADR Rules, Rule 19.7), and, in this regard, Philippine courts are mandated: (a) not to disturb the arbitral tribunal's determination of facts and/or interpretation of law in a petition to vacate a domestic award (Special ADR Rules, Rule 11.9), and (b) to dismiss any other recourse from the arbitral award, such as by appeal or petition for review or petition for certiorari or otherwise, with respect to an international commercial award (Special ADR Rules, Rule 12.5).

5.5 What procedure exists for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

Rule 12 of the Special ADR Rules sets out the procedure for the recognition and enforcement of an international commercial arbitral award rendered by an arbitral tribunal seated in the Philippines. The procedure is outlined below:

1. *Who may request recognition and enforcement.* - Any party to an international commercial arbitration in the Philippines may petition the proper court to recognize and enforce an arbitral award (Rule 12.1, Special ADR Rules);
2. *When to file petition.* - The petition to recognize and enforce an arbitral award may be filed anytime from receipt of the award, but it must be filed within 10 years from receipt of the award (Civil Code of the Philippines, Article 1144). However, if a petition to set aside an arbitral award is timely filed (*i.e.*, within three [3] months from the receipt of the award), the opposing party must file therein and in opposition thereto the petition for recognition and enforcement of the same award within fifteen (15) days from receipt of the petition to set aside (Rule 12.2, Special ADR Rules);
3. *Grounds to oppose a petition for recognition and enforcement.* - A party resisting the recognition and enforcement of an arbitral award must prove that: (a) 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 thereof, under Philippine law; (b) it was not given proper notice of the appointment of

an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; (c) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; 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 only that part of the award which contains decisions on matters submitted to arbitration may be enforced; (d) 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 Philippine law from which the parties cannot derogate, or, failing such agreement, was not in accordance with Philippine law; (e) the subject-matter of the dispute is not capable of settlement by arbitration under the law of the Philippines; or (f) the recognition or enforcement of the award would be contrary to public policy (Rule 12.4, Special ADR Rules). These grounds were drawn from Article V of the New York Convention;

4. *Venue.* - The petition may, at the option of the petitioner, be filed with the Regional Trial Court: (a) where arbitration proceedings were conducted; (b) where any of the assets to be attached or levied upon is located; (c) where the act to be enjoined will be or is being performed; (d) where any of the parties to arbitration resides or has its place of business; or (e) in the National Capital Judicial Region (Rule 12.3, Special ADR Rules);

5. *Form.* - The application to recognize and enforce (either through (a) a petition to recognize and enforce, or (b) an opposition to a petition to set aside the award), shall be verified by a person who has personal knowledge of the facts stated therein (Rule 12.6, Special ADR Rules);

6. *Notice.* - Upon finding that the petition filed is sufficient both in form and in substance, the court shall cause notice and a copy of the petition to be delivered to the respondent directing him to file an opposition thereto within fifteen (15) days from receipt of the petition. In lieu of an opposition, the respondent may file a petition to set aside in opposition to a petition to recognize and enforce, or a petition to recognize and enforce in opposition to a petition to set aside (Rule 12.8, Special ADR Rules);

7. *Submission of documents.* - If the court finds that the issue between the parties is mainly one of law, the parties may be required to submit briefs of legal arguments, not more than fifteen (15) days from receipt of the order. If the court finds that there are issues of fact relating to the grounds relied upon for the court to set aside, it shall require the parties within a period of not more than fifteen (15) days from receipt of the order simultaneously to submit the affidavits of all of their witnesses and reply affidavits within ten (10) days from receipt of the affidavits to be replied to. The parties shall attach to these affidavits all documents relied upon in support of their positions (Rule 12.9, Special ADR Rules);

8. *Hearing.* - If, on the basis of the submissions of the parties, the court finds that there is a need to conduct an oral hearing, the court shall set the case for hearing. During the hearing, the affidavits of witnesses shall take the place of their direct testimonies and they shall immediately be subject to cross-examination thereon. The court shall ensure that the case is heard without undue delay (Rule 12.10, Special ADR Rules);

9. *Judgment of the court.* - Unless a ground to set aside an arbitral award is fully established, the court shall grant the petition to recognize and enforce the arbitral award, or dismiss the petition to set aside. If a petition to recognize and enforce the arbitral award was filed in opposition to the petition to set aside, the court shall recognize and enforce the award. In resolving the petition or petition in opposition thereto, the court shall either set aside or enforce the arbitral award. The court shall not disturb the arbitral tribunal's determination of facts and/or interpretation of law." (Rule 12.13, Special ADR Rules);

Rule 13 of the Special ADR Rules sets out the procedure for the the recognition and enforcement of an international commercial arbitral award rendered by an arbitral tribunal seated outside the Philippines, which is similar to the procedure outlined above.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

A petition to vacate a domestic award, or set aside and refuse the recognition of an international commercial award, must first be resolved before the award is enforced. In this regard, if a petition to vacate a domestic award is filed within the relevant period before a petition to confirm the award is filed, then the petition to confirm must be filed in opposition to the petition to vacate (Special ADR Rules, Rule 11.2). If a petition to set aside an international commercial award is filed within the relevant period and ahead of a petition to recognize and enforce the award, the petition to recognize and enforce must be filed in opposition to the period to set aside. The decision denying any of the foregoing petitions may be appealed to the Court of Appeals, but the appeal shall not stay the award, judgment, final order or resolution sought to be reviewed unless the Court of Appeals directs otherwise upon such terms as it may deem just. For example, the Court of Appeals may, as a condition for the stay of the enforcement of the award, require the appellant to post a bond in an amount equivalent to the amount of the award to answer for all damages that may be suffered by the winning party as a result of the stay if the enforcement of the award is sustained on appeal. The failure of the appellant to post the bond, when required by the Court of Appeals, is a ground for the dismissal of the appeal (Special ADR Rules, Rule 19.25).

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Under Article 4.36, Rule 6 of the ADR Act IRR, the enforcement of an arbitral award, made in a state that is a party to the New York Convention, may be refused if the party furnishes proof that the award has been set aside or suspended by a court at its seat. There are no known precedents of a request to recognize and enforce an award which has been annulled at the seat.

5.8 Are foreign awards readily enforceable in practice?

A foreign arbitral award is presumed to have been made and released in due course of arbitration and is subject to enforcement by the court. Thus, a Philippine court is therefore mandated to recognize and enforce a foreign arbitral award, unless a ground to refuse recognition or enforcement of the foreign arbitral award under this rule is fully established (Special ADR Rules, Rule 13.11).

6. Funding arrangements

6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

6.1.1 If so, what is the practical and/or legal impact of such restrictions?

At present, there are no restrictions or regulations on the use of contingency or alternative fee arrangements or third-party funding for arbitration conducted in the Philippines.

7. Is there likely to be any significant reform of the arbitration on the near future?

There are no pending bills before the Philippine Congress that seek to amend the current arbitration laws in the Philippines. Having said that, the Office of Alternative Dispute Resolution ("OADR"), the attached agency of the Department of Justice created under RA 9285 to, among others, "*assist the government to monitor, study and evaluate the use by the public and the private sector of ADR, and recommend to Congress needful statutory changes to develop, strengthen and improve ADR practices in accordance with world standards*", has created a Technical Working Group on arbitration to recommend amendments to RA 9285. The OADR will be conducting public consultations on the proposed amendments by late 2017, after which the proposed amendments will be submitted to the Philippine Congress for consideration in 2018.

POLAND

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

BARTOSZ KRUŻEWSKI AND ADELINA PROKOP
OF CLIFFORD CHANCE

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VERSION: 27 MAY 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Key places of arbitration in the jurisdiction	The key place of arbitration is Warsaw, where the most reputable arbitration institutions in Poland are based. The cases typically concern M&A transactions, construction disputes and disputes arising from commercial leases.
Civil law / Common law environment?	Civil law.
Confidentiality of arbitrations?	Arbitration is confidential (this is not specifically regulated by Polish law, but typically the rules of arbitration of the Polish courts of arbitration provide for confidentiality).
Requirement to retain (local) counsel?	There is no requirement to retain legal counsel.
Ability to present party employee witness testimony?	The parties can present the testimony of their own employees.
Ability to hold meetings and/or hearings outside of the seat?	Meetings and/or hearings can be held outside of the seat.
Availability of interest as a remedy?	The arbitral tribunals typically award interest on the principal amounts claimed.
Ability to claim for reasonable costs incurred for the arbitration?	A party typically can claim any reasonable costs incurred in the course of arbitration including the arbitrators' fees and expenses, the party's costs of legal representation, costs of expert opinions and translations.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Lawyer's fees cannot be based solely on a contingency basis.
Party to the New York Convention?	Yes.
Other key points to note	The arbitration agreement must be in writing (or in electronic communications exchanged between both parties). The arbitration proceedings usually last from between six and eighteen months.
WJP Civil Justice score (2018)	0.67

ARBITRATION PRACTITIONER SUMMARY

Date of arbitration law?	The Polish arbitration law was enacted in 2005 and the last revision was made in 2015.
UNCITRAL Model Law? If so, any key changes thereto?	The Polish arbitration law is mainly based on the UNCITRAL Model Law. The key modifications are: the arbitration agreement must be in writing and cannot confer a unilateral right to arbitrate only on one of the parties. Arbitration agreements in respect of disputes with consumers or concerning labour law are valid only if they are concluded after the dispute arises.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Polish courts can issue <i>ex parte</i> pre-arbitration interim measures.
Courts' attitude towards the competence-competence principle?	
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The grounds for annulment of an arbitral award are similar to those provided for in the New York Convention.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	Under Polish law, the courts cannot recognize and enforce an award annulled at the seat of the arbitration. Set aside and recognition/enforcement proceedings are single-staged and are held before the Court of Appeal. The decision of the Court of Appeal (concerning the enforcement of a foreign arbitral award or setting aside of local/foreign awards) can be appealed to the Supreme Court, but on very narrow grounds.
Other key points to note?	∅

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law?

Yes, the Polish arbitration law (*Part Five of the Code of Civil Procedure, "CCP"*) is largely based on the UNCITRAL Model Law. The key modifications are:

- The Polish arbitration law applies to all arbitration proceedings which are conducted in Poland (irrespective of whether these are domestic or international arbitrations) (**Art. 1155 CCP**).
- The arbitration agreement must be in writing, which is defined as an exchange of statements by both parties (**Art. 1162 CCP**, see point 2.3 below).
- An arbitration agreement conferring a unilateral right to arbitrate on one of the parties is ineffective (**Article 1161 § 1 CCP**).
- An active national judge cannot serve as an arbitrator (**Article 1170 § 2 CCP**).
- There are some separate rules as to the enforceability of awards issued outside of Poland (**Art. 1215 CCP**, see point 5.5 below).

1.2 When was the arbitration law last revised?

The Polish arbitration law was enacted in 2005 and was subject to the last revision in September 2015, which came into force on 1 January 2016 and limited the post-arbitration proceedings to one-instance proceedings (before the Court of Appeal, with the possibility of a cassation appeal to the Supreme Court).

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

Under Polish private international law ("**PIL**"), the arbitration agreement is subject to:

- the law of the parties' choice;
- in the absence of such choice - the law of the seat of arbitration;
- in the absence of the choice of the seat - the law governing the subject matter of the dispute;
- in any event, the arbitration agreement is effective if it is effective at least under the law where the award was issued or the arbitration proceedings are pending (**Article 39 PIL**).

The formal requirements of the arbitration agreement are governed by the law of the seat of arbitration. The arbitration agreement, however, is also effective if it meets the formal requirements of the law governing the arbitration agreement (**Article 40 PIL**).

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Yes, the arbitration agreement is considered to be independent from the rest of the contract (as confirmed by the Polish Supreme Court).¹ Consequently, the invalidity of the contract does not affect the validity of the arbitration agreement.

2.3 What are the formal requirements for an enforceable arbitration agreement?

An arbitration agreement must be in writing (**Article 1162 § 1 CCP**), which encompasses also agreements concluded by way electronic communications e.g. an exchange of e-mails, short text messages.²

¹ Judgment of the Supreme Court dated 2 March 2017, case ref. V CSK 392/16.

This requirement is also fulfilled if the arbitration agreement is concluded in an exchange of documents or statements between the parties by means of communication which provides a record of the agreement or, if the written contract refers to a document containing an arbitration clause, making it a part of the contract (**Article 1162 § 2 CCP**). This does not apply to arbitration agreements entered into with consumers and concerning labour law.

The arbitration agreement may also be incorporated in the articles of association of a company, in which case it will bind the shareholders (**Article 1163 CCP**).

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

A third party can be bound by the arbitration agreement only in very exceptional cases. For example:

- If a claim or right arising under the contract (which was subject to the arbitration agreement) is transferred to a third party, then such third party is also bound by the arbitration agreement.³
- If a contract grants a benefit to a third party (which is subject to an arbitration agreement), then the third party enforcing such benefit is bound by the arbitration agreement.⁴
- An arbitration agreement contained in the articles of association of a company binds its shareholders (even those who did not sign the articles of association but joined the company later) in relation to disputes concerning the company (**Article 1163 CCP**).

2.5 Are there restrictions to arbitrability?

Yes:

- Disputes concerning spousal and child support (maintenance claims) are not arbitrable (**Article 1157 CCP**) (as well as other disputes concerning rights that cannot be freely disposed of by parties).
- In the case of disputes with consumers and labour disputes, the parties may agree to arbitrate only after the dispute arose (**Article 1164** and **1164¹ § 1 CCP**).

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

The Polish courts will dismiss (rather than stay) the case if there is a valid arbitration agreement (irrespective of the seat of the arbitration) (**Article 1165 CCP**).

But the courts will only dismiss the case upon an objection raised by one of the parties. Such objection must be raised in litigation before the party submitted the first statement on the merits.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

The Polish arbitration law does not entitle arbitrators to issue orders enjoining the court to stay litigation because of the pending arbitration proceeding. Therefore, it is rather unlikely that Polish courts would consider themselves bound by such orders.

² Jakubecki Andrzej, *Kodeks postępowania cywilnego. Komentarz aktualizowany. Tom II. Art. 730-1217, Komentarz do art. 1162 § 2* (2017).

³ Judgment of the Supreme Court dated 3 September 1998, case ref. I CKN 822/97.

⁴ Art. 393 § 1 and § 2 of the Polish Civil Code.

3.3 On what grounds can the court intervene in arbitrations seated outside of the jurisdiction?

The Polish courts can intervene in arbitrations seated outside Poland only if this is expressly provided for by the Polish arbitration law. For example, Polish courts can:

- issue interim injunctions in support of pending arbitration proceedings seated outside of Poland (**Article 1166 CPC**);
- upon the arbitrators' request, Polish courts can examine the evidence or perform other actions which the arbitral tribunal is not able to perform (**Article 1192 CCP**).

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

Yes, the parties can be self-represented or represented by another person. The parties are not required to be represented by legal counsel.

4.2 How strictly do courts control arbitrators' independence and impartiality?

A person appointed as an arbitrator should immediately disclose any circumstances that could raise doubts as to his/her impartiality or independence (**Article 1174 § 1 CCP**).

An arbitrator may be challenged only if there are circumstances that raise justifiable doubts as to his/her impartiality or independence or if he/she does not have the qualifications prescribed by the agreement between the parties (**Article 1174 § 2 CCP**).

The parties should first file a challenge to the arbitral tribunal, and only if this challenge is unsuccessful may the parties request the Polish courts to deal with the challenge (**Article 1176 CCP**). There are no statutory time limits for the courts to decide on the challenge.

An arbitrator may not be challenged only because he/she failed to disclose the circumstances which the party considered as proving his/her impartiality. If the circumstances do not cast a justifiable doubt on the arbitrator's independence, the court will not accept the challenge and order the revocation of the arbitrator whose independence is disputed.

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

The court will appoint an arbitrator (or the presiding arbitrator) upon a motion filed by any of the parties, if:

- a party fails to appoint an arbitrator within one month from receiving the other party's request to do so, or
- the arbitrators appointed by the parties failed to appoint the presiding arbitrator within one month from their appointment.

The same rules apply if the parties fail to cooperate in appointing a sole arbitrator (**Article 1171 § 2 CCP**). The parties are free to agree on different appointment mechanism.

4.4 Do courts have the power to issue interim measures in connection with arbitration?

Polish courts are entitled to issue interim measures in support of arbitration proceedings if the applicant's case is plausible and it is likely that in the absence of such measure the enforcement of the award or the achievement of the purpose of the proceedings will be prevented or significantly impeded (**Articles 730 and 1166 CCP**). The interim measures may be ordered before the constitution of the arbitral tribunal and *ex parte*.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

Unless the parties have agreed otherwise, the arbitral tribunal may conduct the proceedings in the manner it deems appropriate. The arbitral tribunals often rely on the UNCITRAL Arbitration Rules or the IBA Guidelines.

The Polish Code of Civil Procedure (to the extent it governs the litigation before Polish courts) does not apply to arbitration. However, the CCP regulates certain aspects of the conduct of arbitration and key principles:

- At all times, the parties shall be treated equally. Each party has the right to be heard and to present its arguments and evidence for its support (**Article 1183 CCP**).
- The place where the hearing may be held is left to the parties' choice. However, if the parties have not agreed otherwise the arbitral tribunal may regardless of the parties' choice, designate a hearing to be held in any place the tribunal considers appropriate for the arbitrators' deliberation or hearing of evidence (**Article 1185 CCP**);
- The tribunal can hold a hearing or, alternatively, conduct the proceedings on the basis of an exchange of pleadings and documents. The arbitral tribunal is obliged to hold a hearing if any party requests the tribunal to do so (**Article 1189 § 1 CCP**).
- Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party which *prima facie* proved its claim, order the interim measures it considers necessary. The arbitral tribunal may require a party to provide appropriate security in order for the measure to be effective (**Article 1181 CCP**).
- The arbitral tribunal has the power to order the disclosure or discovery of documents. In the event of difficulties with obtaining documents, the arbitral tribunal may request a state court to assist in the taking of evidence (**Article 1192 § 1 CCP**). It is worth mentioning that under Polish law, there are no restrictions as to the presentation of testimony by a party's employees.
- The arbitral tribunal cannot apply coercive measures to obtain evidence (**Article 1191 § 1 CCP**).

Polish arbitration law itself does not provide for any rules on the confidentiality of arbitration. However, the arbitration rules of Polish arbitration institutions often include such confidentiality obligations.

The length of arbitration proceedings is not regulated by law. Practically, it usually fluctuates from between twelve and twenty-four months.

The CCP is silent on costs of arbitration, however, in the absence of an agreement between the parties, the arbitral tribunal will typically order the unsuccessful party to bear the costs (as this is a general rule which applies in Polish litigation). However, the 'pay your own way' rule, pursuant to which each party should bear its own costs irrespective of the outcome of the proceedings, is also recognised by some arbitral tribunals.

The costs typically include: the arbitrators' fees and expenses, costs of legal representation, and other costs of the arbitral proceedings, e.g. costs of expert opinions and translations.

The Polish arbitration law does not regulate the awarding of interest.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

The Polish arbitration law does not grant arbitrators general immunity to civil liability. The Polish arbitration law only provides that an arbitrator can resign at any time. If, however, such resignation is not justified by important reasons the arbitrator is liable for the losses arising from his/her resignation (**Article 1175 CCP**).

The issue of liability is usually regulated by the particular arbitration rules.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in arbitration proceedings?

There are no specific rules concerning the criminal liability of the participants in arbitration proceedings (for example, witnesses). It is disputable whether witnesses who commit perjury in arbitration proceedings could be subject to criminal liability.

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

The Polish arbitration law does not expressly allow the parties to waive the requirement for an award to provide reasons (**Article 1197 § 2 CCP**).

5.2 Can parties waive the right to seek the annulment of the award?

The parties cannot waive the right to seek the annulment of the award.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

Pursuant to the Polish Arbitration Law (**Article 1197 CCP**), the arbitral award should not only provide the reasons, but also:

- include a reference to the arbitration agreement; and
- identify the parties and the arbitrators.

In addition, (and in line with the UNCITRAL Model law), the arbitral award should (**Article 1197 CCP**):

- be made in writing and signed by the issuing arbitrators (if the award is issued by a tribunal composed of three or more arbitrators, the signatures of the majority of the arbitrators, accompanied by an explanation why the other signatures have not been provided are sufficient);
- specify the date and place the award was issued.

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

It is not possible to appeal an award. The annulment proceedings are the only mechanism a party can invoke to set aside an award. However, if the parties have agreed that the arbitration proceedings themselves will consist of two instances, the award rendered in the first instance can be appealed against in the course of the arbitration proceedings.

5.5 What procedure exists for the recognition and enforcement of awards, what time limits apply and is there a distinction to be made between local and foreign awards?

The Polish arbitration law applies to awards rendered in Poland and in foreign countries which are not signatories of the New York Convention (if the award was rendered in a country-signatory of the New York Convention, the New York Convention applies to its enforcement).

The recognition/enforcement of awards is subject to one-instance proceedings conducted by the Court of Appeal. There are no time limits for filing an application to enforce/recognise awards.

The recognition or enforcement of a domestic award shall be refused if:

- the subject matter of the dispute is non-arbitrable under Polish law; or
- the award violates the basic principles of Polish public policy (**Art. 1215 § 3 CCP**).

The same rules apply to the enforcement of foreign awards, with the following exceptions:

- the court hearing is mandatory (**Art. 1215 § 1 CCP**);

- the decision of the Court of Appeal is subject to a cassation appeal to the Supreme Court (**Art. 1215 § 3 CCP**);
- there are five additional grounds to refuse the recognition/enforcement of the award, i.e. if:
 - there was no arbitration agreement between the parties or the agreement was invalid, ineffective or ceased to be binding in accordance with the law governing the agreement;
 - a party was not duly notified of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present its case; or
 - the award was made in relation to a dispute not contemplated by or not falling within the terms of the arbitration agreement or contains a decision on matters beyond the scope of the arbitration agreement - where only part of an award has been rendered outside the scope of the arbitration agreement, then only that part of the award may be set aside; or
 - the composition of the arbitral tribunal or the basic rules of the arbitration proceedings were contrary to the composition or rules agreed on by the parties or to the CCP; or
 - the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, it was made.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

The filing of an application to annul an award does not automatically suspend the exercise of the right to enforce the award, but the court may, at its discretion, suspend the enforcement proceedings (**Article 1216**).

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

According to **Article 1215 § 1, 5) CCP** the court shall refuse recognition or enforcement, if the party proves that the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, it was made. However, this applies only to awards which are not subject to the New York Convention.

5.8 Are foreign awards readily enforceable in practice?

Polish courts are rather arbitration-friendly and both foreign and domestic awards are readily recognised and enforced in Poland. The grounds for recognition and enforcement of domestic awards under Polish arbitration law are similar to those under the New York Convention.

Polish courts typically refuse to recognize and enforce awards in case of violation of due process. Polish courts rely on public policy, as a basis to refuse enforcement, only in extreme cases.

6. Funding arrangements

6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

The rules of ethics of Polish advocates and legal advisers state that their remuneration cannot be based solely on a contingency fee.

Third-party funding is still not very common in Poland. Because there is little practice in this regard, there are no legal provisions regulating the issue.

7. Is there likely to be any significant reform of the arbitration law in the near future?

No, not in the nearest future. The last significant reform came into force in 2016 and limited the post-arbitration proceedings to one-instance proceedings.

PORTUGAL

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

FILIPPE VAZ PINTO, ANTÓNIO SAMPAIO CAMELO
AND JOANA GRANADEIRO
OF MORAIS LEITÃO, GALVÃO TELES, SOARES DA SILVA & ASSOCIADOS

MORAIS LEITÃO
GALVÃO TELES
SOARES DA SILVA

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

1. Law ●
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 - b. Adherence to international treaties ●
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2. Judiciary ●
3. Legal expertise ●
4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

VERSION: 22 DECEMBER 2017

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

The choice of the seat of the arbitration is one of the most consequential decisions in any arbitration agreement. The arbitration law of the arbitral seat will typically govern a wide range of issues concerning both the internal procedural conduct of the arbitral proceedings, as well as the external relationship between the arbitration and national courts. The seat may affect not only the way how the arbitration is conducted, but also its final outcome *e.g.*, as to the possibility of enforcement. It is also a main driver of time and cost.

Portugal has a pro-arbitration and modern arbitration law, enacted in 2012, which is based on the 2006 UNCITRAL Model Law, with certain improvements mostly based on the experience of other leading jurisdictions and/or on demands by users (*e.g.*, providing specific rules governing multi-party and multi-contract arbitrations, expressly allowing for interim measures and preliminary orders, prohibiting state entities from relying on domestic law to evade from an arbitration agreements and a liberal attitude towards the validity of arbitration agreements).

Key places of arbitration in the jurisdiction	Lisbon / Porto.
Civil law / Common law environment?	Portuguese legal system is a civil law jurisdiction with a significant influence in other Portuguese speaking jurisdictions including Angola, Brazil, Cabo Verde, Guinea-Bissau, Macau, Mozambique, S. Tomé e Príncipe and Timor Leste and a long-lasting tradition on international arbitration.
Confidentiality of arbitrations?	Yes.
Requirement to retain (local) counsel?	The issue is not regulated by the Portuguese Voluntary Arbitration Law ("PAL") and is not entirely settled. Some authors consider that, unlike in court litigation, representation by counsel is not mandatory, unless the parties agreed otherwise and, thus, according to this understanding, absent agreement by the parties on the matter, each of them is free to decide whether they wish to be represented by counsel or not.
Ability to present party employee witness testimony?	Yes.
Ability to hold meetings and/or hearings outside of the seat?	Yes. Under Article 31(2) of the PAL the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate to hold hearings, to allow the production of evidence, or to deliberate.
Availability of interest as a remedy?	Yes. The PAL does not prescribe for any rules governing the awarding of interest as, under Portuguese law, that is a substantive matter.
Ability to claim for reasonable costs incurred for the arbitration?	Yes. According to Article 42(5) of the PAL, unless otherwise agreed by the parties, the award shall determine the proportions in which the parties shall bear the costs directly resulting from the arbitration.
Restrictions regarding contingency	φThe Code of Ethics of the Portuguese Bar Association expressly

<p>fee arrangements and/or third-party funding?</p>	<p>prohibits the use of fee arrangements according to which the right to lawyer's fees is dependent on the success of the claim ("<i>quota litis</i>").</p> <p>Third-party funding is not specifically regulated and there are no particular restrictions to its use.</p>
<p>Party to the New York Convention?</p>	<p>Portugal is a party to the most important international treaties governing international arbitration, including the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Geneva Convention on the Execution of Foreign Arbitral Awards and the Inter-American Convention on International Commercial Arbitration making arbitral awards rendered in Portugal readily enforceable worldwide.</p>
<p>Other key points to note</p>	<p>Portuguese Courts are renowned for their independence and impartiality and are generally supportive of arbitration.</p> <p>Portugal has a highly committed, specialized, experienced, multilingual and culturally and legally diverse arbitration community capable of conducting all kinds of arbitration. Portugal has a unique geographical location at the cross-roads of Europe, America and Africa. Portugal is a relatively less expensive jurisdiction when compared to other major international seats, with all necessary equipment and infrastructures.</p>
<p>WJP Civil Justice score (2017-2018)</p>	<p>0.69</p>

ARBITRATION PRACTITIONER SUMMARY

The current Portuguese Voluntary Arbitration Law (“PAL”) is the result of an extensive debate and peer-review process and it materializes the efforts of the Portuguese government to equip Portugal with a more competitive, effective and modern arbitration law, thereby rendering the country truly arbitration-friendly.

Date of arbitration law?	The PAL entered into force on 14 March 2012 and is heavily influenced by the 2006 UNCITRAL Model Law, with certain improvements mostly based on the experience of other leading jurisdictions and/or on demands by users.
UNCITRAL Model Law? If so, any key changes thereto?	Yes, with main changes discussed below.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Portuguese Courts are renowned for their independence and impartiality and are generally supportive of arbitration. Notwithstanding, there is no specific judicial body devoted to handling arbitration-related matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes, in the appropriate circumstances.
Courts’ attitude towards the competence-competence principle?	Article 5, both the positive and negative effects of the competence-competence principle are recognized.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Parties may request annulment of awards by means of a set aside motion under Article 46 of the PAL. In this regard, the Portuguese law significantly reflects, but does not absolutely mirror, the New York Convention, as it sets narrow grounds to set aside the award and does not allow for a review of the merits of the arbitral decision.
Courts’ attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The PAL has a pro-arbitration stance in respect of the enforcement of arbitration agreements. To the best of our knowledge, Portuguese courts have not yet had the opportunity to address the question of whether an award that has been annulled at the seat may be recognized and enforced in Portugal.
Other key points to note?	<ul style="list-style-type: none"> – The PAL provides for specific rules governing multi-party and multi-contract arbitrations and expressly allows for interim measures and preliminary orders. – The PAL provides a general principle of confidentiality of the arbitration proceedings.

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law?

Yes. The current Portuguese Voluntary Arbitration Law¹ ("PAL") entered into force on 14 March 2012. This Law confirms Portugal as a friendly jurisdiction towards arbitration, integrated in the universe of legislations that were based on the UNCITRAL on 2006 Model Law ("Model Law"),

Despite its overall proximity to the Model Law, the PAL has its own specificities and points of departure which, in most cases, express PAL's general pro-arbitration attitude and the fact that it was enacted in 2012 and, thus, considered subsequent developments in key jurisdictions:

- Article 5 of the PAL adopted the competence-competence principle establishing not only its positive effect, but also its negative effect, limiting the powers of a Court seized with a matter subject to an arbitration agreement to a mere prima facie control of the validity and applicability of the arbitration agreement adopting a similar solution, although not equal, to the one provided by French law.
- Articles 11 and 36 of the PAL contain provisions dealing with the constitution of the arbitral tribunal in case of multiparty party arbitration, as well as provisions regulating the joinder and the intervention of third parties in pending arbitral proceedings.
- Article 43(1) of the PAL establishes a flexible time-limit for the rendering of the award: unless the parties have agreed on a different time-limit up to the acceptance by the first arbitrator, the arbitrators shall deliver the final award within twelve months from the date of acceptance of the last arbitrator. However, the parties may subsequently agree on extensions of this time-limit, and the tribunal may also, through a duly reasoned decision, determine such extension, except if all parties oppose to it.
- Article 46(3) of the PAL establishes that with regards to public policy as a ground to set aside an arbitral award, only the contrariety with "*international public policy*" of the Portuguese State may lead the setting aside of the award (regardless of whether it is a foreign or a domestic arbitral award).
- Article 49 of the PAL, under the influence of French law, adopted a substantive/economic criterion to define international arbitration, providing that "*[a]n arbitration is considered international when international trade interests are at stake*".
- Article 50 of the PAL, provides that, if the arbitration is international and one of the parties to the arbitration agreement is a State, a State-controlled organization or a State-controlled company, this party may not invoke its domestic law to challenge the arbitrability of the dispute or its capacity to be a party to the arbitration, nor to evade its obligations arising from such agreement.
- Article 51 of the PAL provides for a specific *pro valitatis* regime applicable to the validity of the arbitration agreement, according to which the arbitration agreement shall be deemed valid if its validity is recognized by one of the following laws: (i) the law selected by the parties to govern their arbitration agreement, (ii) the law applicable to the underlying contract, or (iii) Portuguese law.

¹ Law No. 63/2011, of 14 December.

- Article 52(2) of the PAL provides that, when the parties have not chosen the rules of law applicable to the substance of the dispute, the arbitral tribunal shall apply the law of the State with which the subject matter of the dispute has the closest connection.

1.2 When was the arbitration law last revised?

The PAL currently in force was approved in 2011 and has not been revised since.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

In determining the law applicable to the substantive validity of the arbitration agreement, the PAL² adopts a specific *in favour of validity* provision, which has no parallel in the Model Law, but was inspired by Swiss law. This rule constitutes an important embodiment of the principle *favor arbitrandum* in the PAL.³

Under article 51(1) of the PAL, arbitration agreements providing for arbitration in Portugal will be deemed valid if they satisfy any one of the following potentially-applicable national laws: (i) the law selected by the parties to govern their arbitration agreement, (ii) the law applicable to the underlying contract, or (iii) Portuguese law.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Article 18(2) of the PAL lays down the principle of separability, stating expressly that the arbitration agreement is separable from the contract in which it is set forth. This provision is modelled after article 16 (1) of the Model Law.

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

Similarly to article 7(2) of the Model Law and in line with article II(1) of the NY Convention, article 2(1) of the PAL requires the arbitration agreement to be in writing.

Article 2 of the PAL deals with what is the meaning of “writing”, for the purposes of this law. It provides that this requirement is met “*if the agreement is recorded in a written document signed by the parties, in an exchange of letters, telegrams, faxes or other means of telecommunications which provide a written record of the agreement, including electronic means of communication*” or “*it is recorded on an electronic, magnetic, optical or any other type of support, as long as it offers the same guarantees of reliability, comprehensiveness and preservation*”.

Importantly, a reference made in a contract to any document containing an arbitration agreement satisfies the requirement of article 2, provided that such contract is in writing and that the reference is such as to make that clause part of the contract.⁴

Furthermore, this requirement is also met if there is “*an exchange of statements of claim and defence in arbitral proceedings, in which the existence of such an agreement is invoked by one party and not denied by the other*”.⁵

² Article 51(1) of the PAL. It is important to note that this provision is only applicable to international arbitration agreements.

³ Dário Moura Vicente, Annotation to article 51 of the PAL, in *Lei da Arbitragem Voluntária Anotada*, Third Edition, Almedina, 2017.

⁴ Article 2(4) of the PAL. See, also, Decision by the Oporto Court of Appeal, 13 April 2015, process 471/14.8TVPR.T.P1. In this case, the court upheld an arbitration clause inserted in a standard form contract. Specifically, it stated that the clause inserted in the standard form contract was deemed integrated in the separate swap confirmation contract concluded by the parties pursuant to the former.

Finally, it is worth noting that, under article 3 of the PAL, the failure to satisfy this requirement renders the putative arbitration agreement null.

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

The PAL does not have any specific rule governing this matter. The starting point for this discussion is the premise that arbitration is consensual by nature. The source of legitimacy of the arbitral tribunal's existence and power is the will of the parties, materialized in their agreement to submit certain disputes to arbitration. A corollary of the consensual nature of the arbitration agreement is, in turn, the fact that, as a matter of principle, it binds only the parties that agreed to it.

Nevertheless, there are particular cases in which, through certain legal institutes, arbitration agreements may be found to bind parties other than those who formally signed them. Below are some examples of such cases, being certain that it is always necessary to conduct a careful examination of all characteristics of each case in order to reach a definitive conclusion.

One first example in which extension may occur is where there is an assignment of a contract or the transfer of a debt that is subject to an arbitration clause. In these cases, as all the involved parties had to give their consent, the person that was not originally a party to the transferred contract or debt will ordinarily become bound by the arbitration clause *vis-à-vis* the original counterparty or creditor.⁶

When it comes to the assignment of a credit right, although it does not require the agreement of the debtor, some authors deem the arbitration clause as accessory to the assigned right and thus consider the new creditor to be bound towards the debtor by the arbitration clause.⁷ However, although accepting the same practical result, some authors do not construe the arbitration clause as accessory to the right. Instead, they prefer the view according to which when an arbitral clause is inserted in a contract the credits and other rights arising therefrom are *configured* so as to render the exercise of the corresponding claims only possible through arbitration.⁸

Further to this, third party beneficiary contracts also typically give rise to the question of whether the arbitration clause may bind the beneficiary. Some authors support the view that, if the beneficiary seeks to enforce a substantive right conferred by the parties to the contract, then he must do so in compliance with the framework the parties agreed on for the conferral of such right. Thus, the beneficiary may be bound by the arbitration agreement contained in the contract.⁹ However, it is important to note that courts have reached conflicting conclusions on this issue.¹⁰

Finally, in some particular instances, it may be possible to resort to general principles of good faith to lift the corporate veil of the signatory of the arbitration agreement to bind a third party, typically a controlling shareholder. This possibility faces specific challenges in the Portuguese jurisdiction, as the PAL expressly mandates that the agreement to arbitrate shall be in writing.

In general, courts usually engage in a highly fact-specific analysis of this topic, making it difficult to draw general conclusions on the extent to which an arbitration agreement may be binding on non-signatory parties.

⁵ Article 2(5) of the PAL. This provision did not exist in the former version of the arbitration law, and it takes inspiration from article 7(5) of the Model Law.

⁶ Mariana França Gouveia, *Curso de Resolução Alternativa de Litígios*, Third Edition, 2014, p.155-159.

⁷ Mariana França Gouveia, *Curso de Resolução Alternativa de Litígios*, Third Edition, 2014, p.155-159.

⁸ António Sampaio Caramelo, "Autonomia" da cláusula compromissória e a competência da competência do tribunal arbitral, in *Temas de Direito da Arbitragem*, Coimbra Editora, Coimbra, 2013, pp. 115-116.

⁹ Mariana França Gouveia, *Curso de Resolução Alternativa de Litígios*, Third Edition, 2014, p.161.

¹⁰ See, for instance, Supreme Court Decision of 27 November 2008, Process 08B3522. In this case, the Supreme Court held that the arbitration clause inserted in an insurance contract concluded between the insurance company and the employer, the employee being the third party beneficiary of such contract, was not binding on the employee.

2.5 Are there restrictions to arbitrability? In the affirmative:

Article 1(1) of the PAL provides that any dispute concerning patrimonial interests may be referred by the parties to arbitration. Further to this, the parties may also refer to arbitration disputes involving non-patrimonial interests, so long as they are entitled to conclude a settlement on the right in dispute, that is, as long as the rights in dispute can be disposed of/are alienable.¹¹

With regards to labour disputes, the criterion based on the disposability/alienability of the rights in dispute shall apply exclusively, until a new law governing the submission to arbitration of employment disputes is approved. Since such law is yet to be approved, the question of whether a labour dispute is arbitrable shall be answered only according to whether the rights in dispute are disposable or not (regardless of whether such rights are patrimonial in nature).¹²

Finally, in addition to the general arbitrability criteria, it is important to keep in mind that there are specific restrictions to arbitrability both related to specific domains of the law and to specific persons.

2.5.1 Do these restrictions relate to specific domains (such as IP, corporate law etc.)?

The PAL provides that disputes subject to mandatory arbitration or to the exclusive jurisdiction of national courts cannot be submitted to voluntary arbitration.

The following kinds of disputes are subject to mandatory arbitration, and are therefore subject to a different set of rules:

- Industrial property rights related to reference and generic medicinal drugs;¹³
- Particular issues concerning sports federations, leagues and other sports entities, as well as disputes related to doping in sports;¹⁴
- Particular issues of collective bargaining (Portuguese Labour Code).
- Issues relating to copyright and intellectual property, namely those involving:¹⁵ rewards for the lease of works protected by copyrights;¹⁶ rights to authorize or prohibit cable retransmission of works protected by copyright;¹⁷ compensation for the recording or reproduction of works¹⁸; and technological protection measures.¹⁹

In addition to the disputes that are subject to mandatory arbitration in Portugal, there are disputes that cannot be submitted to arbitration and are under the exclusive jurisdiction of national courts.

First, with regards to industrial property disputes, one distinction must be drawn. Disputes concerning the validity of industrial property titles subject to registration (such as patents and trademarks) cannot be arbitrated.²⁰ However, disputes concerning the granting or refusal of a patent or of the registration of a trademark may, as a matter of principle, be arbitrated, provided that all concerned interested parties

¹¹ Article 1(2) of the PAL.

¹² See Article 4(4) of the Law No. 63/2011, that approves the PAL.

¹³ Law No. 62/2011 of 14 December 2011, article 2.

¹⁴ Law No. 74/2013 of 6 September 2013.

¹⁵ Please note that all other copyrights disputes that are not on the list and that do not relate to “undisposable” rights may be referred to arbitration. See Article 229 of the Portuguese Code on Copyright and Related Rights 1995, Decree-Law No. 63/85 of 14 March 1985.

¹⁶ Decree-Law No. 332/97 of 27 November 1997.

¹⁷ Article 7, Decree Law n.º 333/97 of 27 November.

¹⁸ Decree-Law No. 62/98 of 1 September 1998.

¹⁹ Article 221 of the Portuguese Code on Copyright and Related Rights 1995, Decree-Law No. 63/85 of 14 March 1985.

²⁰ António Sampaio Caramelo, Critérios de Arbitrabilidade dos Litígios. Revisitando o Tema, in *IV Congresso do Centro de Arbitragem da Câmara de Comércio e Indústria*, Almedina, 2011, p. 38.

adhere to the arbitration agreement.²¹ The reasoning behind this legal regime lies in the fact that these disputes may involve and affect the interests of third parties who may not be signatories of the arbitration agreement. In this case, the resolution of the dispute through arbitration is only allowed when such third parties adhere to the arbitration agreement.

Secondly, core bankruptcy issues are also typically non-arbitrable, for the same rationale mentioned above. Indeed, all creditors of the insolvent debtor are directly affected by the resolution of most core bankruptcy issues, and may not be signatories to the arbitration agreements concluded by the debtor.

Thus, article 87 (1) of the Portuguese Bankruptcy Code provides that, once bankruptcy is declared, the effectiveness of any existing arbitration agreement entered into by the insolvent debtor, with respect to disputes which may affect the insolvent estate, is suspended.²² If, however, arbitration proceedings under such clauses are already underway, those proceedings shall be suspended for the period of time necessary for the insolvent debtor to be represented in them by the insolvency administrator.²³

Finally, one must address the arbitrability of internal corporate disputes. In this regard, it is worth noting that it is currently under discussion a draft proposal of a new law disciplining exclusively arbitration of internal corporate disputes.²⁴

The difficulty with the arbitrability of this kind of disputes relates to the fact that arbitration is a decentralized process that only binds those who participate in it, while certain decisions on internal corporate disputes must affect all shareholders, because of their very nature.

Particularly relevant in this regard are the disputes concerning the validity of the company's resolutions. The prevailing view among Portuguese commentators²⁵ is that such disputes should only be arbitrable if (i) publicity is given to the initiation of arbitral proceedings, (ii) the tribunal provides all shareholders with the opportunity to join or intervene in the proceedings, (iii) the tribunal is not constituted through appointments from the disputing parties, but rather through an arbitral institution, and, finally, (iv) the tribunal allows the consolidation of parallel proceedings.

2.5.2 Do these restrictions relate to specific persons (i.e. State entities, consumers etc.)?

In this regard, a distinction must be drawn between private law and public law disputes.

Indeed, article 1(5) provides that the State and other legal entities governed by public law may enter into arbitration agreements as long as they concern private law disputes. Thus, for disputes arising under private law and involving the State or State entities, no particular restrictions on arbitrability apply.

However, with regards to public law disputes, article 1(5) of the PAL provides that the State and other legal entities governed by public law may only enter into arbitration agreements insofar as they are authorised to do so by law.

As an example of authorisations provided by law, article 180 of the Code of Procedure of Administrative Courts²⁶ sets out a very wide number of circumstances in which the State and other legal entities governed by public law are authorised to enter into arbitration agreements. They include: (i) matters related to

²¹ Articles 48 and 39 (a) of the Portuguese Code of Industrial Property.

²² It is debatable what this means: the prevailing view is that the arbitration agreement becomes temporarily without effect. Another possible view is that it will be up to the administrator of the insolvency to accept or not the submission of the disputes to arbitration.

²³ Article 85(3) of the Portuguese Bankruptcy Code.

²⁴ Draft Proposal available at: <http://arbitragem.pt/projetos/arb-societaria/regime-juridico-arbitragem-societaria-v-discussao.pdf>.

²⁵ See, for instance, António Sampaio Caramelo, *Arbitragem de Litígios Societários*, in *Revista Internacional de Arbitragem e Conciliação*, Ano IV-2011.

²⁶ Decree Law n.º 214-G/2015, of 2 October 2015.

contracts, including the annulment or nullity of administrative acts of execution of such contracts, *(ii)* matters related to tort liability, *(iii)* matters related to the validity of administrative acts, unless otherwise provided by law, *(iv)* matters related to legal relationships governed by public law, insofar as they do not involve undisposable rights, work-related injuries or occupational illness.

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

3.1.1 If the place of the arbitration is inside the jurisdiction?

Article 5(1) of the PAL expressly provides that the state court before which an action is brought, on a matter that is object of an arbitration agreement, must dismiss the case upon request of the respondent, submitted no later than when the respondent submits its first statement on the substance of the dispute.

The limited instances in which the court will not do so, are cases in which the court finds that the arbitration agreement is manifestly *(i)* null and void, *(ii)* has become inoperative, or *(iii)* is incapable of being performed.²⁷ This provision embodies the so-called “negative effect” of the arbitration agreement.

3.1.2 If the place of the arbitration is outside of the jurisdiction?

Portuguese courts enforce an arbitration agreement, regardless of where the arbitration is seated. Thus, the answer given to the preceding question is equally valid if the place of the arbitration is outside of the jurisdiction.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

Anti-suit injunctions are not addressed in the PAL and, to the best of our knowledge, have not yet been addressed by Portuguese courts in an arbitration context.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)

Article 38(2) of the PAL, unlike the Model Law, provides that state courts may assist an arbitral tribunal seated outside of the jurisdiction in the taking of evidence. Specifically, it provides that, when the evidence to be taken depends on the will of one of the parties or of third parties and these refuse to cooperate, a party may, with the approval of the arbitral tribunal, request from the competent State court that the evidence be taken before it, the results thereof being forwarded to the arbitral tribunal.

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

Parties may always be represented by counsel in arbitral proceedings. Some authors consider that, unlike in court litigation,²⁸ representation by counsel is not mandatory,²⁹ unless the parties agreed otherwise and, thus, according to this understanding, absent agreement by the parties on the matter, each of them is free to decide whether they wish to be represented by counsel or not. However, one must note that the issue is not regulated by the PAL and is not entirely settled.

²⁷ See Article 5(1) of the PAL.

²⁸ For litigation in court, article 40 of the Portuguese Code of Civil Procedure establishes a set of circumstances in which representation by counsel is mandatory, which includes cases valued in more than €5.000.

²⁹ Manuel Pereira Barrocas, *Manual de Arbitragem*, Second Edition, Almedina, p.394.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

Article 9(3) of the PAL provides that arbitrators have a duty to remain independent and impartial throughout the arbitral proceedings.

Under article 13(1) of the PAL, arbitrators have a duty to disclose any circumstances that may give rise to justifiable doubts as to their impartiality and independence.

However, if the arbitrator fails to make such disclosure and those facts or circumstances are subsequently made known to the parties, the arbitrator may be challenged by the parties.³⁰

The challenging party must then submit the challenge directly to the arbitral tribunal within 15 days of becoming aware of the constitution of the arbitral tribunal or after becoming aware of the facts forming the basis for the challenge. The arbitral tribunal, including the challenged arbitrator, shall decide on the challenge.

If the tribunal rejects the challenge, thus allowing the challenged arbitrator to remain as part of the tribunal, the challenging party may file a petition in state courts, requesting them to decide the challenge.

The state court engages in a fact-specific analysis of the case. An arbitrator's failure to disclose circumstances that may give rise to justifiable doubts will be considered in the analysis but does not, alone, suffice for the court to accept a challenge. Indeed, courts have required that the undisclosed circumstances justify that outcome.³¹

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of ad hoc arbitration)?

Similarly to article 5 of the Model Law, article 19 of the PAL states that in the matters governed by it, State courts may only intervene where so provided by the PAL.

Further to the above, article 59(4) of the PAL is a procedural provision, which determines which state courts, specifically, are competent to assist in the constitution of the arbitral tribunal.

Briefly, the Court of Appeal in whose district the place of arbitration is located is generally competent to decide (i) the appointment of arbitrators who have not been appointed by the parties or by third parties that have been entrusted with this duty, in accordance with the provisions of article 10(3) (4) and (5), and article 11(1) of the PAL, (ii) the challenge made under article 14(2), against an arbitrator who has not accepted such challenge, in case the challenge is deemed to be justified, and finally (iii) the removal of an arbitrator, requested under article 15(1).

4.4 Do courts have the power to issue interim measures in connection with arbitrations?

Yes. Under article 29 of the PAL, courts have the power to issue interim measures both prior to and during the arbitral proceedings. As article 7 of the PAL (similarly to article 9 of the Model Law) makes clear, recourse to state courts for the purposes of obtaining interim relief does not constitute a breach of the arbitration agreement.

³⁰ Note that, under article 13(3) of the PAL, a party may only challenge an arbitrator appointed by it, or in whose appointment it has participated, for reasons of which it becomes aware after the appointment has been made.

³¹ Decision by the Lisbon Court of Appeal, 24 March 2015, process 1361/14.0YRLSB.L1, where the Court stated precisely that the failure to comply with the duty of disclosure does not necessarily mean that there is a lack of independence and impartiality on the part of the arbitrator. Those have to be determined based on the concrete circumstances of the case.

See, also, José Miguel Júdice, Annotation to article 13 of the PAL, in *Lei da Arbitragem Voluntária Anotada*, Third Edition, Almedina, 2017.

In accordance with article 366(1) of the Portuguese Code of Civil Procedure, the court shall hear the party against whom interim measures are sought, except if such hearing puts the purpose and effectiveness of the measures at serious risk. In conclusion, Portuguese courts are willing to consider *ex parte* requests for interim relief in the appropriate circumstances.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

Article 30(5) of the PAL makes clear that the arbitrators, the parties and the arbitral institutions must maintain the confidentiality of any information obtained and any documents produced during the arbitration proceedings, without prejudice to the duty to communicate or disclose information or activities to the competent authorities, if imposed by law.

However, as stated in article 30(6) of the PAL, unless a party objects, awards and other decisions may be published, excluding details that would identify the parties.

4.5.2 Does it regulate the length of arbitration proceedings?

Under article 43(1) of the PAL, unless the parties have agreed on a different time-limit up to the acceptance by the first arbitrator, the arbitrators shall deliver the final award on the dispute brought before them within twelve months from the date of acceptance of the last arbitrator. However, the parties may subsequently agree on extensions of this time-limit, and the tribunal is also free to determine such extensions, unless all parties oppose.

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

Under article 31(2) of the PAL the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate to hold hearings, to allow the production of evidence, or to deliberate. This provision takes inspiration from article 20(2) of the Model Law.

4.5.4 Does it allow for arbitrators to issue interim measures?

The PAL reflects the 2006 Model Law revision, providing that not only tribunals have the power to issue interim measures, but they also have the power to issue preliminary orders.

On the one hand, under article 20 of the PAL, and absent agreement of the parties to the contrary, the arbitral tribunal may, at the request of a party and after hearing the opposing party, grant the interim measures it deems necessary in relation to the subject matter of the dispute. Thus, the tribunal cannot grant interim relief *ex parte*.

On the other hand, under article 22 of the PAL, and absent agreement of the parties to the contrary, the tribunal may issue preliminary orders. These are orders necessarily requested together with a request for interim relief, directing a party not to frustrate the purpose of the interim measure sought. Preliminary orders can be granted *ex parte*.

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?

Article 30(4) of the PAL makes clear that the arbitral tribunal has the power to determine the admissibility, relevance and weight of any evidence presented or to be presented.

Thus, the PAL gives the tribunal wide discretion in the exercise of such power, and it also makes clear that the arbitral tribunal is not bound, by default, by the rules of civil procedure on admissibility of evidence that apply to state court proceedings.³²

4.5.6 Does it make it mandatory to hold a hearing?

Article 34 of the PAL provides that, subject to any contrary agreement between the parties, the tribunal shall decide whether to hold hearings, or whether the proceedings shall be conducted merely on the basis of documents and other means of proof.

However, the abovementioned provision also states that the arbitral tribunal shall hold one or more hearings for the presentation of evidence whenever that is requested by a party, except if the parties themselves had previously agreed that no hearings would be held.

4.5.7 Does it prescribe principles governing the awarding of interest?

The PAL does not prescribe principles governing the awarding of interest as, under Portuguese law that is a substantive matter.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

According to article 42(5) of the PAL, unless otherwise agreed by the parties, the award shall determine the proportions in which the parties shall bear the costs directly resulting from the arbitration.

Further to this, the abovementioned provision makes clear that the arbitrators may decide in the award, if they so deem fair and appropriate, that one or some of the parties shall compensate the other party or parties for the whole or part of the reasonable costs and expenses that they can prove to have incurred due to their participation in the arbitration. This provision is particularly relevant when tribunals seek to sanction a party's negative and hindering procedural behaviour throughout the arbitration, through the allocation of costs.³³

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

Article 9(4) of the PAL provides that arbitrators cannot be held liable for damages resulting from their decisions, save for the situations in which judges may be. This is due to the fact that arbitral tribunals are considered to perform a jurisdictional function.³⁴

Article 43(4) of the PAL, however, provides for a specific case of civil liability, where the arbitrators who unjustifiably prevent the award from being rendered within the time limit set for that purpose³⁵ shall be liable for the damages caused.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

There are no particular concerns with regards to potential criminal liability of any of the participants in the arbitral proceedings.

³² Mariana Soares David, Os Poderes do Tribunal Arbitral em Matéria de Prova, no Âmbito da Actual Lei de Arbitragem Voluntária, in *Revista Internacional de Arbitragem e Conciliação*, Anual n.º 9 – 2016, p. 59.

³³ José Robin de Andrade, Annotation to article 42 of the PAL, in *Lei da Arbitragem Voluntária Anotada*, Third Edition, Almedina, 2017.

³⁴ Constitution of the Portuguese Republic, article 209(2).

³⁵ Unless otherwise agreed between the parties, the arbitrators shall have twelve months, starting from the moment of designation of the last arbitrator, to render the award. See article 43(1) of the PAL.

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Unless a settlement is reached, the arbitral proceedings will end with an award. Similarly to the Model Law,³⁶ article 42 of the PAL provides that 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 41.³⁷

5.2 Can parties waive the right to seek the annulment of the award?

5.3 If yes, under what conditions?

Article 46(5) of the PAL expressly states that parties cannot waive the right to seek the annulment of the award.

5.4 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

There are no atypical mandatory requisites for the rendering of a valid award. As in most jurisdictions, the award must be in writing and signed by the arbitrator, in case there is a sole arbitrator, or by a majority of the arbitrators, in case there is a plural tribunal³⁸. The award must also state the date in which it was rendered, as well as the seat of the arbitration³⁹.

5.5 Is it possible to appeal an award (as opposed to seeking its annulment)?

5.5.1 If yes, what are the grounds for appeal?

Under article 53 of the PAL, the default rule is that, in international arbitration, the award made by the arbitral tribunal is not subject to appeal.

However, article 53 allows the parties, in the exercise of party autonomy, to expressly agree on the possibility of an appeal to another arbitral tribunal, provided that they regulate its terms (namely its grounds).

5.5.2 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

The procedure for obtaining the recognition and enforcement of foreign arbitral awards in Portugal is governed by the PAL, without prejudice to the provisions of the New York Convention, to which Portugal adhered in 1994. No specific time-limits apply.

The party seeking the recognition of a foreign arbitral award must file a petition before the Court of Appeal of the district in which the person against whom enforcement is sought is domiciled. The petition must be filed together with the award or a duly authenticated copy of the award, as well as the original or an authenticated copy of the agreement to arbitrate.⁴⁰ If such documents are not in Portuguese, a certified translation must also be provided. The opposing party is then notified and has a 15-day window to oppose such request.

With regards to grounds for refusal of recognition of the foreign award, the list provided by article 56 of the PAL, which in turn is inspired by article V of the New York Convention, shall apply.

³⁶ Article 31 (2) of the UNCITRAL Model Law.

³⁷ Article 41 of the PAL concerns the termination of the arbitral proceedings through settlement.

³⁸ Article 42(1) of the PAL.

³⁹ Article 42(5) of the PAL.

⁴⁰ Article 57(1) of the PAL.

Once the foreign arbitral award has been recognized by the competent court, the award constitutes an enforceable title, allowing the party to bring enforcement proceedings.

In case of a local arbitral award, recognition proceedings are not necessary. The award itself is an enforceable title and enforcement proceedings may be brought in a court of first instance, subject to no specific time-limit.

As stated in article 47(1) of the PAL, the party seeking the enforcement of a local arbitral award must file a petition before a court of first instance, together with the original award or a duly authenticated copy thereof and, if the award is not in Portuguese, a certified translation of the said award.

5.5.3 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

The introduction of annulment proceedings does not automatically suspend the right to enforce an award, nor does it suspend any recognition proceedings that may be underway.

However, as provided in article 47(3) of the PAL, the party seeking the annulment may request the suspension of the enforcement proceedings, provided that such party offers to provide security, such effect only being granted if and when security is effectively provided within the time limit set by the court.⁴¹

5.5.4 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Article 56(1)(a) of the PAL provides that recognition and enforcement of an arbitral award made in an arbitration taking place in a foreign country may be refused, at the request of the party against whom the award is invoked, if that party furnishes to the competent court in which recognition or enforcement is sought proof that the award has been set aside by a court of the country in which, or under the law of which, that award was made.

To the best of our knowledge, Portuguese courts have not yet had the opportunity to address the question of whether an award that has been annulled at the seat may be recognized and enforced in Portugal.

5.6 Are foreign awards readily enforceable in practice?

The grounds for refusal of enforcement of foreign arbitral awards, provided by the PAL and by the New York Convention, have in common the fact that they are very limited and do not allow for a review of the merits of the arbitral decision.

The one aspect in which the PAL differs from the Convention, as well as from the Model Law, is the fact that it provides, in article 56(1)(b)(ii), that enforcement may be refused if the court finds that it would lead to a result manifestly incompatible with the international public policy of Portugal.

This provision already existed in the Portuguese Code of Civil Procedure, for the recognition and enforcement of foreign court decisions. Indeed, by introducing the word “manifestly”, the legislator restricted even more the cases in which enforcement of an arbitral award may be refused.

Thus, it can be concluded that foreign awards are readily enforceable in Portugal.

6. Funding arrangements

The Code of Ethics of the Portuguese Bar Association expressly prohibits the use of contingency fee arrangements according to which the right to lawyer's fees is dependent on the success of the claim.⁴²

⁴¹ See, also, Central Administrative Court, 18 March 2016, process 03300/14.9BEPRT, where the court stated that the request for annulment of an arbitral award does not immediately suspend enforcement proceedings based on said arbitral award.

Third-party funding is not specifically regulated and there no particular restrictions to its use.

7. Is there likely to be any significant reform of the arbitration law in the near future?

It is not anticipated that there will be a significant reform of the PAL in the near future. However, it is currently under discussion a draft proposal of a new law disciplining exclusively arbitration of internal corporate disputes.⁴³

⁴² Article 101(1) of the Code of Ethics of the Portuguese Bar Association.

⁴³ Draft Proposal available at: <http://arbitragem.pt/projetos/arb-societaria/regime-juridico-arbitragem-societaria-v-discussao.pdf>.

ROMANIA

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

ADRIAN IORDACHE AND RALUCA - FLORINA DANES
OF IORDACHE PARTNERS

IORDACHE PARTNERS
LEGAL SUPPORT FOR GOOD IDEAS

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

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VERSION: 3 MAY 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Romania has a history in commercial arbitration, including international arbitration: arbitration has been regulated in Romania since 1865 (under the old Civil Procedure Code and now under the new Civil Procedure Code, which entered into force on 15 February 2013). Romanian legal provisions applicable to domestic and international arbitration are compatible with the UNCITRAL Model Law as they are based on the same main principles, but without following the text of the Model Law. Due to the modern legal framework, more and more investors and state entities are choosing arbitration to settle disputes in Romania. Below are some key aspects of Romanian arbitration law.

Key places of arbitration in the jurisdiction	Bucarest.
Civil law / Common law environment?	Civil law. It is important to note that EU law is considered to be part of the national order.
Confidentiality of arbitrations?	Although not expressly provided, the arbitrators have the obligation to keep the proceeding confidential, otherwise they can be held liable.
Requirement to retain (local) counsel?	No legal obligation to hire counsels.
Ability to present party employee witness testimony?	There are no restrictions, but the relationship would be relevant to the evidentiary weight granted.
Ability to hold meetings and/or hearings outside of the seat?	Yes.
Availability of interest as a remedy?	The arbitral tribunal can award interest if requested and if the law applicable to the merits allows it.
Ability to claim for reasonable costs incurred for the arbitration?	Yes.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Under Romanian law, lawyers are not allowed to conclude <i>quota litis</i> agreements.
Party to the New York Convention?	Yes.
Other key points to note	∅
WJP Civil Justice score (2017-2018)	0.65

ARBITRATION PRACTITIONER SUMMARY

Date of arbitration law?	2013. The main body of law applicable to arbitration in Romania is set out in Book IV "On Arbitration" and in Book VII, "On International Arbitration and the Effects of Foreign Arbitral Awards", of the new Civil Procedure Code.
UNCITRAL Model Law? If so, any key changes thereto?	Although the International arbitration provisions are not based on the UNCITRAL Model Law, it is in line with its principles.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	The arbitration related matters are handled by the municipal civil courts (<i>Tribunal</i>) or by courts of appeal (<i>Curte de Apel</i>).
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes.
Courts' attitude towards the competence-competence principle?	Arbitral tribunal's right to rule on its own competence is upheld. Furthermore, the court, when seized with a dispute in relation to which there is a valid arbitral agreement will decline competence.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Awards can notably be annulled in the following circumstances: <ul style="list-style-type: none"> - the decision was rendered after the expiry of the agreed time limit although termination had been invoked by one of the parties and there was no party agreement for the continuation of the arbitration; - the decision did not include the reasons, did not state the date and place where it was rendered, or was not signed by the arbitrators; - after the award was rendered, the Constitutional Court renders a decision on an unconstitutionality objection raised in the course of the arbitral proceedings, declaring unconstitutional the law or piece of legislation or provision which formed the subject of the objection.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	Under the new provisions, both recognition and enforcement may be suspended or rejected if the foreign award had been subject to annulment at the seat.
Other key points to note?	<u>Access to the Constitutional Control for arbitral tribunals:</u> The access of arbitral tribunals to the Constitutional Court takes place by means of objection as to the unconstitutionality of a law or a provision of the law.

JURISDICTION DETAILED ANALYSIS

1. Legal framework

Emerging economies, such as Romania, perhaps more than developed markets, require arbitration friendly legislation and arbitration sympathetic courts to provide investors with efficient ways for settling commercial disputes and encourage engagement with new and relatively challenging markets.

Both the main body of private law and procedural law in Romania has seen significant changes in the past few years, including a new Civil Procedure Code (“NCPC”) enacted in 2013.

Since 2013, the main body of law applicable to arbitration in Romania is set out in **Book IV “On Arbitration”** (“Domestic arbitration provisions”) and in Book VII, “*On International Arbitration and the Effects of Foreign Arbitral Awards*”, of the NCPC (“International arbitration provisions”).¹ Although the International arbitration provisions are not considered to be based on the UNCITRAL Model Law,² they are generally in line with its principles.

The Domestic arbitration provisions provide the legal default and mandatory rules applicable to Romania-seated arbitrations in general, while the International arbitration provisions provide additional and derogatory rules for proceedings involving foreign elements.

2. The arbitration agreement

The *arbitration agreement* is what permits parties to use binding arbitration as a lawful and legally recognized means of dispute resolution. Under general contract and construction rules in Romanian law, an arbitration agreement may generally be defined as the consensus of the parties with regards to the settling of particular disputes through arbitration. We note that neither the Domestic arbitration provisions nor the International arbitration provisions contain any further legal definition of the arbitration agreement.

2.1 Formal requirements (general)

Under the NCPC, the arbitration agreement may take the form of an *arbitration provision* included in the principal contract (or in a separate agreement incorporated by reference therein), or that of a *submission agreement*,³ i.e., a separate legal instrument, independent of the main contract. Furthermore, the arbitration agreement may be deemed to result from the written agreement of the parties expressed before the arbitral tribunal.

Except otherwise stipulated, an *arbitration clause* will cover all disputes arising out of or in connection with the contract containing it.

By means of a *submission agreement* the parties may agree to resolve a certain, already existing, dispute that has arisen between them through arbitration. A distinct submission agreement must be concluded for each dispute.⁴ The submission agreement must refer to a contract, to a contractual package and/or to another legal relationship (e.g. tort liability) to be valid.

¹ According to art. 1109 (1) NCPC “An arbitration that takes place in Romania is considered international if it arises from a private law relation with a foreign element. (2) the provisions of this chapter (n.a International arbitration proceedings) shall apply to any international arbitration if the place of arbitration is in Romania and at least one of the parties, at the time when the arbitration agreement was concluded did not have its domicile or its habitual residence or, respectively, its headquarters in Romania, unless the parties have excluded their application in the arbitration agreement or thereafter in writing.”

² Status of such legislation based on the Model Law is available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

³ In Romanian: *compromis*.

⁴ C. Leaua, Flavius Baias (ed) *Arbitration in Romania. A Practitioner`s Guide*, Wolters Kluwer, 2016, p. 98

2.2 Requirements of an enforceable arbitration Agreement

Under the Domestic arbitration provisions, the arbitration agreement must (i) fulfil the validity conditions of a contract,⁵ (ii) refer to a dispute that can be the subject matter of arbitration, and (iii) in case of *ad hoc* arbitration, indicate the procedure for appointing the arbitrator(s).

The Domestic arbitration provisions require that a valid arbitration agreement be in writing. This condition will be met if the parties agree to resort to arbitration by exchange of correspondence, irrespective of form, or through exchange of procedural submissions.

If the arbitration agreement concerns a dispute related to the transfer of a property or to the creation of *real* rights in *immovables*, then the arbitration agreement must be *authenticated*, by a Notary Public. In practice, a contract constituting rights in *immovable* property is likely to be in authentic (notarial) form in any event and therefore the question might be of reduced practical importance.

Reflecting international practice, the International arbitration provisions uphold the valid arbitration agreement if it complies with the substantive requirements of *any* of: (i) the law chosen by the parties – *lex voluntatis*; (ii) the law governing the dispute – *lex causae*; (iii) the law of the agreement that comprises the arbitration clause – *lex contractus*; or (iv) Romanian law.

The International arbitration provisions further spell out that the writing requirement may be fulfilled by telegram, telex, scan, electronic mail or any other means of communications that can be evidenced by text. No requirement as to any mandatory authentic form is reiterated.

2.3 Law governing the arbitration agreement

The law applicable to the substantive requirements of an international arbitration agreement can be determined by either the parties themselves, or by the arbitrators. First, the parties are permitted to freely determine the law applicable to the arbitration agreement. However, in the absence of the parties' choice, the law that governs the arbitration agreement is left to be determined by the appointed arbitrators, between (a) the law governing the subject matter of the dispute, (b) the law governing the contract containing the arbitration clause or (c) Romanian law.

2.4 Arbitrability of disputes

An important substantive requirement for a valid arbitration agreement is the *arbitrability* of the dispute. Only arbitrable disputes can form the subject matter of an enforceable arbitration agreement.

An arbitral tribunal seized with a dispute which is deemed not arbitrable, must decline competence over it.

Arbitrability assessment is two-pronged: as regards the object of the dispute (*ratione materiae*) and as regards one or more of the parties (*ratione personae*.)

A dispute may be non-arbitrable *ratione materiae*, under the Domestic arbitration provisions, either where (i) the dispute relates to rights of which parties cannot freely dispose, or (ii) the dispute relates to a matter over which the State has reserved exclusive jurisdiction, or (iii) the dispute relates to the personal status, personal capacity, inheritance, or family relations.

In international disputes, a dispute is arbitrable *ratione materiae* where it concerns an economic interest (a so-called *patrimonial* dispute),⁶ provided that the dispute concerns rights of which the parties can dispose of

⁵ The Romanian Civil Code states that agreements are valid if the following conditions are met: the parties have legal capacity to conclude the agreement; the consent of the parties is free from any coercion or undue influence; and the subject matter and the causa of the agreement are in accordance with the applicable law.

⁶ In Romanian : *de natura patrimoniala*.

and that the law of the place of arbitration does not reserve such matters for the exclusive jurisdiction of the state courts.

The *ratione personae* arbitrability is connected to the possibility that certain legal entities may be prohibited from resorting to arbitration. Under the Domestic arbitration provisions, the State and public authorities may conclude arbitral agreements only if they are authorized to do so by law, while other legal entities of a public nature may conclude arbitration agreements if so provided by their statute or by-laws.

However, where the arbitration is *international*, if one of the parties to the arbitration agreement is the State (including a State-owned or -controlled enterprise), such party cannot invoke the right to contest the arbitrability of a dispute on this ground or its own capacity to be a party in arbitral proceedings.

2.5 Separability doctrine and *competence-competence*

The NCPC provides expressly for a separability principle by stipulating that the validity of the arbitration agreement may not be challenged on the grounds of invalidity of the contract containing it.

As regards both international arbitration and domestic arbitration, the principle of *competence-competence* applies and arbitral tribunals rule on their own jurisdiction. The tribunal's discretion to rule on its own competence is retained even if identical disputes are pending before the courts or other arbitral tribunals and the tribunals may decide to assume or decline jurisdiction or stay proceedings, if deemed necessary.

As to the timing of any jurisdictional objection, the parties must plead jurisdictional matters before any pleading on the merits. However, in international arbitration disputes, tribunals may decide to rule on jurisdictional matters together with the final award on merits.

2.6 Joinders

Except where the arbitration agreement provides otherwise, third parties are entitled to participate in arbitration proceedings only if they consent and with the consent of all other parties. The consent of all the parties in the arbitration is not requested if a third party joins the arbitration proceedings only to support the position of one of the existing parties.⁷

3. Intervention of domestic courts

Under the NCPC, the execution of an arbitration agreement excludes the jurisdiction of the courts over the same subject matter. However, Romanian courts remain present in assisting with the arbitration procedure, as further discussed below.

3.1 The general role of Courts of Law in arbitration proceedings

The intervention of courts is permitted in order to remove obstacles in the organization and running of arbitral proceedings, as well as to fulfil other court functions in pending arbitral proceedings. The intervention is triggered by a request to the court in the jurisdiction in which the arbitration takes place, by an interested party. At first instance, the request is heard by a single judge sitting and proceedings are carried out with priority through expedited procedure. Decisions are subject to appeal.

In this context, it is important to note that under Romanian arbitration doctrine, arbitration tribunals are not subservient to the courts, but there must be a partnership between courts and arbitrators in which each one has a different role to play, at different relevant times.

According to legal commentary on the subject,⁸ there are two key reasons for this partnership between the arbitrators and the judges: firstly, in order to promote the right to a fair trial and the maintenance of public

⁷ In Romanian: *interventie accesorie*.

⁸ Ilias Bantekas, *An introduction on International Arbitration*, ed. Cambridge, p.132.

policy rules; and, secondly, since the authority of the arbitral tribunal is contractual in nature and it extends only so far as the scope of the arbitration agreement, the courts are required to intervene in order to remove any impediments to the organization and running of the arbitral proceedings, as well as to fulfil other court functions. Absent such court intervention, third parties, such as experts, witnesses, persons in possession of assets or evidence relevance to the arbitral proceedings, are under no enforceable obligation to comply with an arbitral tribunal order.

3.2 Specific cases of court intervention during arbitral proceedings

At the beginning of the arbitration, national courts have the task of enforcing the agreement to arbitrate against the party seeking to avoid it. At the request of any of the parties referring to an arbitration agreement, domestic courts are required to decline jurisdiction when seized with a dispute in relation to which an arbitration agreement has been concluded.

If the arbitration agreement provides for an institutional arbitration, the court declines jurisdiction “*in favour of*” the organization or arbitral institution. Under this procedure, the court decision declining jurisdiction requires that the arbitral institution take the necessary steps to constitute the tribunal by direct reference from the declining court. If reference is made to a place of arbitration outside Romania, the courts usually rejects the request⁹ to decline “*in favour of*” arbitration, as not falling under the domestic court’s jurisdiction. Similarly, in case of *ad hoc arbitration*, the court regularly rejects the request to send the matter to arbitration as failing outside its remit. The court must nevertheless dismiss the case on jurisdictional grounds, but, in order to commence subsequent arbitration, the interested party must initiate it *de novo* in accordance with the arbitration agreement and any applicable arbitration rules, otherwise the case is simply dismissed.

At the conclusion of arbitral proceedings, national courts enforce the arbitral award, where the losing party is not willing to comply with it voluntarily.

During the proceedings, it is for the arbitral tribunal to take charge of all aspects of the proceedings, set time limits, organize meetings and hearings, issue procedural orders, consider the arguments of facts and law and render the award. However, if a party or the tribunal itself so requests, the national courts can decide on specific issues only, as mentioned above, for the purposes of removal of any impediments to the arbitral proceedings.

Further, during the proceedings, courts can be asked to assist with provisional measures, such as attachment orders.

When issuing any decision in the context of arbitration, the domestic courts are bound by domestic as well as UE law and CJUE Case law.

4. The conduct of the proceedings

4.1 Representation

There is no limitation or restriction as to the representation of the parties in arbitral proceedings. Parties may exercise their procedural rights directly (self-represented) or through outside representatives. Such representatives may be assisted by other specialists.

4.2 Arbitrators

The arbitral tribunal is appointed in accordance with the institutional rules in case of institutionalized arbitration and in accordance with the parties’ agreement in an *ad hoc* arbitration. If parties fail to regulate the appointment of arbitrators the provisions of NCPC will apply.

⁹ Bucharest Tribunal, Civil Sentence no 3189/2016 from 25.05.2016, rendered in Case file no 45773/3/2015 (not published).

Rules for the appointment of arbitrators are common to domestic and international arbitration. In general, unless otherwise regulated by the arbitration clause or the rules of the relevant arbitration institution, parties are free to appoint arbitrators of their choosing.

Where the parties disagree with regard to the appointment of a sole arbitrator, or of the presiding arbitrator (in a multi-person panel), or if a party fails to make an appointment allotted to it, the parties can request the court to make the appointment. If so seized, the court must decide within 10 days, and its decision is subject to appeal.

The parties can challenge an arbitrator, in a manner similar to the challenge to the sitting judges in regular courts. A challenge must be raised within 10 days from the date when the aggrieved party becomes aware of the appointment or, as the case may be, from the occurrence of the ground for challenge. The challenge must be determined within 10 days and the decision is not subject to appeal. The parties and the challenged arbitrator must be heard before the court makes a determination. For a challenge to be successful it is sufficient to cast doubt upon the arbitrator's independence and impartiality.

Arbitrators are bound by a positive obligation to disclose grounds for his/her challenge, if known to them, and must inform the parties and the other co-arbitrators before accepting an appointment (so that the parties can make an informed choice) and he or she must inform the parties if such circumstances arise after appointment as soon as they are discovered.

4.3 Interim measures

An interim measure is a temporary measure the purpose of which is to address an urgent situation prior to the issuance of the award on the merits. The NCPC stipulates that before or during the arbitration any party may address the domestic court to issue conservatory and provisional measures related to the subject matter of the dispute or to acknowledge certain factual circumstances. During the proceedings the arbitral tribunal may also issue conservatory and provisional measures and it may acknowledge certain factual circumstances. If the parties refuse to comply, the domestic court may be seized to take enforcement measures.

Parties may prefer interim measures ordered by the national court in situations where third parties need to be involved or where there is a strong possibility that a party will not voluntarily comply with the arbitral tribunal's order.

Arbitral tribunal may order interim measures only after it has been constituted. Also, any orders by the arbitral tribunals will only bind the parties to the arbitration agreement. Notably, interim measures ordered by the arbitral tribunal are not deemed final awards under the New York Convention.

4.4 Arbitral proceedings

Both Domestic and International arbitration provisions stipulate that parties to an *ad hoc* arbitration can set out their own arbitration rules or they can refer to a pre-existing set of rules: of an arbitration institution or those set out by a procedural law.

If parties fail to do so, the arbitral tribunal will determine the procedural rules for the arbitration using either their own set of rules, or a pre-existing set of rules.

However, in both institutional and *ad hoc* arbitration, as a matter of public order, the arbitral tribunal must observe the due process principles such as equality of treatment of the parties, respect their right to defence and the principle of hearing both parties on all issues in dispute.

Although not expressly provided, the arbitral proceedings, under the NCPC are, by default, confidential.¹⁰ Two provisions of the NCPC provide grounds for this default confidentiality rule: the first states that “*arbitration is an alternative jurisdiction having a private character*”; and the other institutes liability for arbitrators for failure to observe the confidential character of the arbitration, which suggests an implicit rule on confidentiality of proceedings. The confidentiality of arbitration proceedings is subject to several exceptions such as: party autonomy, the intervention of domestic courts for interim measures, setting aside proceedings, recognition and enforcement, etc. In such cases, the rule of confidentiality in arbitration is replaced by the principle of publicity of the hearings and by the condition of rendering a decision in public session. Although case law is scant on the matter, it is assumed that the principle of party autonomy will also include a waiver principle, whereby if a party chooses to make disclosures, it also waives the right to invoke confidentiality if the other party responds in a similar fashion.

Arbitration hearings can be organised in venues located in jurisdictions other than the seat of arbitration. The venue of any hearing may be agreed by the parties or, in the absence of such agreement, determined by the arbitral tribunal. There are no legal restrictions in this regard.

Except where parties otherwise agree in the arbitral agreement or where the parties agree to a judgement made solely on written submissions, oral hearings are organised.

The time limit for rendering a final award is six months, for domestic arbitration, and one year in international arbitration, which may be extended by a maximum of three (3) months by the tribunal. The time limit operates provided that no ground for extension is applicable and provided that the parties have not agreed otherwise. Absent such procedural cures, the consequence of the expiry of the time limit for a decision is the lapse of the arbitration proceeding.

However, in order for the lapse to operate, the parties must make a reservation in writing declaring the intention to make use of the defense no later than at the first hearing. The tribunal cannot move *ex officio* to terminate the arbitration once the time limit lapses in the absence of such reservation. The reservation may be cured/overridden by the parties’ subsequent agreement to continue the proceedings.

As a general rule, evidence is ordered and taken by the arbitral tribunal, which has exclusive power to determine the materiality, relevance and weight of the evidence put forth by the parties. There are no formal restrictions as to the presentation of testimony by a party’s employee or other related persons.

However, the arbitral tribunal cannot compel or sanction witnesses, experts or public authorities for failure to appear or produce documents, and the intervention of a court is required to impose any sanctions. In this situation, the arbitral tribunal or the parties (with the ascent of the arbitral tribunal) may request the assistance of the courts, acting in accordance with domestic law.

When rendering the award, the arbitral tribunal can award interest if requested and if the law applicable to the merits allows it.

Regarding costs, the NCPC defers to party autonomy in a first phase and cost are allocated in accordance with the parties’ agreement. Absent such agreement, the losing party bears all costs, if the request is accepted entirely, or proportionally to such part of its claim that has been granted. The same applies to partially successful counterclaims.

In *ad hoc* International arbitrations where parties fail to agree otherwise in the arbitration agreement, the rule regarding costs is different. Each party bears the fees and expenses of its appointed arbitrator (in a panel) or, if the dispute is referred to a single arbitrator, and in the case of a presiding arbitrator in a panel, the costs are split equally between the parties. Caution must be exercised therefore in using *ad hoc*

¹⁰ For more discussion of the confidentiality principle in arbitration, see B. Oglinda, *The Principle Of Confidentiality In Arbitration, Application And Limitations Of The Principle*, available [here](#).

arbitration which may be qualified as *international* by expressly referring to more modern principles of allocation of costs.

5. Liability

Arbitrators do not benefit from immunity with regard to the award, but they can only be held liable if: (i) they resign after accepting the appointment; (ii) they fail to attend the hearings or present their decision within the deadline provided in the arbitration agreement or the law; (iii) they fail to observe the confidential nature of the arbitral proceedings; or (iv) they breach their duties with bad faith or gross negligence.

Also, under Romanian law, arbitrators can face criminal liability for fraud or corruption.

6. The Award

The arbitral tribunal shall resolve the dispute in accordance with the terms of the main contract and the applicable law or, if the parties agree, *ex aequo et bono*.

In domestic arbitration, following deliberations on the award, minutes must be drafted to briefly summarise the dispositive part of the award and indicate dissenting options, if any. The international arbitration provisions do not stipulate the obligation of drafting such minutes, therefore reference must be made to the parties' agreement.

6.1 Form requirements

The minimum requirements as to the form of the award are expressly provided by the NCPC. In both international and domestic arbitration, the award must state the reasons for any decision. Importantly, if an award does not contain reasons, the award may be set aside.

Under the Domestic arbitration provision the award must be in writing and must contain (i) the names of the arbitrators; (ii) the place and the date of the award; (iii) the name and address of the parties, the name of their counsels and other persons having attended the hearings; (iv) an indication of the relevant arbitration agreement; (v) the object of the dispute and a summary of the parties' arguments; (vi) the factual and the legal grounds of the award; if the arbitration was decided *in equity*, the award should equally comprise the reasoning of the decision; (vii) the dispositive part of the award; (viii) the signatures of all arbitrators and the signature of the assistant arbitrator.

In International arbitration, the minimum formal requirements consist of: (a) the written form; (b) provision of reasoning; (c) date of the award; and (d) the signature of all arbitrators.

If the dispute is related to the transfer of immoveable property or to the establishment of other property rights over *immovables*, then the parties must follow a special procedure in order to enable the registration with the Land Registry of such transfer. In this regard, the award must be passed before a public notary or before the court of justice who will render a notarized deed or a court decision authenticating the award. This requirement is often criticized by legal scholarship as impractical.

6.2 Aspects of set aside procedure

After the award is communicated to the parties, the award becomes final and binding, and therefore it may no longer be appealed on the facts.

The arbitral award may only be set aside by means of an "action for annulment" for one or more expressly stated grounds. Parties can effectively waive their right to file an action for annulment only after the award is rendered, not during the arbitral proceedings and not by means of the arbitration agreement.

The arbitration award can be challenged within one month to the Court of Appeal, on the following grounds:

- (a) the dispute was not arbitrable;

- (b) the arbitral tribunal decided the dispute in the absence of an arbitration agreement or on the basis of a void or inoperative agreement;
- (c) the arbitral tribunal was not constituted according to the arbitration agreement;
- (d) the party challenging the award was absent on the hearing on the merits and the summoning procedure was not legally fulfilled;
- (e) the decision was rendered after the expiry of the agreed time limit although termination had been invoked by one of the parties and there was no party agreement for the continuation of the arbitration;
- (f) the arbitral tribunal decided on matters not requested, or awarded more than was requested;
- (g) the decision did not include the reasons, did not state the date and place where it was rendered, or was not signed by the arbitrators;
- (h) the arbitral award is in violation of public policy, good morals or mandatory provisions of the law; or
- (i) after the award was rendered, the Constitutional Court rendered its decision on the unconstitutionality objection raised in the arbitration, declaring unconstitutional the law or piece of legislation or provision thereof which formed the subject of the objection. (In this situation, the time limit for challenging the award is three (3) months from the publication of the Constitutional Court decision in the Romanian Official Journal). If an action for annulment is filed, on request only, the court can suspend enforcement of the award, pending a decision on the annulment action. Suspension of enforcement may be conditioned by the posting of adequate security.

6.3 Enforcement of arbitral awards

Unlike domestic arbitral awards, which are treated as regular court decisions for the purposes of enforcement, *foreign* arbitral awards must first be granted recognition and enforcement by the Romanian courts. Consistently with the provisions of article 1 of the New York Convention, any domestic or international arbitral award made in another state and which is not considered a national award, is a foreign arbitral award.

Foreign arbitral awards can be recognised and enforced in Romania, under the Civil Procedure Code, by domestic courts, if the following two conditions are met: (i) the dispute is arbitrable in Romania; and (ii) the award does not infringe “public order” as recognised by the Romanian private international law. The reference to “public order” in this context means those rules of Romanian law which could be invoked to dislodge the application of a foreign law, under the Romanian conflict of law rules.¹¹

The proper court to be seized with a request for recognition and enforcement of an arbitral award is the municipal court (in Romanian: *Tribunal*) and a petition must enclose the original award and the original arbitration agreement, or authenticated copies thereof. Under the New York Convention the party seeking recognition or enforcement of an arbitral award must enclose the original award an arbitration agreement or duly certified copies. If the award or the arbitration agreement are not in Romanian, a certified translation must also be provided, also in accord with the New York Convention.

Upon receiving the request and the enclosed documents, the parties will be summoned to present their position before the court, except for the cases where the respondent agreed with the relief sought in the request for arbitration.

The Romanian law does not provide for an express statute of limitation for the enforcement of the foreign arbitral awards. Absent such provision, the time limit for the domestic arbitral award has been applied, which is three (3) years from the award. A special limitation of ten years applies if the award deals with the transfer of a property rights over *immovables*.

¹¹ Curtea de Apel Constanta, DECIZIA CIVILĂ NR. 348/2016.

Recognition and enforcement of a foreign award may be refused, if any or more of the following are shown:

- (a) the parties lacked capacity to conclude the arbitration agreement in accordance with the provisions applicable to each party, as determined by the law of the State where the award was rendered;
- (b) the arbitration agreement was void in accordance with the law governing such agreement as such law is determined by the parties' choice or, absent such choice, in accordance with the law of the State where the award was rendered;
- (c) the party against which the award is invoked was not duly notified of the appointment of arbitrators or of the arbitral proceedings, or was prevented from mounting a defence thereto;
- (d) the constitution of the arbitral tribunal or the arbitral procedure was not in accordance with the parties' agreement or, absent such agreement, with the law of the place of arbitration;
- (e) the award resolves a dispute that exceeds the arbitration agreement. Nevertheless, if certain elements of the award are in accordance with such arbitration agreement and such aspects can be separated from the remaining aspects, the award can be partially recognised; or
- (f) the arbitral award has not become binding for the parties, or it was set aside or suspended by a competent authority of the State where it was rendered or in accordance with the law of such State.

In ruling on the recognition and enforcement of the foreign awards, Romanian courts cannot proceed to analysing the merits of the dispute.

Where a request for setting aside the award or a request for suspending the award have been filed to the competent authority of the State where such award was rendered, the domestic court can stay the recognition and enforcement proceedings. To this end, the party seeking enforcement and recognition of the award may request the court to ask the other party to provide security.

Once the decision on the recognition and enforcement of the arbitral award is rendered, the interested party can request the *enforcement*¹² of the arbitral award in the same manner as that of a domestic court judgment.

7. Funding arrangements

Under the Romanian Law, lawyers cannot conclude *pactum de quota litis* with their clients. However, the parties to the legal assistance contract can agree on any combination of fixed or hourly fees and success fees.

Third party funding is not regulated in Romania; therefore, such funding arrangement may be possible, but the legal structure of the arrangements should be examined from case to case for compliance with the local law.

8. Changes in the arbitration law in the near future

Given the relatively recent overhaul of the legal framework, it is unlikely that the arbitration rules in the NCPC will be amended in the near future.

¹² In Romanian: *executare silita*.

RUSSIA

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

NOAH RUBINS AND ALEXEY YADYKIN
OF FRESHFIELDS BRUCKHAUS DERINGER



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JURISDICTION INDICATIVE TRAFFIC LIGHTS

1. Law ●
 - a. Framework ●
 - b. Adherence to international treaties ●
 - c. Limited court intervention ●
 - d. Arbitrator immunity from civil liability ●
2. Judiciary ●
3. Legal expertise ●
4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

VERSION: 29 JANUARY 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

<p>Key places of arbitration in the jurisdiction</p>	<p>As a practical matter, Moscow is the key place for arbitration in Russia. At the time of writing, there are just four institutions eligible to administer arbitrations under Russia's new arbitration legislation, and all of them located in Moscow. These are the two institutions which obtained a governmental permit required under the country's new arbitration legislation (the Arbitration Centre with the Institute of Modern Arbitration and the Arbitration Centre with the Russian Union of Industrialists and Entrepreneurs) and the two institutions which were exempted from the permit requirement: Russia's most important arbitration institution, the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC), and the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation. Some of these institutions have established or are establishing branches in the Russian regions. For example, the ICAC opened branches in Rostov-on-Don, Irkutsk, Ufa and Kazan, with plans for further regional expansion, and the Arbitration Centre with the Institute of Modern Arbitration opened a Far East branch with offices in Vladivostok and Petropavlovsk-Kamchatsky. Numerous other arbitral institutions have been established in Moscow and Russia's regions before adoption of the new Russian arbitration legislation in late 2015, but at the time of writing, none of them holds a governmental permit as required under the new legislation, which presently bars them from administering arbitrations. (See also Other key points to note below.) Hearings can generally be conducted outside of the location of the institution (subject to any provisions to the contrary in the applicable arbitration rules), and <i>ad hoc</i> proceedings can take place anywhere in the country.</p>
<p>Civil law / Common law environment?</p>	<p>Russia is a civil law country. Legislative acts are the primary sources of law. Court decisions are not officially regarded as sources of law, but guidance from the highest level of courts (<i>i.e.</i>, the Constitutional Court, the Supreme Court and – prior to its dissolution – the Higher Arbitrazh Court) determines how laws are to be interpreted.</p>
<p>Confidentiality of arbitrations?</p>	<p>Russia has separate statutes for "international" and domestic arbitrations. The former generally applies to Russia-seated arbitrations with significant cross-border elements and to the recognition and enforcement of foreign awards in Russia, while the latter regulates domestic arbitration of "intra-Russian" disputes.</p> <p>The new Russian statute on domestic arbitration expressly establishes the confidentiality of arbitral proceedings, but the statute on international commercial arbitration does not include analogous provisions. In practice, confidentiality is sometimes</p>

	addressed in arbitration rules (for instance, there are confidentiality provisions in the ICAC arbitration rules).
Requirement to retain (local) counsel?	<p>There is no requirement for parties to be represented by external counsel in Russian arbitrations.</p> <p>Federal Law of 31 May 2002 'On Advocate Activities and Advocacy in the Russian Federation' regulates foreign advocates' activities in Russia. According to Article 2 of that law, foreign advocates may provide legal assistance in the Russian Federation on matters of law of the country from which they come, provided that they are registered in a special Russian registry of foreign advocates. 'Advocate' is a special subcategory of Russian legal professional (essentially, a trial attorney being a member of advocates' bar organization, to some extent akin to barristers in English court practice). Most lawyers in Russia (including trial lawyers) are not advocates. Russian law does not require lawyers (including trial lawyers) to be advocates, does not require admission to the advocates' bar as a pre-condition to practicing law, and does not state that Russian or foreign legal professionals who represent clients in courts or arbitration are automatically deemed to be advocates. While Article 2 appears to apply to representation of clients in Russian courts, it is unclear whether it also applies to representation in arbitration.</p>
Ability to present party employee witness testimony?	It is possible to present party employee witness testimony. There are no specific rules in Russian law regulating witness testimony in arbitration.
Ability to hold meetings and/or hearings outside of the seat?	Russia's arbitration laws do not prohibit holding meetings and/or hearings outside of the seat.
Availability of interest as a remedy?	There are no procedural rules in Russian law specifically regulating the interest that a tribunal may or should award. Assuming Russian substantive law applies to the dispute, interest can be awarded as a remedy for non-performance of financial obligations; in the absence of the parties' agreement to the contrary, interest is to accrue at the "key rate" (ключевая ставка) of the Bank of Russia for the relevant default periods (Article 395(1) of the Civil Code).
Ability to claim for reasonable costs incurred for the arbitration?	As a matter of practice, costs are usually borne by the losing party, with the successful party recovering arbitrators' fees and expenses, fees and expenses of the arbitration institution and its own reasonable legal costs and expenses. Cost allocation is subject to agreement between the parties and the applicable arbitration rules, and usually tribunals have wide discretion in this regard.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Contingency fees of lawyers are not expressly prohibited as a matter of law, but courts have repeatedly held such fee arrangements to be unenforceable. Third-party funding of arbitration is not expressly regulated. Russian parties are increasingly considering seeking third party funding available

	<p>from foreign funders, at least in respect of proceedings seated outside Russia. Funder firms have also started to appear domestically.</p>
<p>Party to the New York Convention?</p>	<p>Russia is a party to the New York Convention, as the legal successor to the USSR. The USSR made a reservation that it will apply the Convention in respect of arbitral awards made in the territories of non-contracting states only on a reciprocal basis.</p>
<p>Other key points to note</p>	<p>Russia's arbitration laws were overhauled by reform legislation passed on 29 December 2015 (in force from 1 September 2016).</p> <p>According to the reform legislation, all Russian arbitration institutions except the ICAC and the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation (MAC) must receive a special permit from the Government and deposit their rules before 1 November 2017, otherwise they are not eligible to administer arbitrations in Russia. At the time of writing, only two arbitration institutions received such permits: the Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs and the Arbitration Center at the Institute of Modern Arbitration. Permits may also be issued after 1 November 2017 (including to institutions that have had their filings rejected), and the number of eligible arbitral institutions in Russia is expected to grow with time. Ad hoc arbitrations are not prohibited, except in respect of corporate disputes in respect of Russian companies, which is a defined term encompassing all disputes relating to the incorporation, management and participation in a Russian corporation, and may in practice include post-M&A disputes in respect of Russian companies.</p> <p>As a matter of Russian law, corporate disputes can only be arbitrated in arbitral institutions (Russian or foreign) holding a Russian Government permit (as above), and cannot be arbitrated ad hoc. While it can be argued that foreign arbitral institutions can administer Russian corporate arbitrations without a permit, the more conservative reading of the reform legislation suggests that resulting awards would not be enforceable in Russia. In addition, some types of corporate disputes (<i>e.g.</i>, most types of disputes relating to "strategic" Russian companies, as defined in Russian legislation on foreign investment, <i>i.e.</i> entities engaged in certain listed types of sensitive businesses such as the atomic industry, defense industry, mining at major mineral deposits, major mass media and dominant telecommunications companies, and more), are non-arbitrable. Foreign arbitral awards are generally enforceable in Russia based on the New York Convention, but as noted a foreign award is likely to be refused recognition and enforcement in Russia if rendered in respect of a Russian corporate dispute at a foreign arbitral institution holding no Russian Government permit, or in foreign-seated ad hoc proceedings.</p>

	<p>It is important to be aware of whether a dispute will qualify as 'domestic' or 'international' for Russian law purposes. It is arguable that domestic disputes are not capable of being referred to arbitration abroad. If the dispute qualifies as corporate, it is also important to check when the arbitration clause was made. The new Russian arbitration legislation only allows the parties to make arbitration clauses in respect of Russian corporate disputes (including post-M&A disputes) from 1 February 2017 and suggests that earlier arbitration clauses relating to such disputes are non-enforceable.</p>
<p>WJP Civil Justice score (2018)</p>	<p>0.53</p>

ARBITRATION PRACTITIONER SUMMARY

Date of arbitration law?	Russia has separate statutes for international and domestic arbitration. International arbitration is governed by Law 'On International Commercial Arbitration' dated 7 July 1993 (the ICA Law) which was significantly modified by arbitration reform legislation adopted in December 2015. The reform legislation also included a new Federal Law 'On Arbitration' dated 31 December 2015 (the Domestic Arbitration Law) which replaced Russia's pre-existing federal statute on domestic arbitration. The Domestic Arbitration Law and the reformed ICA Law entered into force on 1 September 2016. The ICA Law generally applies to Russia-seated arbitrations with significant cross-border elements and to the recognition and enforcement of foreign awards in Russia, while the Domestic Arbitration Law regulates the arbitration of "intra-Russian" disputes. In respect of Russia-seated international arbitrations, some provisions of the Domestic Arbitration Law (e.g., in respect of eligibility criteria for arbitrators) apply by reference. Qualification of a dispute as 'domestic' or 'international' not only determines which statute and arbitral rules will apply, but may have wider consequences. For example, it is arguable that purely domestic disputes are not capable of being referred to arbitration outside Russia, and those arguments have been supported in some Russian court decisions. It is also important to bear in mind that new Russian arbitration legislation expressly allows arbitration clauses in respect of Russian corporate disputes from 1 February 2017 and suggests that earlier arbitration clauses relating to such disputes are non-enforceable.
UNCITRAL Model Law? If so, any key changes thereto?	Russia`s two arbitration laws are largely harmonized, and based to a significant extent on the UNCITRAL Model Law. There are some differences, for example the criteria of 'international' disputes under the ICA Law are not identical to those under the Model Law, arbitrators may not decide cases <i>ex aequo et bono</i> , etc.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	There are no specialised courts or judges dealing exclusively with arbitration-related matters. The key seat of arbitration in Russia and the location of the most important arbitral institutions in the country is Moscow. The judicial corps in Moscow is well-trained, and Moscow courts of different levels often have to deal with arbitration-related cases such as recognition of foreign arbitral awards and annulment of awards issued in Moscow-seated arbitrations. Regional courts have also had exposure to arbitration matters, e.g. in the cases of recognition and enforcement of foreign arbitral awards against companies in the Russian regions.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Pre-arbitration interim relief is available from courts. Applications for interim relief are considered <i>ex parte</i> . As a practical matter, Russian courts are usually reluctant to grant interim relief, unless

	very strong evidence of immediate risk of asset dissipation can be demonstrated.
Courts' attitude towards the competence-competence principle?	Both the ICA Law and the Domestic Arbitration Law recognise the principle of competence-competence. Russian courts can be expected to recognise and support this rule.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The grounds for the annulment of an award under Russia's arbitration legislation are based on the criteria for the recognition and enforcement of awards under the New York Convention. However, as a practical matter, the application of these grounds may differ from that applied by courts in other countries. For example, Russian courts have traditionally taken a broad view of the public policy exception to the recognition and enforcement of arbitral awards (although the approach has recently evolved towards a narrower interpretation). The New York Convention-based non-arbitrability exception to enforcement will also apply differently in Russia compared to some other jurisdictions. This is because Russia, unlike many foreign jurisdictions, has specific and complex rules defining the arbitrability of various types of disputes, including corporate disputes.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	Russian courts will generally refuse enforcement of annulled arbitral awards.
Other key points to note?	∅

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law?

Russia has separate statutes for international and domestic arbitration. International arbitration is governed by Law 'On International Commercial Arbitration' dated 7 July 1993 (the **ICA Law**) which was significantly modified by arbitration reform legislation adopted in December 2015. This law governs Russia-seated 'international' arbitrations and the recognition and enforcement of foreign awards. The reform legislation also included a new Federal Law 'On Arbitration' dated 31 December 2015 (the **Domestic Arbitration Law**) which replaced Russia's pre-existing federal statute on domestic arbitration. The Domestic Arbitration Law and the reformed ICA Law entered into force on 1 September 2016.

Depending on the existence of 'international' elements as defined in the ICA Law, a dispute may qualify as either 'international' or domestic. This will determine the legal regime and in practice may also determine the applicable rules (for example, the ICAC has adopted separate rules for 'international' and domestic arbitrations). If the dispute is entirely domestic/intra-Russian, it is arguable that it is not capable of being arbitrated outside Russia. There are some court decisions supporting this position.

Important provisions related to arbitration may be found in other Russian legislation, most importantly in the Arbitrazh Procedural Code (the **APC**), which governs proceedings in Russia's commercial (arbitrazh) state courts, including on matters of recognition, enforcement and setting aside of arbitral awards. The crucial definition of *corporate disputes* and the rules on their arbitrability are contained in Article 225.1 of the APC. Provisions related to arbitration can also be found in the Civil Procedural Code (the **CPC**), which governs proceedings in ordinary state courts.

Both the ICA Law and the Domestic Arbitration Law are largely based on the UNCITRAL Model Law on International Commercial Arbitration (1985) (Model Law). However, they differ from the Model Law in some respects.

The Domestic Arbitration Law contains a range of detailed and technical rules adapted to purely Russian disputes. These include mandatory rules not found in the Model Law, such as arbitrator qualification requirements and rules on the operation of arbitral institutions. Some of these domestic provisions also apply by reference to international arbitration seated in Russia, pursuant to Article 1(2) of the ICA Law.

The key differences between the reformed ICA Law and the Model Law can be summarised as follows.

- (1) The determination of the 'international' nature of arbitration under the ICA Law differs in some respects from that under the Model Law. For instance, a foreign seat and/or the parties' agreement that the subject-matter of the dispute is related to more than one jurisdiction are insufficient to render the dispute "international" under the ICA Law. Also, in addition to the standard Model Law language covering cross-border commercial disputes, disputes relating to foreign investments in Russia and Russian investments abroad are in any event considered international under Article 1(3) of the ICA Law.
- (2) The revised ICA Law follows the Model Law in designating courts as supporting and supervisory authorities (as defined in Article 6 of the Model Law). However, for international commercial arbitration proceedings under the auspices of the ICAC and Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation, the President of the Chamber of Commerce and Industry, rather than the courts, is designated as the supervisory authority for arbitrator nominations, replacements and challenges (see Clause 11 of Annex I and Clause 10 of Annex II to the ICA Law).

- (3) The provisions on arbitral agreements in the ICA Law are Model Law-based at their core, but are more extensive and detailed. For example, the ICA Law:
- (a) provides for the possibility of including arbitration agreements in stock exchange and clearing rules and corporate charters (Articles 7(7) and 7(8));
 - (b) contains a default rule that an arbitral agreement in a contract applies to any transactions between the same parties made with the purpose of the performance, modification and termination of the main contract (Article 7(10));
 - (c) provides that, in the event of assignments (change of parties), the arbitration agreement remains in effect as between the assignor and the assignee (and, in the event of the transfer of obligations, remains binding for both the initial and the new obligor) (Article 7(11)), and
 - (d) contains a default rule that a contractual arbitration clause applies to disputes relating to entry into the contract, its effectiveness, modification, termination, validity and to the restitution obligations arising from its invalidation (Article 7(12)).
- (4) The ICA Law allows parties to opt out (by express agreement) of the Model Law-based provisions regarding referral to assistance and supervision authorities in matters of arbitrator appointments and challenges and on the preliminary issue of jurisdiction (Articles 11(5), 13(3), 14(1) and 16(3)); they may also agree on the finality of the award (Article 34(1)). All of these opt-out and finality agreements are only possible in the context of institutional arbitration.
- (5) Unlike the Model Law, the ICA Law does not contemplate arbitrators deciding cases *ex aequo et bono*.

1.2 When was the arbitration law last revised?

Significant reform of the arbitration laws took place quite recently. On 29 December 2015, the Russian President signed into law arbitration reform legislation, including the Domestic Arbitration Law, the revised ICA Law and amendments to a number of other enactments including the APC, resulting in a complete overhaul of Russia's arbitration regime. The reform legislation came into force on 1 September 2016, although a number of provisions took effect later. For example, the provision that only arbitral institutions holding a special Government permit are eligible to administer arbitrations has only become effective on 1 November 2017. As of the time of writing, the reform legislation has become fully effective.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

Russian law does not establish special choice of law rules for arbitration agreements, leaving this issue open to interpretation. When determining the validity of foreign arbitral agreements in the absence of the parties' express choice, Russian courts are most likely to apply the law of the seat of arbitration, however, other scenarios (including the application of Russian law) cannot be ruled out.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Arbitration clauses are considered separable from the main contract in which it is set forth according to Article 16(1) of the ICA Law and Article 16(1) of the Domestic Arbitration Law.

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

Pursuant to Article 7 of the ICA Law, an arbitration agreement must be made in writing. This requirement will be satisfied, for instance, where the parties co-sign a contract containing an arbitration clause, or if they exchange letters to the same effect. They can also conclude an arbitration agreement by means of reference to a document containing such an agreement. Arbitration agreements made by exchange of electronic

messages are also acceptable, provided that the legal requirements for contracts made by electronic exchange have been observed. In practice, these legal requirements are only satisfied where an electronic exchange is signed with a legally compliant electronic signature (arguably, a simple e-mail will not suffice).

The parties are also considered to have concluded an arbitration agreement in writing where one of the parties alleges its existence in a statement of claim and the other does not deny its existence in its statement of defence.

Russian law sets out additional requirements in respect of the arbitration of corporate disputes, which impacts arbitration agreements. The notion of corporate disputes (per Article 225.1 of the APC) encompasses all disputes relating directly or indirectly to the management of Russian companies or participation in them. Arguably, the definition of corporate disputes covers, among other things, disputes arising out of shareholders' agreements and share purchase agreements in respect of Russian companies. Arbitration clauses in respect of corporate disputes are permitted, and the arbitration of corporate disputes is expressly allowed under the reform legislation, starting from 1 February 2017. Such clauses can be included in particular in the articles of association of Russian companies (provided that the articles are adopted by all participants unanimously, and subject to carve-outs in respect of public joint stock companies and joint stock companies with at least 1,000 voting shareholders).

Arbitration agreements in respect of corporate disputes have to comply with a number of specific requirements, which vary depending on the type of dispute.

The only universal requirement in respect of corporate disputes is that they can only be arbitrated under the auspices of eligible arbitral institutions, meaning those that have obtained a Russian government permit envisaged by the reform legislation (except for the International Commercial Arbitration Court with the Chamber of Commerce and Industry of the Russian Federation (ICAC), which is exempted from the permit requirement). At the time of writing, permits have been issued to just two Russian institutions (the Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs and the Arbitration Center at the Institute of Modern Arbitration), though more permits are expected to be issued in future. It remains a matter of controversy whether foreign institutions holding no Russian government permit are eligible to administer Russian corporate arbitrations (such as, for example, disputes under share purchase and shareholders' agreements in respect of Russian companies). On a conservative interpretation of the reform legislation, awards issued under the auspices of institutions without a permit, even if issued outside Russia, could be unenforceable in Russia.

In addition, corporate disputes cannot be referred to *ad hoc* tribunals.

Another requirement is that the seat of arbitration in respect of most corporate disputes related to a Russian company must be in Russia, but exceptions apply: for example, disputes over title to Russian company shares (and arguably, all disputes whatsoever arising under Russian share purchase agreements), as well as disputes over creation of lien and foreclosure in respect of such shares, are not required to be arbitrated with seat in Russia. All disputes involving the target Russian company as well as disputes arising out of shareholder agreements and similar other contracts relating to management of the company must be arbitrated under specialized arbitration rules that provide for information-sharing with the non-disputing shareholders of the target Russian entity and that permit them to join the dispute. Such specialised rules have already been adopted by some Russian institutions, including the ICAC. Where a dispute has to be arbitrated under such specialized rules, a further requirement is that the parties, the target company and all its shareholders must accede to the arbitration agreement. This requirement may often be difficult or impossible to achieve in practice.

It is also important to bear in mind that new Russian arbitration legislation expressly allows arbitration clauses in respect of Russian *corporate disputes* from 1 February 2017 and suggests that earlier arbitration clauses relating to such disputes are non-enforceable. This is indeed how Russian courts treated such clauses in judgments issued under the new arbitration legislation.

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

The default position under Russian law is that parties who have not signed the arbitration agreement, and have not agreed to join the arbitration, are not bound by the arbitration agreement. However, an arbitration agreement applies not only to the signatory parties but also to their successors. Furthermore, Article 7(11) of the ICA Law expressly provides that, in the event of assignment of claims and/or transfer of obligations, the arbitration agreement will apply to all relevant parties (i.e., the assignee, assignor, and the initial and new obligors).

2.5 Are there restrictions to arbitrability? In the affirmative:

2.5.1 Do these restrictions relate to specific domains (such as IP, corporate law etc.)?

There is a defined list of non-arbitrable disputes in the APC (as to commercial disputes) and the CPC (as to private non-commercial disputes). According to Article 33 of the APC, the following disputes are considered non-arbitrable:

- (a) insolvency disputes;
- (b) disputes arising out of public officials' refusal to register a legal entity in the state register of legal entities;
- (c) intellectual property disputes involving organizations responsible for the collective management of copyright and related rights or falling within the exclusive competence of the Court for Intellectual Rights due to their public nature (e.g., IP registration challenges);
- (d) disputes arising from administrative and other public law matters;
- (e) class actions (however, multi-party actions in corporate disputes may, in principle, be arbitrated);
- (f) privatization disputes;
- (g) disputes relating to public procurement (with a reservation that in future public procurement disputes may become arbitrable, provided that an appropriate arbitral institution is designated for such disputes by separate federal law);
- (h) disputes over compensation for environmental damage;
- (i) certain corporate disputes (Article 225.1(2) of the APC):
 - disputes about the convocation of general shareholders' meetings;
 - disputes arising out of notarization of transactions in respect of participation interests in Russian limited liability companies;
 - challenges to the acts, resolutions and actions (or failures to act) of public and municipal bodies, private entities performing public-law functions, and public officials;
- (j) disputes concerning "strategic" Russian companies as defined in Federal Law No. 57-FZ on Foreign Investments in Business Entities of Strategic Importance for the Defense of the Country and the Safety of the State of 29 April 2008 (the **Strategic Investments Law**); there is a carve-out from this restriction - disputes over share ownership in "strategic" companies can be arbitrated, unless they arise under a transaction that required approval under the Strategic Investments Law; importantly, for the purposes of arbitrability, "strategic" status of the target Russian entity is to be tested as of the date of commencement of the arbitration, and not as of the date when the arbitration clause is entered into;
- (k) disputes relating to "voluntary" and mandatory tender offers and squeeze-out procedures under chapters IX and XI.1 of Federal Law No 208-FZ on Joint-Stock Companies of 26 December 1995; and
- (l) disputes over the expulsion of participants from legal entities.

Despite the fact that the law provides for a closed list of non-arbitrable disputes, there is a continuing controversy in Russian court practice about arbitrability of various types of commercial disputes with a public element, such as concession agreements with state entities, agreements involving the use of State funds for a public purpose, etc. In particular, in respect of concession agreements, a court ruling in the *Orlovsky tunnel*

case in February 2016 suggested that arbitrations under concession agreements cannot be administered by foreign institutions, and another ruling made in September 2017 by a Moscow court in the case *Glavnaya Doroga v Avtodor* (later overturned) suggested non-arbitrability of concession disputes. It would be fair to say that the courts' position in respect of agreements with public elements is still evolving.

2.5.2 b. Do these restrictions relate to specific persons (i.e. State entities, consumers etc.)?

Further carve-outs from arbitrability, in respect of disputes concerning individuals, are envisaged by the CPC. For example, it prohibits arbitration of employment, inheritance and eviction disputes.

There is no general restriction/non-arbitrability of disputes involving public entities, however such disputes may be deemed non-arbitrable if they are of a public nature (see section a above).

2.6 Intervention of domestic courts

2.6.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

Under Article 148(1)(5) of the APC, Russian courts must terminate litigation proceedings ("leave the claim without consideration") and refer the parties to arbitration if there is a valid and enforceable arbitration agreement between the parties, provided that the defendant objects to the court's jurisdiction and invokes the arbitration agreement before its first submission on the merits. This rule applies irrespective of the seat of the arbitration.

2.6.2 How do courts treat injunctions by arbitrators enjoining such courts to stay litigation proceedings?

Russian courts do not enforce anti-suit injunctions ordered by foreign courts (Information Letter of the Presidium of the Higher Arbitrazh Court of the Russian Federation of 9 July 2013 No. 158). While there is no clear guidance on the subject, a similar approach is to be expected in respect of arbitrators' anti-suit injunctive orders.

2.6.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)

It is open to debate if Russian courts have any legal standing to intervene in an arbitration seated outside of their jurisdiction. To our knowledge, no attempt to obtain anti-suit injunctions through Russian courts has ever been successful even domestically, and it appears quite unlikely that a Russian court would entertain an anti-suit injunction in respect of a foreign-seated arbitration.

2.7 The conduct of the proceedings

2.7.1 Can parties retain outside counsel or be self-represented?

There is no requirement to retain counsel to represent the parties in the proceedings. Generally, the parties are allowed to be self-represented in the proceedings.

2.7.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

Under the Russian arbitration laws, arbitrators must be impartial and independent. However, these general principles are not particularised in legislation.

In order to give the parties more guidance, in 2010 the Chamber of Commerce and Industry of the Russian Federation published non-binding Rules on Independence and Impartiality of Arbitrators, influenced by the

IBA Guidelines on Conflicts of Interest in International Arbitration. This non-binding guidance may be used by courts in practice as a reference point in resolving challenges.

According to Article 12(1) of the ICA Law, when a person is approached in connection with his possible appointment as an arbitrator, he or she shall disclose, in writing, any circumstances which may give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator must inform the parties about any such circumstances that arise during the arbitral proceedings.

A party can challenge an arbitrator if it has sufficient grounds to believe that an arbitrator is not impartial and independent or does not satisfy the requirements established by the law or agreed by the parties. However, it may only challenge its own appointed arbitrators if the circumstances giving rise to the challenge became known only after the appointment (Article 12(2) of the ICA Law).

In practice, the courts' approach to challenges is heavily fact-dependent, and challenges are decided on a case by case basis.

2.7.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

Under Article 11(3) of the ICA Law, unless the parties agree otherwise (including by reference to arbitration rules), the appointment of an arbitrator shall be made, upon application of a party, by the competent Russian court if: (i) in an arbitration with three arbitrators, a party fails to appoint an arbitrator within 30 days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment; (ii) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator.

A court appointing an arbitrator must have due regard for any qualifications required of the arbitrator by the agreement of the parties, and must ensure that the arbitrator will be independent and impartial (Article 11(6) of the ICA Law).

Russian courts have only recently (as part of the arbitration reform) been designated as the competent body to assist in the constitution of arbitral tribunals and in resolving deadlocked challenge procedures. It remains to be seen how efficiently Russian courts will perform these functions.

2.8 Do courts have the power to issue interim measures in connection with arbitrations?

Russian courts have powers to issue interim measures in connection with arbitrations, upon application of a party.

The list of interim measures is open-ended but includes asset freezing orders as well as orders enjoining the respondent or other parties from disposing of the object of the dispute (Article 91 of the APC).

Interim relief applications will be considered by the judge *ex parte* on an urgent basis. Injunctive relief is granted if failure to do so may obstruct or make impossible the enforcement of the decision, or cause substantial damage to the applicant. In practice, Russian courts are often reluctant to grant interim relief, unless urgency and risk of imminent dissipation are very obviously established.

2.9 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

2.9.1 Does it provide for the confidentiality of arbitration proceedings?

The Domestic Arbitration Law expressly establishes confidentiality of arbitral proceedings by default. By contrast, the ICA Law does not contain such default rules. In practice, confidentiality is often addressed in arbitration rules (for instance, there are confidentiality provisions in the ICAC Rules).

2.9.2 Does it regulate the length of arbitration proceedings?

The length of arbitration proceedings is not regulated by law.

2.9.3 Does it regulate the place where hearings and/or meetings may be held?

The parties are free to choose the legal seat of arbitration (save for the restriction that most corporate disputes related to Russian companies must be arbitrated in Russia). The physical location of meetings and hearings can be at any place the tribunal considers appropriate (subject to any restrictions in the applicable rules and the parties' agreement).

2.9.4 Does it allow for arbitrators to issue interim measures?

The arbitral tribunal is allowed to issue any interim measures it deems necessary upon application of parties to the dispute. If the measure is granted, the arbitral tribunal may ask for security (Articles 17 of the Domestic Arbitration Law and the ICA Law). Parties may agree (including by reference to arbitration rules) that the arbitration institution administering the dispute can issue interim measures before the constitution of an arbitral tribunal.

2.9.5 Does it regulate the arbitrators' right to admit/exclude evidence?

There is no restriction on the presentation of testimony by a party employee. Article 19 of the ICA Law stipulates that arbitrators are free to assess the admissibility, relevance and significance of evidence.

2.9.6 Does it make it mandatory to hold a hearing?

According to Article 24 of the ICA Law and Article 27 of Domestic Arbitration Law, unless the parties' agreement provides otherwise (including by reference to arbitration rules), the tribunal may decide the dispute on the basis of the documents submitted by the parties without holding a hearing, unless a party requests a hearing.

2.9.7 Does it prescribe principles governing the awarding of interest?

Russian arbitration laws do not stipulate any arbitration-specific rules on interest to be awarded as a remedy for non-performance of financial obligations. In the absence of contrary agreement, and assuming Russian substantive law applies to the dispute, interest is to be awarded at the "key rate" (*ключевая ставка*) of the Bank of Russia in the relevant periods of default (Article 395(1) of the Civil Code).

There are also separate rules for so-called "statutory interest" to which a creditor is entitled for the use of his funds (for instance, in a situation of a contractually-agreed deferred payment for delivered goods) if the parties agreed to apply the statutory interest rate, or if the law specifically provides for such statutory interest. Statutory interest is calculated at the "key rate" of the Bank of Russia– Article 317.1 of the Civil Code.

There is also a specific rule in the Civil Code (Article 308.3(1)) that a court may award a creditor a fair and proportionate amount to be paid by the debtor for non-performance of the judgment. The term "court" under the Civil Code includes an arbitral tribunal, so arguably an arbitral tribunal may award such a payment. As recently clarified in the ruling of the Supreme Court of the Russian Federation of 24 March 2016 No.7, Article 308.3 applies only to the failure to perform non-monetary obligations (i.e., it does not apply to late payments).

2.9.8 Does it prescribe principles governing the allocation of arbitration costs?

Under the Domestic Arbitration Law, the default rule (absent the parties' agreement and/or provisions of the arbitral rules to the contrary) is that the arbitration costs are allocated/awarded to the winning party in proportion to the claims that have been satisfied; the winning party may also be awarded its legal costs. There are no similar rules in the ICA Law. As a practical matter, both in domestic and Russia-seated international arbitrations, absent the parties' agreement to the contrary, the unsuccessful party will usually

be ordered to pay the successful party's costs (including arbitrators' fees and expenses, fees and expenses of the arbitration institution and reasonable legal costs and expenses of successful party).

2.10 Liability

2.10.1 Do arbitrators benefit from immunity to civil liability?

According to Article 51 of the Domestic Arbitration Law, arbitrators are excluded from civil liability (except liability for damage caused by a criminal offense). This rule also applies to international arbitration seated in Russia.

There are no arbitration-specific offences in the Russian Criminal Code. To the extent that the activity of the participants of an arbitration qualifies as a general criminal offense (for example, fraud), such activity may trigger criminal liability on general grounds.

3. The award

3.1 Can parties waive the requirement for an award to provide reasons?

According to Article 31 of the ICA Law an award should provide grounds (reasons). Article 34 of the Domestic Arbitration Law sets out a more detailed list of mandatory elements of an award, but allows the parties to opt out or modify the default requirements.

3.2 Can parties waive the right to seek the annulment of the award?

Parties are permitted to waive the right to seek annulment of the award (both in domestic and Russia-seated international arbitration), but only in administered (institutional) arbitration.

3.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

Russian law does not establish any atypical requirements for the award. Under Article 31 of the ICA Law an award shall be made in writing and shall be signed by a sole arbitrator and by at least the majority of an arbitral tribunal. The award must also indicate:

- (a) the reasons on which it is based;
- (b) the remedies/claims granted and dismissed;
- (c) the arbitration fees and costs and their allocation between the parties, and
- (d) the date of the award and the seat of arbitration.

For domestic arbitration purposes, the requirements to an award are more detailed, but can be overridden by party agreement.

3.4 Is it possible to appeal an award (as opposed to seeking its annulment)? a. If yes, what are the grounds for appeal?

Appeal of the award is not possible. The setting aside of an award rendered in Russia is possible (on grounds similar to those for refusal to enforce awards under the New York Convention). In institutional arbitration, parties may waive the right to apply for set-aside.

3.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

For enforcement of domestic award or an international award rendered in Russia, the award creditor must submit an application for a writ of execution with the arbitrazh court that has territorial jurisdiction at the award debtor's registered address or, if the debtor's address is unknown, at the court having jurisdiction over the location of the property against which the creditor seeks to enforce. The parties may agree that

application for a writ of execution will be filed with the court at the seat of arbitration or at the location of the award creditor.

An application must be accompanied by originals or duly authenticated copies of the award and the relevant arbitration agreement. If any of the documents are not in Russian, they have to be translated and the translators' signature should be verified by a notary. The application must also include a document confirming the payment of a state duty.

The application is heard by a single judge at a hearing with summons to the parties, held within one month from the application. Even if a party fails to appear, the court may proceed with the hearing.

The court assesses whether there are any grounds stipulated in the New York Convention or federal laws (which mirror the Convention) to reject the recognition and enforcement of the award fully or in part. If either party is not satisfied with the court's ruling in respect of the application to enforce the award it has the right to appeal the ruling to a cassation arbitrazh court within one month.

For recognition and enforcement of foreign arbitral awards the award creditor must submit the relevant application to the Russian arbitrazh court. The proceedings are broadly the same as those described in respect to enforcement of domestic awards or international awards rendered in Russia. However, the parties cannot change the court venue by agreement.

Once the Russian arbitrazh court issues a ruling recognising the foreign award, a writ of execution is issued, allowing enforcement through the Russian bailiff system. The award creditor must apply for the writ of execution within three years of issuance of the award. If the award beneficiary misses this deadline for good cause, the deadline may be extended by the court (Article 246 of the APC). Once a writ of execution has been issued, it can be enforced through bailiffs for an additional three years (Article 321(1) of the APC).

Foreign declaratory awards are automatically recognized in Russia unless the recognition is opposed by the party whose interests are affected by the award (in other words, the customary recognition and opposition procedure under the New York Convention applies in reverse order).

The grounds for refusal in recognition and enforcement of Russian ('international' and domestic) and foreign awards, as well as for the setting aside of awards made in Russia (both in 'international' and domestic disputes), are similar and Model Law-based.

3.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

According to Article 238(6) of the APC, if an application for enforcement and an application for annulment are filed with respect to the same award, proceedings in respect of the application filed later must be suspended. If both applications (for enforcement and for annulment) were filed on the same day, proceedings in respect of enforcement application must be suspended. These rules apply to annulment applications filed with a Russian arbitrazh court.

Russian court practice is inconsistent with respect to the enforcement of awards pending annulment by a foreign court. For instance, the case *Bouygues Batiment International S.A. v. CJSC Potok & 0458* (case No A40-100678/12) concerned the enforcement of an ICC award rendered in Stockholm. The respondent objected to the enforcement of the award on various grounds, including ongoing set aside proceedings before the Svea Court of Appeal. Russian courts found that pursuant to the ICC Rules the award becomes final and binding upon being rendered by the tribunal. Accordingly, the court could not refuse to enforce even if the award were subject to a set-aside application. However in another case - *Stena RoRo v. Baltiisky Zavod*, the Presidium of the High Arbitrazh Court (the highest instance for resolution of commercial disputes before 2014) adjourned the enforcement proceedings pending resolution of a set aside application abroad.

3.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Generally, Russian courts will refuse to recognize and enforce a foreign award which has been annulled at its seat. However, in 2011, in *Ciment Francais v Open Joint Stock Company Sibirskiy Cement Holding Company* (case No A27-781/2011), an arbitrazh court of the first instance recognised an ICC arbitral award issued in Turkey which had been set aside by a Turkish court. The court noted that both the New York Convention and Russian laws allow a court to refuse recognition of arbitral awards which have been set aside. However, the European Convention on International Commercial Arbitration provides for recognition and enforcement to be refused in such circumstances only where the set-aside was based on limited grounds indicated in the convention, which were not present in the case. This decision was overturned by higher courts, which refused recognition and enforcement of the ICC award.

3.8 Are foreign awards readily enforceable in practice?

Based on the New York Convention, foreign arbitral awards are to be recognised and/or enforced in Russia in the absence of convention-based grounds for non-recognition. Russian courts have dealt with a large number of applications for recognition and enforcement of foreign awards, and the practice is generally favorable towards recognition and enforcement.

Russian courts used to apply the New York Convention-based public policy exception for refusal of the recognition and enforcement of foreign arbitral awards broadly. The situation has improved with the issuance of helpful guidance by the Higher Arbitrazh Court in 2013, although the risk of non-recognition on public policy grounds has not disappeared. In order to streamline court practice, the Presidium of the Higher Arbitrazh Court issued Information Letter No. 156 dated 26 February 2013 on public policy issues. The Higher Arbitrazh Court clarified that public policy comprises only those fundamental provisions of law that are mandatory and universal, have social and public significance, and comprise the basis of the economic, political and legal system of the state. Following the recent arbitration reform, the public policy exception was applied broadly in at least one case to prevent the recognition in Russia of an ostensibly foreign arbitral award which, according to the courts' findings, was actually issued in Russian-seated proceedings. Going forward, Russian courts may be expected to use the public policy exception to block enforcement of foreign awards they consider to be issued in circumvention of the Russian arbitration legislation.

Additional issues may arise in specific sectors, for example recently Russian courts have refused to enforce an arbitration clause in a Russian concession agreement, finding that Russian legislation relating to this sector only allows such disputes to be arbitrated and administered domestically. A more recent Russian court judgment (later overturned) suggested non-arbitrability of concession disputes. The risks of non-recognition on Convention-based grounds are also high in respect of disputes deemed non-arbitrable and/or required to be arbitrated in eligible (permitted) arbitral institutions under Russia's new arbitral legislation (see also, Section 2.E above).

Once the recognition of a foreign award is granted by a Russian court, and absent voluntary compliance by the debtor, the award creditor must enforce the award via the bailiff system. In practice, the compulsory enforcement procedure can be protracted where the debtor seeks to conceal his assets or where assets are insufficient.

4. Funding arrangements

Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

Assignment of claims (including in return for funding) is widespread, but third-party funding without the assignment of the legal interest in the claim is a relatively new phenomenon for the Russian market, which is not expressly regulated by law. In practice Russian parties are increasingly looking to foreign funders (at

least to finance foreign-seated arbitration), but this type of arrangement is not yet widely used. Some funder firms have begun to emerge domestically.

Contingency fees of lawyers are not expressly prohibited as a matter of law, but courts have held such fee arrangements to be unenforceable. For example, Ruling of the Constitutional Court No. 1-P of 23 January 2007 held unenforceable a success fee arrangement that made payments to lawyers conditional on the positive outcome of a court hearing. Various aspects of success fee arrangements have been reviewed by the courts, but the Constitutional Court's position has never been overturned.

5. Is there likely to be any significant reform of the arbitration law in the near future?

Significant reform of the arbitration laws took place in late 2015, as described above. The reform was followed with a corresponding change in the arbitral rules of the Russian arbitral institutions, including the ICAC arbitration rules (reformed as of February 2017).

The interim period under the reform legislation, during which period Russian arbitral institutions were required to obtain a Government permit to administer arbitrations, ended on 1 November 2017. At present, there are just three eligible arbitral institutions in Russia for general commercial arbitration, but the number is expected to rise with time. At the moment, there is unlikely to be any further significant reform in the arbitration field in Russia.

SERBIA

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

JELENA BEZAREVIĆ PAJIĆ, NATAŠA LALATOVIĆ ĐORĐEVIĆ AND
TANJA ŠUMAR OF MORAVČEVIĆ VOJNOVIĆ AND PARTNERS
IN COOPERATION WITH SCHOENHERR

moravčević vojnović and partners
in cooperation with **schoenherr**

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

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 - a. Framework ●
 - b. Adherence to international treaties ●
 - c. Limited court intervention ●
 - d. Arbitrator immunity from civil liability ●
2. Judiciary ●
3. Legal expertise ●
4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Serbian arbitration law is currently framed by the 2006 Arbitration Act (“SAA”), modelled after the 1985 UNCITRAL Model Law, with some additions as specified further below. However, before the SAA was enacted, arbitration law was governed by the more general legislation, such as the former Codes of Civil Procedure. In that sense, it could be said that Serbian law is traditionally accepting arbitral dispute resolution, as also evidenced in the operation of, at the moment, two distinct arbitral institutions: one attached to the Serbian Chamber of Commerce, and the other established by the Serbian Arbitration Association.

Key places of arbitration in the jurisdiction	Belgrade
Civil law / Common law environment?	Civil law
Confidentiality of arbitrations?	Not explicitly prescribed under the Serbian Arbitration Act.
Requirement to retain (local) counsel?	Not explicitly provided.
Ability to present party employee witness testimony?	Not forbidden
Ability to hold meetings and/or hearings outside of the seat?	Permitted, unless the parties agreed otherwise.
Availability of interest as a remedy?	The SAA is silent on the matter of interest. This matter is generally regarded as a part of substantive law.
Ability to claim for reasonable costs incurred for the arbitration?	The SAA does not provide explicit rules for the allocation of costs. In practice, arbitrators take into consideration all the facts of the case, including the outcome, before costs allocation.
Restrictions regarding contingency fee arrangements and/or third-party funding?	The SAA does not regulate contingency fee arrangements and/or third-party funding. Local bar rules allow lawyers to agree on type of contingency fees for up to 30% of the value of the dispute (not the value of awarded amount).
Party to the New York Convention?	Yes, with reservations with regard to reciprocity, commercial disputes and retroactive application.
Other key points to note	None
WJP Civil Justice score (2017-2018)	0.49

ARBITRATION PRACTITIONER SUMMARY

Date of arbitration law?	10 June 2006
UNCITRAL Model Law? If so, any key changes thereto?	Yes, the Serbian Arbitration Act was modelled after the 1985 UNCITRAL Model Law. Changes include that: <ul style="list-style-type: none"> – the number of arbitrators must be odd; – the parties must appoint arbitrators within a certain timeframe; and – an award may be set aside if it was based on a false witness or expert testimony, counterfeit documents or criminal acts by arbitrators or parties (as established in a final and binding criminal court judgment).
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No, arbitration-related matters fall within the jurisdiction of the Higher Courts and Commercial Courts in the first instance.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes. Although the courts typically request input from the opponent on applications for interim measures, if applicant can indeed justify urgency or in case of service of process abroad, the courts were willing to issue <i>ex parte</i> interim measures.
Courts' attitude towards the competence-competence principle?	The courts accept that the arbitral tribunal may decide on its own competence, as a rule expressly provided by the Serbian Arbitration Act. However, if an arbitral tribunal decided on its competence as a preliminary matter, a party may still request the courts to decide this matter.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Yes. An award may be set aside if it is based on a false witness or expert testimony, counterfeit documents or criminal acts by arbitrators or parties (as established in a final and binding criminal court judgment).
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The court may refuse to recognise and enforce foreign awards set aside at the seat of arbitration. This is an express ground for refusal of recognition and enforcement.
Other key points to note?	The setting aside procedure is a standard litigation; the decision on the setting aside application is appealable, and may also be subject to revision before the Supreme Court of Cassation.

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

The Serbian Arbitration Act (“SAA”) was modelled after the UNCITRAL Model Law of 1985, and has not been amended since its enactment in mid-2006. No significant amendments to the SAA are expected in the near future.

In large part, the SAA is identical to the UNCITRAL Model Law, however, the legislator included some additional features, which will be highlighted further in the analysis, and which include, by way of example, that:

- the number of arbitrators must be odd;
- the parties must appoint arbitrators within a certain timeframe; and
- an award may be set aside if it is based on a false witness or expert testimony, counterfeit documents or criminal acts by arbitrators or parties (as established in a final and binding criminal court judgment).

The SAA applies to all arbitration proceedings seated in the Republic of Serbia. For these arbitration proceedings, in addition to the SAA, mandatory rules of Serbian law (*i.e.*, such rules, the application of which the parties cannot exclude contractually) also apply even if the parties chose a foreign law to govern their dispute.

The following analysis will focus primarily on the provisions of the SAA, highlighting the specificities of Serbian law where applicable. However, to the extent the SAA did not regulate a certain aspect of arbitration proceedings, this analysis will endeavour to find an appropriate rule within the general rules of civil procedure in the Serbian Code of Civil Procedure (“CCP”) and related legislation.

The analysis was structured to follow the general structure of the questionnaire set out in Section II of the Memorandum circulated to the GAP Working Group – Law Firms & Chambers on 5 September 2017. To that effect, the analysis focuses first on rules pertaining to the arbitration agreement (Section 2), before proceeding to elaborating on the intervention of domestic courts (Section 3), conduct of the proceedings (Section 4), the award (Section 5), and funding arrangements (Section 6).

2. The arbitration agreement

In Serbian law, an arbitration agreement is the basis for arbitration.¹ Under the SAA, the arbitration agreement is the agreement whereby the parties entrust their future or existing disputes in respect of a defined legal relationship to an arbitral tribunal.² It can take the form of (i) an arbitration clause within a contract, or (ii) a separate arbitration agreement.³ Regardless of the form, arbitration agreements are deemed independent and separable from the rest of the contract, *i.e.*, the contract from which the dispute arises.⁴

The parties are generally free to choose any law or rules to govern the substantive validity of their arbitration agreement.⁵ It is implicit in the SAA that, absent any parties’ agreement, in an arbitration seated

¹ Article 4(1) of the SAA; M. Stanivuković, *Serbian Arbitration Law*, IV.Serbia.7.a in *International Commercial Arbitration* (ed. Eric E. Bergsten), p. 10.

² Article 9(1) of the SAA.

³ Article 9(2) of the SAA.

⁴ M. Stanivuković, *Međunarodna arbitraža [International Arbitration]*, Belgrade, 2013, p. 81.

⁵ As opposed to, for instance, the required form of the arbitration agreement, party capacity and similar matters, for which different laws might be applicable. Article 58(1)(1) of the SAA; M. Stanivuković, *Međunarodna arbitraža [International Arbitration]*, Belgrade, 2013, p. 83.

in the territory of the Republic of Serbia, the arbitration agreement must comply with Serbian law (*lex arbitri*).⁶ If the Parties did not agree upon the law applicable to their arbitration agreement specifically, and such arbitration agreement was included as a clause within the Parties' contract, as is usually the case, it should be presumed that the arbitration agreement is governed by the law agreed for the Parties' contract.⁷ Otherwise, the arbitration agreement should be governed by the law of the place where the arbitral award is (or will be) rendered.⁸

Every arbitration agreement, in addition to expressing the parties' agreement to resolve a dispute by arbitration, must also (i) refer to an arbitrable dispute;⁹ (ii) be in writing;¹⁰ (iii) be concluded by the parties of necessary qualities or capacity;¹¹ (iv) be concluded without duress, fraud or error;¹² and (v) refer to a dispute involving a defined legal relationship.¹³

2.1 Arbitrability

The concept of arbitrability is reflected in Article 5 of the SAA providing that the "*parties may agree to an arbitration for the resolution of a pecuniary dispute concerning rights they can freely dispose of, except for disputes that are reserved to the exclusive jurisdiction of courts.*"¹⁴

Further developed, this concept entails that, to be arbitrable, a dispute must (a) be pecuniary (in that it should entail or relate to a certain property, acts or assets the value of which can be expressed in monetary terms);¹⁵ and (b) concern rights that the parties may freely dispose of (essentially, that the parties may settle their dispute, *i.e.* waive, transfer, assign or otherwise dispose of the right concerned).

Additionally, to be arbitrable, a dispute must not fall within the exclusive jurisdiction of state courts. In practice, non-arbitrable disputes include certain disputes concerning (i) property rights over real estate;¹⁶ (ii) Serbian insolvency proceedings;¹⁷ (iii) privatisation issues;¹⁸ (iv) intellectual property;¹⁹ and (v) specific corporate matters relating to Serbian companies.²⁰

⁶ Article 58(1)(1) of the SAA; M. Stanivuković, *Međunarodna arbitraža [International Arbitration]*, Belgrade, 2013, p. 83. This approach is also recognised in Article VI(2) of the European Convention on International Commercial Arbitration ("European Convention") and Article V(1)(a) of the the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").

⁷ Commercial Appellate Court, Case no. 3 Pž. 6442/15, 16 December 2015.

⁸ M. Stanivuković, *Međunarodna arbitraža [International Arbitration]*, Belgrade, 2013, p. 83.

⁹ Article 10(1)(1) of the SAA.

¹⁰ Article 10(1)(2) and Article 12 of the SAA.

¹¹ Article 10(1)(3) of the SAA.

¹² Article 10(1)(4) of the SAA.

¹³ Article 9 of the SAA; M. Stanivuković, *Međunarodna arbitraža [International Arbitration]*, Belgrade, 2013, pp. 88-89.

¹⁴ Article 5 of the SAA.

¹⁵ With the exception of sports arbitration as per Article 53 of the Sports Act (2016). International Bar Association, Arbitration Committee, Subcommittee for Recognition and Enforcement of Arbitral Awards – Country Report on "non-arbitrability" as a defence to the recognition and enforcement of arbitral awards under the New York Convention. Available at: http://www.schoenherr.rs/fileadmin/content-articles/pdf/Report_on_the_Arbitrability_Exception_Serbia_2016.pdf.

¹⁶ For instance, disputes concerning property rights or lease of real estate located in Serbia were normally considered within the exclusive jurisdiction of state courts, as per Article 56 of the Private International Law Code (1982). However, legal doctrine has expressed conflicting views on this provision. For a pro-arbitrability stance see, for instance, Maja Stanivuković, *Međunarodna arbitraža [International Arbitration]*, Belgrade, 2013, pp. 104-106. For a contrary view see, for instance, Vladimir Pavić, National Reports – Serbia, in *World Arbitration Reporter*, Second Edition, 2010, SERB-13.

¹⁷ Commercial Appellate Court, Case no. Pž. 6875/2013, 25 September 2013. The doctrine, however, advocates for a somewhat different approach – that the scope of the "insolvency exception" should depend on the specific circumstances of each case and the connection between the substance of the claim and the insolvency proceedings (M. Stanivuković, *Zakon o stečaju i arbitraža [Serbian Law on Bankruptcy and Arbitration]*, Zbornik radova Pravnog fakulteta u Novom Sadu, br. 1/2014, pp. 124-127).

¹⁸ Supreme Court of Cassation, Case no. Prev. 137/2014, 11 December 2014; Supreme Court of Cassation, Case no. Prev. 350/2008, 1 October 2008. However, certain authors expressed that the public-status elements of such contracts do not

2.2 Written form

There are several forms in which an arbitration agreement may be concluded:²¹

- (i) in writing by signature of the parties;
- (ii) by exchange of notes via means of communication that provide written evidence of the parties' agreement;
- (iii) by referring to another written document containing the arbitration agreement (general conditions, text of another agreement, etc.), if the purpose of such reference is for the arbitration agreement to become an integral part of the written agreement between the parties;
- (iv) if a claimant initiates, in writing, an arbitration proceeding and a respondent expressly accepts arbitration in writing or at the hearing; and
- (v) if a respondent takes part in the arbitration proceeding and engages in discussion on the merits without objecting to the existence of an arbitration agreement or contesting the jurisdiction of the arbitral tribunal.

2.3 Parties' qualities and capacity

Under the SAA, every natural or legal person, including the State, its instrumentalities, institutions and companies in which a State has a property interest, may agree to an arbitration.²² Moreover, given that anyone with the capacity to be a party in the civil procedure under the CCP may agree to arbitration,²³ exceptionally, even certain "*forms of association and organization which have no capacity to be a party*"²⁴ may be granted a party status in an arbitration if such entities "*substantially meet the requirements for acquiring [party] capacity, and particularly if they hold property that may be subject to enforcement.*"²⁵

2.4 Lack of duress, fraud or error

Under this requirement, the parties' intent to submit a dispute to arbitration must be genuine and not tainted by duress, threat, fraud or mistake.²⁶

2.5 Dispute involving a defined legal relationship

Finally, an arbitration agreement must refer to disputes arising from a defined legal relationship.²⁷ It may relate to future or existing disputes²⁸ arising out of one or several specific contracts or tort. However, an

impose limits on the disposal of rights, and that there is no exclusive court jurisdiction prescribed by law, which would deprive these disputes of arbitrability (see M. Stanivuković, *Međunarodna arbitraža [International Arbitration]*, Belgrade, 2013, pp. 112-113).

¹⁹ Pursuant to Article 7 of the Trademark Act (2009), protection of trademarks falls within the jurisdiction of public (administrative) authority. While a court decision affirming exclusive jurisdiction of state courts over protection of IP rights was remanded (Commercial Appellate Court, Case no. Pž. 1422/2012, 21 February 2012), it seems that the reason for remanding was the lower instance court's failure to establish the applicable law governing the validity of the arbitration agreement. The lower-instance court's position that exclusive jurisdiction stems from the fact that IP rights have *erga omnes*, and not *inter partes* effects established by a contract, does not seem to have been challenged by the higher instances.

²⁰ Supreme Court of Serbia, Prev. 333/2001, 6 March 2002 (although, pre-SAA).

²¹ Article 12 of the SAA.

²² Article 5(2) of the SAA.

²³ Article 5(3) of the SAA.

²⁴ Such as, for example, a consortium (*e.g.*, formed for the purposes of participation in a tender, as was the case in the Higher Commercial Court case Pz. 14353/05), a customs office (which does not have its distinct legal personality but is, rather, an organizational sub-unit of the State's Customs Administration within the Ministry of Finance), or a sports association (if not registered as a legal entity).

²⁵ Article 74(4) of the CCP.

²⁶ M. Stanivuković, *Serbian Arbitration Law*, IV.Serbia.7.a in *International Commercial Arbitration* (ed. Eric E. Bergsten), p. 10.

arbitration agreement may not relate generically to all disputes that conceivably could arise between the parties in connection with any and all of their (unspecified) relations.²⁹

Like any other agreement, an arbitration agreement operates *inter partes*.³⁰ The SAA does not specifically recognise the “group of companies” or a similar doctrine, to allow for extending the scope of an arbitration agreement to non-signatories, and there appears to be no published court practice to that effect. Serbian company law recognises, in certain circumstances and as a matter of substantive law, the principle of “corporate veil piercing”. However, while corporate veil piercing may relate to questions of liability, there appears to be no practice allowing this concept to operate so as to establish a binding effect of an arbitration agreement for a non-signatory. Still, rights and obligations arising out of the arbitration agreement are generally transferable, unless agreed otherwise.

3. Intervention of domestic courts

Intervention of domestic courts in arbitration is limited only to activities expressly provided for in the SAA.³¹ These activities are intended mainly to resolve a deadlock in case parties are not able to reach an agreement, or when an arbitral tribunal needs assistance. In particular:

- to issue interim measures – both in domestic and international arbitrations;
- to appoint arbitrators, if the parties or appointment authority have not done so;
- to rule on the challenge of the arbitrators, if the parties have not chosen a different procedure or if they have not chosen a permanent arbitral institution, typically in *ad hoc* arbitrations;
- to issue a final judgment on an interlocutory question at the request of one of the parties if the arbitral tribunal is deciding on its jurisdiction as an interlocutory question;
- to assist with collecting evidence, at the request of the arbitral tribunal;
- to deposit for safe-keeping the decision of the arbitral tribunal, at the request of a party;
- to decide on the request for annulment of a domestic arbitral award;³² and
- to recognise and enforce a foreign award.

If there is a valid arbitration agreement (regardless of the seat of arbitration) the court which received the lawsuit will declare itself incompetent to decide the matter and will dismiss the claim. However, this is not done *ex officio*, but only if a party objects and if this objection is raised before discussing the merits of the case.

Serbian courts could intervene in arbitrations seated abroad only by ordering interim measures at the request of one of the parties. The court may order any interim measure it deems appropriate, both before and during arbitral proceedings. At the same time, it can order the other party to provide appropriate security.

²⁷ Article 9 of the SAA.

²⁸ M. Stanivuković, *Serbian Arbitration Law*, IV.Serbia.7.a in *International Commercial Arbitration* (ed. Eric E. Bergsten), p. 10.

²⁹ M. Stanivuković, *Međunarodna arbitraža [International Arbitration]*, Belgrade, 2013, p. 89.

³⁰ M. Stanivuković, *Međunarodna arbitraža [International Arbitration]*, Belgrade, 2013, p. 142.

³¹ Article 7 of the SAA.

³² A domestic arbitral award is, irrespective of the nationalities of the parties and the applicable substantive law, an award rendered by a tribunal (or sole arbitrator) seated in Serbia, provided that such tribunal or sole arbitrator did not apply a foreign procedural law. Namely, pursuant to Article 64(3) of the SAA, an award which was rendered by a tribunal or sole arbitrator seated in Serbia, applying a foreign procedural law to the arbitral proceedings, will be deemed a foreign arbitral award.

4. The conduct of the proceedings

4.1 Party representation

The SAA does not regulate party representation, while the CCP allows parties to be self-represented or to engage counsel before domestic courts. Under the SAA therefore, there are no limitations with regard to the parties' retaining outside counsel or taking part self-represented.

4.2 Arbitrators' independence and impartiality; constitution of the tribunal

The courts control arbitrators' independence and impartiality at the party's request.

Parties can challenge the appointment of an arbitrator solely if there are circumstances that reasonably raise doubts as to his or her independence or impartiality, or if he or she does not fulfil the requirements agreed to by the parties, if any. Further, once the arbitrator has been appointed, the parties can challenge him or her only for reasons that arose or of which the party learned after the arbitrator was appointed.

Parties can agree on the procedure for challenging the appointment of arbitrators. In case of no agreement, or if the case is not administered by an arbitral institution, the competent court will decide upon the challenge (the challenge can be made within 15 days of the date when the party learned of the appointment or of the reasons for the challenge). In doing so, the court is not obliged to take into account the IBA Guidelines on Conflicts of Interest in International Arbitration, unless the parties have explicitly agreed on their application. Even if the procedure for challenging the arbitrator is in progress, the arbitral tribunal can continue the arbitral proceedings and render its decision.

Courts will assist in the constitution of the arbitral tribunal in *ad hoc* arbitrations if: (i) parties fail to agree on the number of arbitrators and/or fail to appoint an arbitrator (within 30 days from the other party's request), and/or (ii) if the 'appointing authority' selected by the parties fails to do so.³³

4.3 Conduct of the arbitration proceedings

The SAA applies only to arbitral proceedings that are seated in Serbia. The parties may agree on the rules of procedure or agree to apply rules of some arbitral institution; if they fail to do so, the arbitral tribunal can conduct the procedure in the manner it deems fit. However, mandatory provisions of the SAA cannot be excluded. This includes the main principle that parties to the arbitration are equal and must be treated equally.³⁴ The arbitral tribunal is obliged to allow a party to present its arguments and evidence, as well as to comment on the actions of the other side.³⁵ Furthermore, the parties must receive timely notice of every oral hearing and every meeting of the arbitral tribunal scheduled *e.g.*, for site visits or document inspection. Each party must receive each and every submission of the other side, and expert opinions or other documents that represent evidence.

Some of the more specific features regarding the conduct of the arbitration proceedings include that:

- confidentiality of the arbitration proceedings is not expressly regulated. Thus, if the parties wish to ensure confidentiality of their arbitration proceedings, they are strongly advised to stipulate it in advance;
- neither the time frame for conducting the proceedings nor time limit for the arbitral tribunal to render an award are specified in the SAA;

³³ Article 16 of the SAA.

³⁴ Article 33 of the SAA.

³⁵ Article 33 of the SAA.

- unless the parties have agreed otherwise, an arbitral tribunal may decide to meet at any place it deems most appropriate for a hearing, examination of witnesses, experts or the parties, voting, or review of documents;³⁶
- unless the parties have agreed otherwise, at the request of a party, an arbitral tribunal can grant any interim relief that it deems necessary based on the subject matter of the dispute. At the same time, it can order the other party to provide appropriate security;³⁷
- arbitrators may decide on the admissibility, relevance and probative value of the proposed and presented evidence, unless the parties have agreed otherwise. Documentary evidence is commonly admitted, as well as factual evidence and expert witness reports. The IBA Rules on the Taking of Evidence in International Commercial Arbitration may be taken into account if so agreed by the parties, or, otherwise, if preferred by the arbitrators as best practice. Also, the arbitral tribunal may seek a court’s assistance in the obtaining of evidence;
- a hearing is not mandatory. However, the arbitral tribunal will hold a hearing at either party’s request, unless the parties previously agreed that a hearing would not be held;
- the SAA is silent on the matter of interest. In litigation, however, interest is only allowed on the principal claim. In Serbia, the applicable interest rate is either determined by the parties in the underlying agreement (contractual interest rate) or provided for by the law (statutory interest rate). However, the mentioned rules are generally regarded as a part of substantive law and would apply in arbitration only if Serbian law was chosen as the applicable substantive law;
- a decision on costs is a mandatory part of an arbitral award. When making such a decision, the arbitrators should take into consideration all the facts of the case, including the outcome. The “loser pays” rule is not explicitly provided for under the SAA, although it applies in Serbian litigation. While it is often applied by arbitral tribunals, they are also free to apply other principles. At the request of the tribunal, the parties are obliged to make an advance payment on the costs.

4.4 Liability

The SAA does not regulate the issue of arbitrators’ immunity. However, in practice, immunity is commonly agreed on in the terms of reference or terms of appointment for each particular case; however, even then, liability cannot be excluded in cases of wilful misconduct or gross negligence on the arbitrator’s part. This is so as a result of the express and mandatory stipulation in the Serbian Contracts and Torts Act,³⁸ that liability for damages caused by wilful misconduct or gross negligence can never be contractually excluded in advance.³⁹ Likewise, the SAA does not address any potential criminal liability of the participants in an arbitration; therefore, general rules provided in the criminal law legislation may apply.

5. The award

The SAA defines an award as a decision on the substance of the dispute whereby the arbitral tribunal decides all claims of the parties (the final arbitral award).⁴⁰ It recognizes also the possibility of making a partial or interim award.⁴¹

³⁶ Article 34 of the SAA.

³⁷ Article 31 of the SAA.

³⁸ Article 265 of the Contracts and Torts Act.

³⁹ Moreover, under Article 265 of the Contracts and Torts Act, a Serbian court could be requested to annul a contractual provision excluding liability even for damages caused by (ordinary) negligence, provided that such contractual provision is a result of the contracting parties’ unequal positions.

⁴⁰ Article 48 (1) of the SAA.

In terms of rendering a valid arbitration award, the requirements mostly correspond to those expressed by the 1985 UNCITRAL Model Law,⁴² with the addition that an award must also contain an introduction, a decision on the substance of the dispute, and a decision on costs,⁴³ and that *all* arbitrators must participate in deliberation, unless the parties otherwise agreed.⁴⁴ The parties may waive the requirement that the award shall contain a statement of reasons.⁴⁵

An arbitral award is final and binding upon the parties and there is no appeal mechanism.⁴⁶ The only remedy against an award rendered in Serbia is an application for setting aside, which the parties may not waive in advance.⁴⁷ Setting aside allows only for a very limited (no review of the merits) control of the award,⁴⁸ and on grounds which are substantially similar to those provided in the UNCITRAL Model Law of 1985 (which served as the model for the SAA).

The enforcement procedures generally differ depending on whether the award is domestic or foreign.⁴⁹

A *domestic arbitration award* can be enforced directly, under the Serbian Enforcement and Securities Act ("SESA"), since it has the force of a final court judgment.⁵⁰ Thus, after the voluntary execution term set by the award expires, a party may use such award as an "enforceable document" under the SESA to request enforcement.⁵¹

However, a *foreign arbitral award* must first be recognised by the competent court, to gain the same effect as a domestic arbitral award.⁵² Such recognition (and enforcement) of foreign arbitral awards is generally governed by the SAA, the New York Convention and the European Convention. Grounds for refusal of recognition under the SAA correspond to those listed in Article V of the New York Convention, and are not country specific. Recognition of a foreign arbitral award can be the subject matter of an independent proceeding, or it can be decided as a provisional/preliminary question in an enforcement proceeding.

Enforcement of the award is not automatically suspended in case of parallel set aside proceedings. However, a Serbian court may adjourn its decision on a requested recognition of a foreign arbitral award until parallel setting aside or suspension of enforcement proceedings are completed in the state in which or under the laws of which the award was made.⁵³

⁴¹ Article 48 (2) of the SAA.

⁴² Global Arbitration Review, Commercial Arbitration 2017, Serbia, question 37. Available at: <http://globalarbitrationreview.com/jurisdiction/1004539/serbia>.

⁴³ Article 53 of the SAA.

⁴⁴ Article 51(2) of the SAA.

⁴⁵ Article 53 (1) of the SAA.

⁴⁶ Global Arbitration Review, Commercial Arbitration 2017, Serbia, question 41.

⁴⁷ Article 62 of the SAA.

⁴⁸ Sketching the Setting Aside of Arbitral Awards in Serbia, Kluwer Arbitration Blog (2017), Available at: <http://arbitrationblog.kluwerarbitration.com/2017/09/28/sketching-setting-aside-arbitral-awards-serbia/>.

⁴⁹ Getting the Deal Through - Dispute Resolution (2014), Serbia, question 31 (available at: http://www.schoenherr.rs/fileadmin/content-rs/articles/pdf/DR2014_Serbia.pdf); Schoenherr Roadmap 2014: Serbia & Montenegro: Enforcing Foreign Court Judgments and Arbitral Awards. Available at: http://www.schoenherr.rs/fileadmin/content-rs/articles/pdf/Roadmap2014_Enforcing_Foreign_Court_Judgments_and_Arbitral_Awards.pdf. In principle, a domestic arbitral award is one rendered in arbitration seated in Serbia, while a foreign arbitration award is one rendered in arbitration seated abroad, as well as an award made by an arbitral tribunal seated in Serbia which applied foreign law to the arbitral proceedings (Article 64(3) of the SAA).

⁵⁰ Article 64(1) of the SAA.

⁵¹ Articles 41 and 42 of the SESA.

⁵² Article 64(2) of the SAA.

⁵³ Article 67(1) of the SAA.

If the award has been set aside by the court of the state in which, or under the law of which, it was made, Serbian courts may refuse to recognize (and enforce) such award in Serbia.⁵⁴ If the award was set aside while enforcement was pending in Serbia, the enforcement procedure can be terminated.⁵⁵ However, if the award had already been enforced, the opposing party may only apply for counter-enforcement.⁵⁶

Although there is no comprehensive statistic, the limited publicly available practice shows that foreign arbitral awards do seem readily enforceable in Serbia.⁵⁷

6. Funding arrangements

The SAA does not regulate third-party funding or any particular fee arrangements, nor has a Serbian court decided on these matters yet. Local bar rules allow lawyers to agree on type of contingency fees for up to 30% of the value of the dispute (not the value of awarded amount).

⁵⁴ Article 66(1)(5) of the SAA.

⁵⁵ Article 129 of the SESA.

⁵⁶ Article 115 of the SESA.

⁵⁷ See, for instance, International Bar Association, Arbitration Committee, Subcommittee for Recognition and Enforcement of Arbitral Awards – Country Report on ‘public policy’ as a defence to the recognition and enforcement of arbitral awards under the New York Convention, Appendix. Available at: http://www.schoenherr.rs/fileadmin/content-rs/articles/pdf/Report_on_the_Public_Policy_Exception_Serbia_2016.pdf.

SINGAPORE

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

PAUL TAN AND DEVATHAS SATIANATHAN
OF **RAJAH & TANN SINGAPORE LLP**

RAJAH & TANN

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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS

1. Law ●
 - a. Framework ●
 - b. Adherence to international treaties ●
 - c. Limited court intervention ●
 - d. Arbitrator immunity from civil liability ●
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3. Legal expertise ●
4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

VERSION: 29 MAY 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Arbitration law in Singapore is consistent with the Model Law regime – it is generally pro-arbitration focused, premised on minimal curial intervention. Arbitration awards – both domestic (generally, arbitrations seated in Singapore) and international (generally, where at least one of the parties has its place of business in any state other than Singapore, or the place with which the subject-matter of the dispute is most closely connected is situated outside of the state in which the parties have their place of business) are readily enforceable before the Singapore courts.

Courts are also an avenue for support during, and before, the arbitration process. For instance, parties may apply to the Singapore court for interim measures in support of the arbitration (for instance the seeking of injunctions). Where possible, however, these applications should first be made to the tribunal.

Recently, Singapore has embraced third-party funding, legalising it in the realm of arbitration. Parties involved in arbitration (as well as mediation and arbitration related court proceedings) may now avail themselves of third party funding, subject to certain restrictions as provided for in the applicable regulation.

Key places of arbitration in the jurisdiction	Singapore is a city-state.
Civil law / Common law environment?	Common law.
Confidentiality of arbitrations?	Whilst the duty of confidentiality in arbitration is not expressly embodied in statute, case law confirms that there is an implied common law duty of confidentiality of arbitrations. ¹
Requirement to retain (local) counsel?	Parties can either retain outside counsel or be self-represented. However, in arbitration-related proceedings in court, all companies need to be represented by counsel.
Ability to present party employee witness testimony?	There is nothing in Singapore law that prohibits this <i>per se</i> .
Ability to hold meetings and/or hearings outside of the seat?	There is nothing in Singapore law that prohibits this <i>per se</i> .
Availability of interest as a remedy?	Yes. There are no restrictions prescribed in respect of the awarding of interest. ²

¹ See *Myanma Young Chi Oo Co Ltd v Win Win Nu and another* [2003] 2 SLR(R) 547 at [17]: “The first issue that is to be resolved is whether there is an implied duty of confidentiality. I prefer the English position over the Australian. Parties who opt for arbitration rather than litigation are likely to be aware of and be influenced by the fact that the former are private hearings while the latter are open hearings. Rather than to say that there is nothing inherently confidential in the arbitration process, it is more in keeping with the parties’ expectations to take the position that the proceedings are confidential, and that disclosures can be made in the accepted circumstances.” See also *International Coal Pte Ltd v Kristle Trading Ltd and another and another suit* [2009] 1 SLR(R) 945 at [82]: “As a matter of law, an obligation of confidentiality is to be implied in arbitration proceedings due to the private nature of such proceedings”; and *AAY and others v AAZ* [2011] 1 SLR 1093 at [55]: “... as a principle of arbitration law at least in Singapore and England, the obligation of confidentiality in arbitration will apply as a default to arbitrations where the parties have not specified expressly the private and/or confidential nature of the arbitration. While parties anticipating international arbitration would remain well advised to agree prospectively on the obligation of confidentiality, there is no need to do so where Singapore is to be the seat of the arbitration because confidentiality will apply as a substantive rule of arbitration law, not through the IAA or the AA, but from the common law.”

Ability to claim for reasonable costs incurred for the arbitration?	Yes. Case law confirms that costs are for the tribunal to decide.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Third-party funding is generally allowed in arbitration, mediation and arbitration-related court matters. Contingency fee arrangements are not allowed.
Party to the New York Convention?	Yes.
Other key points to note	ϕ
WJP Civil Justice score (2018)	0.80

² See section 35 of the AA; section 20 of the IAA.

ARBITRATION PRACTITIONER SUMMARY

Arbitration law in Singapore is consistent with the Model Law regime – it is generally pro-arbitration focused, premised on minimal curial intervention. Arbitration awards – both domestic (i.e. arbitrations seated in Singapore) and foreign (i.e. awards from arbitrations seated in NY Convention countries) are readily enforceable before the Singapore courts.

Courts are also an avenue for support during, and before, the arbitration process. For instance, parties may apply to the Singapore court for interim measures in support of the arbitration (for instance the seeking of injunctions). Where possible, however, these applications should first be made to the tribunal.

The most recent development in Singapore is the relative liberalisation of third-party funding in the realm of arbitration. Parties involved in arbitration (as well as mediation and arbitration related court proceedings) may now avail to third party funding, subject to certain restrictions as provided for in the regulation: the Civil Law (Third-Party Funding) Regulations 2017 (S 68/2017).

Date of arbitration law?	The arbitration law (i.e. the two relevant statutes: the Arbitration Act and the International Arbitration Act) was last amended in 2016; it continues to be updated by case law.
UNCITRAL Model Law? If so, any key changes thereto?	Yes. Chapter VIII of the Model Law, which deals with Recognition and Enforcement of Awards, is excluded. But this is largely technical; Enforcement may be resisted in Singapore on the bases set out in Article 36.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Yes, there is an arbitration docket at the High Court such that judges experienced in arbitration-related matters are typically rostered to hear such matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes.
Courts' attitude towards the competence-competence principle?	Wholly supportive.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	No. However, in setting aside cases, section 24 of the International Arbitration Act provides that: "24. Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if — (a) the making of the award was induced or affected by fraud or corruption; or (b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced." However, the courts have interpreted these as being consistent with and not different from the due process and public policy rights already provided for under the Model Law.
Courts' attitude towards the recognition and enforcement of	Uncertain, although likely dismissive.

foreign awards annulled at the seat of the arbitration?	
Other key points to note?	φ

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law?

1.1.1 If yes, what key modifications if any have been made to it?

1.1.2 If no, what form does the arbitration law take?

The arbitration law is based on the UNCITRAL Model Law. This is given effect to by statute – generally the Arbitration Act (Cap 10) (“AA”) for domestic arbitrations and the International Arbitration Act (Cap 143A) (“IAA”) for international arbitrations. Chapter VIII of the Model Law, which deals with Recognition and Enforcement of Awards, is excluded (see the IAA s 3) as this is already provided for under the New York Convention. For international arbitrations seated in Singapore, case law confirms that the grounds for refusing enforcement of such awards are the same as under Chapter VII of the Model Law and/or article V of the New York Convention.

1.2 When was the arbitration law last revised?

Both the IAA and the AA were last amended in 2016, and the statutes continue to be interpreted and supplemented by the courts in judgments.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

The law governing the arbitration agreement is determined by the parties’ choice. Where there is no express indication, the parties’ choice is presumed to be the governing law of the main contract (typically the parties’ express choice of law, *i.e.* within a choice of law clause).³ If the arbitration agreement were “freestanding” in the sense it is not intended to be a term of any other contract, the parties’ choice would be presumed to be the law of the seat.⁴

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

The arbitration agreement is considered independent – in the sense it is separable – from the rest of the contract. For instance, if a party was impugning the validity of the (rest of the) contract, this would not on its own compromise the arbitration agreement.

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

The only formal requirement of an arbitration agreement is that it has to be in writing. This is set out in the AA (at s 4) and the IAA (at s 2A).

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

A third party may not be bound by an arbitration agreement to which it is (by definition) not privy. Even where a company is related to another (or to individuals), courts will generally not construe third parties as

³ *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engenharia SA and others* [2013] 1 WLR 102; see also, *BCY v BCZ* [2017] 3 SLR 357 at [49]-[67].

⁴ *BCY v BCZ* [2017] 3 SLR 357 at [49]-[67], particularly at [67].

privity to the arbitration agreement.⁵ In particular, the “group of companies” doctrine – i.e. that an arbitration agreement signed by one company in a group of companies entitles (or obligates) affiliate non-signatory companies, if the circumstances surrounding negotiation, execution, and termination of the agreement show that the mutual intention of all the parties was to bind the non-signatories (alternatively known as the “single economic entity concept”) – has not been accepted in Singapore.⁶

As to whether an arbitration agreement is capable of assignment, the position is not settled – one view is the “conditional benefit” notion, i.e. that “it would not be necessary for an assignee to consent independently to the arbitration agreement, and that the intent of the assignor and assignee is irrelevant [because] the consent to arbitrate is found in the assignee’s consent to accept the substantive right, regardless of whether it knew of the arbitration agreement”: *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] 5 SLR 455 at [54]. The Court of Appeal considered this view and noted that this “seems a principled and attractive argument but needs further consideration”: also at [54]. The alternative view is simply that, consistent with the view that burdens cannot be assigned, neither can the *obligation* to arbitrate: see [52]-[53].

2.5 Are there restrictions to arbitrability? In the affirmative:

2.5.1 Do these restrictions relate to specific domains (such as IP, corporate law, etc.)?

There are restrictions. Generally, “where the subject matter of the dispute is of such a nature as to make it contrary to public policy for that dispute to be resolved by arbitration”, the dispute will be non-arbitrable.⁷ This includes matters which involve or concern the interests of third parties, public rights or concerns and matters of uniquely governmental authority.⁸ Matters relating to criminal and family law are prime examples.

2.5.2 Do these restrictions relate to specific persons (i.e. State entities, consumers, etc.)?

Insofar as the character of the persons bring the matter within the criterion of non-arbitrability as discussed above.

3. The conduct of the proceedings

3.1 Can parties retain outside counsel or be self-represented?

Parties can either retain outside counsel or be self-represented.⁹ However, in arbitration-related proceedings in court, all companies need to be represented by counsel.

⁵ See *BC Andaman Co Ltd and others v Xie Ning Yun and another* [2017] 4 SLR 1232 at [98]: “In contrast, Murex is owned, directly and indirectly, by a number of individuals and entities (see [4]-[9] above). These include not only Andaman, Legacy, Ace and Legacy Thailand but also Mr Chayut (or his successor-in-title, Mr Praphant). Neither Mr Chayut nor Mr Praphant is a party to the ARSHA, the BVI Proceedings or the SIAC Arbitration Proceedings. Further, it is unclear whether Mr Chayut (or Mr Praphant) holds 202 of his 505 shares in Andaman on behalf of the Sias. Before me, Murex did not deny this uncertainty, and submitted only that this is a question for the Tribunal, rather than the Thai court, to answer. I thus struggle to conclude that Murex enjoys sufficient privity of interest with Andaman, Legacy, Ace and Legacy Thailand in the SIAC Arbitration Proceedings to entitle it to invoke the Final Award to resist a claim against it by the Sias. Such caution is warranted particularly in light of the recent comment by the CA that “allowing non-parties to an arbitration agreement to avail themselves of the right to arbitration under the agreement would, on its face, conflict with the doctrine of [contractual] privity”: *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] 5 SLR 455 at [55].”

⁶ See *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832.

⁷ *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 at [75].

⁸ *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 at [71].

⁹ See, e.g., the SIAC Rules 2016 (http://www.siac.org.sg/our-rules/rules/siac-rules-2016#siac_rule23), rule 23.1: “Any party may be represented by legal practitioners or any other authorised representatives. The Registrar and/or the Tribunal may require proof of authority of any party representatives.”

3.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

Generally, the courts adopt a policy of minimal curial intervention in arbitral proceedings.¹⁰ Consistent with this policy, courts' control over the arbitrators' independence and impartiality is generally consistent with the general principle that arbitrators are expected to be free of real and apparent bias.¹¹ To quote the High Court, "[t]he main query was whether [the] circumstances [alleged] ... disclosed evidence of apparent bias or partiality, thereby impinging on the Arbitrator's ability to arrive at a fair and just conclusion in the Arbitration".¹²

In an instance where an arbitrator was found to have failed in his "basic duty" to "listen to both sides of the argument and give each side a chance to submit on all the relevant points", the High Court did not hesitate in allowing the application to have him removed.¹³

Courts would only intervene upon the application of one of the parties – typically the party seeking to challenge the award or the appointment of the arbitrator.

3.3 On what grounds to courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

The court would generally interpret the arbitration agreement (to ascertain the parties' intent) and direct the parties accordingly based on its interpretation of the arbitration agreement. See, for instance, *Bovis Lend Lease Pte Ltd v Jay-Tech Marine & Projects Pte Ltd and Another Application* [2005] SGHC 91, where the court construed the arbitration agreement,¹⁴ found that parties had agreed to *ad hoc* arbitration, and declared that (giving effect to the parties' agreement) "*the arbitration to be conducted pursuant to the arbitration agreement is an ad hoc arbitration and shall be conducted by the arbitrator in accordance with such rules of the SIAC as the arbitrator determines are applicable*" (at [22(b)]).

Relatedly, in a decision that may be interpreted as supportive of an otherwise poorly worded arbitration clause,¹⁵ the High Court held that "*where an arbitration clause does not provide a mechanism for breaking a deadlock between parties on the appointment of arbitrators, the SIAC President can step in to make the necessary appointment if parties are not able to agree on the sole arbitrator or presiding arbitrator, as the case may be*".¹⁶

¹⁰ *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 at [37].

¹¹ See, e.g., *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 at [56]-[68]. See also *Prometheus Marine Pte Ltd v King, Ann Rita and another appeal* [2017] SGCA 61 at [71]. See also the AA at s 22: "*The arbitral tribunal shall act fairly and impartially and shall give each party a reasonable opportunity of presenting his case*".

¹² *PT Central Investindo v Franciscus Wongso and others and another matter* [2014] 4 SLR 978 at [12]; see also at [19].

¹³ *Koh Bros Building and Civil Engineering Contractor Pte Ltd v Scotts Development (Saraca) Pte Ltd* [2002] 2 SLR(R) 1063, particularly at [47].

¹⁴ The relevant portion of the arbitration agreement read: "*All other disputes (including disputes referred to in Clause 13.2.1 which are not required by [Bovis] to be determined in accordance with Clause 13.2) will be dealt with in the following manner: ... 13.3.2 Unless otherwise agreed by the parties, the arbitrator will be appointed by the President of the Institute of Architects in Singapore (or such other body as carries on the functions of the Institute) or his nominee. 13.3.3 The arbitrator must conduct the proceedings in accordance with Rules of the Singapore International Arbitration Centre*".

¹⁵ The arbitration clause was worded as follows: "*The Seller and the Buyer agree that all disputes arising out of or in connection with this agreement that cannot be settled by discussion and mutual agreement shall be referred to and finally resolved by arbitration as per Indian Contract Rules*."

¹⁶ *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd and another suit* [2017] 4 SLR 182 at [34].

3.4 Do courts have the power to issue interim measures in connection with arbitrations?

3.4.1 If so, are they willing to consider *ex parte* requests?

Yes, courts have the power to issue interim measures (such as injunctions, securing the amount in dispute, etc). This power is provided for in section 31 of the AA and section 12A of the IAA.¹⁷

Courts are willing to hear *ex parte* requests insofar as those requests are urgent,¹⁸ although even when such a request is being made, the opponent should generally be given notice of the hearing at least 2 hours in advance.¹⁹ The practical difference between such a hearing and an *inter partes* hearing – despite both parties being represented – is that the opponent would generally not present any arguments in an *ex parte* hearing. An explanation will need to be furnished as to why the hearing has to be *ex parte* and/or if notice cannot be given to the counterparty.

Additionally, parties may seek permanent anti-suit injunctions from the High Court in support of arbitration proceedings whether in Singapore or abroad (although strong cause will have to be shown in respect of the latter).²⁰

3.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration (sub-questions omitted)?

Generally, consistent with the policy of minimal curial intervention, Singapore arbitration law does not regulate the conduct of the arbitration.

There is no regulation as to the length or venue of arbitration proceedings.

There are provisions for arbitrators to issue interim measures (for instance, security for costs, injunctions, etc). These are contained in section 28 of the AA and section 12 of the IAA).

Under either the AA or the IAA, security for costs may not be ordered by reason only that: (1) the claimant is an individual ordinarily resident outside Singapore; or (2) a corporation or an association incorporated or formed under the law of a country outside Singapore, or whose central management and control is exercised outside Singapore.²¹

The law allows the Tribunal to determine its own rules of procedure in relation to evidence (in the absence of parties' agreement).²²

There is no compulsion for a hearing to be held.

Neither are there any principles prescribed for the awarding of interest²³ or the allocation of arbitration costs.²⁴ If the Tribunal orders that costs be paid (without quantifying the costs), such costs are to be taxed

¹⁷ See also *Maldives Airports Co Ltd and another v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449, particularly at [34].

¹⁸ See, e.g., O 69A r 3(3) of the Rules of Court (which applies to proceedings under the IAA): "*Where the case is one of urgency or an application under section 18, 19 or 29 of the Act for leave to enforce an award or foreign award, such application may be made ex parte on such terms as the Court thinks fit*". There is similar language in O 69 r 3(3) (which applies to proceedings under the AA).

¹⁹ Supreme Court Practice Directions (https://www.supremecourt.gov.sg/Data/PracticeDirections/ePD_WebHelp/ePD.htm) at para 41(1) and (2).

²⁰ See *R1 International Pte Ltd v Lonstroff AG* [2014] 3 SLR 166; see also the appeal in *R1 International Pte Ltd v Lonstroff AG* [2014] SGCA 56 which focussed on a different point but nevertheless yielded in the granting of a permanent anti-suit injunction, overturning the High Court's decision. See further the recent decision of *BC Andaman Co Ltd and others v Xie Ning Yun and another* [2017] 4 SLR 1232 where the High Court granted a permanent anti-suit injunction to restrain a party from commencing foreign (Thai) court proceedings in breach of an arbitration agreement.

²¹ Section 28(3) of the AA; section 12(4) of the IAA.

²² Section 23 of the AA; Article 19 of the Model Law.

²³ See section 35 of the AA; section 20 of the IAA.

by the Registrar of the Supreme Court (for domestic arbitrations)²⁵ and the Registrar of the SIAC (for international arbitrations).²⁶

3.6 Liability (sub-questions omitted)

The arbitral institutions are generally immune from civil liability (except where there is bad faith).²⁷

Arbitrators shall not be liable for:²⁸

1. "negligence in respect of anything done or omitted to be done in the capacity of the arbitrator; or
2. any mistake of law, fact or procedure made in the course of arbitral proceedings or in the making of an arbitral award."

The arbitration law in Singapore does not give rise to concerns of potential criminal liability for any of the participants in an arbitration proceeding. But the tribunal may have a duty to investigate allegations of criminal conduct insofar as such conduct would affect its decision or the enforceability of its award: see *Re Landau, Toby Thomas QC* [2016] SGHC 258 at [65]-[69], *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2018] SGHC 101 at [224].

4. The award (sub-questions omitted)

The general requirements of an award are that:²⁹

1. the award has to be in writing;
2. the award is to be signed by the Tribunal;
3. the award should state the reasons upon which it is based;
4. the date of the award and place of the arbitration shall be stated in the award; and
5. the award shall be delivered to each party.

Parties may waive the requirement for an award to provide reasons.³⁰

There is no provision under the IAA with respect to whether the parties can waive the right to set aside the award, but this agreement will possibly be one factor the court takes into account when faced with a set aside application. This position has yet to be tested in Singapore.

Awards arising from domestic arbitrations may be appealed against where (i) parties did not agree to preclude appeals; and (ii) where either the parties agree to the appeal being brought or leave of court is obtained. The appeal shall be on a question of law.³¹ Under AA (not the IAA), the right to appeal on a question of law may be excluded by the parties. No appeal is allowed in respect of awards arising from international arbitrations.

²⁴ This is subject section 39(2) and (3) of the AA, which generally provides that if parties agree *before a dispute arises* that they are to bear their own costs of the arbitration, that agreement would be void.

²⁵ See section 39 of the AA.

²⁶ See section 21 of the IAA.

²⁷ Section 59 of the AA; section 25A of the IAA.

²⁸ Section 20 of the AA; section 25 of the IAA.

²⁹ Section 38 of the AA; article 31 of the Model Law.

³⁰ Section 38(2) of the AA; article 31(2) of the Model Law.

³¹ Section 49 of the AA.

Recognition and enforcement of awards – both domestic and international – entail the following key steps:³²

1. The party seeking to recognise / enforce would generally apply to court on an *ex parte* basis with an affidavit exhibiting the arbitration agreement, the original award, the details of the applicant and respondent,³³ and an indication as to the extent to which the award has been complied with (if at all). This first step is a largely mechanistic process.³⁴ What this means is that this process “does not require a judicial investigation by the court enforcing the award under the IAA [and that] the examination that the court must make of the documents ... is a formalistic and not substantive one”.³⁵
2. As the proceeding is *ex parte*, the applicant would be under a duty to provide full and frank disclosure.³⁶ This includes disclosing to the court any circumstances which may affect the enforceability of the award (such as attempts to set aside the award or resist enforcement in other jurisdictions).
3. Where the court is satisfied the papers are in order, it will issue an order allowing leave to enforce the award.
4. This order must then be served on the respondent by delivering a copy to him personally or by sending a copy to him at his usual or last known place of residence or business or in such other manner as the court may direct.
5. Within 14 days of service of the order, the respondent may apply to set aside the order.

An application to set aside an order granting leave to enforce generally results in the suspension of the applicant-creditor’s right to enforce an award; the debtor will simply have to apply to set aside the order for granting leave to enforce the award on the bases, among other things, relied on for the setting aside application.³⁷ An appeal on a point of law (in domestic cases), on the other hand, does not automatically suspend the right to enforce an award.

When a foreign award has been annulled at the seat, it is likely such annulment will preclude the award from being enforced in Singapore.³⁸ A Singapore court could stay enforcement proceedings pending a setting-aside at the seat pursuant to the New York Convention, though this has not been tested.

³² O 69A r 6 for proceedings under the IAA; O 69 r 14 for proceedings under the AA.

³³ In particular, the name and the usual or last known place of residence or business of either party.

³⁴ *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another* [2006] 3 SLR(R) 174 at [42].

³⁵ *Strandore Invest A/S and others v Soh Kim Wat* [2010] SGHC 151 at [22].

³⁶ *AUF v AUG and other matters* [2016] 1 SLR 859 at [164]-[165].

³⁷ O 69A r 6(4) for proceedings under the IAA; O 69 r 14(4) for proceedings under the AA.

³⁸ See *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 at [77], where the Court of Appeal, despite eventually leaving the question open, indicated a preference for the view that awards that had been set aside cannot be enforced: “While the wording of Art V(1)(e) of the New York Convention and Art 36(1)(a)(v) of the Model Law arguably contemplates the possibility that an award which has been set aside *may* still be enforced, in the sense that the *refusal* to enforce remains subject to the discretion of the enforcing court, the contemplated *erga omnes* effect of a successful application to set aside an award would generally lead to the conclusion that there is simply *no award to enforce*. What else could it mean to set aside an award? If this avenue of recourse would only ever be of efficacy in relation to enforcement proceedings in the seat court, then it seems to have been devised for little, if any, discernible purpose. As such, we do not think that in principle, even the wider notion of “double-control” can encompass the same approach as has been adopted by the French courts. The refusal to enforce awards which have not been set aside at the seat court may therefore constitute one of the outer-limits of “double-control”. However, as this specific issue is not directly engaged in the present appeal, we offer no further comment beyond these tentative thoughts.”

Foreign awards – in the sense of arbitral awards made in pursuance of an arbitration agreement in the territory of a New York Convention country other than Singapore – are enforceable in the same manner as an award made in Singapore.³⁹

5. Funding Arrangements

5.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction? If so, what is the practical and/or legal impact of such restrictions?

Contingency or alternative fee arrangements or third-party funding are generally prohibited by the laws against champerty and maintenance. This has recently been changed by legislation as follows:⁴⁰ (i) the common law torts of maintenance and champerty are abolished;⁴¹ (ii) contracts affected by maintenance and champerty continue to be contrary to public policy or are otherwise illegal, and hence are unenforceable unless they fall under permitted categories; and (iii) permitted categories will be specified in subsidiary legislation, the only permitted category at present being arbitration and mediation (and their related court proceedings).⁴²

6. Reform in Singapore

6.1 Is there likely to be any significant reform of the arbitration law in the near future?

Given the prevailing position which generally espouses minimal curial intervention in line with the Model Law, as discussed above, any reforms in the future are likely to develop along the lines of supporting, rather than resisting arbitration.

Relatedly, in the light of Singapore's increasing prominence as an arbitration hub, there have recently been calls by prominent practitioners (including the former Attorney-General) for an international ethics code for arbitration practice to be forged.⁴³

³⁹ See section 29 of the IAA.

⁴⁰ See generally: <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Civil%20Law%20Amendment.pdf>.

⁴¹ Section 5A of the Civil Law Act (Cap 43).

⁴² Section 5B of the Civil Law Act (Cap 43); Civil Law (Third-Party Funding) Regulations 2017 (<http://statutes.agc.gov.sg/aol/search/display/view.w3p?page=0;query=Compld%3A66e51c5d-5e38-4671-acf2-cbaa38abb068%20ValidTime%3A20171112000000%20TransactionTime%3A20171112000000;rec=0;resUrl=http%3A%2F%2Fstatutes.agc.gov.sg%2Faol%2Fbrowse%2FtitleResults.w3p%3Bletter%3DC%3BpNum%3D3%3Btype%3DactsCur>).

⁴³ See <http://www.straitstimes.com/singapore/spore-urged-to-take-lead-in-ethics-code-for-arbitration> (accessed 14 March 2018).

SLOVAKIA

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

MARTIN MAGAL, LUCIA DULOVIČOVÁ AND MICHAL PORUBSKÝ
OF ALLEN & OVERY

ALLEN & OVERY

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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS

1. Law ●
 - a. Framework ●
 - b. Adherence to international treaties ●
 - c. Limited court intervention ●
 - d. Arbitrator immunity from civil liability ●
2. Judiciary ●
3. Legal expertise ●
4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

VERSION: 26 JANUARY 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Key places of arbitration in the jurisdiction	Bratislava. It is also common for local parties to submit their dispute to the Vienna International Arbitration Centre, due to its proximity and well-known reputation.
Civil law / Common law environment?	Slovakia is a civil law jurisdiction.
Confidentiality of arbitrations?	Arbitrators are bound by law to keep all the information they come across during the arbitral proceedings confidential. However, this duty does not apply to parties to an arbitration or their representatives.
Requirement to retain (local) counsel?	Parties to arbitrations seated in Slovakia are free to engage an outside counsel or be self-represented.
Ability to present party employee witness testimony?	There are no statutory restrictions as to the evidence that can be presented to the arbitral tribunal, which has wide discretion in determining which evidence will be admitted.
Ability to hold meetings and/or hearings outside of the seat?	It is accepted that arbitral hearings and procedural meetings may take place in a different country from the seat of arbitration.
Availability of interest as a remedy?	Interest on the principal claim can be awarded. It is unlikely that interest on costs of the arbitration would be ordered.
Ability to claim for reasonable costs incurred for the arbitration?	Parties to an arbitration are able to recover costs incurred in the arbitration. Generally, the 'costs follow the event' principle applies.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Legally speaking, there are no restrictions regarding third party funding arrangements. Contingency fee arrangements are allowed up to 20 % of the amount in dispute.
Party to the New York Convention?	Slovakia is a party to the New York Convention, subject to the reciprocity reservation.
Other key points to note	∅
WJP Civil Justice score (2017-2018)	∅

ARBITRATION PRACTITIONER SUMMARY

Date of arbitration law?	The Arbitration Act was enacted in 2012 and was substantially amended with effect from 1 January 2015.
UNCITRAL Model Law? If so, any key changes thereto?	The Arbitration Act is fully based on the 2006 version of the UNCITRAL Model Law. There are no key modifications.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Three general courts exercise jurisdiction over arbitral proceedings: the District Court Bratislava V, the District Court Banska Bystrica and the District Court Kosice I.
Availability of <i>ex parte</i> pre-arbitration interim measures?	<i>Ex parte</i> pre-arbitration interim relief may be granted by a court.
Courts' attitude towards the competence-competence principle?	Slovak law recognizes the negative effect of the competence-competence principle.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	There are no additional grounds for the annulment of awards rendered in Slovakia on top of those laid out in the New York Convention.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	A court may, but is not obliged to, refuse the enforcement of an award that has been set aside at the seat of the arbitration. There is no case law confirming whether the courts of the Slovak Republic would be willing to enforce awards that have been set aside.
Other key points to note?	<ul style="list-style-type: none"> • There are no issues with the enforcement of partial awards. However, interim awards are not per se considered as arbitral awards and are not immediately enforceable by the courts of the Slovak Republic. • The commencement of annulment proceedings does not automatically suspend the enforcement of an award. However, upon request of a party, the enforceability of an award may be suspended. • Arbitrators and experts can face civil as well as criminal liability.

JURISDICTION DETAILED ANALYSIS

1. Legal Framework

1.1 Is the arbitration law based on the UNCITRAL Model Law? If yes, what key modifications if any have been made to it?

Commercial arbitrations seated in Slovakia are governed by [Act No. 244/2002 Coll. on arbitration, as amended \(the Arbitration Act\)](#), which applies to both domestic and international commercial arbitrations seated in Slovakia, as well as to the recognition and enforcement of awards. The Arbitration Act is based on the 2006 version of the UNCITRAL Model Law.¹ There are no key modifications.

1.2 When was the arbitration law last revised?

On 1 January 2015, substantially amended the Arbitration Act. The main changes consist of (i) an adoption of a Model Law-compliant regime for commercial arbitration, (ii) its separation from consumer alternative dispute resolution and (iii) an enactment of a new framework for the operation of domestic arbitration institutions. The Arbitration Act was further revised to implement new rules on the establishment of domestic arbitral institutions and to align it with the wording of the new [Act No. 160/2015 Coll. the Code of Civil Litigation](#) (the Code of Civil Litigation).²

In addition to the Arbitration Act, some sections of the Code of Civil Litigation apply to the relationship between courts and arbitral tribunals, in particular with respect to the power of the courts to assist the arbitral process. The enforcement of both domestic and foreign awards is governed by [Act No. 233/1995 Coll. on court bailiffs and enforcement of judgments, as amended](#) (the Code of Civil Enforcement of Judgments).

Arbitration-like alternative dispute resolution methods applying to consumer contracts are governed by [Act No. 335/2014 Coll. on consumer arbitration](#) (the Consumer ADR Act).

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

Parties to an arbitration are free to choose the law governing the arbitration agreement, though it is very rare for parties to do so. This law does not have to be the law of the Slovak Republic, even if the arbitration is seated in Slovakia.

In case of an express choice of the law governing the arbitration agreement, Slovak courts will apply the law chosen by the parties to determine the validity of an arbitration agreement and any claims arising out of the agreement.³ There are, however, two exceptions to the general freedom to choose the law applicable to the arbitration agreement. If the arbitration is seated in Slovakia, (i) the form of an arbitration agreement and (ii) the objective arbitrability will always be determined according to the law of the Slovak Republic, regardless of the parties' choice of law ([third and fourth sentence of section 5\(1\)](#)).⁴

¹ Slovakia is listed amongst the countries that have adopted legislation based on the UNCITRAL Model Law on International Commercial Arbitration. See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

² With effect from 1 July 2016, the Slovak Code of Civil Procedure was replaced by three separate codes: the Code of Civil Litigation (Civilný sporový poriadok), the Code of Civil Non-Litigation (Civilný mimosporový poriadok) and the Code of Administrative Court Procedure (Správny súdny poriadok).

³ J. Gyarfás, M. Števíček, *et al.*, *Commentary to the Slovak Arbitration Act* (C.H.Beck, Prague, 2016), p. 111.

⁴ See, also J. Gyarfás, *Commentary to the Slovak Arbitration Act*, p. 111.

In the absence of the choice of law by the parties, the validity of an arbitration agreement for the purpose of potential set aside proceedings will be determined according to the law of the Slovak Republic ([section 40 \(1\)\(a\)\(1\)](#)).

For the purpose of recognition and enforcement of a foreign award in the Slovak Republic, the validity of an arbitration agreement will be determined according to the law to which the parties have subjected it or, failing such agreement, under the law of the country where the award was made ([section 50\(1\)\(a\)](#)).

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Arbitration clauses are considered separable from the main contract. As specified in [section 5 of the Arbitration Act](#), if an arbitration clause is part of an otherwise invalid contract, the arbitration clause will only be invalid if the grounds for invalidity of the contract affect the arbitration clause as well. This could include, for example, cases of invalidity on the grounds of forgery, undue influence or incapacity.

The principle of separability is generally recognized with respect to all commercial contracts ([section 267\(3\) of Act No. 513/1991 Coll. \(the Commercial Code\)](#)).

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

An arbitration agreement can be in the form of either a separate agreement or an arbitration clause in a contract ([section 4\(1\)](#)). The only formal requirement that applies to both forms is that it has to be in writing ([section 4\(2\)](#)).

An agreement is considered to be in writing even if it is contained in an exchange of parties' written communication or concluded by purely electronic means, as long as the content of the electronic exchange and the identity of the parties involved are identifiable ([section 4\(3\)](#)). Furthermore, the Arbitration Act contains an explicit acknowledgement that an agreement to arbitrate can also be incorporated by reference to any document containing the arbitration clause, as long as the reference is clear and specific ([section 4\(4\)](#)). An agreement is also in writing in the case of acceding in writing to a contract which contains a valid arbitration clause ([section 4\(5\)](#)). Thus, arbitration clauses contained in corporate documentation are in general automatically binding on new shareholders of the company, without the need for a separate acceptance or signature.

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

The general rule is that an arbitration agreement cannot be invoked or enforced against a non-signatory. Slovak law does not recognise the "group of companies" doctrine as a means to bind associated corporate entities to an arbitration agreement and it is unlikely that the doctrine would be applied by the courts.⁵

Nevertheless, there are a few exceptions to the general rule of no extension to non-signatories. In particular, legal successors of the parties to an arbitration agreement are bound by the agreement, unless agreed otherwise in the agreement ([section 3\(2\)](#)). Similarly, the arbitration agreement is also applicable in the case of an assignment or any other substitution in a relationship falling under the arbitration agreement ([section 3\(2\)](#)).

2.5 Are there restrictions to arbitrability? In the affirmative: Do these restrictions relate to specific domains (such as IP, corporate law etc.) or specific persons (i.e. State entities, consumers etc.)?

Arbitration, as a form of dispute resolution, is generally available in civil and commercial matters, including disputes on the existence of a legal relationship or legal title ([section 1\(2\)](#)). The Arbitration Act allows for the

⁵ J. Gyrfas, *Commentary to the Slovak Arbitration Act*, p. 77.

arbitrability of almost all private law relationships that do not involve a consumer contract. In particular, both case law and legal authors confirmed the arbitrability of (i) competition law claims, (ii) intellectual property claims that do not concern the validity of intellectual property assets and (iii) corporate claims that do not concern disputes regarding personal status.⁶ The arbitrability of employment claims has not yet been settled. However, the current prevailing view is that employment matters are non-arbitrable in Slovakia⁷ (which has been confirmed in [Decision of the Slovak Supreme Court No. 1 Cdo 156/2011, dated 11 December 2013](#)).

Private law relationships that involve a consumer contract are arbitrable, but pursuant to a different legal framework. The resolution of disputes involving consumer contracts was carved out from the scope of the Arbitration Act and placed in a separate Consumer ADR Act, which provides for a stricter regulatory regime.

Furthermore, the Arbitration Act contains an exhaustive list of non-arbitrable disputes, namely, (i) personal status of physical persons including divorce, adoption etc.; (ii) ownership rights and other rights *in rem* in respect of immovable property; (iii) forced enforcement (execution) of court or administrative decisions; and (iv) disputes arising out of bankruptcy and work-out proceedings ([section 1\(3\)](#)).

3. Intervention of Domestic Courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

3.1.1 If the place of the arbitration is inside of the jurisdiction?

3.1.2 If the place of the arbitration is outside of the jurisdiction?

Slovak law recognises the ‘negative effect’ of the competence-competence principle in relation to the jurisdiction of the general courts of the Slovak Republic. The same considerations apply regardless of whether the place of arbitration is inside or outside of the jurisdiction.⁸ However, different considerations may apply depending on whether the proceedings before a court were initiated before or after the commencement of the arbitration.

If the arbitration has already commenced, and the same question is pending before a general court, the court must always stay litigation on its own motion until the tribunal rules on its own jurisdiction ([the Code of Civil Litigation, section 8](#)).

If the arbitration has not yet commenced, the court will stay litigation upon the objection of a party raised upon or before the first act in the proceedings ([the Code of Civil Litigation, section 6\(1\)](#)), unless (i) the recognition of a foreign award in the same matter⁹ has been refused in Slovakia, (ii) the dispute is non-arbitrable under Slovak law or (iii) the tribunal has declined jurisdiction ([the Code of Civil Litigation, sections 8\(1\)\(2\)](#)). Consequently, at this stage, the court will review the validity of the arbitration agreement only in terms of its objective arbitrability.¹⁰ For this purpose, it should be sufficient that the challenging party shows that the arbitration agreement exists *prima facie*.¹¹ It shall be noted, however, that the scope of the court intervention has not been tested in practice since the Amendment of 2015 and there are opposing academic views as to whether the courts are only entitled to examine the arbitration agreement in terms of its objective arbitrability or also in terms of its validity in general.¹²

⁶ J. Gyarfas, *Commentary to the Slovak Arbitration Act*, pp. 36-52.

⁷ J. Gyarfas, *Commentary to the Slovak Arbitration Act*, p. 39.

⁸ J. Gyarfas, *Commentary to the Slovak Arbitration Act*, pp. 702 and 705.

⁹ “Same matter” implies same parties and same object of the claim.

¹⁰ J. Gyarfas, *Commentary to the Slovak Arbitration Act*, p. 701.

¹¹ J. Gyarfas, *Commentary to the Slovak Arbitration Act*, p. 701.

¹² J. Zámožík, “The objection of lack of jurisdiction of the court on the ground that the dispute shall be dealt with and decided in arbitration, and the so called forced arbitral proceedings”, published in *Súkromné Právo*, 5/2017, November 2017.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

We are not aware of any case law available on this topic. Nevertheless, we would expect the courts of the Slovak Republic to perceive anti-suit injunctions rendered by arbitrators as an interference with their sovereignty. It is therefore most likely that such injunctions would not be followed.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)

Slovak courts are only entitled to intervene in arbitrations seated in Slovakia. However, in some circumstances, their powers may also extend to arbitrations seated outside of the jurisdiction.

If the seat of arbitration has not yet been determined and at least one of the parties to the arbitration has its registered office, place of business or permanent residence in the territory of the Slovak Republic, the courts of the Slovak Republic are empowered to assist in the establishment of an arbitral tribunal and in the termination of the mandate of an arbitrator ([section 1\(5\)](#)).

Notwithstanding the location of the seat of arbitration, the courts of the Slovak Republic have the power to take evidence and issue interim measures ([section 2\(3\)](#)) before the appointment of the arbitrators. Anti-suit injunctions are unknown to Slovak jurisprudence and the courts are unlikely to issue them. Nevertheless, the provision on interim measures in the Code of Civil Litigation is wide enough to encompass injunctive relief if a party to an arbitration pursues such a claim ([the Code of Civil Litigation, section 325](#)).

4. Conduct of the Proceedings

4.1 Can parties retain outside counsel or be self-represented?

Slovak law does not require that parties to an arbitration be represented by a counsel, neither does it restrict the parties' choice of a counsel. Therefore, parties can retain outside counsel, or be self-represented.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

Every arbitrator has a duty to inform the parties about any fact that may have an impact on his or her impartiality ([section 9\(1\)](#)). There is no specific guideline for arbitrators as to which matters should be disclosed. The general rule is that a party may challenge an arbitrator that it has appointed or in whose appointment it has participated (e.g. by approving the list of candidates from which the Appointing Authority selected the arbitrator) and only for reasons of which it became aware after the appointment ([section 9\(2\)](#)).

Parties to an arbitration are in principle free to decide on a procedure for challenging arbitrators, but such an agreement may not exclude the right of a party to ask a court to decide on an unsuccessful challenge ([section 9\(3\)](#)). A court will only accept a challenge that has been brought to it within 30 days following the delivery of the tribunal's decision dismissing the challenge or a challenge that has not been decided by the tribunal within the statutory time limit of 60 days ([section 9\(5\)](#)). The challenge will only be successful if a rational third party could have reasonable doubts that the arbitrator would not act impartially and independently.¹³ The standard is even stricter for the purpose of the annulment proceedings, where it is required that the alleged breach of duty to act impartially and independently must have had an impact on the decision on the merits.¹⁴

¹³ J. Gyarfas, *Commentary to the Slovak Arbitration Act*, p. 192.

¹⁴ J. Gyarfas, *Commentary to the Slovak Arbitration Act*, p. 194.

A decision of the general court dismissing the challenge of the arbitrator cannot be appealed. While such a request is pending, the arbitral tribunal may continue arbitral proceedings and render an award (section 9(5)).

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

Arbitral tribunals can be appointed by the parties themselves, by a natural or a legal person selected by the parties (the appointing authority) or by a general court.

The courts can intervene to assist in the constitution of the arbitral tribunal if the parties do not agree on the identity of an arbitrator or on the procedure for appointing an arbitrator (section 8(2)). In arbitrations with three or more arbitrators, an arbitrator can be selected by the court, upon request of a party, if one of the parties fails to make a nomination within 15 days of the other party's request or if the two appointed arbitrators fail to nominate the presiding arbitrator within 30 days of their nomination. The court will only intervene upon the request of a party, which allows parties to agree on a longer period for the constitution of the arbitral tribunal if needed. In arbitrations with a sole arbitrator, the requesting party may go directly to a court.¹⁵

An arbitral tribunal can also be constituted by the court if, at the moment of an arbitrator's appointment, (i) the Appointing Authority does not exist; (ii) the Appointing Authority does not have the power to appoint an arbitrator or (iii) the Appointing Authority fails to appoint an arbitrator within the agreed time period (section 6(3)).

4.4 Do courts have the power to issue interim measures in connection with arbitrations? If so, are they willing to consider *ex parte* requests?

General courts¹⁶ are permitted to issue interim measures in support of arbitrations in accordance with the Code of Civil Litigation. In general, interim measures may be granted if it is necessary to temporarily adjust relationships between the parties (when the requesting party is likely to suffer harm if the measure is not granted) or if there is a risk that the enforcement of an award could be endangered (section 326). Interim relief can take many forms, including an order to deposit assets or financial amounts, a prohibition to dispose of assets and a general obligation to perform an action or refrain from doing so (section 325). A general court may also decide on *ex parte* requests for interim measures (the Code of Civil Litigation, section 329(1)).

An interim measure against a party to arbitration may only be issued before the establishment of an arbitral tribunal (Arbitration Act, section 2(2)). Once the arbitral tribunal is established, it alone has jurisdiction to decide on interim relief.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

Arbitrations seated in Slovakia are private under the Arbitration Act. Arbitrators are bound to keep all information they came across during the arbitral proceedings confidential, even after the end of their mandate (section 8(4)). The statutory duty of confidentiality is, however, not extended to the parties or their

¹⁵ The Arbitration Act does not provide for a specific timeline for the parties to first purport to select the sole arbitrator and if they fail, to go to a court.

¹⁶ The court system in the Slovak Republic is composed of: (i) general courts, including district courts (first instance courts), regional courts (appeal courts) and the Supreme Court of the Slovak Republic (an appellate review court), and (ii) the Constitutional Court of the Slovak Republic, which is considered as a separate court. For more details on the court system in the Slovak Republic see http://wwwold.justice.sk/a/wfn.aspx?pg=lb&htm=l4/crt_sys.htm.

representatives. The Arbitration Act further provides for a possibility of waiving the arbitrators' duty of confidentiality by agreement of the parties ([section 8\(4\)](#)).

4.5.2. Does it regulate the length of arbitration proceedings?

The Arbitration Act does not regulate the length of the proceedings. The procedural timetable is determined by a tribunal at an early stage of the proceedings by means of a procedural order. Although there are no statutory time limits imposed on arbitrators to render an award, they are bound to act expeditiously ([section 6\(a\)](#)).

4.5.3. Does it regulate the place where hearings and/or meetings may be held?

The parties are free to agree on the place of arbitration ([section 23](#)). In the absence of such agreement, the place of arbitration is determined by the tribunal, having regard to the interests of the parties and circumstances of the case. It is accepted that arbitral proceedings may physically take place in a different state from the seat of arbitration. Likewise, hearings and procedural meetings of the tribunal may be conducted at any place which the arbitral tribunal and the parties consider appropriate ([section 23\(2\)](#)).

4.5.4. Does it allow for arbitrators to issue interim measures? In the affirmative, under what conditions?

Unless otherwise agreed by the parties, the arbitral tribunal may grant interim measures if: (i) it is necessary to temporarily regulate relationships between the parties (when the requesting party is likely to suffer harm if the measure is not granted), (ii) there is a risk that the enforcement of an arbitral award might be prejudiced, or (iii) there is a risk that evidence may in the future no longer be available or only available under complicated circumstances ([section 22\(1\)](#)). If the circumstances on which the measure was issued no longer exist, the tribunal will revert the interim measure ([section 22b\(2\)](#)).

Interim measures may be granted to, for example, (i) prohibit the disposal of some assets or funds; (ii) order a party to perform an action or refrain from doing so; (iii) order the disclosure of evidence; or (iv) order a party to deposit financial security with the arbitral tribunal ([section 22\(3\)](#)).

The Arbitration Act recognises standard interim measures as well as *ex parte* interim measures. The arbitral tribunal may grant an *ex parte* interim measure without prior notice to the affected party if authorised to do so in the arbitration agreement ([section 22a\(1\)](#)), but such measures will not be immediately enforceable by Slovak courts. Once served with an *ex parte* measure, the affected party may file an objection with the arbitral tribunal within 15 days ([section 22a\(3\)](#)). If the objection is unsuccessful at the tribunal level, the interim measure will be enforceable by courts. The affected party will have an opportunity to submit further objections to a general court ([section 22c\(2\)](#)).

4.5.5. Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?

The Arbitration Act only lays out general rules with respect to the arbitrators' power to admit and assess evidence. The principal rule is that an arbitral tribunal may only take into account evidence proposed by the parties ([section 27\(1\)](#)). To the extent that any applicable duty of confidentiality, the right to be heard and equal treatment of the parties is preserved, an arbitral tribunal has wide discretion to determine which evidence it intends to take into consideration ([section 27\(2\)](#)).

If the tribunal cannot secure the taking of evidence, it may ask a court for assistance ([section 27\(4\)](#)). Furthermore, if the determination of a dispute depends on the assessment of facts that require professional knowledge, the tribunal may appoint an expert ([section 28\(1\)](#)).

4.5.6. Does it make it mandatory to hold a hearing?

Hearings are not mandatory under the Arbitration Act. In the absence of an agreement of the parties, it is for the arbitral tribunal to decide whether to hold a hearing or decide on the basis of written documents alone ([section 23\(1\)](#)).

4.5.7. Does it prescribe principles governing the awarding of interest?

An arbitral tribunal may award interest on the principal amount awarded in the decision on merits. Slovak law contains a default statutory rate of interest for principal claims, which may vary depending on the subject matter of a dispute.

It is unlikely that interest on costs of arbitration would be ordered.

4.5.8. Does it prescribe principles governing the allocation of arbitration costs?

In the absence of an agreement of the parties, the arbitral tribunal is free to decide on the allocation of arbitration costs.

Generally, 'the costs follow the event' principle is applicable.¹⁷ (See, for example, [Rules of Procedure of the Arbitration Court of the Slovak Bar Association, Attachment A, Article IV](#)).

Legal fees are often (but not necessarily) awarded on the basis of a legal decree which sets out an exact amount for each action undertaken in the court (or arbitration) and may not reflect the real expenditure of the parties ([Decree of the Ministry of Justice of the Slovak Republic No. 655/2004 Coll. on Legal Counsel Compensation for Rendered Legal Services, as amended](#)).

5. Liability

5.1 Do arbitrators benefit from immunity to civil liability?

Arbitrators are afforded no special immunity for their function as adjudicators and can be liable for damages caused by the exercise of their function in accordance with the [Civil Code of the Slovak Republic \(section 420\)](#). To give rise to such liability, the challenging party must establish (i) a breach by the arbitrator of his duties, (ii) an occurrence of damage, (iii) a causal link between the breach of duty and the damage caused and (iv) a fault of the arbitrator (whether intentional or negligent).¹⁸

5.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

Participants in arbitration proceedings can face criminal sanctions if they engage in corruption. According to the Slovak Criminal Code, this can include accepting a bribe, bribery, or indirect corruption ([Act No. 300/2005 Coll., as amended, sections 328-336](#)) (the Criminal Code). In the event that allegations of corruption are raised, it will have no suspensive effect over the arbitration or otherwise affect the proceedings.

We are not aware of any other potential criminal liability issues that the participants in an arbitration proceedings seated in the Slovak Republic may face.

6. The award

6.1 Can parties waive the requirement for an award to provide reasons?

The parties can agree that the award does not have to provide reasons ([section 34\(2\)\(g\)](#)).

¹⁷ J. Gyrfas, *Commentary to the Slovak Arbitration Act*, p. 488.

¹⁸ J. Gyrfas, *Commentary to the Slovak Arbitration Act*, p. 157.

6.2 Can parties waive the right to seek the annulment of the award? If yes, under what conditions?

The general rule is that the parties may not exclude by agreement the provisions of Arbitration Act providing for the setting aside of an award (section 42). This applies to the right to seek the annulment for reasons stipulated by law as well as to the time limit governing this right.¹⁹ However, a waiver of the right to seek the annulment of the award on the basis of a specific default (which cannot be reviewed by a court *ex officio*) after the default has already occurred may be possible.²⁰

6.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

The only atypical mandatory requirement applicable to arbitral awards rendered in Slovakia is that in every award, an arbitral tribunal must advise the parties about the possibility to initiate set aside proceedings before general courts (section 34(2)(h)).

Other than that, an award must be in writing (section 34(1) (which in this context means a hard copy) and signed by a majority of the arbitrators, with a stated reason for any absent signature (section 32(3)). It must identify the arbitral institution, names of the arbitrators, names of the parties, place of arbitration and the date on which it was made (section 34(3)). An arbitral award shall contain a decision and, if the parties have not agreed otherwise, reasons for the decision (section 34(2)(g)). An award shall also state the amount of costs of the proceedings and the ratio of their distribution between the parties (section 34(4)). If the tribunal orders a party to perform something, it must also specify the time limit for the performance (section 34(4)).

6.4 Is it possible to appeal an award (as opposed to seeking its annulment)? If yes, what are the grounds for appeal?

The Arbitration Act explicitly recognizes that the parties may agree in the arbitration agreement that the award will be reviewed by another arbitrator (section 37). The Arbitration Act stipulates that the request for review should be filed within 15 days of the award's delivery, although this time limit can be modified by the parties' agreement.²¹ The parties may also specify the scope of the review and the method of taking evidence.²²

A limited form of review of an award occurs also at the enforcement stage. The relevant court for the enforcement (district court Banská Bystrica) scrutinizes, on its own motion, (i) whether the substance of the dispute can be arbitrated under the laws of the Slovak Republic and (ii) whether its recognition and enforcement would be against public policy. The review of an award on these two grounds should take place regardless of whether the seat of the arbitration is in Slovakia or abroad.²³ Other grounds for refusing the recognition and enforcement of the award are considered by the court only when raised by a party. However, if the seat of arbitration is in Slovakia, the party against whom the enforcement is sought is precluded from raising grounds for refusing the enforcement of the award if it did not initiate set-aside proceedings.²⁴

¹⁹ J. Gyarfas, *Commentary to the Slovak Arbitration Act*, p. 598.

²⁰ J. Gyarfas, *Commentary to the Slovak Arbitration Act*, p. 597.

²¹ J. Gyarfas, *Commentary to the Slovak Arbitration Act*, p. 505.

²² J. Gyarfas, *Commentary to the Slovak Arbitration Act*, p. 505.

²³ For foreign awards, this duty is explicitly stated in section 50 (2) of the Slovak Arbitration Act. For domestic awards, it is less clear as there is no explicit reference to either public policy or objective arbitrability in the applicable law (the Code of Civil Enforcement of Judgments), but the prevailing view is that the court will in any case make such an examination before giving effect to a domestic award. One exception to the review of a domestic award on these two grounds by the relevant court for the enforcement is when the relevant court for the annulment refused the challenge of the award - in such case; the relevant court for the annulment had already performed the same review *ex officio*. J. Gyarfas, *Commentary to the Slovak Arbitration Act*, p. 610-611.

²⁴ J. Gyarfas, *Commentary to the Slovak Arbitration Act*, p. 610.

6.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

The New York Convention is applicable with respect to the recognition and enforcement of foreign awards (only) and is implemented in [sections 46-50 of the Slovak Arbitration Act](#). In accordance with the New York Convention, the Arbitration Act only lays out the basic formal requirements for the recognition and enforcement of foreign awards and the limited grounds on the basis of which the recognition and enforcement may be refused. A more detailed procedure for the enforcement of both local and foreign awards is laid out in [the Code of Civil Enforcement of Judgments](#).

The enforcement of both local and foreign awards commences upon the filing of an electronic execution application with the District Court Banská Bystrica ([sections 48 and 49 of the Code of Civil Enforcement of Judgments](#)), together with: (i) the original foreign award or its certified copy, (ii) the original arbitration agreement or its certified copy; and in case of foreign awards (iii) an official Slovak translation of both the award and the arbitration agreement ([section 47 of the Arbitration Act](#)).

The procedure upon the receipt of the execution application differs depending on whether enforcement of a foreign or a domestic award is sought. In case of domestic awards, the court proceeds directly to an examination of the enforceability of the award. If the court considers that none of the grounds for refusing the enforcement listed in [section 53\(3\) of the Code of Civil Enforcement of Judgments](#)²⁵ are present, it approves the execution and instructs a randomly selected executor.²⁶ It is only after the court's approval that the party against whom the enforcement is sought will be notified ([section 61 of the Code of Civil Enforcement of Judgments](#)). The party against whom the enforcement is sought is precluded from challenging the enforcement if it is on the grounds that could have been addressed by means of the set-aside proceedings.

In case of foreign awards, the court notifies²⁷ the party against whom the award is sought to be enforced directly upon the receipt of the execution application ([section 54\(1\) of the Code of Civil Enforcement of Judgments](#)), to allow it to put forward the possible grounds for refusing the recognition and enforcement of the award pursuant to [section 50\(1\) of the Arbitration Act](#). The party must do so within 15 days of its notification of the execution application ([section 54 \(2\) of the Code of Civil Enforcement of Judgments](#)). Even if the party did not object to the enforcement of the award, the court will, on its own motion, examine whether the substance of the dispute can be arbitrated under the laws of the Slovak Republic and whether the recognition and enforcement of the award would be against public policy ([section 54 \(2\) of the Code of Civil Enforcement of Judgments](#) in conjunction with [section 50\(2\) of the Arbitration Act](#)). If the court considers that none of the grounds for refusing the recognition and enforcement of the award are present, it approves the execution and instructs a randomly selected executor.²⁸ Any decision refusing the recognition and enforcement of an award can be appealed within 15 days of receipt of the decision.

²⁵ Amongst the most common grounds are: (a) general non-compliance with the law and (b) existence of reasons on the basis of which the execution could be stopped at a later stage. The examination of objective arbitrability and compliance with public policy should fall within the scope of the review.

²⁶ There is no specific time-frame for this, though the court shall act without undue delay.

²⁷ The notification may take months if the party against whom the enforcement is sought has no presence in the Slovak Republic. In such cases, it seems that the court may proceed directly to the examination of (i) objective arbitrability and (ii) compliance with public policy without notifying the party. The party against whom the enforcement is sought will be then entitled to raise grounds against the enforcement of the award pursuant to section 50 (1) of the Arbitration Act later in the proceedings.

²⁸ If the execution application does not have to be delivered outside of the Slovak Republic, the court's approval can be granted within 15 days upon receipt of the execution application.

Foreign awards which do not need to be enforced²⁹ can be recognized by special court decisions ([section 49\(3\) of the Arbitration Act](#)). The recognition by special decision is effected by a court order and delivered to the claimant only. The court order allowing for the recognition of the award cannot be appealed.

6.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

There is no automatic suspension of the right to enforce an award upon the commencement of annulment proceedings. However, the court deciding on the set aside action may suspend the enforceability of the award upon the request of a party ([section 40\(3\)](#)).

6.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

A court may, but is not obliged to, refuse the enforcement of an award that has been set aside at the country of its origin ([section 50\(1\)\(e\)](#)). Upon the request of a party, a court may also stay the enforcement of an award if an application for setting aside the award has been made at the country of its origin ([section 48](#)).

6.8 Are foreign awards readily enforceable in practice?

Following the Amendment of 2015, the pro-arbitration and pro-enforcement attitude of the Slovak courts has started to emerge. The public policy exception is rarely used and there is a number of recent enforcement decisions that emphasise that “public policy” ought to be interpreted narrowly and in accordance with international standards.

In addition, the Constitutional Court of the Slovak Republic has published an opinion to serve as a unifying interpretation of some of the controversial arbitration related aspects³⁰ ([Opinion of the Constitutional Court of the Slovak Republic No. PLz. ÚS 5/2015, dated 18 November 2015](#)), which the general courts of the Slovak Republic are expected to follow.

7. Funding arrangements

7.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction? If so, what is the practical and/or legal impact of such restrictions?

In principle, nothing in Slovak law prohibits third-party funding arrangements in commercial arbitration.

Contingency fee arrangements are also allowed, provided they do not exceed 20 per cent of the value of the matter ([Decree of the Ministry of Justice of the Slovak Republic No. 655/2004 Coll. on Legal Counsel Compensation for Rendered Legal Services, as amended](#)).

8. Is there likely to be any significant reform of the arbitration law in the near future?

No significant reform of arbitration law will be expected in the near future.

²⁹ This refers to a situation where a party to an arbitration seeks to use the award as a ‘shield’ rather than a ‘sword’ to block any attempt to initiate new proceedings on questions which have already been decided in the arbitration. The recognition of an award without its enforcement is typically sought in the context of declaratory awards or awards that dismissed the claim altogether.

³⁰ These controversial aspects concern the jurisdiction of the Constitutional Court of the Slovak Republic to review arbitral awards and arbitral proceedings upon request of a party. It has been confirmed that the Constitutional Court of the Slovak Republic has no jurisdiction to decide on complaints against the arbitral proceedings or arbitral awards.

SPAIN

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

CARLOS DE LOS SANTOS, MARGARITA SOTO MOYA AND
ELISA VICENTE MARAVALL
OF GARRIGUES

GARRIGUES

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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS

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 - a. Framework ●
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 - c. Limited court intervention ●
 - d. Arbitrator immunity from civil liability ●
2. Judiciary ●
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4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

The importance of both domestic and international arbitration have increased in Spain since the Arbitration Act¹ ("the SAA") was passed in 2003, and the Spanish courts have generally displayed a pro-arbitration approach. In this regard, it is important to note that arbitration in Spain is mainly based on the principle of party autonomy and thus, the parties may decide how most part of the procedure will be developed. Consequently, the arbitral proceeding is characterized, as per its own nature, for its flexibility and efficiency. However, there are certain mandatory provisions on procedure from which the parties may not deviate (i.e. impair number of arbitrators).

Key places of arbitration in the jurisdiction	The key places of arbitration in Spain are Madrid and Barcelona.
Civil law / Common law environment?	Spain has a civil law system based on comprehensive legal codes and laws rooted in Roman Law.
Confidentiality of arbitrations?	<p>According to Article 24(2) SAA, arbitrators, the parties and the arbitral institutions shall keep confidential any information received in the course of the arbitral proceedings.</p> <p>Although this provision seems to apply only to substantive information received during the proceedings, it is however extended to any kind of document and information provided during the arbitration (that is, the submissions, award, etc.).</p>
Requirement to retain (local) counsel?	No requirements exist.
Ability to present party employee witness testimony?	There are no specific rules either on who can or cannot appear as a witness. Therefore, there is no restriction on the ability to present party employee witness testimony.
Ability to hold meetings and/or hearings outside of the seat?	<p>Pursuant to Article 26 SAA, the parties are free to agree on the place of arbitration.</p> <p>However, arbitrators may, after consulting the parties and unless otherwise agreed by them, meet at any place they deem appropriate for hearing witnesses, experts or the parties, examining or recognising goods, documents or persons.</p>
Availability of interest as a remedy?	Interest is allowed under Spanish law. As to the principal amount, it includes the interest agreed by the parties or, failing such agreement, the legal interest rate published in the Official Gazette (the interest rate provided in the Spanish Act 3/2004, of 29 December, against late payment in commercial transactions, also applies to certain commercial transactions).
Ability to claim for reasonable costs incurred for the arbitration?	Pursuant to Article 37(6) SAA, the award will include the arbitrators' decision on costs related to the arbitration, which will include their own fees and expenses and, where appropriate, the fees and expenses of counsels or

¹ Act 20/2003, of 23 December 2003, on Arbitration (*Ley 20/2003, de 23 de diciembre, de Arbitraje*).

	<p>representatives of the parties, the cost of the service provided by the institution administering the arbitration, as well as any other costs incurred during the arbitration proceedings. Such costs do not usually include travel and/or accommodation arrangements for witnesses or experts.</p> <p>The SAA remains silent regarding the apportionment of arbitration costs. Consequently, the criteria established under the Spanish Civil Procedure Act, which, in general terms, only provides for the recoverability of the costs by a party who is entirely successful (in case of partial success, each party bears its own expenses and the common costs are split), does not always apply.</p> <p>In order to decide on such costs, the arbitrators will take into account the parties' agreement; but if such agreement does not exist, the arbitrators are not bound by any specific rules in this regard. Generally, arbitrators take into consideration not only the outcome of the arbitration, but also the behaviour of the parties during the proceedings and if there has been frivolous disregard to the other party's rights.</p>
<p>Restrictions regarding contingency fee arrangements and/or third-party funding?</p>	<p>No restrictions regarding contingency fee arrangements exist. Contingency and success fees were historically banned, but were recently accepted as a pro-competitive measure (the prohibition of contingency fee arrangements under Article 16 of the Code of Conduct of Spanish Advocates was suspended by the agreements passed by the Plenary of the General Council of Spanish Advocates on 10 December 2002 and 21 July 2010).</p> <p>The SAA does not govern third-party funding. Although in practice this type of funding is being used (particularly after the prohibition of contingency fees was lifted), there is still scope for improvement and development.</p>
<p>Party to the New York Convention?</p>	<p>Spain is a Contracting State to the New York Convention since 12 May 1977 and no reservations or declarations were made. The Convention entered into force in Spain on 10 August 1977.</p>
<p>Other key points to note</p>	<p>φ</p>
<p>WJP Civil Justice score (2017-2018)</p>	<p>0.70 (23rd position in the global ranking).</p>

ARBITRATION PRACTITIONER SUMMARY

The SAA, amended in 2011, was drafted following the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law), adopted on 21 June 1985, and only a few modifications were introduced thereto. It applies to both domestic and international arbitration when Spain is the place of arbitration, and certain provisions apply even when the place is abroad.

Date of arbitration law?	23 December 2003, last amended by Law 11/2011, of 20 May 2011.
UNCITRAL Model Law? If so, any key changes thereto?	<p>The SAA is based on the UNCITRAL Model Law. Nevertheless, the SAA presents some differences:</p> <ul style="list-style-type: none"> - any dispute over matters that can be freely and legally disposed of by the parties are arbitrable (Article 2(1) SAA); - in international arbitration, States or State-controlled entities cannot invoke prerogatives provided by their national law to circumvent obligations deriving from the arbitral agreement (Article 2(2) SAA); - arbitral proceedings are considered international also if the legal relationship from which the dispute stems has an impact on international trade (Article 3(1c) SAA); - in international arbitration, the arbitration agreement is valid if they fulfil the requirements set forth in any of the following rules are met: the legal rules chosen by the parties, the rules applicable to the merits of the dispute or the SAA (Article 9(6) SAA); - capital companies may subject their internal disputes, including the challenge of corporate resolutions, to arbitration (Article 11 bis SAA); - awards setting aside a registrable agreement must be entered in the Mercantile Registry (Article 11 ter SAA); - the default rule requires a single arbitrator to be appointed (rather than three) (Article 12 SAA); - a specific procedure for the appointment of arbitrators in multi-party arbitrations is foreseen (Article 15(2b) SAA); - if arbitrators do not notify the acceptance of their appointment within the agreed period (default rule of 15 days from the nomination) the appointment shall be deemed to have been declined (Article 16 SAA); - arbitrators may incur liability in the event of bad faith, gross recklessness or wilful act (Article 21 SAA); and - arbitral proceedings are presumed confidential (Article 24(2) SAA).
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling	Since 25 November 2010, the Court of First Instance, No. 101 of Madrid (<i>Juzgado de Primera Instancia No. 101 de Madrid</i>) was assigned exclusive jurisdiction over arbitration matters. This is

<p>arbitration-related matters?</p>	<p>the first, and so far only, specialized court in Spain for arbitration-related matters.</p> <p>The success of this specialized court, especially in terms of length of the proceedings, has led to several requests for more of these courts from different legal practitioners. Therefore, it is not unlikely that more courts specialized in arbitration are to be created in Madrid; as well as in other key seats in Spain, such as Barcelona.</p> <p>In fact, there is already an initiative to centralize the enforcement of arbitral awards requested all over Catalonia in a specialized court located in Barcelona, which is pending for approval from the Spanish General Council of the Judiciary.</p>
<p>Availability of <i>ex parte</i> pre-arbitration interim measures?</p>	<p>Article 11(3) SAA provides that the arbitration agreement will not prevent any of the parties, prior to or during the arbitral proceedings, from requesting for interim measures to a court, or the court from granting such measures.</p>
<p>Courts' attitude towards the competence-competence principle?</p>	<p>The <i>Kompetenz-Kompetenz</i> principle is enshrined in Article 22 SAA (as expressly admitted in its recitals), pursuant to which arbitrators can decide on their own jurisdiction, either through a partial or final award.</p> <p>Such principle is generally respected by Spanish courts, even when the validity or the existence of the arbitration agreement itself is challenged (see decisions of the Supreme Court n° 409/2017, of 27 June 2017 (RJ 2017\3021)²; and n° 776/2007, of 9 July 2007 (RJ 2007\4960)).</p> <p>Spanish courts may only review the decision of an arbitral tribunal on its own jurisdiction within the context of a request for set aside or a request for recognition and enforcement of an award deciding on the jurisdiction of the tribunal.</p>
<p>Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?</p>	<p>In accordance with the criteria for the recognition and enforcement of awards under Article V of the New York Convention, Article 41(1) SAA states the grounds for the annulment of awards, establishing that an award may be set aside only if the party against whom it is requested evidences that:</p> <ul style="list-style-type: none"> a) The arbitration agreement does not exist or is not valid; b) The party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; c) The award contains decisions on matters not submitted to arbitration; d) The appointment of the arbitrators or the arbitral procedure was not in accordance with the agreement of the

² In this decision, the Supreme Court admitted that, in case the jurisdiction of a court is challenged due to the existence of an arbitration agreement, such court may fully examine the validity and effectiveness of the arbitration agreement.

	<p>parties, unless such agreement was in conflict with an imperative provision of the SAA, or, failing such agreement, was not in accordance with such act;</p> <p>e) The subject-matter of the dispute cannot be submitted to arbitration;</p> <p>f) That the award is contrary to Spanish public policy.</p> <p>In conclusion, all the grounds for annulment of awards provided for by the SAA are based on the standard set-out for the recognition and enforcement of awards under the New York Convention.</p>
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>There is no express legal provision regarding the enforcement of annulled foreign awards in Spanish Law.</p> <p>However, the granting of <i>exequatur</i> for foreign awards is governed by the New York Convention. Pursuant to Article V(1e) of the Convention, recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, if that party demonstrates that the award has been set aside by a competent authority in the country where the award was rendered.</p> <p>In that line of reasoning, Spanish courts have generally adopted the view that an annulled award cannot be recognized.</p> <p>Notwithstanding with the above, it is important to note that the European Convention on International Commercial Arbitration concluded in Geneva on 21 April 1961 ("the Geneva Convention"), ratified by Spain in 1975 provides, to a certain extent, a more favourable regime regarding the recognition and enforcement of arbitral awards than the one established in the New York Convention.</p> <p>Concretely, with regard to the recognition and enforcement of foreign awards that have been annulled at the seat of arbitration, the Geneva Convention provides that their recognition and enforcement may only be refused when their annulment was based on any of the grounds set out in its Article IX (incapacity of the parties or invalidity of the arbitral convention, lack of due process, abuse of powers by arbitrators, and when the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the Convention). Therefore, if the award was annulled on a different ground, the Convention does not prohibit its recognition or enforcement.</p> <p>However, the scope of application of the Geneva Convention is more limited than the New York Convention, since it is only applicable to commercial matters, and only if the parties are located in different contracting States.</p>
<p>Other key points to note?</p>	<p>φ</p>

JURISDICTION DETAILED ANALYSIS

1. Legal Framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law?

1.1.1 If yes, what key modifications, if any, have been made to it?

The current SAA is based on the UNCITRAL Model Law on International Commercial Arbitration, adopted on 21 June 1985.

However, the SAA presents the following differences:

- any disputes over matters that can be freely and legally disposed of by the parties are arbitrable (Article 2(1) SAA);
- in international arbitration, States or State-controlled entities cannot invoke prerogatives of their national law to circumvent obligations deriving from the arbitral agreement (Article 2(2) SAA);
- arbitral proceedings are considered international also if the legal relationship from which the dispute stems has an impact on international trade (Article 3(1c) SAA);
- in international arbitration, arbitration agreements are valid provided that the requirements set forth in the legal rules chosen by the parties, the rules applicable to the merits of the dispute or the SAA are met (Article 9(6) SAA);
- capital companies may subject their intra-company disputes, including the challenge of corporate resolutions, to arbitration (Article 11 bis SAA);
- awards setting aside a registrable agreement must be entered in the Mercantile Registry (Article 11 ter SAA); the default rule is a single arbitrator to be appointed (Article 12 SAA);
- a specific procedure for the appointment of arbitrators in the case of several parties is foreseen (Article 15(2b) SAA);
- if arbitrators do not notify the acceptance of their appointment within the agreed period (default rule of 15 days from the nomination) it will be understood to be declined (Article 16 SAA);
- arbitrators may incur liability in the event of bad faith, gross recklessness or wilful act (Article 21 SAA); and
- arbitral proceedings are presumed confidential (Article 24(2) SAA).

1.2 When was the arbitration law last revised?

The SAA was last amended by Law 11/2011, of 20 May 2011.

Even though Law 29/2015, of 30 July 2015, on International Legal Cooperation did not amend the SAA, it amended the legal regime for the recognition and enforcement of foreign decisions, which applies when the foreign country where the decision was rendered is not part to the New York Convention.

2. The arbitration agreement

2.1 How do courts in the jurisdiction determine the law governing the arbitration agreement?

As per Article 34 SAA, arbitral tribunals must decide disputes in accordance with the law or rules chosen by the parties. Any designation of the law or legal system of a particular State is deemed to refer directly to the substantive laws of that respective state.

In international arbitration, in the absence of an agreement between the parties, the arbitral tribunal may directly – without resorting to conflict of law rules – apply the law that it considers the most appropriate.

Arbitrators may decide the case *ex aequo et bono* (i.e., according to what is fair and equitable) only if expressly authorised to do so by the parties.

If the arbitration agreement is included in a broader contract, it will be possible to apply the law applicable to the contract to the arbitration agreement itself. This remains without prejudice to the principle of separability that will be explained below.

At any rate, regardless of the substantive law chosen by the parties, if the seat of arbitration is Spain, mandatory laws affecting Spanish public policy may not be infringed. Otherwise, the award may be annulled.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which is set forth?

Yes. The principle of separability or autonomy of the arbitration clause is enshrined in Article 22(1) SAA, which establishes that an arbitration clause that forms part of a broader contract will be considered as an independent agreement from the other terms thereof.

This means that the invalidity of the underlying contract will not automatically extend to the arbitration agreement contained therein, unless it is proven that the arbitration agreement itself is vitiated by fraud, or initial lack of consent.

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

Regarding the formal requirements of an arbitration agreement, the SAA follows Article 7 of the UNCITRAL Model Law and provides in Article 9(3) SAA that the arbitration agreement should be in writing, in a document signed by the parties or in an exchange of letters, telegrams, telex, facsimile or any other means of telecommunications that provides a record of the agreement. This requirement is considered to be met when the arbitration agreement is accessible for its subsequent consultation in an electronic, optical or any other format.

Article 9(5) SAA establishes that there is an arbitration agreement when, in an exchange of statements of claim and defence, the existence of an arbitration agreement is alleged by one party and not denied by the other.

Lastly, as regards of international arbitration, under Article 9(6) SAA, the arbitration agreement shall be deemed valid and the dispute arbitrated if it meets the requirements set by any of the following: the rules of law chosen by the parties to govern the arbitration agreement, the rules of law applicable to the merits of the dispute, or the SAA.

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

Arbitration agreements may bind non-signatories if they have a very close and strong relationship with a signing party, or have played a strong role in the performance of the contract.

In practice, the criteria as put forward in the ICC case *Dow Chemical France v Isover Saint Gobain's* (whereby a non-signatory may benefit from or be bound by an arbitration agreement signed by a group company because of its active role in the transaction) is generally followed. In any event, according to Spanish case law, third parties' tacit acceptance of the arbitration clause may only be deduced from unequivocal and conclusive facts of the case. Thus, extending arbitration clauses to parent companies is certainly not automatic, but based on fact-intensive tests. Contrary to the extension of the arbitration clause to non-signatories, we refer to the decision of the Supreme Court, Civil Section, of 9 July 2007 and, in favour of the

extension of the arbitration clause to non-signatories, we refer to the decisions of the Supreme Court, Civil Section, of 26 May 2005 and the *La Coruña* Court of Appeal, 4th Section, of 22 June 2005.

2.5 Are there restrictions to arbitrability? In the affirmative:

2.5.1 Do these restrictions relate to specific domains?

The SAA favours arbitrability. In fact, pursuant to Article 2 SAA, it has been established that any matters that can be freely and legally disposed of by the parties can be submitted to arbitration.

Notwithstanding with it, matters related to criminal law or constitutional law, as well as those related to civil status, nationality, family or inheritance, cannot be resolved by arbitration.

Furthermore, according to Article 1(4) SAA, labour arbitration is expressly excluded from the scope of the SAA.

Civil and corporate matters can be arbitrated. In fact, submitting intra-company disputes to arbitration is expressly recognised in Article 11 bis SAA.

Likewise, intellectual and industrial property issues, as well as disputes related to competition law, are arbitrable. However, there are some restrictions over these matters. For instance, regarding trademark registration, disputes related to the existence of formal defects or to absolute prohibitions to register are not arbitrable; with regard to patents, only disputes between two private parties are arbitrable; and with reference to competition law, only disputes over civil aspects and compensations are arbitrable.

2.5.2 Do these restrictions relate to specific persons?

Arbitration regarding consumers falls under Law 26/1984, of 19 July, on the General Defence of Consumers and Users. In such cases, the SAA will only apply to those issues that are not addressed in Law 26/1984.

Spanish courts have consistently held that when deciding on an action to set aside, they are not entitled to review the merits of the case neither to correct hypothetical mistakes from arbitrators. Accordingly, the courts have interpreted the concept of “*public policy*” very restrictively. Despite this consolidated case law, in 2015, the Superior Court of Justice of Madrid set aside several awards reaching its decisions by reviewing the merits of the case based on a broader interpretation of “*public policy*”, specifically in the so called “*economic public order*” which, according to the Superior Court of Justice of Madrid, includes certain basic rules and irrevocable principles of contract law in cases of special gravity or singularly in need of protection, being the good faith principle the paradigm of the principles integrating the “*economic public policy*”.

Notwithstanding the above, these decisions do not imply a change in the courts consistent trend to restrictively interpret “*public policy*” but an exception in specific cases with certain common characteristics *i.e.*: banking disputes concerning the validity of interest rate swap contracts and concerning consumers and small and medium-sized business that were not duly informed of the mechanics of the swaps at stake. In fact, in coetaneous cases of actions to set aside an award, the same Court confirmed its traditional view: “*the concept of public policy cannot turn into a backdoor to allow control of the decision granted by the arbitrators*” (Judgment of the Superior Court of Justice of Madrid of 21 April 2015).

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

3.1.1 If the place of the arbitration is inside of the jurisdiction?

Pursuant to Article 11(1) SAA, the arbitration agreement prevents courts from hearing disputes submitted to arbitration, where invoked by the interested party by a jurisdictional objection (*declinatoria*, which is comparable to a motion to stay the proceedings).

The defendant must file such objection before the court within the first 10 days of those provided to file the answer to the claim.

In this regard, it is relevant to note that the decisions of Spanish courts are consistent and clear with regard to the court not being able to assess, of its own motion, the submission to arbitration. Therefore, it is necessarily the interested party who has to file the jurisdiction objection.

3.1.2 If the place of the arbitration is outside of the jurisdiction?

According to Article 1(2) SAA, although the scope of application of the Act is limited to the arbitration proceedings conducted in Spain, rules contained in certain articles, including those contained in Article 11, will be applicable even when the place of arbitration is outside Spain.

Therefore, Spanish courts will also stay litigation when there is a valid arbitration agreement, even if the place of arbitration is outside the jurisdiction, provided that the interested party files a jurisdictional objection (*declinatoria*).

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

Arbitrators cannot enjoin courts to stay litigation proceedings. As it has been explained in the question above, Article 11(1) SAA provides that it is the interested party who has to file a jurisdictional objection (*declinatoria*) in order to prevent courts from hearing the dispute.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)

As per Articles 1(2) and 8(3), (4) and (6) SAA, the Spanish courts will intervene in arbitrations seated outside of Spain on the following grounds:

- the adoption of interim measures when the award is to be enforced in Spain, or when such measures are to carry legal consequences in Spain; irrespective of whether they are requested by the interested party or by the arbitrators; and
- the recognition and enforcement of foreign awards in Spain.

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

The SAA remains silent regarding whether an obligation or not from a party exists to be represented by a counsel within the arbitration proceedings. Therefore, parties may retain outside counsels or be self-represented.

However, pursuant to Article 539(1) of the Spanish Civil Procedure Act, the involvement of counsel and court representative (in Spanish, *procurador*) shall be required for enforcement actions arising from arbitration awards whenever the amount for which the enforcement is being ordered exceeds 2,000 euros.

In such cases, outside-counsels will have to meet the special requirements applicable to them in order to be entitled to appear before Spanish courts. Until a couple of years ago, the only requirements to be admitted as a lawyer in Spain were to hold a Spanish law degree (or an equivalent foreign degree officially approved) and to be a member of a local bar association, which would entitle a lawyer to practise anywhere in Spain.

New legislation was enacted in line with other European jurisdictions, according to which prospective lawyers – apart from holding a law degree – will need to hold a Master's degree, which will be followed by a period of apprenticeship and passing a written national exam.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

According to Article 17(2) SAA, a person proposed to act as arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of nomination, shall disclose to the parties without delay the occurrence of any such circumstances.

However, an arbitrator may only be challenged where there are grounded doubts regarding his/her impartiality or independence (Article 17(3) SAA).

In this sense, Spanish courts tend to seek guidance from the IBA Guidelines on Conflicts of Interest, as well as the recommendations published by the Spanish Arbitration Club (*Club Español del Arbitraje*).

Notwithstanding with the above, it is relevant to note that, unless otherwise agreed by the parties, courts do not play any role in the procedure to challenge an arbitrator. This is exclusively handled by the arbitral tribunal.

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

The appointment of arbitrators is regulated under Article 15 SAA.

Pursuant to this article, the parties may freely agree the procedure for the appointment of arbitrators, as long as the principle of equality is honoured.

Failing such agreement, the following rules will apply:

- a) In arbitration with a sole arbitrator, he/she will be appointed by the competent court upon request of the interested party.
- b) In arbitration with three arbitrators, each party will appoint one arbitrator, and the two arbitrators appointed will appoint the third arbitrator, who will chair the proceedings. If a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of the latest acceptance, the appointment will be made by the court upon request of the interested party.

Where more than one claimant or respondent is involved, the latter will appoint one arbitrator and the former another. If claimants or respondents cannot agree on the appointment, all arbitrators will be appointed by the court at the request of the interested party.

- c) In arbitration with more than three arbitrators, they will be appointed by the competent court upon request of the interested party.

Where the appointment of arbitrators under the procedure agreed to by the parties is not possible, any party may apply to the competent court to appoint the arbitrators or, if appropriate, to adopt the necessary measures therefore. The court may dismiss a request for appointment of arbitrators only when, in light of the documents produced, it deems that no arbitration agreement exists.

Where arbitrators are to be appointed by the court, it will draw up a list of three candidates for each arbitrator to be appointed. When drawing up the list, the court will take into consideration any requirements agreed by the parties, and will take the necessary measures to ensure their independence and impartiality. Where a sole or a third arbitrator is to be appointed, the court will also have regard to the advisability of appointing an arbitrator of a nationality other than those of the parties and, as appropriate, of those of the arbitrators already appointed, in light of the circumstances prevailing. The arbitrators are subsequently appointed by lot.

4.4 Do courts have the power to issue interim measures in connection with arbitrations?

4.4.1 If so, are they willing to consider *ex parte* requests?

Courts have the power to issue interim measures in connection with arbitrations whenever any of the parties request their issuance, even prior to the starting of the arbitration proceedings.

In fact, Article 11(3) SAA states that the arbitration agreement will not prevent a party, prior to or during the arbitral proceedings, from applying to a court for interim measures, or the court from granting such measures.

Concretely, as stated under Article 8(3) SAA, competence to adopt interim measures will be incumbent upon the court with jurisdiction in the place where the award is to be enforced and, failing that, upon the court in the place where the measures are to carry legal consequences.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

As stated under Article 24(2) SAA, arbitrators, parties and arbitral institutions, if appropriate, are bound to honour the confidentiality of the information received on the occasion of arbitration.

4.5.2 Does it regulate the length of arbitration proceedings

Article 37(2) SAA provides that, unless otherwise agreed to by the parties, arbitrators shall deliver the award within 6 months of the date of submission of the defence or the expiration of the deadline therefor.

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

The parties are free to agree on the procedure to be followed by the arbitrators in conducting the proceedings (Article 25(1) SAA).

In particular, according to Article 26 SAA, the parties are free to agree on the place of arbitration. Notwithstanding, the arbitrators may, in consultation with the parties and unless otherwise agreed by them, meet at any place they deem appropriate for hearing witnesses, experts or the parties, or recognising goods, documents or persons. Arbitrators may hold consultation meetings at any place they deem appropriate.

4.5.4 Does it allow for arbitrators to issue interim measures?

Pursuant to Article 23(1) SAA, once the arbitration proceedings have started, except otherwise agreed by the parties, the arbitrators may, at the request of a party, grant any interim measures deemed necessary or appropriate with respect to the subject-matter of the dispute.

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence?

As stated under Article 25 SAA, the parties are free to agree on the procedure to be followed by the arbitrators in conducting the proceedings, although subject to certain provisions established under Article 24 SAA (*i.e.*, that the parties will be treated with equality, that each party will be given full opportunity to present his case and that the arbitrators, parties and arbitral institutions, as appropriate, are bound to honour the confidentiality of the information received on the occasion of arbitration).

However, in the absence of such agreement between the parties, the arbitrators may conduct the proceedings as they deem appropriate. This faculty includes the power to decide over the admissibility, relevance, materiality and usefulness of the evidence, as well as over its taking and evaluation.

4.5.6 Does it make it mandatory to hold a hearing?

In Spain, it is not mandatory to hold a hearing; the proceedings may be conducted in writing only.

In fact, pursuant to Article 30 SAA, except otherwise agreed by the parties, the arbitrators will decide whether it is necessary to hold a hearing for the presentation of opening statements, evidence and/or closing statements, or whether the proceedings will exclusively be conducted in writing.

4.5.7 Does it prescribe principles governing the awarding of interest?

As indicated in Section I above, arbitrators may award interest. However, the SAA does not prescribe principles governing the awarding of interest.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

The SAA does not prescribe principles governing the allocation of arbitration costs.

Regarding arbitration costs, the Act only establishes that the award will include the arbitrators' decision on costs, which will include their own fees and expenses and, where appropriate, the fees and expenses of counsels or representatives of the parties, the cost of the service provided by the institution administering the arbitration, as well as any other costs incurred during the arbitration proceeding (Article 37(6) SAA).

However, as explained in Section I above, arbitrators usually take into consideration not only the outcome of the arbitration ("loser pay" rule), but also the behaviour of the parties during the proceedings and if there has been frivolous disregard to the other party's rights.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

Arbitrators are not immune from liability (nor are arbitral institutions).

In fact, Article 21 SAA states that the acceptance of the arbitration proceedings by the arbitrators requires them to comply with their mission in good faith; so that if they fail to do so, they will be liable for any damages they cause resulting from bad faith, recklessness or *mens rea*.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

Arbitrators, as well as arbitral institutions, as the case may be, may incur, not only in civil, but also in criminal liability, again in those cases where damages were intentionally caused or when they acted with gross negligence.

In arbitrations held before an arbitral institution, the injured party may file suit directly against it, irrespective of any action for indemnity lodged against the arbitrators.

With regard to lawyers intervening in the arbitral proceedings, they may also incur in criminal liability if they commit certain crimes regulated under the Spanish Criminal Code. For instance, the destruction, disablement or hiding of documents received as a lawyer (article 465 of the Criminal Code); the defence of two parties with opposing interests in the same matter or the causing of damage to the interests of his/her client by actions or omissions (article 467 of the Criminal Code).

5. The award

5.1 Can parties waive the requirements for an award to provide reasons?

Pursuant to Article 37(4) SAA, the award will state the grounds upon which it is based, except for awards delivered on the terms agreed by the parties, when they have decided to settle the dispute wholly or

partially.

Consequently, the parties cannot waive the requirements for an award to provide reasons, except in the case of settlement of the dispute by agreement.

5.2 Can parties waive the right to seek the annulment of the award?

No, the parties cannot waive the right to challenge an arbitration award.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at the seat of arbitration?

There are no atypical mandatory requirements as per SAA.

Nonetheless, Article 37 SAA sets forth the formal requirements that an award must fulfil to be valid:

- a) it shall be rendered within 6 months from the date when the statement of defence was or should have been filed, unless otherwise agreed by the parties (this period may be extended by the arbitrators for no more than 2 months by means of a reasoned decision, unless the parties agreed otherwise);
- b) it shall be made in writing, qualifying as such when its content and signatures are recorded and accessible for consultation in an electronic, optical or other type of format;
- c) it shall be signed by the arbitrators, who may manifest their favourable or dissenting vote (where there is more than one arbitrator, the signatures of the majority of all members of the arbitral panel or that of its presiding arbitrator alone shall suffice, provided that the reason for any omitted signature is stated);
- d) it shall state the reasons upon which it is based, unless it is an award by consent of the parties; and
- e) it shall state its date and place of arbitration, as well as the allocation of costs.

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

In Spain, the awards cannot be appealed.

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign?

The enforcement procedure varies depending on whether the award is domestic or foreign (an award issued outside of Spain is considered a foreign award pursuant to Article 46 SAA).

- In relation to the enforcement of domestic awards, Article 44 SAA refers to the Civil Procedure Act, save certain provisions regarding the stay, dismissal and restart of the proceedings.

Consequently, domestic awards may be enforced directly by the First District Court of the place where the award was issued, following the procedure established in the Civil Procedure Act (Articles 517 and seq.), which may be summarised as follows:

- a) the application to enforce an award may be filed before the court only after 20 days have expired since the award was notified to the parties; and
- b) the court will issue its decision (*auto*), whereby it will verify that the award complies with all the legal formalities and that the relief sought by the enforcing party complies with the award, ordering enforcement of the award.

The party against whom enforcement is being sought has 10 days after receiving the court's decision to

oppose the enforcement on the following grounds, established in Articles 556 and 559 of the Civil Procedure Act:

- a) the party has already paid or complied with the award;
- b) enforcement has been requested after the expiry of the maximum period to enforce the award (five years after the award was notified);
- c) formalisation of the parties' agreements and transactions in a public document;
- d) lack of capacity or representation of the enforcing party or the party against whom enforcement is sought;
- e) radical nullity of the award, if it contains no ruling; and
- f) if the award has not been notarized, lack of authenticity of the latter.

The court enforcing the award is also the competent court to rule on the grounds raised against the enforcement. Filing an objection against the enforcement will not stay the enforcement of the award pursuant to Article 556.2 of the Civil Procedure Act.

- With regard to foreign awards, Article 46 SAA provides that they will be recognised pursuant to the New York Convention, save any other most favourable international convention.

The competent authority for the recognition of a foreign award is the Civil and Criminal Chambers of the High Courts of Justice of the region where the party against whom recognition is requested or who is affected by such award or decision has his place of business or residence (Article 8(6) SAA). The enforcement procedure of foreign award will be the same as for domestic awards above explained.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

Article 45 SAA provides that an award is enforceable even if it is being challenged. Hence, annulment proceedings do not automatically stay the exercise of the right to enforce an award.

Nonetheless, the aforementioned provision allows the party against whom enforcement is sought to apply to the competent court to have the enforcement suspended, provided that security is offered for the amount awarded, plus the damages and losses that could arise from the delay in the enforcement of the award.

The security may be in any of the forms provided in paragraph 3(2) of Article 529 of the Civil Procedure Act: cash, first demand bank guarantee or any other means that, in the opinion of the court, guarantees the immediate availability of the amount of the security.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

There is no express legal provision regarding the enforcement of annulled foreign awards in Spanish Law.

However, as it was explained in Section II.5.E above, *exequaturs* for foreign awards are governed by the New York Convention. Pursuant to Article V(1e) of the Convention, recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, if that party proves that the award has been set aside by a competent authority of the country in which the award was made.

Spanish courts have adopted the view that an annulled award cannot be recognised. However, some isolated decisions have been favourable to the enforcement of vacated awards, as it was explained in Section I above.

5.8 Are foreign awards readily enforceable in practice?

Once a foreign award has been recognized in Spain pursuant to the New York Convention, enforcement may take approximately nine months.

6. Funding arrangements**6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?**

No restrictions regarding contingency or alternative fee arrangements exist. Contingency and success fees were historically banned, but were recently accepted as a pro-competitive measure (the prohibition of contingency fee arrangements under Article 16 of the Code of Conduct of Spanish Advocates was suspended by the agreements passed by the Plenary of the General Council of Spanish Advocates on 10 December 2002 and 21 July 2010).

The SAA does not govern third-party funding. Although in practice this type of funding is being used (particularly after the prohibition of contingency fees was lifted), there is still scope for improvement and development.

7. Is there likely to be any significant reform of the arbitration law in the near future?

There is not likely to be any significant amendment of the SAA.

SWEDEN

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

KRISTOFFER LÖF AND AZADEH RAZANI
OF MANNHEIMER SWARTLING



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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS

1. Law ●
 - a. Framework ●
 - b. Adherence to international treaties ●
 - c. Limited court intervention ●
 - d. Arbitrator immunity from civil liability ●
2. Judiciary ●
3. Legal expertise ●
4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Traditionally as well as today, Sweden is one of the favorite places for international arbitration. The Arbitration Institute of the Stockholm Chamber of Commerce, founded in 1917, has been seen as a preferred neutral venue for arbitrations in East/West disputes involving parties from the USA and Russia (including former Soviet Union), and later also from Asia. Stockholm has also become a much-used venue for energy related disputes and investor-state disputes. The Swedish Arbitration Act is highly developed and in line with best practices of international arbitration. The arbitral proceedings are safeguarded by arbitration-friendly courts.

Key places of arbitration in the jurisdiction	Stockholm.
Civil law / Common law environment?	<p>Unique Scandinavian legal environment with roots in Civil law tradition in substantive law but also features of Common law in procedural law.</p> <p>The prevailing Civil law traditions are evident in the dependence on statutory law as the primary source of law and in the non-binding, yet authoritative, nature of court judgments. The area of contract law has a special close connection with Civil law traditions.</p> <p>Common law features are particularly evident in the adversarial nature of court and arbitral proceedings. It is for the parties to outline the facts of the case and present the evidence they deem necessary, with judges and arbitrators rarely embarking on fact-finding or appointing their own experts.</p>
Confidentiality of arbitrations?	<p>Arbitrations are private but not confidential unless so agreed. Arbitrators have a duty of confidentiality. Parties do not have a duty of confidentiality, unless expressly agreed.</p> <p>No third-party participation. No duty to register Swedish awards.</p>
Requirement to retain (local) counsel?	No.
Ability to present party employee witness testimony?	Admissible.
Ability to hold meetings and/or hearings outside of the seat?	Yes, if not otherwise agreed by the parties.
Availability of interest as a remedy?	Yes.
Ability to claim for reasonable costs incurred for the arbitration?	Yes.
Restrictions regarding contingency fee arrangements and/or third-party funding?	<p>Contingency fees are generally prohibited for members of the Swedish bar, but no general restriction for foreign counsel.</p> <p>No restrictions on third party financing.</p>
Party to the New York Convention?	Yes.

Other key points to note	φ
WJP Civil Justice score (2017-2018)	Sweden's score is 0.86 ranking it 4 th in the world.

ARBITRATION PRACTITIONER SUMMARY

The Swedish Arbitration Act is fundamentally based on party autonomy. As a consequence, the structure of the arbitral proceedings under the Arbitration Act is primarily decided by the parties and, absent their agreement, by the arbitral tribunal. The Arbitration Act imposes very few mandatory rules, so the parties are free to contract out of the majority of provisions. Swedish courts are considered very arbitration-friendly, which is evident in that they will typically not intervene in arbitrations but will readily enforce both Swedish and foreign arbitral awards.

Date of arbitration law?	The Swedish Arbitration Act of 1 April 1999 (the “ Arbitration Act ”).
UNCITRAL Model Law? If so, any key changes thereto?	Sweden is <u>not</u> a Model Law country, but the Arbitration Act conforms to the Model Law’s basic principles.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No special courts for handling arbitration-related matters. In practice, the Svea Court of Appeal located in Stockholm is very specialised in arbitration as it has jurisdiction over e.g. challenge procedures regarding arbitrations seated in Stockholm and enforcement procedures of foreign awards.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Swedish courts have power to order pre-arbitration interim measures for arbitrations seated in Sweden and abroad. The courts will also consider requests <i>ex parte</i> , <i>i.e.</i> , without hearing the other party, if delay would place the applicant’s claim at risk. If interim measures are sought prior to commencing the arbitration, the applicant must submit a request for arbitration within one month from the issuance of the interim measure.
Courts’ attitude towards the competence-competence principle?	Courts respect the competence-competence principle that is enshrined in the Arbitration Act. However, the Arbitration Act also entitles a party to seek a declaratory judgment from a competent Swedish court on whether or not the arbitral tribunal has jurisdiction.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The Arbitration Act makes a distinction between an action to declare an award invalid and an action to set aside an award. An award made in Sweden is invalid if the dispute was non-arbitrable, if the award is clearly incompatible with public policy or if it does not meet the formal requirements of an award (written form and signature). An award made in Sweden can be wholly or partially set aside if the arbitration agreement is invalid, the award was not rendered within a time limit agreed by the parties, arbitrators exceeded their mandate, the arbitral proceedings should not have taken place in Sweden, there were irregularities in the appointment of arbitrators, an arbitrator lacked capacity or impartiality, or there are other procedural irregularities that influenced the outcome of the case.
Courts’ attitude towards the	The grounds for refusing the recognition and enforcement of a

<p>recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>foreign arbitral award are those set out in the New York Convention.</p> <p>Upon the objection of a party, an award that has been set aside at the seat is not enforceable in Sweden.</p> <p>An interim measure by an arbitral tribunal is generally not considered as a decision on the merits and is thus not recognised as an enforceable award in Sweden.</p>
<p>Other key points to note?</p>	<p>φ</p>

JURISDICTION DETAILED ANALYSIS

1. The legal framework

The law governing arbitration in Sweden is the Arbitration Act of 1 April 1999 (the “**Arbitration Act**”).¹ Notwithstanding minor technical corrections, the Arbitration Act has remained unchanged since its enactment in 1999.

Sweden has opted not to adopt the UNCITRAL Model Law as such. However, during the enactment of the Arbitration Act, particular attention was given to the Model Law. Thus, the Arbitration Act is essentially based on the UNCITRAL Model Law and conforms with its basic principles, although it does not follow the Model Law in form or in wording.

2. The arbitration agreement

2.1 Applicable law

Under section 48 of the Arbitration Act, the parties may choose the law applicable to the arbitration agreement. Absent such choice, the applicable law is that of the seat of arbitration. When assessing whether the parties have chosen the law applicable to the arbitration agreement, the arbitral tribunal or a court is to assume that a choice of law clause in the contract in which the arbitration agreement is incorporated only applies to the substantive agreement and not to the arbitration agreement.

The law governing the arbitration agreement applies to questions regarding the formation, interpretation, validity and termination of the arbitration agreement. It does not apply to the question of whether a party had capacity or was authorised to enter into an arbitration agreement. Instead, the law applicable to these issues is determined by the general Swedish choice of law rules. For example, in Sweden, the capacity of a company and the authority of its representatives are decided in accordance with the law of the company's place of incorporation.

2.2 Separability

An arbitration agreement is considered to be independent from the rest of the contract in which it is included. Swedish law has long recognised this doctrine of separability and it is codified in section 3 of the Arbitration Act.

2.3 Formal requirements

The Arbitration Act does not set any formal requirements for enforceable arbitration agreements. An arbitration agreement can thus be concluded orally, in writing, or by conduct.

However, an enforceable arbitration agreement must fulfil certain general contractual requirements. *First*, the parties must have the legal capacity to conclude the arbitration agreement. *Second*, the arbitration agreement must refer to disputes arising out of a specific contractual relationship or to a specific dispute. *Third*, the matter to be settled by arbitrators must be arbitrable. *Finally*, the arbitration agreement must be valid in accordance with the general rules of Swedish contract law, *i.e.*, it must not be tainted by duress, undue influence, fraud, mistake or any other circumstance that give rise to voidability under general contract law.

2.4 Parties

Arbitration agreements are in principle only binding on the parties to the agreement.

¹ In Swedish, *Lag (1999:116) om skiljeförfarande*, available in Swedish at: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1999116-om-skiljeforfarande_sfs-1999-116.

However, in limited circumstances, an arbitration agreement may also become binding on third parties. For example, where a party assigns all of its rights and obligations under a contract, this assignment includes the agreement to arbitrate. Thus, the assignee will generally be bound by the arbitration agreement. Another notable example regards guarantees, where the prevailing view is that a guarantor is bound by an arbitration agreement included in the main contract between the creditor and debtor because the guarantee is ancillary to the main obligation of the debtor.

2.5 Arbitrability

Disputes that the parties may not settle by agreement are non-arbitrable. This is generally the case in disputes that affect public or third-party interests. Restrictions to arbitrability concern disputes related to criminal law, tax, declarations of bankruptcy, the personal status of individuals and companies, IP matters (the registration and validity of patents and trademarks except as between parties), certain employment law matters (disputes concerning collective bargaining agreements and discrimination), and family matters (divorce, guardianship, adoption etc.). There is a specific provision in section 1(3) of the Arbitration Act which provides that disputes concerning the Civil law effects of competition law as between parties are arbitrable.

Section 6 of the Arbitration Act includes a restriction to arbitrability with respect to consumers. Pursuant to said section, consumer disputes are arbitrable only if the arbitration agreement was made after the dispute arose. It is also noteworthy that an arbitration agreement may be invalidated or modified under section 36 of the Swedish Contracts Act.² This is relevant particularly with respect to weaker parties such as consumers or employees, if enforcing the agreement would be considered unreasonable in the circumstances of the case.

There are no general restrictions to arbitrability with respect to state entities. It is generally accepted that a valid arbitration agreement constitutes a waiver of sovereign immunity, with the possible exception for immunity from execution.

3. The intervention of the courts

3.1 The court's power to assess the arbitral tribunal's jurisdiction

Swedish courts respect the competence-competence principle that is enshrined in section 2 of the Arbitration Act. However, the section 2 of the Arbitration Act also entitles a party to seek a declaratory judgment from a competent Swedish court on whether or not the arbitral tribunal has jurisdiction. Such an action may be brought both before and after the initiation of the arbitral proceedings.³ If the arbitration is ongoing at the time of the court action, the arbitral tribunal may continue the arbitration pending the final outcome of the court proceedings.

3.2 Dismissing litigation covered by an arbitration agreement

If a party initiates court proceedings in breach of a valid arbitration agreement, the court must, at the request of a party, dismiss the action.

An objection to the jurisdiction of the court must be raised not later than when the objecting party submits its first defence brief. The party invoking the arbitration agreement bears the burden of proof to show the existence of a valid arbitration agreement.

² In Swedish, *Lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område*, available in Swedish at: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1915218-om-avtal-och-andra-rattshandlingar_sfs-1915-218.

³ In a proposed bill with amendments to the Arbitration Act (SOU 2015:37), the right to initiate such an action will be more limited. The bill is expected to result in legislation in 2018.

This applies regardless of whether the place of arbitration under the agreement is in Sweden or abroad. However, if the law applicable to the arbitration agreement is something other than Swedish law (*i.e.*, the seat of arbitration is outside Sweden or the parties have agreed on applying foreign law), the Swedish court will not only determine whether the arbitration agreement is enforceable under the applicable law, but also whether the dispute is arbitrable under Swedish law prior to dismissing the action.

Pursuant to section 5 of the Arbitration Act, a party loses its right to invoke an arbitration agreement as a bar to court proceedings if the party has obstructed the arbitration by (a) opposing a request for arbitration, (b) failing to appoint an arbitrator in due time, or (c) failing in due time to provide its share of the requested security for the compensation of the arbitrators.

3.3 Effects of injunctions by foreign tribunals

It is unlikely that Swedish courts would give direct effect to injunctions by arbitral tribunals seated abroad enjoining the court to stay litigation proceedings.

3.4 Intervention in foreign arbitrations

Swedish courts are arbitration-friendly and will typically not intervene in arbitrations seated in Sweden or abroad. However, under section 49(2) of the Arbitration Act, Swedish courts are permitted to order interim measures in aid of arbitrations seated outside of Sweden at the request of a party. The available measures are provided for in Chapter 15 of the Swedish Code of Judicial Procedure.⁴ These measures include the attachment of assets or specific property and any other “*appropriate measures*” intended to secure the claimant’s claim, such as prohibitory injunctions or orders to perform a certain action under a default fine. Although it remains somewhat open for discussion, the prevailing view is that the reference to “*appropriate measures*” under Chapter 15, section 3 of the Code of Judicial Procedure does not grant Swedish courts authority to intervene in arbitrations abroad by ordering an anti-suit injunction.

The interim measures can be ordered only at the application of a party who shows that there is probable cause of a lawful claim against the other party. It must also be reasonable to suspect that the opposing party would evade payment or otherwise obstruct the applicant’s right. The applicant is generally obliged to deposit security in order to obtain the interim measure.

In addition, section 50 of the Arbitration Act allows a party to an arbitration seated abroad to have direct recourse to a Swedish court for assistance with the taking of evidence. Subject to the consent of the arbitral tribunal, a party may request assistance from the Swedish court to hear a witness or an expert under oath or a party under truth affirmation. The court may also order a person to produce a document or an item as evidence. The Swedish court will accept such a request if the measure can be lawfully taken under the Swedish Code of Judicial Procedure, the arbitration is covered by an arbitration agreement and the dispute is arbitrable in accordance with Swedish law.

4. The conduct of the proceedings

4.1 Party representation

In Swedish arbitral proceedings, parties can either retain outside counsel or be self-represented. In practice, parties most often retain outside counsel.

4.2 Court control of arbitrators

Swedish courts exercise control over the independence and impartiality of arbitrators at the application of a party in *ad hoc* arbitral proceedings. However, the party must first make a request to the arbitral tribunal to remove the arbitrator. If such request is denied by the arbitral tribunal, the matter will be tried by the

⁴ In Swedish *Rättegångsbalk* (1942:740), available in English at: <http://www.regeringen.se/49bb67/contentassets/5503f73d320b4de5bb521dd7ee07500a/the-swedish-code-of-judicial-procedure>.

court at the request of the party. The courts will remove an arbitrator if there exists any circumstance which may diminish confidence in the arbitrator's impartiality. Section 8 of the Arbitration Act lists four situations in which such circumstances are always deemed to exist:

- when the arbitrator or a person closely associated with him/her is a party, or otherwise may expect considerable benefit or detriment as a result of the outcome of the dispute,
- when the arbitrator or a person closely associated with him/her is the director of a company or any other association which is a party, or otherwise represents a party or any other person who may expect considerable benefit, or detriment as a result of the outcome of the dispute,
- when the arbitrator has taken a position in the dispute, as an expert or otherwise, or has assisted a party in the preparation or conduct of his case in the dispute, or
- when the arbitrator has received or demanded compensation on the basis of a private agreement concluded with only one of the parties.

In practice, Swedish courts demand a rather high standard of independence and impartiality from arbitrators. For example, in *AJ v Ericsson AB*, the Supreme Court explained that the determination of whether certain circumstances give rise to justifiable doubts must be made on the basis of objective grounds and not on the basis of a risk assessment in a specific case.⁵ The Supreme Court also acknowledged the relevance of the IBA Guidelines on the Conflict of Interest in International Arbitration in assessing impartiality under Swedish law.

An arbitrator's failure to disclose relevant circumstances does not *per se* suffice to accept a challenge of an arbitrator. However, it may in some cases be a factor to be taken into account.⁶

4.3 Court assistance in the constitution of a tribunal

Section 13 of the Arbitration Act provides that, unless the parties have agreed otherwise, each party appoints one arbitrator and the party-appointed arbitrators appoint a third arbitrator to act as chairman. Pursuant to section 14 of the Arbitration Act, if a party fails to appoint an arbitrator within 30 days, the court will appoint the arbitrator at the request of the other party. Similarly, pursuant to section 15(1) of the Arbitration Act, if the party-appointed arbitrators fail to appoint the chairman within 30 days from the date on which the last arbitrator was appointed, the court will make such an appointment at the request of any party.

There are also other instances where courts will assist in the constitution of the arbitral tribunal. Section 15(2) of the Arbitration Act provides that the court will appoint an arbitrator if a party so requests after a 30 day time-limit, when the parties have agreed that the arbitrator is to be appointed by a third party but the third party had failed to do so despite the request of a party. The same applies when the parties have agreed to jointly appoint an arbitrator but fail to agree on the person to be appointed.

4.4 Interim measures by courts

Sections 4(3) and 49(2) of the Arbitration Act grant Swedish courts power to issue interim measures during and prior to arbitral proceedings, regardless of whether the seat of arbitration is in Sweden or abroad. The available measures and the conditions under which they are issued are provided in Chapter 15 of the Swedish Code of Judicial Procedure.⁷

The available interim measures include, for example, the attachment of assets or specific property, restoration of possession, and any other appropriate measures intended to secure the claimant's claim,

⁵ Supreme Court case NJA 2007, p. 841.

⁶ Government Bill 1998/99:35, p. 217.

⁷ See, footnote 4 above.

such as prohibitive measures to restrain a party from carrying out certain actions or positive measures to require a party to take certain action under a default fine.

The interim measures can be ordered only at the application of a party who shows that there is probable cause of a lawful claim against the other party. It must also be reasonable to suspect that the opposing party would evade payment or otherwise obstruct the applicant's right. The applicant is generally obliged to deposit security in order to obtain the interim measure. The courts will also consider requests *ex parte, i.e.*, without hearing the other party, if delay would place the applicant's claim at risk. If interim measures are sought prior to commencing the arbitration, the applicant must submit a request for arbitration within one month from the issuance of the interim measure.

4.5 Confidentiality

The Arbitration Act does not regulate the confidentiality of arbitral proceedings. The Supreme Court has established that the parties to an arbitration do not have a legal duty of confidentiality unless the parties have explicitly agreed so.⁸ Parties are thus free to disclose, for example, that they are involved in arbitration unless they have agreed otherwise.

Arbitrators are, instead, understood to be under a duty of confidentiality by virtue of their assignment. Arbitrations are also private in the sense that third parties cannot attend hearings or access documents without the consent of the parties. Moreover, there is no duty to register Swedish arbitral awards with any third parties. An award which is challenged in court becomes public under the general rules of court publicity. To avoid this, a party can request the court to declare the award secret *e.g.*, on the grounds of protecting trade secrets.

4.6 Length of proceedings

The Arbitration Act does not regulate the length of arbitral proceedings. The parties may, however, agree on a time limit for rendering the award, for example, by referring to institutional rules including such a time limit.

4.7 Place of hearings

Section 22(2) of the Arbitration Act provides that, unless the parties have agreed otherwise, the arbitral tribunal may hold hearings and meetings outside the seat of arbitration.

4.8 Interim measures by arbitrators

Section 25(4) of the Arbitration Act allows for arbitrators to issue interim measures, unless the parties have agreed otherwise. The interim measures may be issued at the request of a party and for the purposes of securing the claim to be decided by the arbitral tribunal. The arbitrators may require the requesting party to provide reasonable security to cover any damage that may be incurred to the other party as a result of the interim measure.

Under the above-mentioned section 25(4), arbitrators have wide discretion in deciding whether it is justifiable to grant interim measures. Similarly, they have wide discretion as to deciding on the measures granted. At the very least, the same interim measures are available to the parties as those provided for in Article 17 of the UNCITRAL Model law, *e.g.*, orders to maintain or restore the *status quo*, to take action that would prevent or refrain from taking action that is likely to harm the proceedings, to preserve the assets out of which the award may be satisfied, or to preserve evidence. Arbitral tribunals are not, however, empowered to grant interim measures against third parties except by asking a third party to voluntarily perform in order to secure evidence.

⁸ Supreme Court case NJA 2000 p. 538.

Interim measures granted by arbitral tribunals (similar to decisions by emergency arbitrators) are not enforceable in Sweden. However, interim measures granted by arbitral tribunals seated in Sweden may be enforceable elsewhere, for example in countries which have adopted Article 17 H of the UNCITRAL Model Law. Although the unenforceability of interim measures issued by arbitral tribunals in Sweden may seem like a disadvantage compared to countries that have adopted Article 17 H, the difference does not often have much practical relevance. Parties are contractually bound by interim measures issued by the arbitral tribunal in their mutual relationship. Failure to comply with such measures can have contractual implications and may also be ascribed importance by the arbitral tribunal, for example, with respect to determining liability for losses or calculating damages. Thus, the parties generally comply with the interim measures. Also, an interim measure issued by an arbitral tribunal does not prevent a party from seeking an enforceable interim measure from Swedish courts.

4.9 Evidence

It is for the parties to outline the facts of the case and present the evidence they deem necessary, with judges and arbitrators rarely embarking on fact-finding or appointing own experts. Pursuant to section 25(2) of the Arbitration Act, the arbitral tribunal may refuse to admit evidence which is manifestly irrelevant to the arbitration. Evidence may also be refused if it is justified having regard to the time at which the evidence is submitted, *i.e.*, if the evidence is submitted at a late stage in the proceedings.⁹ Otherwise, there are few rules on the admissibility of evidence in Swedish arbitration law. For example, there are no restrictions to the presentation of testimony by a party employee or to the presentation of hearsay evidence. The arbitral tribunal is free, however, to exercise its discretion in determining the evidentiary value of such evidence in the arbitration.

4.10 Mandatory hearing

Section 24(1) of the Arbitration Act makes it mandatory to hold a hearing prior to the determination of an issue on the merits if a party so requests. The arbitral tribunal can only deny the right to a hearing if the parties have agreed that no hearings must be held, for example, by referring to institutional rules for expedited arbitrations in which holding a hearing is made subject to the arbitrator's discretion.

4.11 Awarding of interest

Section 37(2) of the Arbitration Act regulates the awarding of interest to the arbitrator's costs by providing that such interest is to be calculated as from one month after the rendering of the award. Section 42 of the Arbitration Act also mentions that the arbitral tribunal may, at the request of party, order the other party to compensate for its legal expenses with interest. Otherwise, the Arbitration Act is silent on the principles of awarding interest. Interest on the principal amount on the merits is deemed a substantive, rather than procedural, issue. If Swedish law applies to the merits, the substantive provisions for interest are included in the Swedish Interest Act.¹⁰

The Interest Act defines the applicable interest rate on the basis of a fluctuating reference rate determined by the Swedish National Bank every half-year. If the parties have not agreed otherwise, the delay interest rate for debts that have fallen due (including, for example, arbitrators' costs and compensation for the parties' legal expenses as referred to in sections 37 and 42 of the Arbitration Act) is eight (8) percentage units higher than the reference rate. Between 1 January 2015 and 30 June 2018, the reference rate has been either 0.00% or -0.50% and the corresponding delay interest rate has thus been either 8.00% or 7.50%.

⁹ Although not explicitly stated in the Arbitration Act, the arbitral tribunal will usually only refuse to admit evidence if the arbitral tribunal has set a final date for submitting evidence and the evidence is – without sufficient cause – submitted after the expiry of such deadline.

¹⁰ In Swedish *Räntelag* (1975:635), available in Swedish at: http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/rantelag-1975635_sfs-1975-635.

4.12 Allocation of arbitration costs

Section 37 of the Arbitration Act provides that the parties are jointly and severally liable for the compensation of the arbitrators' work and expenses. There is one exception to this rule of joint and several liability, that is in situations where the arbitral tribunal has ruled that it lacks jurisdiction to determine the dispute. In such cases, the claimant is to pay the arbitration costs, whereas the respondent is liable only to the extent required due to "*special circumstances*". For example, if a respondent's negligence has increased costs, the respondent may be held liable for those additional costs.

Section 42 of the Arbitration Act provides that the arbitrators may, upon request by a party, order the opposing party to compensate for the party's legal expenses with interest. The arbitrators may also determine the manner in which the compensation to the arbitrators shall be finally allocated between the parties. The main rule in Sweden is that the costs follow the event. In cases where some requests for relief are granted and others denied, the arbitrators are likely to allocate the costs by taking into account the time and effort spent during the proceedings for the various contentious issues. The arbitral tribunal may also use its discretionary powers to allocate costs to sanction an obstructing party.

4.13 Liability

Although the Arbitration Act does not regulate the issue of arbitrators' liability, arbitrators do not benefit from automatic immunity from civil liability. However, most institutional rules include limitations on the arbitrators' liability and arbitrators may also limit their liability through contract. Limitations where the arbitrators' liability for errors caused by normal negligence is excluded are valid and respected in Sweden, whether included in institutional rules or in terms of engagement.

In the absence of such limitations of liability, the liability of the arbitrators is subject to the general rules of Swedish contract law.¹¹ This means that an arbitrator may be held liable in damages if he or she causes loss to a party through negligence in the performance of his or her duties. For example, a failure to perform the arbitrator's obligation to render an award or a procedural error that has led to setting aside the arbitral award may result, if negligence is established, in liability for the arbitrators to compensate for the additional costs incurred to the parties.¹² The lack of cases by Swedish higher courts on arbitrators' liability suggests that it is uncommon to initiate such proceedings against arbitrators.¹³

Any potential criminal liability will be assessed under the Swedish criminal law. For example, if an arbitrator accepts a bribe, he or she may become subject to criminal proceedings.

5. The award

5.1 Reasons

There is no requirement in the Arbitration Act that arbitrators must give reasons for the award. However, most institutional rules require that the award must state the reasons on which it is based and this is generally also considered good practice.

¹¹ As there are no Swedish cases from higher courts on an arbitrator's liability, the conditions under which such liability may arise are not entirely clear. The common view is that an arbitrator has a liability for damages and that the liability will be based on contractual grounds and rules applicable to trustees. The general prerequisite for liability is negligence, although some authors set the standard higher to gross negligence. Also, there are different views on the type of errors that may give rise to liability. Some authors distinguish between procedural errors (that arbitrators should be liable for) and assessment errors, such as incorrect application of substantial law (that arbitrators should arguably not be liable for).

¹² It has been discussed in Swedish legal literature whether a challenge of the award in question is a prerequisite for a claim for damages against an arbitrator. Although there are different views on the subject, it seems that a challenge is not a prerequisite for liability (and neither is the setting aside of the award). However, the setting aside of an award may serve as proof of negligence and possible damage incurred. In absence of any Supreme Court judgment on the matter, the issue remains debatable.

¹³ However, it may be that such cases are settled by involved parties (and their insurance companies) without the assistance of courts.

5.2 Waiver of annulment

The Arbitration Act makes a distinction between an action to declare an award invalid and an action to set aside an award. The right to an action declaring an award invalid cannot be waived by agreement. However, pursuant to section 51 of the Arbitration Act, foreign parties (*i.e.*, those which are neither domiciled nor have a place of business in Sweden) may agree to exclude or limit the application of the grounds for setting aside an award through a binding “*exclusion agreement*”.¹⁴ An award that is subject to such an exclusion or limitation agreement shall be recognised and enforced in Sweden in accordance with the rules applicable to foreign awards.

5.3 Atypical, mandatory requirements

The Arbitration Act distinguishes between awards and decisions. An award is final and binding, whereas decisions are not enforceable and may – at least as a general rule – be amended by the arbitral tribunal at any stage during the proceedings.

Pursuant to section 27 of the Arbitration Act, an *award* is to be issued when the arbitral tribunal (1) makes a determination on the merits of the case, (2) terminates the proceedings without ruling on the merits, for example due to the finding that it lacks jurisdiction or due to withdrawal of claims by the parties, or (3) confirms, at the request of the parties, a settlement agreement entered into by the parties. All other determinations that are not included in an award, such as procedural determinations that do not terminate the proceedings, are to be made in the form of a *decision*.

Section 2 of the Arbitration Act particularly provides that an arbitral tribunal’s affirmation of its own jurisdiction during the proceedings is a non-binding decision. This means that such an affirmation cannot be rendered in the form of an interim or partial award, nor can it be separately challenged or otherwise appealed until the arbitral tribunal has made a final determination on its jurisdiction in the final award. However, as mentioned in the foregoing, a party can seek a declaratory judgment from a Swedish court on whether or not the arbitral tribunal has jurisdiction.¹⁵

Awards rendered in Sweden must abide by certain formal requirements: (i) the award must be made in writing, (ii) the award must be signed by the arbitrators, (iii) the award must state the seat of arbitration, and (iv) the award must state the date upon which the award was rendered. If the award does not fulfil these requirements, then the award is invalid.

In addition to these requirements, some awards must contain instructions with respect to how to seek recourse against them. For example, a final award which does not render a ruling on the merits (for example because the arbitral tribunal finds that it lacks jurisdiction) must include instructions to the parties on how to appeal the award as per section 36 of the Arbitration Act. Moreover, where an award provides that a party has to pay the arbitrators’ compensation, it must contain instructions on how and when to challenge such an award, *i.e.*, how to challenge costs before a competent District Court.

5.4 Appeal

A Swedish arbitral award is final and binding as of the day it is rendered and cannot be challenged on the merits, but only on formal or procedural grounds. On these narrow-defined grounds, parties can apply to have the award declared invalid under section 33 of the Arbitration Act or to have it set aside under section 34 of the Arbitration Act.

The provisions governing invalidity are not based on the UNCITRAL Model Law but on a consideration of public interest and the interest of third parties. Thus, pursuant to section 33 of the Arbitration Act, an award rendered in Sweden is *invalid* if:

¹⁴ Both parties must be foreign in order to apply such an exclusion agreement.

¹⁵ See, section “The court’s power to assess the arbitral tribunal’s jurisdiction” above.

- The disputed matter was not arbitrable.
- The award is clearly incompatible with public policy.
- The award does not fulfil the requirements with regard to its written form and signature in accordance with section 31(1) of the Arbitration Act.

The circumstances set forth above are exhaustive and cannot be waived. Moreover, there are no time limits by which a party must challenge the invalidity of the award. Due to the serious nature of the invalidity grounds, such challenges are exceptionally rare. It is worth noting that invalidity may apply only to a certain part of the award.

Pursuant to section 34 of the Arbitration Act, an award made in Sweden can also be challenged and *set aside*, wholly or partly, by the court on one of the following grounds:

- The arbitration agreement is invalid.
- The arbitrators have exceeded their mandate or have not produced an award within the time limit set by the parties.
- The arbitral proceedings should not have taken place in Sweden.
- There were irregularities in the appointment of an arbitrator.
- An arbitrator lacks capacity or impartiality.
- There are other procedural irregularities that can be presumed to have influenced the outcome of the case.

An action to challenge the award under section 34 of the Arbitration Act must be brought within three months from receipt of the award. Pursuant to section 43 of the Arbitration Act, the action shall be considered by the Court of Appeal, whose determination as a main rule cannot be appealed. However, the Court of Appeal may grant a party leave to appeal to the Supreme Court in circumstances where it is of importance as a matter of precedent. If the Court of Appeal does not grant leave to appeal, the case cannot be tried by the Supreme Court.¹⁶

In addition to actions brought under sections 33 and 34 of the Arbitration Act, certain awards can be subject to *appeal* under section 36 of the Arbitration Act. Section 36 is applicable to awards through which the arbitral tribunal has terminated the proceedings without rendering any ruling on the merits, *e.g.*, due to a negative finding of the arbitral tribunal's jurisdiction. Upon appeal, not only may the court review the procedural issue, which has been answered by the arbitral tribunal's decision to dismiss, but also the actual handling of that issue by the arbitral tribunal.

Pursuant to section 41 of the Arbitration Act, parties can also appeal a decision on the payment of compensation to the arbitrators. Such an action must be brought before the District Court within three months from the receipt of the award. A judgment in which the compensation to an arbitrator is reduced applies also to the party who did not bring the action.

¹⁶ In an appeal process, there can be an oral hearing before the Court of Appeal and/or the Supreme Court if the court finds it appropriate or if requested by any of the parties. Usually, there will be an oral hearing before the Court of Appeal, whereas an appeal before the Supreme Court will usually be based on the written submissions without any oral hearing. An appeal process will take approximately 18 months before each instance. Depending on the specific case at hand, the duration of an appeal process may of course be shorter or longer.

5.5 Recognition and enforcement

The Arbitration Act does not include any provisions on the recognition and enforcement of Swedish awards in Sweden, such provisions are found in the Swedish Enforcement Code.¹⁷ Swedish awards are enforced based on an application for execution filed with the Swedish Enforcement Authority (the “SEA”). On a party’s application, the SEA will enforce an award rendered in Sweden directly, without prior confirmation by the courts, provided that:

- The award is made in writing and is signed; and
- The award cannot be subject to appeal under the provisions contained in the arbitration agreement.

Enforcement proceedings are generally relatively swift, provided that the award is not challenged and no other complicating circumstances arise. There is no expedited enforcement procedure.

If the SEA believes that an award may be invalid because the issue decided is non-arbitrable, or because the award is against public policy, the SEA shall direct the party seeking enforcement to initiate court proceedings concerning the validity of the award (if this has not already been done by the opposing party).

As regards foreign awards, the general rule under section 53 of the Arbitration Act is that they are recognised and enforced in Sweden. An application for enforcement together with the original award or certified copy thereof must be lodged with the Svea Court of Appeal in Stockholm and undergo *exequatur* proceedings. The application is communicated to the opposing party, thereby providing it with an opportunity to express its opinion on that application.

If the opposing party objects to the recognition or enforcement of the foreign award, such will be refused on grounds based on the New York Convention and laid out in section 54 of the Arbitration Act. Enforcement of a foreign award shall also be refused at the court’s own initiative under section 55 of the Arbitration Act, when it finds that (i) the award includes the determination of an issue which, in accordance with Swedish law, may not be decided by an arbitral tribunal; or (ii) it would be clearly incompatible with the basic principles of the Swedish legal system to recognise and enforce that award.

5.6 Suspension of enforcement

An award rendered in Sweden remains binding and enforceable even if the award is challenged. However, the court before which the challenge of the award is pending may, at the request of either party, decide to suspend the enforcement until it has made its final decision on the challenge.

Similarly, the introduction of annulment or appeal proceedings against a foreign arbitral award does not automatically suspend the enforcement of such foreign award in Sweden. Under section 58(2) of the Arbitration Act, the Swedish court before which the enforcement application is pending may decide to postpone its decision, if the opposing party contends that it has challenged the award and requests a stay of enforcement. If the foreign challenge is to be decided in the near future, the Swedish court may be more likely to grant a postponement. However, whether a challenge will be decided in the near or distant future is not determinative but might, at most, only have a minor influence on the court’s decision. Similarly, the amount of money involved in the award, whether large or small, is not a reason to stay execution.

If the foreign court in which the challenge is pending grants a stay of execution of the award, Swedish courts typically respect the stay and await the outcome of the challenge. This postponement is not automatic; if the Swedish courts believe the challenge is weak or unfounded they will pursue the enforcement procedure without delay. A stay of execution must be decided on a case specific basis. If the foreign court grants a stay as a matter of course whenever there is a challenge of an arbitral award, Swedish courts will typically not adhere to the foreign court’s decision.

¹⁷ In Swedish *Utsökningsbalk (1981:774)*, available in Swedish at: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/utsokningsbalk-1981774_sfs-1981-774.

If the Swedish court decides to stay the enforcement of an award that has been challenged abroad, it may, at the request of the party applying enforcement, order the other party to provide reasonable security.

5.7 Annulment at the seat

Swedish law adopts the position that an arbitral award which is set aside by a court in the country in which the award is made cannot be enforced in Sweden. However, in such case, the court will not refuse the enforcement at its own initiative but only at the objection of a party who proves that the arbitral award has been set aside by a competent foreign authority.

5.8 Enforceability in practice

As a result of the limited grounds for refusal of enforcement, the respondent's burden of proof and the pro-arbitration approach of Swedish courts, foreign awards are readily enforced in practice.

6. Funding arrangements

6.1 Fee arrangements

In general, a lawyer is free to agree on any legal fee or fee structure with the party he/she represents. However, an *advokat* (a lawyer who has been accepted to the Swedish Bar) is bound by the rules adopted by the Bar Association that all fees charged by an *advokat* must be reasonable. Fees are normally charged on the basis of several factors such as the importance and difficulty of the matter, the time spent, the responsibility of the *advokat* and the outcome.

6.2 Contingency fees

Contingency fees are generally prohibited for members of the Swedish bar. However, there is no general restriction for foreign counsel. Foreign counsel must abide by the ethical rules of the jurisdiction to which they belong.

6.3 Third-party funding

Third-party funding is allowed. A third party funding an arbitration is not a party and has no formal role in the proceedings. Thus, the third party may under no circumstances assume control of the litigation or otherwise participate therein unless the provisions regarding intervention apply.

7. Reform in arbitration law

In February 2014, *i.e.*, 15 years after the enactment of the current Arbitration Act, an expert committee was set up to review how well the Arbitration Act had worked in practice and how it measured up internationally. In its extensive Government Official Report issued in April 2015 (SOU 2015:37), the committee concluded that the current act had worked well overall. However, it suggested a number of improvements to make arbitration in Sweden even more attractive for both Swedish and international actors.

On 1 March 2018, the Government referred its report to the Council on Legislation for consideration. The referred report did not include all of the suggestions of the expert committee but it did propose the following amendments, among others:

- Repealing the provisions about positive or negative declaratory claim before a District Court regarding the tribunal's jurisdiction that can be made *at any point* during the proceedings. Instead, the Government suggests that such claims may be brought only *before* an arbitration has been initiated. It also suggests that the tribunal's decision affirming its own jurisdiction may be appealed by the dissatisfied party to the Court of Appeal.

- Improving the efficiency of procedure for challenging arbitral awards by allowing the use of English language to a larger extent in the taking of evidence through witness examination, shortening the time for bringing challenges against the award from three months to only two months, and restricting the possibilities to challenge an award on the basis of the arbitrators exceeding their mandate only to cases where it has probably had an effect on the outcome of the case.
- Improving the possibilities of a party to appoint a new arbitrator when the arbitrator cannot carry out its task.

The Government proposes that the amendments enter into force on 1 March 2019.

For more information on arbitration in Sweden, Mannheimer Swartling has published a Concise Guide to Arbitration in Sweden that is available upon request.

SWITZERLAND

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

SÉBASTIEN BESSON, ANTONIO RIGOZZI AND SILJA SCHAFFSTEIN
OF LÉVY KAUFMANN-KOHLER

LKK
LÉVY KAUFMANN-KOHLER

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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS

1. Law ●
 - a. Framework ●
 - b. Adherence to international treaties ●
 - c. Limited court intervention ●
 - d. Arbitrator immunity from civil liability ●
2. Judiciary ●
3. Legal expertise ●
4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

VERSION: 16 APRIL 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

With its longstanding tradition and experience in international arbitration, Switzerland remains one of the preferred arbitral seats in the world. Swiss arbitrators continue to be among the most frequently appointed and Swiss substantive law among the most frequently chosen laws to govern international contracts. Chapter 12 of the Swiss Private International Law Act ("PILA") is a modern and innovative arbitration law. Its main strengths include its clarity and conciseness, making it easily accessible for (foreign) lawyers and non-lawyers alike, as well as the great importance afforded to party autonomy, meaning that the parties are free to fashion the proceedings in accordance with their specific needs. Switzerland's reputation for neutrality and stability and its courts' consistent pro-arbitration approach further explain why parties often choose Switzerland as a place of arbitration and why numerous arbitration institutions are based here.

Key places of arbitration in the jurisdiction	Geneva and Zurich.
Civil law / Common law environment?	Civil law
Confidentiality of arbitrations?	Absent an express agreement to the contrary, the arbitrator's contract implies a duty of confidentiality for the arbitrators. It is controversial whether the arbitration agreement implies a duty of confidentiality for the parties. They may enter into an express confidentiality agreement. ¹
Requirement to retain (local) counsel?	There is no requirement to retain Swiss counsel for arbitration proceedings with a seat in Switzerland. By contrast, applications to the Swiss Supreme Court must be signed by the party or an attorney who is authorised to represent parties before the Swiss courts pursuant to the Swiss Federal Lawyers' Act ("LLCA" or " <i>Loi fédérale sur la libre circulation des avocats</i> " in French, " <i>Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte</i> " in German) or in accordance with an international treaty (Article 40(1) of the Swiss Supreme Court Act ("SCA")). Concerning proceedings before the <i>juge d'appui</i> , the Swiss Code of Civil Procedure ("CCP") does not require the parties to be professionally represented by an attorney (Article 68(1) CCP). As under Article 40(1) SCA, pursuant to Article 68(2) CCP, they may however choose to be represented by a " <i>lawyer admitted to represent parties before the Swiss courts under the [LLCA]</i> ". ²

¹ Gabrielle KAUFMANN-KOHLER/Antonio RIGOZZI, *International Arbitration – Law and Practice in Switzerland*, Oxford 2015, paras. 3.34, 4.188, 7.177; Noradèle RADJAI, Confidentiality of Arbitration in Switzerland, *Arbitration in Switzerland – The Practitioner's Guide*, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands 2013, paras. 18-23.

² Attorneys qualified in a Member State of the European Union ("EU") or the European Free Trade Association ("EFTA") may under certain conditions represent parties before the Swiss courts (Articles 21 to 29 LLCA), subject to the relevant provisions of cantonal law. In Geneva, attorneys qualified in a non-EU/EFTA Member State may under certain conditions obtain an *ad hoc* authorization to assist a party before the Geneva courts. However, in order to represent the party before the Geneva courts, the non-EU/EFTA attorney must act with an attorney registered with a Swiss bar (Article 23 of the Geneva Lawyers' Act ("*Loi sur la profession d'avocat*" or "LPAV")).

Ability to present party employee witness testimony?	As a rule, any person capable of testifying about the facts based on his or her own perception may be a witness, including the parties themselves. ³
Ability to hold meetings and/or hearings outside of the seat?	Meetings and/or hearings can be conducted outside of Switzerland.
Availability of interest as a remedy?	Yes, generally.
Ability to claim for reasonable costs incurred for the arbitration?	The parties have a right to a decision on costs and the arbitral tribunal has an obligation to make such a decision, at the latest in the final award.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Swiss law does not prohibit third party funding. Under Article 12(1)(e) LLCA, Swiss attorneys cannot enter into a prior agreement with their clients providing for a contingency fee based entirely on the outcome of the case (<i>pactum de quota litis</i>); nor can they agree to waive legal fees in the event of an unfavourable outcome. A fee arrangement containing elements of a contingency fee (<i>pactum de palmario</i>) is allowed under certain conditions.
Party to the New York Convention?	Switzerland is a party to the New York Convention. There is no reservation of reciprocity.
Other key points to note	∅
WJP Civil Justice score (2018)	∅

³ Christian OETIKER, Ad Hoc Arbitration in Switzerland, *Arbitration in Switzerland – The Practitioner’s Guide*, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands 2013, para. 44.

ARBITRATION PRACTITIONER SUMMARY

Chapter 12 of the Swiss Private International Law Act ("PILA") governs international arbitrations with a seat in Switzerland. Salient features of Chapter 12 PILA include its clarity and conciseness, party autonomy and arbitration-friendliness, namely through comparatively more favourable standards regarding (i) the validity of arbitration agreements (Article 178 PILA); (ii) the arbitrability of any matter involving an economic interest (Article 177(1) PILA); (iii) the assistance of experienced state courts in support of arbitration (Articles 179(2) and (3), 180(3) and 183-185 PILA); (iv) an exhaustive and narrowly defined list of grounds of annulment of arbitral awards (Article 190(2) PILA), including a possibility for parties without any territorial connection with Switzerland to waive their right to seek annulment (Article 192 PILA); and (v) an arbitration-friendly approach by Swiss courts towards the recognition and enforcement of foreign awards under the New York Convention (Article 194 PILA).

Date of arbitration law?	18 December 1987, in force as from 1 January 1989.
UNCITRAL Model Law? If so, any key changes thereto?	While Chapter 12 PILA is not based on the UNCITRAL Model Law, there are no major differences or inconsistencies between these texts.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	<p><u>Geneva:</u> <i>Tribunal de première instance</i> (Article 356(2) of the Swiss Code of Civil Procedure ("CCP"); Article 86(2)(d) of the Geneva Law on Judicial Organisation ("<i>Loi sur l'organisation judiciaire</i>" or "LOJ/GE")); <i>Chambre civile de la Cour de Justice</i> (Article 120(1)(a) LOJ/GE).</p> <p><u>Zurich:</u> <i>Obergericht</i> (Articles 356(1) and 356(2)(a) and (b) CCP; § 46 of the Zurich Law on Judicial Organisation ("<i>Gesetz über die Gerichts- und Behördenorganisation im Zivil- und Strafprozess</i>" or "GOG/ZH")); <i>Bezirksgericht</i> (specifically, <i>Einzelgericht</i>) (Article 356(2)(c) CCP; §32 GOG/ZH).</p> <p>Assistance in matters of (i) constitution of the arbitral tribunal; (ii) challenge of arbitrators; (iii) any procedural matters, including provisional measures and the taking of evidence (Articles 179(2) and (3), 180(3) and 183-185 PILA).</p>
Availability of <i>ex parte</i> pre-arbitration interim measures?	Swiss courts (Article 265(1) CCP) and arbitral tribunals (unless the parties have otherwise agreed; Article 183 PILA) can grant <i>ex parte</i> provisional measures. However, as long as the arbitral tribunal is not yet constituted and no other private body, such as an emergency arbitrator, is available, the parties have no other option than to submit their request for (<i>ex parte</i>) interim relief to a state court. ⁴
Courts' attitude towards the competence-competence principle?	Articles 186(1) and (1bis) PILA establish and recognize the competence-competence principle.
Grounds for annulment of awards additional to those based on the criteria for the recognition and	Exhaustive and narrowly defined list of annulment grounds (Article 190(2) PILA): irregular constitution of the arbitral tribunal (a); incorrect decision on jurisdiction (b); <i>ultra</i> or <i>infra petita</i> decisions (c); violations of fundamental principles of procedure

⁴ Bernhard BERGER/Franz KELLERHALS, *International and Domestic Arbitration in Switzerland*, 3rd ed., Berne 2015, para. 1275.

enforcement of awards under the New York Convention?	(d); and violations of public policy (e). These grounds are generally in line with Article V of the New York Convention, although the list in Article 190(2) PILA is more restrictive as it does not include the violation of the procedural rules agreed by the parties.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	While the Swiss courts have not yet decided this issue, Swiss commentators suggest that the recognition of awards annulled at the seat could be envisaged where the ground for annulment departs from those stated in Article V of the New York Convention, ⁵ or the annulment amounts to a manifest violation of the law of the country in which the award was made. ⁶
Other key points to note?	∅

⁵ KAUFMANN-KOHLER/ RIGOZZI, *op. cit.* fn 1, para. 8.269.

⁶ BERGER/KELLERHALS, *op. cit.* fn 4, para. 2083; Sébastien BESSON/Luc PITTET, *La reconnaissance à l'étranger d'une sentence annulée dans son Etat d'origine - Réflexions à la Suite de l'Affaire Hilmaron*, 16 ASA Bulletin (1998), p. 525.

JURISDICTION DETAILED ANALYSIS

1. Introduction

Thanks to its arbitration-friendly legal framework and longstanding dispute-settlement tradition, Switzerland is home to a number of well-known arbitral institutions, including the Swiss Chambers' Arbitration Institution ("SCAI"),⁷ the Court of Arbitration for Sport ("CAS")⁸ and the World Intellectual Property Organization ("WIPO")'s Arbitration and Mediation Center.⁹ Together with its stable political environment and strong professional and academic expertise in the field, these factors contribute to making Switzerland one of the leading international arbitral seats.¹⁰

2. The law governing international arbitration in Switzerland

2.1 Swiss arbitration law: a dual system

Swiss law regulates domestic and international arbitration in separate statutes. Chapter 12 of the Swiss Private International Law Act of 18 December 1987 ("PILA"), in force as from 1 January 1989, governs international arbitrations with a seat in Switzerland.¹¹ Part 3 of the Swiss Code of Civil Procedure of 1 January 2011 ("CCP") governs domestic arbitrations.¹²

Under Article 176(1) PILA, Chapter 12 PILA applies if (i) the arbitral seat is in Switzerland and (ii) at the time of the conclusion of the arbitration agreement, at least one of the parties to the arbitration proceedings¹³ had neither its domicile nor its habitual residence in Switzerland. Therefore, for determining the international character of the arbitration, the relevant point in time is the conclusion of the arbitration agreement.¹⁴

Article 353(2) CCP allows the parties to opt out of the domestic and into the international arbitration regime, even if the requirements of Article 176(1) PILA are not fulfilled.¹⁵ Conversely, Article 176(2) PILA entitles the parties to opt out of the international and into the domestic arbitration regime.

Chapter 12 PILA constitutes a stand-alone Arbitration Act, largely independent of other provisions in the PILA. However, some provisions of other chapters of the PILA may be relevant for the purposes of international

⁷ <https://www.swissarbitration.org/>.

⁸ <http://www.tas-cas.org/fr/index.html>.

⁹ <http://www.wipo.int/amc/en/center/background.html>.

¹⁰ See, for instance, 2015 ICC Dispute Resolution Statistics, ICC Bulletin 2016, pp. 14-16; 2016 ICC Dispute Resolution Statistics, ICC Bulletin 2017, pp. 111-112. See, also, the 2015 study commissioned by the JURI Committee of the European Parliament, reporting that Switzerland was the most highly recommended seat for international arbitration; 2010 International Arbitration Survey: Choices in International Arbitration, conducted by White & Case and the School of International Arbitration at Queen Mary, University of London, pp. 17-20.

¹¹ Available at: <https://www.admin.ch/opc/fr/classified-compilation/19870312/index.html>. An unofficial English translation of Chapter 12 PILA is available, among others, at: https://www.swissarbitration.org/files/34/Swiss%20International%20Arbitration%20Law/IPRG_english.pdf. For a translation of the full PILA, see http://www.andreasbucher-law.ch/images/stories/pil_act_1987_as_from_1_1_2017.pdf.

¹² Available at: <https://www.admin.ch/opc/fr/classified-compilation/20061121/index.html>. An English translation of the CCP, provided solely for 'informative purposes' and with no legal force, is also available on the Swiss Federal Legislative Compilation website, at <https://www.admin.ch/opc/en/classified-compilation/20061121/index.html>.

¹³ Supreme Court Decision 4P.54/2002 of 24 June 2002, para. 3. *Contra*: KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 2.33; Jean-François POUURET/Sébastien BESSON, *Comparative Law of International Arbitration*, 2nd ed., Zurich 2007, para. 35, noting that the Supreme Court's case law entails that it may not be possible to determine the law governing the arbitration at the time of the conclusion of the arbitration agreement, but only with the start of the arbitration proceedings.

¹⁴ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 2.32; POUURET/BESESON, *op. cit.* fn 13, para. 7; BERGER/KELLERHALS, *op. cit.* fn 4, para. 102.

¹⁵ See however Supreme Court Decision 4A_7/2018 of 18 April 2018, para. 2.3.3, where the Supreme Court suggested in an obiter dictum that the parties may not circumvent the more restrictive notion of arbitrability under Article 354 CCP by opting out of Part 3 of the CCP and into Chapter 12 PILA, at least as far as mandatory claims arising out of employment contracts are concerned.

arbitration.¹⁶ For instance, Articles 20 and 21 PILA define the notions of “domicile” and “habitual residence” in Article 176(1) PILA, and Article 21(4) PILA defines the notion of “business establishment” within the meaning of Article 192(1) PILA. The general rules in Chapter 13 PILA (Articles 196 to 199 PILA) govern issues of transitional law, and Article 7 PILA governs the effects of an arbitration agreement before a Swiss court seized of the merits of the dispute.

Some provisions in other chapters of the PILA may apply by analogy in international arbitration.¹⁷ For instance, the Swiss Supreme Court has held that arbitral tribunals may apply the conflict of laws rules in other chapters of the PILA to determine the law governing the capacity and authority of parties to enter into an arbitration agreement (Articles 35-36 PILA and Articles 154-155 PILA).¹⁸ It has also been submitted that arbitral tribunals can take the mandatory rules of third states into account, if the requirements of Article 19 PILA applied by analogy are met.¹⁹

Finally, some provisions in other Swiss statutes may be relevant. Concerning the appointment, removal or replacement of an arbitrator, Article 179(2) PILA explicitly provides for the application by analogy of certain provisions of the CCP (Articles 360, 361(2) and (3), 362, 370 and 371 CCP).²⁰ Article 191 PILA refers to Article 77 of the Swiss Supreme Court Act (“SCA”) for the procedure governing actions to annul the award, and Article 123 SCA applies by analogy to requests for revision of arbitral awards.²¹

2.2 Main feature of Chapter 12 PILA: party autonomy

Chapter 12 PILA is a framework legislation. It comprises only 19 provisions, most of which are not mandatory. The parties can choose between the international or domestic arbitration regime to govern their arbitration (Article 353(2) CCP and Article 176(2) PILA). They can constitute their arbitral tribunal (Article 179(1) PILA) and determine the arbitration proceedings according to their needs (Articles 182(1) and 183 PILA). Moreover, the parties can choose the rules of law applicable to the merits of the dispute or authorise the arbitral tribunal to decide *ex aequo et bono* (Article 187 PILA). They can further determine the procedure and form in which the arbitral tribunal shall make its awards (Articles 188 and 189 PILA). Finally, under certain conditions, the parties can waive (in whole or in part) their right to seek the annulment of the award (Article 192 PILA).²²

¹⁶ See KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 1.92; Sébastien BESSON, Salient Features and Amenities of Chapter 12 PILA, *Arbitration, in Switzerland – The Practitioner’s Guide*, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands 2013, para. 13.

¹⁷ BESSON, *op. cit.* fn 16, para. 14; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 1.92.

¹⁸ Supreme Court Decision 4A_428/2008 of 31 March 2009, para. 3.2, 28 ASA Bulletin (2010), pp. 109-110; ATF 138 III 714, para. 3.3.2. ATF (Arrêts du Tribunal fédéral; BGE in German and DTF in Italian) is the acronym used to refer to the Supreme Court’s official reports. These reports reproduce important decisions (generally in excerpted form) some time after their publication (in full) on the Court’s website (www.bger.ch), under the standard “unreported” reference number (*i.e.*, in the format of the reference given for the first decision cited in this footnote). The numbers in ATF references indicate the volume (in the case cited here, 138), section (III) and first page (714) where the decision in question can be located in the printed version of the reports (the ATF collection is also available online at www.bger.ch). Unofficial English translations of the Supreme Court’s decisions rendered in arbitration matters from 2008 onwards can be found at <http://www.swissarbitrationdecisions.com/decisions>.

¹⁹ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 7.96, with references to Swiss scholars and to Supreme Court Decision 4P.119/1998 of 13 November 1998, para. 1.a, 17 ASA Bulletin (1999), pp. 529-536. Cf. BERGER/KELLERHALS, *op. cit.* fn 4, paras. 1425-1431.

²⁰ BESSON, *op. cit.* fn 16, para. 17; Mariella ORELLI, ad Article 179 PILA, *Arbitration in Switzerland – The Practitioner’s Guide*, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands 2013, paras. 33-34; Sophie THORENS-ALADJEM, Le juge d’appui en matière d’arbitrage interne et international, 35 ASA Bulletin (2017), pp. 532-535. See also ATF 139 III 511, para. 4 concerning Article 360 CCP (number of arbitrators).

²¹ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 1.93.

²² KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 2.56; BESSON, *op. cit.* fn 16, para. 21; BERGER/KELLERHALS, *op. cit.* fn 4, para. 89.

Chapter 12 PILA contains a few mandatory provisions from which the parties cannot derogate:²³ (i) the choice of a Swiss arbitral seat will trigger the application of Swiss arbitration law (Article 176(1) PILA); (ii) the definition of arbitrability, *i.e.*, of disputes that can be submitted to international arbitration in Switzerland (Article 177(1) PILA); (iii) the form requirements for arbitration agreements (Article 178(1) PILA);²⁴ (iv) the principle of competence-competence (Article 186(1) PILA); (v) the requirement that arbitrators be impartial and independent (Article 180(1)(c) PILA); (vi) the compliance with fundamental principles of procedure (Article 182(3) PILA); (vii) the grounds for the annulment of awards (Article 190 PILA); (viii) the requirements for the waiver of the right to seek the annulment of awards (Article 192(1) PILA); and (ix) the jurisdiction of the Swiss Supreme Court to hear annulment actions (Article 191 LDIP).

3. The arbitration agreement

3.1 The law governing the arbitration agreement

Regarding the law governing the substantive validity of the arbitration agreement, Article 178(2) PILA provides a conflict of laws rule *in favorem validitatis*.²⁵ To be valid, the arbitration agreement must comply with the requirements of at least one (*i.e.*, the most favourable) of the designated laws, namely the law chosen by the parties to govern the arbitration agreement, the law governing the dispute, or Swiss law. Since there is no hierarchy between the three legal systems designated by Article 178(2) PILA, in practice the substantive validity of the arbitration agreement is often assessed in application of Swiss law, on account of its arbitration-friendliness.²⁶

Article 178(2) PILA does not identify the individual aspects of the substantive validity of the arbitration agreement, but only determines the law applicable thereto. The substantive validity of the arbitration agreement covers its conclusion (*e.g.*, offer, acceptance and defects in consent), interpretation and performance (*e.g.*, delay or impossibility), objective and subjective scopes, as well as its termination or other modes of extinguishment.²⁷

3.2 Separability and competence-competence

Article 178(3) PILA establishes the principle of separability of the arbitration agreement, providing that “[t]he validity of the arbitration agreement cannot be contested on the ground that the main contract may not be valid or that the arbitration agreement concerns a dispute which has not yet arisen”.

Article 186(1) PILA recognizes the principle of competence-competence, stating that “[t]he arbitral tribunal shall decide on its own jurisdiction”. Article 186(1bis) PILA further specifies that the arbitral tribunal “shall decide on its jurisdiction without regard to an action having the same subject matter already pending between the same parties before a state court or another arbitral tribunal, unless serious reasons require staying the proceedings”.²⁸ In other words, an arbitral tribunal seated in Switzerland generally does not have to stay the arbitration until the foreign court or arbitral tribunal has decided on its own jurisdiction.²⁹

²³ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 2.57. Cf. BERGER/KELLERHALS, *op. cit.* fn 4, para. 605 and BESSON, *op. cit.* fn 16, paras. 21 and 22.

²⁴ See, however, ATF 142 III 239, para. 3.3.1, where the Supreme Court considered, but ultimately left open, the question whether the parties can agree to stricter form requirements than those in Art. 178(1) PILA.

²⁵ ATF 119 II 380, para. 4a.

²⁶ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, paras. 3.76-3.77; Christoph MÜLLER, ad Article 178 PILA, *Arbitration in Switzerland – The Practitioner’s Guide*, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands 2013, para. 33.

²⁷ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 3.79; POUDRET/BESSON, *op. cit.* fn 13, para. 295; MÜLLER, *op. cit.* fn 26, para. 35.

²⁸ Article 186(1bis) PILA was introduced in March 2007 to reverse the Supreme Court’s *Fomento* decision (ATF 127 III 279) in which the Court had held that an arbitral tribunal seated in Switzerland and faced with an already pending foreign court proceeding in the same matter was to apply the *lis pendens* rule in Article 9 PILA by analogy.

²⁹ BESSON, *op. cit.* fn 16, para. 33. Article 186(1bis) PILA does not introduce the so-called negative effect of competence-competence, according to which the state court must refrain from ruling on a conflict of jurisdiction until the arbitral tribunal

3.3 The formal requirements for an enforceable arbitration agreement

Article 178(1) PILA requires an arbitration agreement “*in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text*”. The arbitration agreement does not need to be signed and, contrary to Article II(2) of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (“NYC”), Article 178(1) PILA does not require an “exchange” of documents.³⁰

3.4 Arbitration agreements by reference

The Swiss Supreme Court has long accepted the validity of arbitration agreements incorporated into a contract by specific reference, *i.e.*, where the contract expressly refers to the arbitration agreement contained in a separate document, such as general terms and conditions.³¹

In case of a global reference, *i.e.*, where the contract globally refers to a separate document, without expressly referring to the arbitration agreement contained therein, the Supreme Court tends to decide on a case-by-case basis, in light of the circumstances of the conclusion of the contract, such as the parties’ experience and the usages of the relevant trade.³² Furthermore, concerning the substantive validity of a global reference, where Swiss law is applicable pursuant to Article 178(2) PILA, the Supreme Court has held that it must be determined whether, in accordance with the principle of good faith, such global reference shows the parties’ intention to be bound by the arbitration agreement.³³

3.5 The subjective scope of the arbitration agreement and extension to third parties

According to the Swiss Supreme Court, questions regarding the subjective scope of the arbitration agreement pertain to the substantive validity of the arbitration agreement within the meaning of Article 178(2) PILA. Therefore, they must be decided in application of the most favourable law designated by this provision.³⁴

Under the principle of privity of contract, the parties are usually only those who have concluded the arbitration agreement. However, there are several exceptions to this rule.³⁵ For instance, a third party may be bound by the arbitration agreement if an original party to that agreement transfers it to the former by way of an assignment of the main contract or of a claim.³⁶ The transfer of an arbitration agreement may also occur by way of legal succession (universal or singular) or subrogation, *i.e.*, when an insurer settles an insured debt and is thus subrogated to the rights of the creditor. Moreover, in insolvency proceedings, the bankruptcy trustee and the creditors who have been assigned claims of the debtor by the estate are bound by the arbitration agreement entered into by the bankrupt party.³⁷

has rendered a decision on its own jurisdiction (POUDRET/ BESSON, *op. cit.* fn 13, para. 458; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 5.43).

³⁰ POUDRET/BESSON, *op. cit.* fn 13, para. 193; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 1.94; MÜLLER, *op. cit.* fn 26, paras. 14 and 22.

³¹ ATF 110 II 54, para. 3c.

³² ATF 110 II 54, para. 3c.

³³ Supreme Court Decision 4C.44/1996 of 31 October 1996, para. 2. For more details on arbitration agreements by reference, see KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, paras. 3.83-3.97; POUDRET/BESSON, *op. cit.* fn 13, paras. 213-226; BERGER/KELLERHALS, *op. cit.* fn 4, paras. 451-464.

³⁴ ATF 129 III 727, para. 5.3.1; ATF 134 III 565, para. 3.2.

³⁵ See, in particular, KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, paras. 3.155-3.166. See, also, POUDRET/BESSON, *op. cit.* fn 13, paras. 283-290; BERGER/KELLERHALS, *op. cit.* fn 4, paras. 537-581; Tarkan GÖKSU, *Schiedsgerichtsbarkeit*, Zurich, St. Gallen 2014, paras. 656-662.

³⁶ ATF 129 III 727, para. 5.3.1.

³⁷ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 3.165.

Further exceptions to the principle of privity of contract include cases where the arbitration agreement is extended to a third party.³⁸ For instance, a third party beneficiary to a contract containing an arbitration agreement may under certain circumstances be entitled to rely on that agreement in order to seek the performance of a right under the contract.³⁹ In some cases, an arbitration agreement in a contract may be extended to a third party guarantor who has promised to pay the debt of one of the parties or to perform that party's obligation.⁴⁰ Furthermore, piercing the corporate veil may sometimes justify the extension of the arbitration agreement to a third party by allowing the arbitral tribunal to disregard the existence of a separate legal personality, if the reliance thereon would amount to an abuse of rights.⁴¹ As another exception to the principle of privity of contract, where two contracts are so closely connected that in reality they constitute a single transaction, arbitration proceedings initiated on the basis of the arbitration agreement contained in one of them may be extended to the parties to the other contract.⁴² Finally, an arbitration agreement may exceptionally extend to a third party if its participation in the performance of the underlying contract was such that its agreement to be bound by the arbitration agreement is implied.⁴³

3.6 Arbitrability

3.6.1 Arbitrability *ratione materiae*

Under Article 177(1) PILA, any matter involving an economic interest, *i.e.*, any dispute with a value measurable in financial terms for one of the parties, may be submitted to international arbitration, irrespective of the law governing the merits of the dispute.⁴⁴ The notion of "economic interest" is interpreted extensively to make international arbitration widely available.⁴⁵

The following disputes are not arbitrable under Chapter 12 PILA because they do not involve an economic interest or because they are within the exclusive jurisdiction of state authorities:⁴⁶ (i) family law status issues that primarily affect personal rights, *e.g.*, marriage, divorce, separation, paternity, adoption, guardianship; (ii) claims for the mere registration or deposit of intellectual property rights (but differences arising from intellectual property rights, *e.g.*, patents, industrial design, trademarks, copyrights, including disputes concerning their validity, are arbitrable); (iii) in debt collection and bankruptcy matters, those legal actions in the Swiss Federal Act on Debt Enforcement and Bankruptcy ("DEBA") that are strictly related to the debt enforcement process;⁴⁷ (iv) criminal offences; (v) according to the Supreme Court, the arbitrability of a

³⁸ See, in particular, KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, paras. 3.167-3.179. See also POUURET/BESSON, *op. cit.* fn 13, paras. 258-259; BERGER/KELLERHALS, *op. cit.* fn 4, paras. 537-581; GÖKSU, *op. cit.* fn 35, paras. 663-668.

³⁹ Supreme Court Decision 4A_44/2011 of 19 April 2011, para. 2.4.

⁴⁰ Supreme Court Decision 4A_128/2008 of 19 August 2008, para. 4.2.1.

⁴¹ Supreme Court Decision 4A_160/2009 of 25 August 2009, para. 4.3.1. However, Swiss law does not recognise the group of companies doctrine to allow the extension of an arbitration agreement to affiliates belonging to the group of the company that is a party to the arbitration agreement (KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 3.177, with references; POUURET/BESSON, *op. cit.* fn 13, para. 258; MÜLLER, *op. cit.* fn 26, para. 69).

⁴² Supreme Court Decision 4A_376/2008 of 5 December 2008, 27 ASA Bulletin (2009), pp. 776-778; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 3.178.

⁴³ ATF 129 III 727, para. 5.

⁴⁴ Supreme Court Decision 1P.113/2000 of 20 September 2000, para. 1b, 19 ASA Bulletin (2001), pp. 489-490; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, paras. 3.44-3.46; POUURET/BESSON, *op. cit.* fn 13, para. 338. This is particularly important for sports arbitration, for instance in connection with player transfer disputes, which involve decisions on the underlying employment relationships, a subject matter that is not arbitrable in several countries but is in Switzerland, where CAS arbitrations are seated.

⁴⁵ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 3.46, with references; Pierre LALIVE/Jean-François POUURET/Claude REYMOND, *ad Article 177 PILA, Le droit de l'arbitrage interne et international en Suisse*, Lausanne 1989, para. 2.

⁴⁶ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, paras. 3.47-3.55; BERGER/KELLERHALS, *op. cit.* fn 4, paras. 222-253.

⁴⁷ *E.g.* Articles 84 (clearance to proceed with debt collection proceedings), 85 (action for the annulment or stay of debt collection proceedings) or 265a(4) DEBA (action for a declaration that the debtor has or has not acquired new assets).

dispute may be denied to the extent that the claims at issue are to be heard exclusively by a state court, according to legal provisions that must be taken into consideration for reasons of public policy.⁴⁸

3.6.2 Arbitrability *ratione personae*

Chapter 12 PILA does not comprehensively govern arbitrability *ratione personae*, i.e., a person's capacity to enter into an arbitration agreement and to appear as a party in arbitration proceedings. As a prerequisite, a person or entity must have legal capacity, i.e. the capacity to be the subject of rights and obligations.⁴⁹

According to the Swiss Supreme Court, Article 178(2) PILA does not govern a party's capacity. Rather, it is determined by the conflict of laws rules in the PILA that govern the legal capacity of individuals (Articles 35-36 PILA) and legal entities (Articles 154-155 PILA).⁵⁰

In the event of bankruptcy or other insolvency proceedings, the position of the Supreme Court is that the law of a party's place of incorporation determines whether a bankrupt debtor or a company having filed for bankruptcy has the legal capacity to enter into an arbitration agreement.⁵¹ However, the procedural consequences of bankruptcy on pending arbitration proceedings pertain to the substantive validity of the arbitration agreement and thus fall under Article 178(2) PILA and its conflict of laws rule *in favorem validitatis*.⁵²

Chapter 12 PILA contains an express provision on the capacity of states or state-controlled entities to arbitrate. Under Article 177(2) PILA, a state or state-controlled entity "*cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement*".

4. Intervention of domestic courts

4.1 Effects of an arbitration agreement before a Swiss court seized of the merits of the dispute

Under Article 7(b) PILA, a Swiss court seized of the merits of a dispute and faced with an arbitration defence must deny jurisdiction unless it finds that "*the arbitration agreement is null and void, inoperative or incapable of being performed*". The Supreme Court has continuously held that, if the arbitral seat is outside of Switzerland, the Swiss court must apply Article II(3) NYC and examine the validity of the arbitration agreement with full powers of review. By contrast, if the seat of the arbitration is in Switzerland, the Swiss court must limit itself to a *prima facie* examination of the arbitration agreement.⁵³

4.2 Anti-suit injunctions

It has been submitted that Swiss courts could possibly find a basis for issuing anti-suit injunctions in support of arbitration in Article 185 PILA.⁵⁴ This provision grants jurisdiction to the Swiss court at the seat of the arbitral tribunal (the so-called "*juge d'appui*") to assist the arbitral tribunal in any "other" procedural matter (i.e. other than for provisional measures or the taking of evidence, which fall under Articles 183 and 184 PILA respectively).

⁴⁸ ATF 118 II 353, para. 3c. *Contra*: BERGER/KELLERHALS, *op. cit.* fn 4, paras. 268-275.

⁴⁹ ATF 138 III 714, paras. 3.2 and 3.3; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 3.100. See also BERGER/KELLERHALS, *op. cit.* fn 4, paras. 344-368.

⁵⁰ ATF 138 III 714, para. 3.3.2. See also KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, paras. 3.100-3.118; BERGER/KELLERHALS, *op. cit.* fn 4, paras. 345-368.

⁵¹ ATF 138 III 714, para. 3.3.4.

⁵² KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, paras. 3.103-3.104.

⁵³ ATF 138 III 681, para. 3.2. See also KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, paras. 5.32-5.47; POUURET/BESSON, *op. cit.* fn 13, paras. 499-504.

⁵⁴ POUURET/BESSON, *op. cit.* fn 13, para. 1026.

The question whether a Swiss court (or arbitral tribunal) should grant an anti-suit or anti-arbitration injunction in support of arbitration in Switzerland is controversial. It has been argued that they should not do so, because such injunctions are contrary to the principle of competence-competence and to the New York Convention, which calls for mutual trust between the contracting states' courts and arbitral tribunals.⁵⁵

5. The conduct of the proceedings

5.1 Control of the arbitrators' independence and impartiality

According to Article 180(1)(c) PILA, an arbitrator can be challenged "*if circumstances exist that give rise to justifiable doubts as to his or her independence*". The Supreme Court has held that Article 180(1)(c) PILA refers to both independence and impartiality within the meaning of Article 30 of the Swiss Constitution.⁵⁶ The standard set forth in Article 180(1)(c) PILA applies not only to the chairman or sole arbitrator, but also to party-appointed arbitrators.⁵⁷

Article 180(1)(c) PILA is mandatory: the parties cannot waive in advance their right to an independent and impartial arbitral tribunal.⁵⁸

The "justifiable doubts" referred to in Article 180(1)(c) PILA must be serious and the arbitrators' independence and impartiality must be assessed objectively, *i.e.*, from the point of view of a reasonable third party observer; the subjective impressions of the party challenging the arbitrator are irrelevant.⁵⁹

The Swiss Supreme Court has on occasion referred to the IBA Guidelines on Conflict of Interest, stating that while they do not have force of law, they "*constitute a useful tool and contribute to the harmonization and uniformity of the standards applied in international arbitration*" and "*should have an important influence on the practice of arbitral institutions and tribunals*".⁶⁰

Swiss courts apply Article 183(1)(c) PILA restrictively and are thus slow in accepting the existence of justifiable doubts regarding an arbitrator's independence and impartiality.⁶¹

5.2 Swiss court assistance in the constitution of the arbitral tribunal

Under Article 179(2) and (3) PILA, in the absence of a party agreement, the Swiss court at the place of the arbitration may assist in the constitution of the arbitral tribunal, namely in the "*appointment, removal or replacement*" of an arbitrator. In doing so, it must apply by analogy the relevant provisions of the CCP (Articles 360, 361(2) and (3), 362, 370 and 371 ZPO).⁶²

Moreover, under Article 180(3) PILA, the Swiss court "*having jurisdiction at the seat of the arbitral tribunal*" may decide challenges against an arbitrator based on one of the grounds listed in Article 180(1) PILA, if "*the parties*

⁵⁵ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, paras. 5.72-5.73; BERGER/KELLERHALS, *op. cit.* fn 4, para. 677. See, also, the decision of the *Tribunal de première instance* of Geneva in the matter *Air (PTY) Ltd. v. International Air Transport Association (IATA) and C. SA*, C/1043/2005-15SP, 2 May 2005, 23 ASA Bulletin (2005), p. 736. See, however, POUURET/BESSON, *op. cit.* fn 13, para. 1032 (concerning anti-arbitration injunctions issued to prevent arbitration).

⁵⁶ ATF 136 III 605, paras. 3.2-3.3.

⁵⁷ ATF 136 III 605, para. 3.3.1.

⁵⁸ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 4.107.

⁵⁹ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 4.112. See also BERGER/KELLERHALS, *op. cit.* fn 4, para. 860; Mariella ORELLI, ad Article 180 PILA, *Arbitration in Switzerland – The Practitioner's Guide*, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands 2013, para. 13; Decision of the *Obergericht* of the Canton of Zurich of 13 September 2002, para. 5, available at: http://www.gerichte-zh.ch/fileadmin/user_upload/entscheide/oeffentlich/53948217FA347AE1C1256D09004CE0C1_VV020035.pdf; ATF 128 V 82, para. 2a; Supreme Court Decision 4A_210/2008 of 29 October 2008, para. 4.2.

⁶⁰ ATF 142 III 521, para. 3.1.2; Supreme Court Decision 4A_506/2007 of 20 March 2008, para. 3.3.2.2.

⁶¹ See the examples given in KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 4.114, with references; BERGER/KELLERHALS, *op. cit.* fn 4, paras. 861-863; ORELLI, ad Article 180 PILA, *op. cit.* fn 59, paras. 11-18.

⁶² See *supra*, Section 2.1 (final paragraph). On the intervention by the *juge d'appui* in the constitution of the arbitral tribunal, see THORENS-ALADJEM, *op. cit.* fn 20, pp. 530-535.

have not determined the procedure for the challenge". The decision of the *juge d'appui* is final; it is not open to challenge in an annulment action against the arbitral award.⁶³

5.3 The Swiss courts' power to issue interim measures in connection with arbitrations

While Article 183 PILA does not expressly grant Swiss courts a (concurrent) jurisdiction to order provisional measures, it does not exclude this jurisdiction. The parties may thus file a request for provisional measures directly with the competent court, even after the constitution of the arbitral tribunal.⁶⁴

The competent court is the one at the place where the provisional measure sought is to be implemented (Article 10 PILA or Article 31 of the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Lugano Convention")). The Swiss courts' decisions are subject to appeal before the higher cantonal court under Articles 308(1)(b) and 310 CCP, and the decisions of the latter can be challenged before the Swiss Supreme Court on the ground of a violation of constitutional guarantees (Article 98 SCA).⁶⁵

In addition to issuing interim relief and conservatory measures, the *juge d'appui* may also assist the arbitral tribunal with the enforcement of such measures.⁶⁶ Article 183(2) PILA provides that where a party does not comply with a provisional measure from the arbitral tribunal, the latter can "*request the assistance of the competent court*" and "*such court shall apply its own law*". This means that the court may rephrase or modify the arbitral tribunal's provisional measures to render them compliant with "*its own law*". Unlike the arbitral tribunal, the *juge d'appui* can also provide for sanctions in case a party does not comply with the court's order (Article 292 of the Swiss Criminal Code).⁶⁷

Swiss courts can grant *ex parte* provisional measures (Article 265(1) CCP).

5.4 The conduct of the proceedings before the arbitral tribunal

5.4.1 Party and arbitrator autonomy and fundamental principles of procedure

Under Article 182 PILA, it is largely for the parties and, in the absence of a party agreement, for the arbitrators to determine the conduct of the arbitration.⁶⁸ However, they must abide by the fundamental procedural guarantees of equal treatment and the right to be heard in Article 182(3) PILA, which are outside the scope of the parties' autonomy.⁶⁹

⁶³ ATF 138 III 270, para. 2.2.1; ATF 128 III 330, para. 2.2.

⁶⁴ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 6.95; Sébastien BESSON, Arbitrage international et mesures provisoires, Zurich 1998, para. 231; BESSON, *op. cit.* fn 16, para. 46; Christopher BOOG, ad Article 183 PILA, *Arbitration in Switzerland – The Practitioner's Guide*, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands 2013, para. 28; THORENS-ALADJEM, *op. cit.* fn 20, p. 535. On the question whether the parties can agree to exclude the court's concurrent jurisdiction, and the conditions for such an agreement to be valid, see in particular KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, paras. 6.105-6.108.

⁶⁵ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, paras. 6.98-6.99; POUURET/BESSION, *op. cit.* fn 13, para. 637; BESSON, Arbitrage international et mesures provisoires, *op. cit.* fn 64, paras. 231 and 512; BOOG, ad Article 183 PILA, *op. cit.* fn 64, paras. 45-47.

⁶⁶ See, in particular, BESSON, Arbitrage international et mesures provisoires, *op. cit.* fn 64, paras. 511-521; BOOG, ad Article 183 PILA, *op. cit.* fn 64, paras. 29-44.

⁶⁷ THORENS-ALADJEM, *op. cit.* fn 20, p. 535.

⁶⁸ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 6.03.

⁶⁹ Supreme Court Decision 4P.26/2005 of 23 March 2005, para. 3.1.

5.4.2 The arbitral tribunal's power to issue interim measures

Under Article 183(1) PILA, “[u]nless the parties have agreed otherwise, the arbitral tribunal may, at the request of a party, grant interim relief and conservatory measures”. Accordingly, the parties may limit or exclude the arbitrators’ power to issue provisional measures.⁷⁰

Although Chapter 12 PILA does not say so expressly, arbitral tribunals have the power to order provisional measures *ex parte*.⁷¹

Arbitral tribunals are not bound by Swiss rules of civil procedure. In principle, they can grant provisional measures that are not available before Swiss state courts, such as English “Mareva” injunctions.⁷²

Swiss arbitration law is silent with respect to the requirements for provisional measures. It may however be said that, according to transnational standards, there must be (i) a risk of serious harm; (ii) urgency so that the relief sought cannot wait until the award; (iii) a showing that the claim is not manifestly without merit; and (iv) a balance of interest weighing in favour of granting the measure.⁷³

Finally, in conformity with Article 183(3) PILA, the arbitral tribunal “*may make the granting of interim relief or conservatory measures subject to the provision of appropriate security*”.

5.5 Taking of evidence

Under Article 184(1) PILA, “[t]he arbitral tribunal shall itself take the evidence”. Therefore, the arbitral tribunal cannot delegate the taking of evidence to the parties or a third party, such as the secretary to the arbitral tribunal or a state authority.⁷⁴ Furthermore, failing an agreement between the parties, the tribunal also cannot delegate its powers to take evidence to only one or some of its members.⁷⁵

Article 184(1) PILA authorises the arbitral tribunal to decide on the admissibility of the evidence submitted by the parties, as well as on its relevance and materiality. The arbitral tribunal may also determine the admissible evidentiary means and the manner in which evidence is gathered. While the parties have the right to be heard and to submit evidence, they must exercise this right in a timely manner and in accordance with the procedural rules, the evidence at issue must relate to a relevant fact, and it must be capable of establishing a fact that is still uncertain.⁷⁶

According to the IBA Report on the Reception of the IBA Arbitration Soft Law Products, while arbitral tribunals sitting in Switzerland usually do not consider themselves bound by the IBA Rules on the Taking of Evidence, they frequently refer to these Rules (in about 62 percent of cases).⁷⁷

⁷⁰ BESSON, *op. cit.* fn 16, para. 45; BESSON, Arbitrage international et mesures provisoires, *op. cit.* fn 64, para. 214; BOOG, ad Article 183 PILA, *op. cit.* fn 64, paras. 5-6.

⁷¹ BERGER/KELLERHALS, *op. cit.* fn 4, para. 1260 ; BOOG, Part III – Interim Measures in International Arbitration, *Arbitration in Switzerland – The Practitioner’s Guide*, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands 2013, paras. 38-41; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 6.124; POUDRET/BESSON, *op. cit.* fn 13, para. 451 ; Ramon MABILLARD, ad Article 183 PILA, Internationales Privatrecht, Basler Kommentar, Heinrich Honsell, Nedim Peter Vogt, Anton K. Schnyder, Stephen V. Berti (eds.), 3rd ed., Basel 2013, para. 11.

⁷² KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 6.116; BESSON, Arbitrage international et mesures provisoires, *op. cit.* fn 64, para. 517; BERGER/KELLERHALS, *op. cit.* fn 4, para. 1258; BOOG, ad Article 183 PILA, *op. cit.* fn 64, para. 9.

⁷³ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, paras. 6.119-6.120. See, also, POUDRET/BESSON, *op. cit.* fn 13, para. 626; BOOG, Part III – Interim Measures in International Arbitration, *op. cit.* fn 71, paras. 27-33; BERGER/KELLERHALS, *op. cit.* fn 4, paras. 1249-1254.

⁷⁴ BESSON, *op. cit.* fn 16, para. 47; Marc VEIT, ad Article 184 PILA, *Arbitration in Switzerland – The Practitioner’s Guide*, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands 2013, para. 2.

⁷⁵ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 6.15; VEIT, ad Article 184 PILA, *op. cit.* fn 74, para. 2.

⁷⁶ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, paras. 6.14, 6.16 and 6.32; VEIT, ad Article 184 PILA, *op. cit.* fn 74, paras. 65-66.

⁷⁷ IBA Report on the Reception of the IBA Arbitration Soft Law Products, September 2016, paras. 42 and 56 available at <file:///C:/Users/SC/Downloads/Arbitration-soft-law-report-September-2016-final.pdf>.

Under Article 184(2) PILA, the *juge d'appui* may assist the arbitral tribunal in the taking of evidence, e.g. by summoning a witness to appear before the arbitral tribunal or ordering a third party to produce relevant documents.⁷⁸ In assisting the arbitral tribunal, the state court “shall apply its own law”, i.e., title 10 of the CCP (Articles 150-193 CCP).⁷⁹

5.6 The arbitral tribunal's decision on jurisdiction

Article 186(1) PILA empowers the arbitral tribunal to decide on its own jurisdiction.⁸⁰ As a rule, it will not do so *ex officio*, but only if one of the parties has raised a plea of lack of jurisdiction prior to any defence on the merits (Article 186(2) PILA).⁸¹

Article 186(3) states that the arbitral tribunal “shall” in general decide on a plea of lack of jurisdiction by a preliminary decision. However, as an exception to this rule, the arbitral tribunal may decide to rule on its jurisdiction in the final award, e.g., where the jurisdictional issues are closely related to the merits of the dispute.⁸²

The arbitral tribunal's decision on jurisdiction, whether rendered as a preliminary or a final award, is open for challenge under 190(2)(b) PILA. Under Article 190(3) PILA, the aggrieved party must challenge a preliminary award on jurisdiction within thirty days of its notification, without awaiting the final award.⁸³

5.7 Liability

The liability of arbitrators sitting in Switzerland is limited in relation to the exercise of jurisdictional functions, i.e., the arbitrators' decisions relating to the adjudication of the claims before them, as well as decisions regarding procedural measures other than simple administrative formalities.⁸⁴ In this context, a damages claim against the arbitrators would be possible only in case of gross negligence. However, arbitrators may be liable in connection with non-jurisdictional acts or omissions (e.g. a failure to disclose a fact of which the arbitrator was aware that it would lead to his or her removal, a refusal to act, namely to sign an award, a resignation without good cause, a violation of confidentiality, and fraud or corruption).⁸⁵

While provisions contained in institutional arbitration rules that limit the arbitrators' liability are in principle valid, they may not be enforceable in arbitrations in Switzerland in cases of intentional wrongdoing or gross negligence (Article 100(1) of the Swiss Code of Obligations).⁸⁶

5.8 The law applicable to the merits of the dispute

5.8.1 The determination by the arbitral tribunal of the applicable law

Under Article 187 PILA, arbitral tribunals must decide the dispute according to the “rules of law” chosen by the parties or, failing such a choice, according to the “rules of law” with which the case has the closest

⁷⁸ POUURET/BESSON, *op. cit.* fn 13, para. 671; VEIT, ad Article 184 PILA, *op. cit.* fn 74, paras. 67-80.

⁷⁹ THORENS-ALADJEM, *op. cit.* fn 22, p. 536; VEIT, ad Article 184 PILA, *op. cit.* fn 76, para. 79; POUURET/BESSON, *op. cit.* fn 13, para. 671.

⁸⁰ See *supra*, para. 0.

⁸¹ BERGER/KELLERHALS, *op. cit.* fn 4, para. 691.

⁸² KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 5.17; BERGER/KELLERHALS, *op. cit.* fn 4, para. 700.

⁸³ BERGER/KELLERHALS, *op. cit.* fn 4, para. 735.

⁸⁴ POUURET/BESSON, *op. cit.* fn 13, para. 449; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, paras. 4.185 and 4.192-4.194.

⁸⁵ POUURET/BESSON, *op. cit.* fn 13, para. 449; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, paras. 4.185 and 4.192-4.194; Reto JENNY, ad Article 45 of the 2012 Swiss Rules, *Arbitration in Switzerland – The Practitioner’s Guide*, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands 2013, paras. 5-6.

⁸⁶ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 4.193; JENNY, ad Article 45 of the 2012 Swiss Rules, *op. cit.* fn 85, para. 7.

connection. The term “*rules of law*” encompasses not only national laws, but also a-national or transnational rules.⁸⁷

Arbitral tribunals are not bound by the conflict of laws rules contained in other chapters of the PILA (or the conflict of laws rules of any other state that might have a connection with the case). They may however seek guidance from such conflict of laws rules, provided that they do not contravene the provisions of Chapter 12 PILA. For instance, under Article 117(2) PILA, “*a connection is deemed to exist with the state of the habitual residence of the party having to perform the characteristic obligation*”. Article 4(1) of the Rome I Regulation contains a similar provision.⁸⁸

Where the parties have authorised the arbitral tribunal to decide *ex aequo et bono* (Article 187(2) PILA), it may take account of what is fair and just in the circumstances and is not bound by any rule of law, not even mandatory provisions, unless they belong to public policy.⁸⁹

5.8.2 Mandatory rules

The parties’ autonomy to choose rules of law applicable to the merits is limited by the application of mandatory rules (*lois de police*), such as competition law, environmental law, consumer law, or exchange control provisions.⁹⁰

6. The award

6.1 The waiver of the requirement for an award to provide reasons

Article 189(1) PILA recognizes the principle of party autonomy with respect to the deliberation process and the form and content of the award, stating that “*[t]he arbitral award shall be made in conformity with the procedure and form agreed by the parties*”. Article 189(2) PILA adds that “*[i]n the absence of such an agreement, the award shall [...] be in writing [and] reasoned [...]*”. The Supreme Court has confirmed that Article 189(2) is not mandatory.⁹¹ While rare in practice, the parties can thus waive reasons.⁹²

According to the Supreme Court, a waiver of reasons does not imply a waiver by the parties of the right to challenge the award.⁹³

6.2 The waiver of the right to seek the annulment of the award

Under Article 192 PILA, “*[w]here none of the parties has its domicile, its habitual residence, or a place of business in Switzerland, they may, by an express statement in the arbitration agreement or in a subsequent agreement in writing, exclude all setting aside proceedings, or they may limit such proceedings to one or several of the grounds listed in Article 190, paragraph 2*”.

⁸⁷ BESSON, *op. cit.* fn 16, para. 51; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 7.52; BERGER/KELLERHALS, *op. cit.* fn 4, paras. 1382-1385; POUURET/BESSON, *op. cit.* fn 13, para. 691.

⁸⁸ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 7.42.

⁸⁹ Peter BURCKHARDT, ad Article 187 PILA, *Arbitration in Switzerland – The Practitioner’s Guide*, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands 2013, para. 63; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, paras. 7.67-7.68; POUURET/BESSON, *op. cit.* fn 13, paras. 710 and 717-719.

⁹⁰ BESSON, *op. cit.* fn 16, para. 56; POUURET/BESSON, *op. cit.* fn 13, paras. 705-708; ATF 118 II 193, para. 5.

⁹¹ Supreme Court Decision 4P.114/2004 of 13 September 2004, para. 4. See, also, Article 32(3) of the 2012 Swiss Rules, according to which “*[t]he arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given*”.

⁹² KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, paras. 7.125-7.126.

⁹³ Supreme Court Decision 4A_198/2012 of 14 December 2012, para. 2.2.

The parties can waive the right to seek the annulment of the award if they:⁹⁴ (i) have no territorial connection with Switzerland; (ii) have agreed the waiver of annulment proceedings in writing, and (iii) have made an “*express statement*” to that effect. The waiver cannot result from a tacit agreement, an agreement implied from the parties’ acts, or an indirect agreement by submission to arbitration rules that provide that the parties waive any right to appeal or that the award will be final.⁹⁵ While no specific wording or reference to Articles 190 or 192 PILA are required, the parties must have made a clear and unambiguous statement of their intention to waive their right to seek the annulment of the award.⁹⁶ Even though the annulment remedy is not an appeal in the sense of an appeal on the facts and the law, the Supreme Court has interpreted the parties’ express statement to exclude the “*right of appeal*” as a waiver of annulment proceedings.⁹⁷ By contrast, mere statements that the award is “*final and/or binding*” or “*without appeal*” do not operate as a waiver of annulment proceedings.⁹⁸ In addition to the three requirements just discussed, the waiver cannot be one-sided, but must be expressed by all the parties;⁹⁹ it must occur prior to the notification of the arbitral award;¹⁰⁰ and can be made in whole or in part in the sense that the parties can exclude all annulment grounds listed in Article 190(2) PILA or only some of them. By contrast, the parties cannot limit their waiver agreement to certain awards of the arbitral tribunal. A valid waiver will apply to all awards that are open to challenge under Article 190(2) PILA and subsequent decisions correcting an award.¹⁰¹ Finally, being a contract, the waiver agreement must meet the substantive validity requirements of contracts.

The requirements for a waiver of annulment must be met when the waiver is made.¹⁰²

The Supreme Court has held that the parties’ valid waiver of their right to seek the annulment of the award may also extend to the remedy of revision of the award.¹⁰³

6.3 Requirements for the rendering of a valid award

Under Article 189(2) PILA, absent an agreement between the parties, “*the award shall be made by a majority decision or, in the absence of a majority, by the presiding arbitrator alone. It shall be in writing, reasoned, dated and signed. The signature of the presiding arbitrator is sufficient*”.¹⁰⁴

Even though Chapter 12 PILA is silent on this point,¹⁰⁵ and unless the parties have agreed otherwise, the final award must contain a decision on the amount and allocation of the arbitration costs and the parties’ costs.¹⁰⁶

⁹⁴ See KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, paras. 8.49-8.75, with references; BERGER/KELLERHALS, *op. cit.* fn 4, paras. 1848-1869; Domitille BAIZEAU, ad Article 192 PILA, *Arbitration in Switzerland – The Practitioner’s Guide*, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands 2013, paras. 5-33; POUURET/BESSION, *op. cit.* fn 13, para. 839.

⁹⁵ POUURET/BESSION, *op. cit.* fn 13, para. 839.

⁹⁶ See KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, paras. 8.57-8.60, in particular the review of topical Supreme Court cases at para. 8.58.

⁹⁷ See Supreme Court Decision 4A_53/2017 of 17 October 2017, para. 2, including the review of the Supreme Court’s previous case law on this question in para. 2.1.2.

⁹⁸ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 8.58, with references; BAIZEAU, ad Article 192 PILA, *op. cit.* fn 94, paras. 19-21.

⁹⁹ POUURET/BESSION, *op. cit.* fn 13, para. 839.

¹⁰⁰ BERGER/KELLERHALS, *op. cit.* fn 4, para. 1851.

¹⁰¹ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 8.72; POUURET/BESSION, *op. cit.* fn 13, para. 839; BERGER/KELLERHALS, *op. cit.* fn 4, para. 1860; BAIZEAU, ad Article 192 PILA, *op. cit.* fn 94, para. 35.

¹⁰² POUURET/BESSION, *op. cit.* fn 13, para. 839.

¹⁰³ Supreme Court Decision 4A_53/2017 of 17 October 2017, para. 3. On the revision of arbitral awards, see *infra*, Section 6.5 (final two paragraphs).

¹⁰⁴ Regarding the (recommended) content of the award, see BERGER/KELLERHALS, *op. cit.* fn 4, para. 1483; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 7.124.

¹⁰⁵ Unlike the CCP, which requires arbitrators to include a ruling on costs in the (final) award (Article 384(1)(f) CPP).

¹⁰⁶ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 7.129; BERGER/KELLERHALS, *op. cit.* fn 4, para. 1611 with references; Micha BÜHLER/Marco STACHER, Costs in International Arbitration, *Arbitration in Switzerland – The Practitioner’s Guide*, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands 2013, para. 7.

6.4 The annulment of awards

Arbitral awards rendered in Switzerland are not subject to an appeal on the facts or the law.¹⁰⁷ A review of the award is possible only by means of an annulment action before the Swiss Supreme Court (Article 191 PILA and Article 77 SCA) based on one or more of the grounds contained in the exhaustive and narrowly defined list in Article 190(2) PILA. Contrary to Article V(1)(d) NYC, this list does not contain the violation of the arbitral procedure, including procedural rules agreed by the parties. Such violations may be invoked only to the extent that they amount to a violation of the parties' right to be heard in an adversary procedure or to equal treatment within the meaning of Article 190(2)(d) PILA.¹⁰⁸

Under Article 190(3) PILA, preliminary and interim awards can be challenged only on the grounds identified in Article 190(2)(a) (irregular composition of the arbitral tribunal) and (b) PILA (wrongful acceptance of jurisdiction).¹⁰⁹ For other grounds, the annulment action against the preliminary or interim award must be linked with a challenge against a subsequent partial or final award.¹¹⁰

In accordance with Article 100(1) SCA, an annulment action must be filed against the challengeable award within thirty days of its notification in full (including reasons).¹¹¹

Arbitral awards rendered in Switzerland have *res judicata* effect and are enforceable from their notification to the parties (Article 190(1) PILA).¹¹² As a rule, the introduction of annulment proceedings does not suspend the enforceability of the challenged award (Article 103(1) SCA). However, the Supreme Court may suspend the enforcement of an award *ex officio*, which is most unlikely in international arbitration given the restrictive annulment grounds, or upon request (Article 103(3) SCA). In practice, such requests are granted only in exceptional cases and if (i) the enforcement of the award exposes the requesting party to irreparable harm; (ii) the applicant's interests prevail over those of the opposing party; and (iii) a *prima facie* review of the annulment application shows that it is likely to be well founded.¹¹³

In addition to suspending the enforcement of the award, the Supreme Court may also issue "other provisional measures" that are required to preserve the *status quo* or protect interests at risk of suffering irreparable harm pending the outcome of the annulment proceedings (Article 104 SCA).¹¹⁴

Statistically, the median duration of annulment proceedings is approximately 6 months from the filing of the challenge until the decision of the Swiss Supreme Court, although variance remains high. The Supreme Court

¹⁰⁷ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 8.01.

¹⁰⁸ BESSON, *op. cit.* fn 16, para. 65.

¹⁰⁹ ATF 130 III 755, para. 1.2.2. With ATF 140 III 477, para. 3, the Supreme Court clarified that the grounds enumerated in letters (c) to (e) of Article 190(2) PILA (award rendered *ultra* or *infra petita*, violations of fundamental rules of procedure and violations of public policy) can also be relied upon in challenges against preliminary and interim awards, provided they are raised only in connection with matters directly related to the constitution, composition or jurisdiction of the arbitral tribunal (e.g., where a violation of the right to be heard may have been committed in taking the evidence on jurisdictional issues).

¹¹⁰ BESSON, *op. cit.* fn 16, para. 63. See, also, ATF 140 III 477, para. 3.

¹¹¹ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 8.35-8.36. In cases where the arbitral tribunal notifies the operative part of the award first (without the reasons), as is relatively frequent in CAS arbitrations, it is possible to file an application for annulment upon receipt of the operative part (which is enforceable as from its notification) in order to seek a stay of the award pending the communication of the reasons (Supreme Court Decision 4A_444/2016; 4A_446/2016 of 17 February 2017).

¹¹² ATF 117 Ia 166, para. 5a; BERGER/KELLERHALS, *op. cit.* fn 4, para. 1630; POUURET/BESSION, *op. cit.* fn 13, para. 853; BESSION, *op. cit.* fn 16, para. 74; Silja SCHAFFSTEIN, *The Doctrine of Res Judicata Before International Commercial Arbitral Tribunals*, Oxford 2016, para. 4.72.

¹¹³ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, paras. 8.92 and 8.95. For details on the conditions for granting the suspensive effect and a typology of cases, see Cesare JERMINI/Nicola BERNARDONI, *Suspensive Effect of Challenges Against International Arbitral Awards in Switzerland: A Trend Towards More Frequent Grants? in New Developments in International Commercial Arbitration 2011*, Müller, Rigozzi (eds.), Zurich, Basel, Geneva 2011, pp. 83-92.

¹¹⁴ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, paras. 8.92-8.93.

will annul a challenged award only in about 7% of all non-sport related cases and in about 10% of all sport-related cases.¹¹⁵

6.5 The revision, interpretation or correction of an award

Chapter 12 PILA contains no provisions on the interpretation, correction or revision of arbitral awards. However, the Supreme Court has held that arbitral tribunals sitting in Switzerland can interpret or correct their own awards¹¹⁶ and that arbitral awards can be the subject of a revision.¹¹⁷

Concerning the correction and interpretation of international arbitral awards, Article 388 CCP, which applies to domestic arbitrations, may provide some guidance. Under Article 388(2) CCP, a party may submit a request for correction or interpretation within thirty days from the discovery of the error or of the part of the award that needs to be interpreted, but in no event later than one year from the notification of the award. However, in international arbitration it is advised to review the award promptly upon notification and to file a request without delay. Indeed, institutional arbitration rules may provide a (different) time limit from the notification or receipt of the award.¹¹⁸

The remedy of revision allows for the reconsideration of the award after it has come into force. It applies only in the presence of narrowly defined grounds, namely where the award was influenced by a crime or felony to the detriment of one of the parties or where relevant facts or conclusive evidence have come to light on which the parties were unable to rely during the course of the arbitration proceedings. If a request for revision is successful, the competent authority, i.e. the Swiss Supreme Court, annuls the award and remands the case to either the same or, if it is no longer possible to call upon the original tribunal (e.g., because its members have died, cannot be reached or simply refuse to be seized again of the dispute), a new arbitral tribunal for a new award.¹¹⁹

The Supreme Court has raised the question whether the subsequent discovery (i.e., after the time limit to request the annulment of the award has expired) of a ground for the challenge of an arbitrator can be invoked as an additional ground for the revision of an arbitral award. So far, the Court has left this question open, noting that it should be addressed by the Swiss Parliament within the framework of the latter's mandate to reform Chapter 12 PILA.¹²⁰ Indeed, as will be seen in further detail below, a reform of Chapter 12 PILA is currently underway. The Draft Bill for the revised Chapter 12 PILA contains provisions on the revision (draft Article 190a Draft Bill), as well as on the interpretation and correction of awards (draft Article 189a Draft Bill).¹²¹

¹¹⁵ For the most recent statistical analysis, see Felix DASSER/Piotr WOJTOWICZ, Challenges of Swiss Arbitral Awards – Updated and Extended Statistical Data as of 2015, 34 ASA Bulletin (2016), pp. 284 and 286-287. The Swiss Supreme Court is the court of competent jurisdiction to hear challenges against all CAS awards by operation of Article 28 of the CAS Code, which provides that CAS arbitrations are (mandatorily) seated in Lausanne.

¹¹⁶ BESSON, *op. cit.* fn 16, para. 73 with reference to ATF 126 III 524, para. 2b.

¹¹⁷ Silja SCHAFFSTEIN/Sabina SACCO, Commentary of Supreme Court Decision 4A_386/2015 (ATF 142 III 521) of 7 September 2016, XIV *Revista Brasileira de Arbitragem* No. 56 (2017), p. 169; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 8.207 and para. 8.209; POUDRET/BESSION, *op. cit.* fn 13, para. 845. See also ATF 142 III 521, para. 2.1; ATF 129 III 727, para. 1; ATF 118 II 199, paras. 2 and 3.

¹¹⁸ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, paras. 7.192-7.194; BERGER/KELLERHALS, *op. cit.* fn 4, para. 1525; Maria HAUSER-MOREL/Jan Heiner NEDDEN, Correction and Interpretation of Arbitral Awards and Additional Awards, in Post Award Issues, Tercier (ed.), ASA Special Series No 38 (2011), p. 24. See, also, Article 36(2) of the 2017 ICC Rules; Articles 35 and 36 of the 2012 Swiss Rules; Article R63 of the CAS Code; Articles 37 and 38 of the 2013 UNCITRAL Arbitration Rules.

¹¹⁹ ATF 118 II 199, para. 3; SCHAFFSTEIN/SACCO, *op. cit.* fn 117, p. 168; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, paras. 8.206, 8.212 and 8.224; BESSION, *op. cit.* fn 16, paras. 70-71.

¹²⁰ ATF 142 III 521, para. 2.3.5. See also Supreme Court Decision 4A_53/2017 of 17 October 2017, para. 3.1.

¹²¹ See *infra*, Section 8.

6.6 The enforcement of awards rendered in Switzerland

Arbitral awards rendered in Switzerland do not need to be confirmed by a judgment; they can be enforced like Swiss court judgments.¹²²

The DEBA (via Article 335(2) CCP) governs the enforcement of awards “containing an order to pay a monetary compensation or to provide securities”. In particular, awards constitute a “title” to obtain the definitive lift of a suspension of a summon to pay (“*titre de mainlevée définitive*”; “*definitive Rechtsöffnungstitel*”) within the meaning of Article 80 DEBA.¹²³ The enforcement of “non-monetary” awards (*i.e.*, declaratory awards or awards ordering specific performance) is governed by Articles 335-346 CCP.¹²⁴

Article 193 PILA provides for the optional deposit or certificate of enforceability of an arbitral award, but neither the deposit nor the certificate are preconditions for the recognition and enforcement of awards, in Switzerland or abroad.¹²⁵

6.7 The recognition and enforcement of foreign awards in Switzerland

Under Article 194 PILA, the New York Convention governs the recognition and enforcement of all foreign arbitral awards in Switzerland, whether or not the country of the arbitral seat is a contracting state; there is no reservation of reciprocity.¹²⁶

Swiss courts generally do not take a formalistic approach with respect to the requirements set forth in Article IV(1)(a) (duly authenticated original award or a duly certified copy thereof) and (b) NYC (original arbitration agreement or a duly certified copy thereof). The Supreme Court has held that where the authenticity of the award or the arbitration agreement are not disputed, simple, non-legalized and/or non-certified copies of the award or arbitration agreement are sufficient.¹²⁷

7. Funding arrangements

Swiss law does not prohibit third party funding.¹²⁸ In particular, on 10 December 2004, the Supreme Court decided to strike down a draft law proposed by resolution of the Cantonal Council of Zurich, prohibiting parties from resorting to third party funding. According to the Court, a general ban on third party funding would violate the principle of freedom of commerce protected and guaranteed by the Swiss Constitution.¹²⁹

Under Article 12(1)(e) of the Swiss Federal Lawyers’ Act (“LLCA” or “*Loi fédérale sur la libre circulation des avocats*” in French, “*Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte*” in German), attorneys cannot in advance enter into an agreement with their clients providing for a contingency fee based entirely on the outcome of the case. Specifically, the attorney’s (entire) fee cannot be a percentage of the amount recovered (*pactum de quota litis*); nor can Swiss attorneys agree to waive legal fees in the event of an unfavourable outcome. However, the Supreme Court has held that a fee arrangement containing elements of a contingency fee, the so-called *pactum de palmario*, is allowed, albeit within limits. First, attorneys must

¹²² BESSON, *op. cit.* fn 16, para. 75.

¹²³ BESSON, *op. cit.* fn 16, para. 75; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, paras. 8.281-8.282; BERGER/KELLERHALS, *op. cit.* fn 4, paras. 2009-2016.

¹²⁴ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 8.283; BERGER/KELLERHALS, *op. cit.* fn 4, paras. 2006-2008 and paras. 2017-2021.

¹²⁵ BESSON, *op. cit.* fn 16, para. 76.

¹²⁶ BESSON, *op. cit.* fn 16, para. 77.

¹²⁷ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 1, para. 8.237, with references to Supreme Court Decision 4A_124/2010 of 4 October 2010, para. 4.2 and Supreme Court Decision 5A_427/2011 of 10 October 2011, para. 5.

¹²⁸ On this issue, see, for instance, Sebastiano NESSI, Third-party funding: a Swiss law perspective, Practical Law Arbitration Blog of 16 March 2016 available at: <http://arbitrationblog.practicallaw.com/third-party-funding-a-swiss-law-perspective/>; Noradèle RADJAI, Case notes on third-party funding – Switzerland, p. 37 available at: http://www.lalive.ch/data/publications/Third_Party_Funding.pdf.

¹²⁹ ATF 131 I 223.

obtain a fee independently of the outcome of the case, allowing them not only to cover their expenses but also to make a reasonable profit. Second, the contingency fee element must not be so important to result in the attorney losing his or her independence. Third, the *pactum de palmario* must be concluded either in the beginning of the attorney-client relationship or after the conclusion of the case, but not during the exercise of the attorney's mandate.¹³⁰

8. Is there likely to be any significant reform of the arbitration law in the near future?

On 11 January 2017, the Swiss Department of Justice published the Draft Bill on the reform of Chapter 12 PILA and its Explanatory Report.¹³¹ Thereafter, on 3 July 2017, it published the observations filed by various interested stakeholders during the consultation period.¹³²

The Explanatory Report to the Draft Bill makes clear that, even thirty years after its adoption in 1989, Chapter 12 PILA remains an innovative arbitration law of high quality. Its main strengths include its clarity and conciseness, as well as the great importance afforded to party autonomy, allowing the parties to fashion their proceedings in accordance with their specific needs and within a framework that secures the respect of the rule of law.¹³³ Therefore, the reform of Chapter 12 PILA is limited to a "light revision", amending as little as possible and only to the extent necessary, with the goal of modernizing and strengthening Switzerland's position as a leading place for international arbitration. This goal is to be achieved by improving legal certainty and clarity, removing any unclear formulations, and rendering the arbitration law even more user-friendly, namely by incorporating the Supreme Court's established case law.

¹³⁰ Supreme Court Decision 4A_240/2016 of 13 June 2017, para. 2.

¹³¹ The Draft Bill and Explanatory Report are available at: <https://www.bj.admin.ch/dam/data/bj/aktuell/news/2017/2017-01-11/vorentw-f.pdf> and <https://www.bj.admin.ch/dam/data/bj/aktuell/news/2017/2017-01-11/vn-ber-f.pdf>.

¹³² Organizations such as the Swiss Arbitration Association (ASA), the Swiss Chambers' Arbitration Institution (SCAI), judges at the Supreme Court, various law firms, ICC Switzerland, Economiesuisse, universities, academics, as well as some political parties and several Swiss cantons have filed observations. They can all be found at <https://www.admin.ch/ch/f/gg/pc/ind2017.html>. An English translation of ASA's observations, which were filed in German, can be found on the ASA website at: <http://www.arbitration-ch.org/en/publications/asa-position-papers/index.html>.

¹³³ See BESSON, *op. cit.* fn 16, paras. 78-95.

TOGO

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

MARTIAL AKAKPO, EDEM ZOTCHI AND THÉO AL BITHO
OF MARTIAL AKAKPO & ASSOCIÉS



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5. Accessibility and safety ●
6. Ethics ●

VERSION: 27 MAY 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Key places of arbitration in the jurisdiction	Lomé, as the capital city.
Civil law / Common law environment?	Civil law. The Uniform Arbitration Act is a treaty which applies in all member-States of the OHADA, to which the Togo is a party.
Confidentiality of arbitrations?	The Uniform Arbitration Act does not expressly provide for confidentiality, although certain set of arbitral rules on which the parties can agree (such as the CATO Rules and the CCJA rules provide for confidentiality. Hearings are usually held in closed session and awards are not published.
Requirement to retain (local) counsel?	Common, but no legal requirement.
Ability to present party employee witness testimony?	Parties may submit witness testimonies of their employees. It lies in the arbitral tribunal's discretion to weigh such evidence.
Ability to hold meetings and/or hearings outside of the seat?	Parties may choose to hold meetings at a different venue. Unless the parties have agreed on a specific venue, the tribunal has discretion to decide where to hold meetings.
Availability of interest as a remedy?	Interest is a matter of the applicable substantive law.
Ability to claim for reasonable costs incurred for the arbitration?	The arbitral tribunal has discretion in respect of the allocation of costs but must take into consideration the circumstances of the case.
Restrictions regarding contingency fee arrangements and/or third-party funding?	The Togolese bar rules prohibit fee arrangements pursuant to which the lawyers' fees are exclusively determined on the basis of the outcome of the dispute. Otherwise, they provide that the lawyers' fees are freely agreed upon between a lawyer and its client. Third-party funding is not codified in Togolese arbitration law, but it is likely to be accepted.
Party to the New York Convention?	No
Other key points to note	∅
WJP Civil Justice score (2017-2018)	0.81

ARBITRATION PRACTITIONER SUMMARY

Date of arbitration law?	The OHADA Uniform Arbitration Act was revised on 23 November 2017.
UNCITRAL Model Law? If so, any key changes thereto?	The Togolese arbitration law is not based on UNCITRAL Model Law strictly speaking, but most of the core principles underlying the Model Law are applied under the Uniform Arbitration Act.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No. Ordinary courts handle jurisdictional challenges and the annulment and enforcement of awards.
Availability of <i>ex parte</i> pre-arbitration interim measures?	The courts may grant <i>ex parte</i> interim measures.
Courts' attitude towards the competence-competence principle?	The arbitral tribunal may rule on its own jurisdiction and national courts seized with a matter potentially falling within the ambit of an arbitration agreement must refer such matter to the arbitral tribunal save if the arbitration agreement is manifestly void or inapplicable.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Only limited grounds set out in the Uniform Arbitration Act, which are similar to those provided for in the New York Convention.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The question of whether Togolese courts are bound by the foreign court's set-aside decision has not been settled yet, although we believe that such setting aside would not be a ground for non-enforcement in Togo.
Other key points to note?	<p>Arbitration agreements are to be signed by all parties in principle, although the Uniform Arbitration Act leaves room for a binding effect of the arbitration agreement on non-signatories.</p> <p>Based on the decision rendered by Togolese courts, we would assess the arbitration friendliness of Togo at about 40%.</p>

JURISDICTION DETAILED ANALYSIS

1. Legal Framework

1.1 Is the arbitration law based on the UNCITRAL Model Law?

The arbitration law is not directly based on the UNCITRAL Model Law. However, as explained below, all the core principles underlying the UNCITRAL Model Law are in the texts which form part of the Togolese arbitration act (these principles include the binding nature of the arbitration agreement, the autonomy of the same, the competence-competence principle, etc.).

The Togolese Republic is a member of the Organization for the Harmonization of Business Law in Africa (“OHADA”). The OHADA system provides for a uniform set of rules in various branches of commercial law that are directly applicable to its Member States. As of the date of this publication, ten Uniform Acts have been enacted, as a result of their adoption by the OHADA’s Council of Ministers. They apply in the OHADA region and are largely based on French law. Their respective subject matters range from commercial law, bankruptcy, arbitration, financial and commercial accounting, securities, and enforcement proceedings.

The Uniform Arbitration Act (“**Uniform Arbitration Act**”) applies to arbitrations whose seat of arbitration is in a Member State of the OHADA.

In addition to the institutions developed within the framework of the OHADA system (such as the Common Court of Justice and Arbitration located in Abidjan, Ivory Coast). Togo has created the Court of Arbitration of Togo (“**CATO**”) by enacting Law No. 89-39 of 28 November 1989 instituting a Court of Arbitration to provide arbitration facilities for commercial disputes in the region. On 1 January 2011, the CATO Rules were adopted in conformity with Law No. 89-39 and the Uniform Arbitration Act of 1999. Because this institution has been created by law, this chapter will refer to certain of features of the CATO Rules, where these can provide helpful comparison with the Delos Arbitration Rules.

Togo is not a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “**New York Convention**”). The provisions of the Uniform Arbitration Act therefore govern the recognition and enforcement of arbitral awards.

Togo is a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “**ICSID Convention**”), which it has ratified on 11 August 1967. The ICSID Convention has entered into force on 10 September 1967. In addition, Togo has entered into four bilateral investment treaties, two of which are currently in force.

In addition to these international instruments, article 8 of the Togolese Code of Investments provides that disputes between an investor and the State (or between States) arising out of the interpretation or the application of the provisions of this Code shall be submitted to the national courts or to international arbitration.

1.2 When was the arbitration law last revised?

On 23 and 24 November 2017, the Council of Ministers adopted the Uniform Arbitration Act on Mediation, the Uniform Arbitration Act, and the Revised Rules of Arbitration of the Common Court of Justice and Arbitration (“**CCJA**”). The objective of the revision was to modernize the arbitration framework by enhancing the transparency and effectiveness of arbitrations for arbitrations conducted in OHADA Member States. Unless otherwise specified herein, this chapter will focus on the revised Uniform Arbitration Act.

2. Arbitration Agreement

Articles 3 and 4 of the Uniform Arbitration Act concern the arbitration agreement. Article 3 states that an arbitration may be introduced either on the basis of a contractual arbitration agreement, or of an instrument

concerning the protection of investments containing a univocal agreement from the State to arbitration, such as a treaty or the Togolese Code of Investments.

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

The Uniform Arbitration Act does not specifically provide for a method to determine the law governing the arbitration agreement. In addition, since Togo has not ratified the New York Convention, the conflicts of law rules provided at Article V.1 (a) do not apply to determine the law governing the validity of the arbitration agreement.

However, Article 4 of the Uniform Arbitration Act expressly states that the validity of the arbitration agreement is not affected by the nullity of the underlying agreement and has to be assessed pursuant to the intention of the parties without any reference to any national law.

Article 4(2) suggests that a Togolese court reviewing the validity of an arbitration agreement will not need to conduct a conflict of laws analysis to determine the law governing the arbitration agreement's validity and existence. Rather its assessment of the existence and validity of the arbitration agreement will be based exclusively on the parties' intention as evidenced in the record. However, we are not aware of a decision rendered by Togolese Courts which has confirmed this interpretation.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

As explained above, Article 4 of the Uniform Arbitration Act specifically provides that the arbitration agreement is independent from its underlying contract. The rules of the Court of Arbitration of the Togo contain a similar provision. Indeed, Article 9(4) of the CATO Rules provides that unless the parties have agreed otherwise, allegations that the agreement underlying the arbitration clause does not exist or is void do not preclude the arbitrator's jurisdiction to determine the matter if she or he considers the arbitration clause to be valid. In other words, the arbitrator remains competent to determine the parties' respective rights and obligations, even if the underlying contract is void or does not exist. This is confirmed by Article 31(2) of the CATO Rules which provides that an arbitration agreement providing for CATO arbitration is distinct from the other provisions of the contract. Similarly, and as a result of the foregoing, we believe that even if an agreement containing an arbitration agreement providing for the DELOS Rules of Arbitration was void, this would not affect the enforceability of the Delos arbitration agreement.

2.3 Formal requirements for the validity and/or enforceability of the arbitration agreement

Article 3-1 of the Uniform Arbitration Act states that an arbitration agreement can either take the form of an arbitration clause inserted in a contract, or of a specific arbitration contract ("*Compromis d'arbitrage*"). Irrespective of the option chosen, the arbitration agreement must be in writing or in any other manner which would allow it to be evidenced, such as through an incorporation by reference.

2.4 Application of arbitration agreements to non-signatory parties

The Uniform Arbitration Act does not provide for any specific provision dealing with the application *ratione personae* of arbitration agreements. To our knowledge, there are no decisions by Togolese courts which recognize that a non-signatory to a contractual arbitration agreement may be bound by it. However, Articles 8(1) and 8(2) of the CCJA arbitration rules provide for joinder and voluntary joinder.

With respect to investment arbitration based on instruments other than contracts, the Uniform Act does not specifically refer to it, although it is admitted in practice. Article 3 of the revised Uniform Act henceforth provides that an "*arbitration may be based on an arbitration agreement or an instrument pertaining to investments, in particular, an investment code or a bilateral or multilateral investment treaty*". Accordingly, the nationals from signatory countries to such treaties may have recourse to arbitration when these instruments so provide.

2.5 Are there restrictions to arbitrability? In the affirmative:

Article 2 of the Uniform Act provides that « *Any person, whether an individual or a corporation, may have recourse to arbitration with respect to the rights of which one may freely dispose of.*

States, local authorities and public entities may be parties to an arbitration although they are not allowed to rely on their domestic law to challenge the arbitrability of a dispute, their right to arbitrate or the validity of the arbitration agreement”.

Accordingly, are not arbitrable only those matters that relate to rights that cannot be freely disposed of. By contrast, commercial, civil, administrative matters may be the subject of an arbitration, and public entities may arbitrate.

However, in practice, Togolese judges are reluctant to admit that disputes which have arisen out of an employment contract are arbitrable.

3. Intervention of domestic courts

The Uniform Arbitration Act restricts the Domestic courts' right to intervene in arbitration proceedings to supporting the same. In particular, the principle of “competence-competence” is fully recognized in the Uniform Arbitration Act. Indeed Article 11 and 13 of the Uniform Arbitration Act provide that the arbitral tribunal has exclusive jurisdiction to rule on its own jurisdiction, and that courts should decline to exercise jurisdiction over the dispute unless the arbitration agreement is manifestly inapplicable or invalid. The insertion of the adverb “manifestly” shows that any dispute possibly falling within the ambit of an arbitration agreement shall be referred to arbitration, unless its inapplicability or its invalidity is so evident that it only requires a summary examination to be characterized.

The Uniform Arbitration Act also imposes a very short time limit within which this decision has to be rendered. Indeed, if the court fails to decide on whether the arbitration is manifestly inapplicable or invalid within 15 days from its seizure, the matter shall be referred to the arbitral tribunal for a decision on its own jurisdiction.

However, in practice, Togolese courts do not decline their jurisdiction and they allow the arbitration to proceed in parallel to the domestic litigation proceedings before them. Even when the award has been rendered, the parties pursue the proceedings by challenging the award or the judge's decision which has declined jurisdiction. It then falls on the Common Court of Justice and Arbitration to harmonise the law as it is the supreme court of the member-states in the context of disputes relating to the Uniform Acts.

3.1 How do courts treat injunctions by arbitrators enjoining stays of litigation proceedings?

To the best of our knowledge, no anti-suit injunction has ever been issued by an arbitral tribunal to a Togolese domestic court.

As far as arbitrations before the Common Court of Justice and Arbitration are concerned, all jurisdictions of a member State have the obligation to decline jurisdiction in the presence of an arbitration agreement. Because this obligation is set forth in Article 23 of the OHADA treaty, it is mandatory for all jurisdictions of the 17 member-States.

3.2 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

The Uniform Arbitration Act dedicates its second Chapter to the constitution of the arbitral tribunal. In principle, the parties are free to choose the rules governing the constitution of the arbitral tribunal (Article 6 of the Uniform Arbitration Act).

The Uniform Arbitration Act vests the domestic courts with the power to act in support of the constitution of the arbitral tribunal when such constitution is blocked by the refusal of a party to designate its own

appointed-arbitrator, or if the parties are unable to agree on the designation of the sole arbitrator or of the third arbitrator (Article 6 of the Uniform Arbitration Act).

The Uniform Arbitration Act also provides that the decision to appoint an arbitrator should be rendered within 15 days from the court's seizure. This ensures a speedy constitution of arbitral tribunals even if a party seeks to frustrate the process. In an additional effort to speed up the constitution of the arbitral tribunal, decisions from domestic courts in this respect are not subject to appeals or other recourses (Article 6 of the Uniform Arbitration Act).

However, the Republic of the Togo has not yet designated the judge which has jurisdiction to assist in the constitution of the arbitral tribunal, although, in the absence of any designation the provisions of the Togolese code of civil procedure shall apply to determine which judge is competent to take a specific decision.

3.3 Challenge to arbitrators

When the parties have not agreed upon a set of rules prescribing the conditions to challenge an arbitrator, such a challenge is brought before the appropriate domestic courts (Article 8 of the Uniform Arbitration Act). The decision dismissing the challenge can only be challenged through a direct "*appeal*" before the CCJA.

A challenge can only be introduced on the basis of circumstances that have arisen or have become known after the arbitrator's designation (Article 8 of the Uniform Arbitration Act).

3.4 Do courts have the power to issue interim measures in connection with arbitrations?

Pursuant to Article 13 of the Uniform Arbitration Act, the existence of an arbitration agreement does not prevent the parties from requesting interim or conservatory measures from the applicable domestic courts, if urgency so requires. In this regard, Article 13 clarifies that a court's decision to grant any such measure shall not equate to an assessment of the merits of the dispute, for which the arbitral tribunal has exclusive jurisdiction.

Unlike other arbitration laws, Article 13 of the Uniform Arbitration Act does not preclude courts from ordering conservatory and interim measures after the arbitral tribunal's constitution. As a result, even once the arbitration tribunal has been constituted, the parties remain free to request interim and conservatory measures from domestic courts, provided that such request is justified by urgency.

4. Confidentiality of the proceedings

There are no provisions in the Uniform Arbitration Act providing that the arbitration proceedings shall be confidential. Accordingly, it falls on the parties to agree on the degree of confidentiality which they want for their arbitration, either indirectly by making a specific choice of arbitration rules providing that the arbitration shall be confidential or directly by entering into a non-disclosure agreement specifically covering the arbitration.

In any event, pursuant to Article 18 of the Uniform Arbitration Act, the deliberations of the Arbitral Tribunal must remain secret.

5. Award

Article 19 states that the arbitral award should be rendered in accordance with the rules chosen by the parties. The award is rendered by the majority of the arbitrators composing the arbitral tribunal. It must be signed by all arbitrators. If a minority of the arbitrators refuse to sign the award, this refusal should be mentioned and the award will have the same effect as an award signed by all arbitrators.

The award must mention the items set out below:

- The names and first names of the arbitrator(s) that have rendered the arbitral award;

- The date on which the award has been rendered;
- The seat of the arbitration;
- The names of the parties as well as their domicile or place of incorporation;
- The names of the parties' counsel or any person who has represented or assisted them;
- A summary of the parties' claims, their arguments and the procedural steps.

The arbitral award must be reasoned.

The rendering of the awards terminates the mission of the arbitral tribunal.

5.1 Recourse against arbitral awards

5.1.1 What recourses are available if a party is dissatisfied with the award?

Under Article 25 of the Uniform Arbitration Act, an arbitral award cannot be challenged through appeal, opposition or a petition to quash, unlike a Togolese judgment.

It can only be subject to setting aside proceedings before the domestic courts. Article 25 recognizes that parties may waive their right to challenge the arbitral award, provided that the award is not contrary to international public policy.

The arbitral award can also be subject to a third party opposition by any party not involved in the dispute and whose rights have been prejudiced by the award. Any third party opposition must be filed before the domestic court that would have had jurisdiction in the absence of an arbitration agreement.

Finally the arbitral award can also be subject to an application for revision before the arbitral tribunal in instances where the discovery of new facts that would have had a material impact on the outcome of the dispute became known but that remained unknown to the arbitral tribunal at the time it rendered its decision. The application for revision must be brought to the arbitral tribunal that ruled on the matter, and failing that, before the domestic that would have had jurisdiction in the absence of the arbitration agreement.

5.1.2 Can parties waive the right to seek an annulment of the award?

Although the Uniform Act of 1999 did not provide for such a right, Article 25(3) of the 2017 Uniform Act provides that the parties may agree to waive the right to have the award set aside, unless the award violates international public policy, a possibility that is reiterated in Article 29.2 of the CCJA Rules of Arbitration.

With the 2017 reform of the Uniform Arbitration Act, parties to any arbitration, including the CATO or DELOS arbitrations, will have the right to waive their right to apply for the setting aside of the award.

5.1.3 Grounds for annulment

As per Article 26 of the Uniform Arbitration Act, an award will be set aside if:

- The arbitral tribunal's decision is not based on an arbitration agreement, or it is based on an expired or null arbitration agreement;
- The arbitral tribunal was not properly constituted or if the sole arbitrator was not properly designated;
- The arbitral tribunal ruled without complying with the mandate conferred upon it; or
- Due process was violated;
- The arbitral award is contrary to international public policy;
- The arbitral award fails to provide the reasoning on which it is based.

Under Article 27 of the Uniform Arbitration Act, an action to set aside can be filed as soon as the award has been rendered. However, a setting aside application is inadmissible if it has not been lodged within one month following service of order granting leave to enforce the award ("*exequatur*").

Pursuant to Article 28 of the Uniform Act of Arbitration, an application to set aside suspends the enforcement of the award. However, an arbitral tribunal may also order provisional enforcement of the award, thereby allowing parties to immediately take enforcement measures against the award debtor.

5.1.4 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

There is no distinction between domestic and international arbitrations under the Uniform Arbitration Act.

An arbitral award becomes enforceable once a party obtains an order granting it leave to enforce ("*exequatur*") from the domestic courts. This order is obtained by the filing of an *ex parte* request by the party wishing to enforce the award. Such an enforcement title will not be granted if the court finds that the award is manifestly contrary to international public policy. Pursuant to Article 31 of the Uniform Arbitration Act, the court before which an application for enforcement has been lodged has 15 days to rule on the request, failing which, the award will be deemed to have become enforceable.

No recourse exists against the decision granting leave to enforce the award. However, the decision that denies leave to enforce can be challenged by filing a petition before the CCJA.

The enforcement and recognition of the award are considerably facilitated.

5.1.5 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

The enforcement of an award in the Togo is made pursuant to Article 34 of the Uniform Arbitration Act, which provides that the arbitral awards rendered pursuant to rules which differ from the Uniform Arbitration Act may be recognized and enforced in the member-States, pursuant to the conditions set forth in the international conventions potentially applicable and, failing such conventions, pursuant to the same rules provided from in the Uniform Arbitration Act.

Because the Togo is not a party to the New York Convention, a commercial award will not be enforced pursuant to the rules provided therein, but pursuant to the rules set forth in the Uniform Arbitration Act. We are not aware of any case law which has addressed the issue of the enforcement in the Togo of a foreign award which has been annulled at the place of the arbitration, but we believe that Togolese courts would likely apply the same reasoning as the French courts in the *Putrabali* and *Hilmarton* cases given that the annulment of a foreign at the seat is not a ground for refusal of enforcement pursuant to Article 34 of the Uniform Arbitration Act.

6. Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

The Uniform Act does not contain any provision specifically addressing contingency or alternative fee arrangements. However, Article 55 of the West African Economic and Monetary Union rules provides that "*lawyers' fees for the services performed shall be freely agreed upon by the lawyer and his client. They may be the subject of a written agreement. Failing any such fee arrangement, the lawyer's fees shall be determined pursuant to the rules established by the applicable bar*". Although Article 62 of the Bar Rules of the Togolese bar provides that the lawyers' fees are freely fixed between the lawyer and his client, Article 64 of the same prohibits arrangements whereby the lawyer shall be exclusively remunerated on the basis of the amount of damages awarded.

6.1 Funding arrangements

Third-party funding is not formally provided for under Togolese law but is not forbidden either.

UNITED ARAB EMIRATES (UAE)

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

JOHN GAFFNEY, SARA KOLEILAT-ARANJO AND MALAK NASREDDINE
OF AL TAMIMI & COMPANY

الإمامة محمد بن
AL TAMIMI & CO.

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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS +

1. Law ●
 - a. Framework ●
 - b. Adherence to international treaties ●
 - c. Limited court intervention ●
 - d. Arbitrator immunity from civil liability ●
2. Judiciary ●
3. Legal expertise ●
4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

VERSION: 14 JUNE 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

UAE Federal Arbitration Law No. 6 of 2018 on Arbitration has been recently issued and gazetted. It repeals the Arbitration Chapter of the UAE Civil Procedures Law No. 11 of 1992. The new law came into effect on 16 June 2018 and will apply to all ongoing and future arbitral proceedings. The new law is expected to significantly revamp arbitration in the UAE.

This GAP chapter on UAE is currently being updated to incorporate the provisions of the new UAE Federal Arbitration Law.

Arbitration has become a popular method of dispute resolution in the United Arab Emirates (“UAE”). The UAE has a number of popular seats for arbitration, including onshore Dubai and Abu Dhabi and the offshore financial centres such as the Dubai International Financial Centre (“DIFC”) and Abu Dhabi Global market (“ADGM”). The recent trends have shown parties’ willingness to submit their commercial disputes to arbitration, rather than only specialized disputes (e.g. construction). The arbitration rules of the UAE arbitration centres, such as the Dubai International Financial Centre-London Court of International Arbitration (“DIFC-LCIA”) and Dubai International Arbitration Centre (“DIAC”), are generally modern and reflect the best practices of the international arbitration institutions.

Key places of arbitration in the jurisdiction	Dubai and Abu Dhabi.
Civil law / Common law environment?	The UAE is a civil law environment (excluding DIFC and ADGM, which are common law environments).
Confidentiality of arbitrations?	The UAE law does not provide for confidentiality of the arbitrations.
Requirement to retain (local) counsel?	There is no requirement to retain counsel. Parties can either retain outside (local or non-local) counsel or be self-represented.
Ability to present party employee witness testimony?	The UAE Civil Procedure Law No.11 of 1992 (“CPC”) permits parties to present party employee witness testimony.
Ability to hold meetings and/or hearings outside of the seat?	Parties can hold meetings and hearings at any location of their choosing. However, for the arbitral award to be enforceable, it must be signed and issued in the UAE.
Availability of interest as a remedy?	The parties can recover interest as a remedy, subject to the provisions in the CPC.
Ability to claim for reasonable costs incurred for the arbitration?	The CPC does not confer a general right in relation to claims for costs. The ability to claim for reasonable costs incurred throughout the course of the arbitration depends on the parties’ agreement and/or the applicable rules of the arbitration institution.
Restrictions regarding contingency fee arrangements and/or third-party funding?	The UAE law does not prohibit third-party funding in general. For example, the UAE permits subrogation of claims by insurers (Article 1030 of the UAE Civil Transaction Code). However, contingency fee arrangements are prohibited.

Party to the New York Convention?	The UAE is a signatory of the New York Convention. The New York Convention entered into force in the UAE on 19 November 2006.
Other key points to note	The UAE has few unusual features. The CPC requires UAE arbitral awards to be physically signed in the UAE to comply with the technical requirements required for a valid award and be enforceable. In addition, a corporate party to an agreement must be expressly and strictly authorised to agree to arbitration as a means of resolving disputes under the agreement. More recently, in 2016, Article 257 of the Federal Penal Code No.3 of 1987, as amended by Federal Decree Law No.7 of 2016 (the “Penal Code”) expanded potential criminal liability of arbitrators in the UAE. Previously, Article 257 only applied to experts. At present, Article 257 states that an arbitrator and an expert may be punished with imprisonment for issuing a decision or report <i>“in contravention of the requirements of the duty of neutrality and integrity”</i> . The potential criminal liability extends to arbitrators and experts sitting in the DIFC and ADGM since they are also subject to the criminal laws of the UAE.
WJP Civil Justice score (2018)	0.68

ARBITRATION PRACTITIONER SUMMARY

UAE Federal Arbitration Law No. 6 of 2018 on Arbitration has been recently issued and gazetted. It repeals the Arbitration Chapter of the UAE Civil Procedures Law No. 11 of 1992. The new law came into effect on 16 June 2018 and will apply to all ongoing and future arbitral proceedings. The new law is expected to significantly revamp arbitration in the UAE.

This GAP chapter on UAE is currently being updated to incorporate the provisions of the new UAE Federal Arbitration Law.

Arbitration has been a widely-used method for resolving commercial disputes arising out of domestic and international commercial transactions in the UAE. The UAE's ascension to the New York Convention in 2006 and the drafting of a proposed UAE Federal Arbitration Law (to replace the existing Federal Code of Civil Procedure) highlights the UAE's commitment to utilising arbitration as a popular commercial dispute resolution regime in the region. The UAE courts are generally supportive of and respect an agreement to arbitrate between parties (although they have tended to adapt a restrictive approach to confirming arbitration agreements as an exception to their general jurisdiction). The UAE courts also respect domestic, international and foreign arbitral awards and recognise and enforce them, subject to the provisions of the law, without examining the merits of the case.

Date of arbitration law?	At present, the CPC governs all arbitrations conducted in the UAE (excluding those that take place in the context of the DIFC and the ADGM). The CPC arbitration provisions were drafted in 1992 and have remained largely unchanged since then. Article 203 (arbitration agreement) and Article 241 (conduct of the execution bailiff) were amended in 2005 pursuant to Federal Law No. 30 of 2005.
UNCITRAL Model Law? If so, any key changes thereto?	The CPC is not based on the UNCITRAL Model Law. The new federal arbitration law is based on the UNCITRAL Model Law and replaces Articles 203 to 218 of the CPC.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	There are no specialised arbitration courts or judges in the UAE.
Availability of <i>ex parte</i> pre-arbitration interim measures?	The parties can apply for precautionary attachment orders on an <i>ex parte</i> basis as a pre-arbitration interim measure.
Courts' attitude towards the competence-competence principle?	The CPC does not expressly provide for the competence-competence doctrine. However, this principle is recognised by the UAE courts. There are no statutory provisions, which prohibit the arbitrator(s) from determining their jurisdiction.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	N Under the CPC, awards may be challenged for the following reasons: (1) the award was rendered without an arbitration deed or was based on an invalid arbitration agreement or deed, (2) the arbitrator was invalidly appointed, (3) the award was issued by one arbitrator in the absence of other members of the tribunal without their permission, (4) the award was issued out

	of time, (5) a material procedural flaw in the arbitral proceedings (6) the award relates to a matter that is not capable of being arbitrated, or (7) the award is contrary to the public policy of the UAE. This reflects the criteria under Article V of the New York Convention.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	This issue has not been addressed by the courts to date.
Other key points to note?	∅

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law?

At present, the arbitration law is not based on the UNCITRAL Model Law.

The CPC governs all arbitrations conducted in the UAE (excluding DIFC and the ADGM). These provisions are: (a) Articles 203 to 218 which set out the general framework for arbitration in the UAE, (b) Articles 235 to 238 which govern the enforcement of foreign judgments and arbitral awards, and (c) Article 239 to 243 which govern execution proceedings.

The UAE accepted in 2006, without reservation, the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards, and thus the provisions of the convention became part of UAE law and bind the UAE courts. Where there is any contradiction between the UAE law and the convention, the latter prevails.

As indicated above, CPC arbitration provisions are not based on the UNCITRAL Model Law at present, but will likely incorporate the UNCITRAL model law into the forthcoming federal arbitration law.

1.2 When was the arbitration law last revised?

The CPC arbitration provisions were drafted in 1992 and have remained largely unchanged since then. Only Article 203 (arbitration agreement) and Article 241 (conduct of the execution bailiff) were amended in 2005, pursuant to Federal Law No. 30 of 2005.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

The CPC does not contain express provisions that regulate how the courts and/or tribunals should determine the substantive law. In the meantime, the CPC law does not prevent the parties to an arbitration agreement from agreeing on a substantive law. Therefore, the tribunal has procedural freedom under the CPC and, in practice, determines the substantive law using the applicable conflict-of-laws rules.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

The CPC does not contain express provisions in relation to severability of the arbitration clause. However, the trend of the UAE courts has been towards recognising the severability of the arbitration clause in instances where the rest of the contract (in which the arbitration clause is set forth) is cancelled/terminated.

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

For an arbitration agreement to be enforceable, it must fulfil the following requirements:

1. Article 203.2 of the CPC requires that the arbitration agreement is evidenced in writing.
2. The arbitration agreement should be signed in person or electronically by an authorised person in his/her legal capacity.
3. Pursuant to Ministerial Resolution No.406/2 of 2003, UAE governmental bodies may not enter into an arbitration agreement without prior approval from the Cabinet of Ministers (such

contracts are reviewed by the Ministry of Justice, Islamic Affairs and Awqaf in coordination with the Ministry of Finance and Industry).

4. Article 203.3 of the CPC provides that wherever the arbitration agreement takes the form of an arbitration deed, then the subject dispute must be determined in the deed.
5. Article 206.1 of the CPC states that it shall not be permissible for a minor or a person under a legal disability or a person deprived of his civil rights by reason of a criminal penalty or an unrehabilitated bankrupt to be an arbitrator.
6. Article 206.2 of the CPC stipulates that if there is more than one arbitrator, their number must in all cases be uneven.
7. Article 210.1 of the CPC provides that the arbitration award shall be issued within six months as of the date of the first arbitration hearing, unless otherwise agreed.

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

Under UAE law, a third party normally cannot be bound by an arbitration clause contained in an agreement to which it is not a party.

2.5 Are there restrictions to arbitrability? In the affirmative:

2.5.1 Do these restrictions relate to specific domains (such as IP, corporate law, etc.)?

Article 203.4 of the CPC states that "[i]t shall not be permissible to arbitrate matters in which conciliation is not permissible". These matters include matters related to public policy, criminal matters and family matters. Also, certain commercial agency and distributorship disputes (see e.g. Articles 6-7 of the Federal Law No.18 of 1981, as amended also known as the UAE Commercial Agency Law) and all labour disputes (see e.g. Federal Law No.8 of 1980, also known as the UAE Labour Law) may not be resolved through arbitration.

In recent years, the issue of arbitrability has been a key consideration as a result of a Dubai Court of Cassation judgment that seemed to interpret public policy extremely widely to include all real estate disputes and disputes concerning the circulation of wealth. However, recent judgments in both Dubai and Abu Dhabi have clarified that such disputes are indeed arbitrable, save for issues concerning registration of ownership, which is reserved to the State.

2.5.2 Do these restrictions relate to specific persons (i.e. State entities, consumers, etc.)?

In general, the UAE law does not permit a minor or a person with a legal disability to arbitrate. In addition, pursuant to Ministerial Resolution No.406/2 of 2003, UAE governmental bodies may not enter into an arbitration agreement without prior approval from the Cabinet of Ministers (such contracts are reviewed by the Ministry of Justice, Islamic Affairs and Awqaf in coordination with the Ministry of Finance and Industry).

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

Yes, irrespective of whether the place of arbitration is inside or outside of the jurisdiction. However, in order for this to occur, one of the parties must object to the litigation at the first hearing. The court will not do so *sua sponte*.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

This issue does not appear to have been considered yet.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction, but not only)

This issue does not appear to have been considered yet.

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

Parties can opt for either. They can retain outside counsel or be self-represented.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

While there are no explicit independent and impartial disclosure obligations imposed on arbitrators in the CPC, the courts are strict in relation to this issue. Potential arbitrators are highly encouraged to disclose any circumstances likely to give rise to justifiable doubts to his/her impartiality or independence in order to avoid a potential request for disqualification and/or criminal sanction pursuant to Article 257 of the Federal Penal Code No.3 of 1987, as amended by Federal Decree Law No.7 of 2016 ("Penal Code").

4.3 On what grounds to courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

The CPC provides, under Article 204.1, that where a dispute arises and the parties have not appointed the arbitrators or if one or more of the appointed arbitrators refuses to act or retires or is removed or judgment is passed rejecting him or if an obstacle arises preventing him from conducting the arbitration and there is no agreement in that respect between the parties, the court with the original jurisdiction to hear the dispute shall appoint the required arbitrators on application by one of the parties. This is conducted through the regular procedures for bringing an action and the number appointed by the court shall be equal to the number agreed upon by the parties.

4.4 Do courts have the power to issue interim measures in connection with arbitrations?

Under the CPC, the UAE courts rarely grant such relief and it is unlikely that any order for interim relief made by a tribunal would be enforced by the court. The UAE courts can grant orders stopping a tribunal from proceeding with arbitration, but this is extremely rare.

4.4.1 If so, are they willing to consider *ex parte* requests?

The parties can apply for precautionary attachment orders on an *ex-parte* basis as a pre-arbitration interim measure.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

Yes, the CPC regulates the conduct of the arbitration proceedings. For example, the CPC regulates the appointment and challenge of arbitrators. It also provides that the arbitrators must require testifying witnesses to take an oath. In addition, the CPC regulates the time limit for an arbitrator to produce an arbitral award and the requirements of issuing the award.

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

The CPC does not expressly provide that arbitration proceedings are confidential. Parties should explicitly request that the arbitration proceedings be confidential or opt for rules of an arbitration institution which provide for a confidential treatment of the proceedings. However, the confidentiality of the arbitration

proceedings can no longer be assured once the proceedings are adjudicated before the local courts (e.g., in relation to the ratification and execution of the award).

4.5.2 Does it regulate the length of arbitration proceedings?

Yes. The proceedings must be completed within six months from the date of the first arbitration hearing unless the parties agree to extend the time limit (Article 210 of the CPC).

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

No, but generally hearings and meetings can take place anywhere. However, the arbitral award must be signed and issued in the UAE.

4.5.4 Does it allow for arbitrators to issue interim measures?

The CPC does not explicitly vest the tribunal with such powers. Since the UAE courts do not tend to regularly grant such measures in practice, any grant of such measures by a tribunal is likely to face enforcement challenges.

4.5.4.1 In the affirmative, under what conditions?

Not applicable.

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence?

The UAE courts expressly stipulate that the arbitrators are empowered to evaluate the weight of the evidence presented, and accordingly the courts do not review this issue during the ratification process.

4.5.6 Does it make it mandatory to hold a hearing?

In the case of documents-only proceedings, it is not mandatory for parties to hold a hearing. However, in the case where the parties provide witness statements, the UAE law provides that it is mandatory for witnesses to give evidence under oath. In such cases, it is necessary for the parties to ensure that a hearing takes place even if it is for the sole purpose of having the witness swear an oath as to the truth of their statement.

4.5.7 Does it prescribe principles governing the awarding of interest?

The UAE law does not prohibit awarding of interest. Awards of interest in the UAE generally vary between 9% and 12% and are granted on a single/simple interest basis. The UAE courts are unlikely to enforce an award of interest if such an award is calculated on a compounded basis. Alternatively, the UAE courts may grant enforcement for the award except for the part dealing with the compound interest.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

Article 218 of the CPC states that the assessment of their fees and the costs of the arbitration shall be left to the arbitrators to decide, and they may make an award in respect of the whole or part thereof against the losing party. The court may, upon the application of one of the parties, vary such assessment to make it appropriate to the effort expended and the nature of the dispute.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

The UAE law does not provide immunity for arbitrators. The arbitrators under UAE law could be liable if they have acted criminally. An arbitrator may, however, be required to compensate the parties where the arbitrator withdraws from the proceedings without a good reason (Article 207.2 of the CPC). The arbitrators further may be criminally liable under Article 257 of the Penal Code as noted above in Paragraph 4(B). The

arbitrators also may be subject to a civil liability if it is proved that they committed a gross error in line with the general rules of tort liability, however, it is difficult under the UAE law to evidence the gross error, and we may say that it is very rare.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

The recent amendment of Article 257 of the Penal Code expanded the potential criminal liability of arbitrators in the UAE. Previously, an arbitrator could be held criminally liable when he or she was held guilty of corruptions. At present, Article 257 states that an arbitrator may be punished with imprisonment for issuing a decision “in contravention of the requirements of the duty of neutrality and integrity”. The amended provision puts arbitrators at risk of criminal prosecution which may result in imprisonment if he/she is found to have issued a decision which violates the arbitrator(s) duty of neutrality and integrity. The potential criminal liability extends to arbitrators sitting in the DIFC and ADGM since they are also subject to the criminal laws of the UAE.

5. The award

The general requirements of for an award to be enforceable are as follows:

1. Article 212.5 of the CPC states that the award of the arbitrators shall be issued by a majority; it must be in writing, with the dissenting view, if any, and it must in particulate include a copy of the arbitration agreement, a summary of the statements and documents of the parties, the reasons for the award and the order(s) made, the date of issue, the place at which it was issued, and the signature of the arbitrators, and if one or more of the arbitrators has refused to sign the award such fact shall be stated, and the award shall be valid if signed by the majority of the arbitrators.
2. Article 212.6 of the CPC stipulates that the award shall be written in Arabic unless the parties have agreed otherwise, and in that even it must, on being deposited, be accompanied by an official [notarised] translation.
3. Article 216.1(a) of the CPC stipulates that the arbitration award must be issued with a terms of reference.

Article 215.1 of the CPC provides that the arbitration award must be ratified by the competent court in order to be enforceable.

UKRAINE

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

SERGIY GRYSHKO, YAROSLAV PETRENKO AND YURIY RYBAK
OF REDCLIFFE PARTNERS

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JURISDICTION INDICATIVE TRAFFIC LIGHTS †

- | | |
|---|---|
| 1. Law | ● |
| a. Framework | ● |
| b. Adherence to international treaties | ● |
| c. Limited court intervention | ● |
| d. Arbitrator immunity from civil liability | ● |
| 2. Judiciary | ● |
| 3. Legal expertise | ● |
| 4. Rights of representation | ● |
| 5. Accessibility and safety | ● |
| 6. Ethics | ● |

VERSION: 21 MAY 2018 (v01.001)

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Ukraine is an arbitration-friendly jurisdiction with detailed regulation of courts' control over and support to international commercial arbitration. International and domestic arbitration are regulated in separate statutes: international commercial arbitration is regulated in the Law of Ukraine On International Commercial Arbitration (the "**ICA Law**") while domestic arbitration is subject to the Law on Domestic Arbitration Courts. In practice, the only international commercial arbitration institution in Ukraine that administers international commercial arbitration disputes is the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (the "**ICAC**"), however there is no legal restriction to set up an institution for administering international commercial arbitrations.

Key places of arbitration in the jurisdiction	Kyiv.
Civil law / Common law environment?	Civil law.
Confidentiality of arbitrations?	The ICA Law does not address confidentiality and it is therefore advisable to insert confidentiality provisions into the arbitration agreement.
Requirement to retain (local) counsel?	No.
Ability to present party employee witness testimony?	Yes.
Ability to hold meetings and/or hearings outside of the seat?	Yes.
Availability of interest as a remedy?	Interest as a remedy is considered to be a substantive rather than a procedural matter and an award of interest is therefore determined in accordance with the applicable substantive law. If Ukrainian substantive law applies, (i) pre-award interest shall be determined on the basis of the agreement of the parties; absent such agreement, the defaulting party, in case of breach of a monetary obligation, shall pay 3% statutory interest plus interest linked to the official inflation rate; (ii) post-award interest is not envisaged. The law expressly authorises Ukrainian courts to recognise awards with post-award interest that shall continue to accrue until the award is fully enforced. At the same time, the ICA Law does not authorise Ukraine-seated arbitral tribunals to order post-award interest.
Ability to claim for reasonable costs incurred for the arbitration?	Yes.
Restrictions regarding contingency fee arrangements and/or third-party funding?	No.
Party to the New York Convention?	Yes. Ukraine is a party to the New York Convention subject to the reciprocity reservation, and the communication dated 20

	<p>October 2015 that application and implementation by Ukraine of the obligations under the Convention, as applied to the occupied and uncontrolled territory of Ukraine, is limited and is not guaranteed, due to acts of illegal occupation and aggression by the Russian Federation.</p>
<p>Other key points to note</p>	<p>Disputes between Ukrainian entities with foreign investments and Ukrainian parties may be referred either to international arbitration, or to domestic arbitration. The restrictions of arbitrability of certain categories of disputes can be found in the Commercial Procedural Code of Ukraine. The legal framework for arbitration has undergone serious overhaul that (i) allowed court-awarded interim measures and taking of evidence in support of international arbitration, (ii) expanded the scope of arbitrable disputes, (iii) relaxed formal validity requirements for arbitration agreement, (iv) granted the possibility of consolidation of annulment and enforcement proceedings, and (v) introduced regulation of enforcement in foreign currencies.</p>
<p>WJP Civil Justice score (2017-2018)</p>	<p>0.51</p>

ARBITRATION PRACTITIONER SUMMARY

Ukraine is an arbitration-friendly jurisdiction with detailed regulation of courts' control over and support to international commercial arbitration. International and domestic arbitration are regulated in separate statutes: international commercial arbitration is regulated in the Law of Ukraine On International Commercial Arbitration (the "**ICA Law**") while domestic arbitration is subject to the Law on Domestic Arbitration Courts. In practice, the only international commercial arbitration institution in Ukraine that administers international commercial arbitration disputes is the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (the "**ICAC**"), however there is no legal restriction to set up an institution for administering international commercial arbitrations.

The Ukrainian parliament has recently adopted a major law restating a number of the procedural codes and amending statutes of Ukraine governing the court procedure and arbitration (the "**Court Procedures Reform Law**"). It entered into force on 15 December 2017.

Date of arbitration law?	The ICA Law was adopted on 24 February 1994 and entered into force on 20 April 1994. The latest amendments were introduced on 15 December 2017.
UNCITRAL Model Law? If so, any key changes thereto?	<p>The ICA Law is based on the UNCITRAL Model Law dated 1985 without the 2006 amendments and with certain deviations regarding:</p> <ul style="list-style-type: none"> • the "international" nature of the disputes (Art. 1); • the "commercial" nature of disputes (Art. 1); and • the indication that the President of the Ukrainian Chamber of Commerce and Industry shall perform the functions of the appointing authority referred to in articles 11(3), 11(4), 13(3). <p>The Court Procedures Reform Law also provides for:</p> <ul style="list-style-type: none"> • negative inferences based on a party's failure to provide evidence; and • additional regulation of interim measures.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No. The cases for annulment of arbitral awards rendered in international arbitration seated in Ukraine will be considered by the appeal court of the region where such arbitration was seated, while the Kyiv City Court of Appeal is in charge of the applications for recognition and enforcement of arbitral awards. However, given the fact that ICAC seated in Kyiv is the only arbitral institution that administers international commercial disputes in Ukraine, the Kyiv City Court of Appeal alone will hear the annulment and recognition cases in Ukraine.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes.
Courts' attitude towards the competence-competence principle?	Ukrainian courts generally recognize the competence-competence principle.
Grounds for annulment of awards additional to those based on the	No.

<p>criteria for the recognition and enforcement of awards under the New York Convention?</p>	
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>Under the ICA Law, a court may refuse to recognise and enforce a foreign award if the foreign award has been annulled at its seat. There have been no precedents of attempts to enforce annulled awards in Ukraine. However, in our view, the annulment of the award at the jurisdiction of its seat would likely be regarded by Ukrainian courts as a bar to recognition and enforcement.</p>
<p>Other key points to note?</p>	<p>The arbitration agreement should expressly indicate the full name of an arbitral institution and the types of disputes that the parties have agreed to refer to the arbitration. Ukrainian courts tend to invalidate the arbitration agreement or deny enforcement of the arbitral award in case of misspelling of the name of an arbitral institution. While the amendments to the ICA Law introduced by the Court Procedures Reform Law provide that any inaccuracies in the text of the arbitration agreement or doubts regarding its validity, effect and enforceability shall be interpreted by the court in favour of its validity, effect and enforceability, it remains to be seen whether the overly strict and formalistic approach of Ukrainian courts will change as a result of these changes.</p>

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law? If yes, what key modifications if any have been made to it?

In Ukraine, international commercial arbitration is governed by the "Law on International Commercial Arbitration" (1994) (the "**ICA Law**"). The ICA Law specifically regulates international arbitration seated in Ukraine.¹ It is essentially based on the UNCITRAL Model Law 1985 (the "**Model Law**"). However, it also includes several important deviations, such as:

- (i) Unlike the Model Law, the ICA Law allows arbitration of domestic disputes between Ukrainian companies, where at least one of them has foreign investment in its charter capital in the amount not less than 10%;²
- (ii) Unlike the Model Law, the ICA Law defines "commercial" disputes in the broadest possible terms to include those arising out of any relationship of trade nature, whether contractual or non-contractual, e.g. sale of goods; provision of services, execution of works; factoring; agency; construction and engineering; leasing; investment; insurance; banking, etc. Although the ICA Law does not explicitly exempt any disputes from its scope, as a matter of practice, disputes between consumers and traders are not deemed to be commercial;
- (iii) Unlike the Model Law, the ICA Law vests in the President of the Ukrainian Chamber of Commerce and Industry certain functions of:
 - the appointing authority, when parties have failed to agree on appointment of arbitrators, either in one or three arbitrator(s) proceedings, or if two arbitrators have failed to agree on the third one;
 - authority of a final instance to decide on challenge of arbitrators, if the previous challenge procedure was not successful for the challenging party.³

In practice, the only institution in Ukraine which administers international commercial arbitration is the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (the "**ICAC**"), the charter of which is enshrined into the ICA Law. In practice, the ICAC is the only arbitral institution that administers international commercial arbitration disputes in Ukraine. However, there is no legal restriction to set up an institution for administering international commercial arbitrations.

1.2 When was the arbitration law last revised?

The ICA Law has not seen significant changes since its adoption. However, over the past years the ICA Law has been amended twice.

The first revision of the ICA Law came into force on 19 October 2016 and extended the ICA Law to disputes between banks and borrowers arising out of financial restructuring schemes.

The second revision of the ICA Law came into force on 15 December 2017 after the Ukrainian parliament adopted a major law which amended a number of the procedural codes and statutes of Ukraine governing the court procedure (the "**Court Procedures Reform Law**"). The Court Procedures Reform Law brought about several significant modification to the ICA Law which are explained in more detail in Section 7 below.

¹ Domestic arbitration in Ukraine is regulated in the law on Domestic Arbitration Courts, the so-called Treteyski Courts.

² ICA Law, Part 2, Article 1.

³ ICA Law, Article 6.

2. The arbitration agreement

2.1 How do the courts in your jurisdiction determine the law governing the arbitration agreement?

Under the prevailing practice of Ukrainian courts, where the parties have failed to choose the law applicable to the arbitration agreement, it is the law of the country where the award was/ is going to be issued, i.e. the law of the legal seat of arbitration, which governs such arbitration agreement.

Ukraine is a Contracting State to the European Convention on International Commercial Arbitration. Thus, Ukrainian courts must give effect to Article 6 thereof which provides that in taking a decision on the existence or the validity of an arbitration agreement, courts shall examine the validity of such agreement with reference to the law to which the parties have subjected their arbitration agreement or, failing any indication thereon, applying the law of the country in which the award is to be made, unless the applicable law can be determined by virtue of the Ukrainian rules of conflict of laws.

However, a solid legal test for the determination of law applicable to the arbitration agreement has not been fully developed yet and, in some instances, courts rather opaquely suggested that the choice of law of the main contract also applied to the arbitration agreement in such a contract.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

The ICA Law provides that an arbitration agreement which forms part of a contract shall be independent of the other terms of the contract. Therefore, invalidity of the main contract does not invalidate the arbitration agreement.⁴

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

The only formal requirement set out in the ICA Law is that the arbitration agreement must be in writing. It may be concluded in the form of a separate agreement, exchange of letters or in the form of a clause in a contract. An arbitration agreement is also deemed to have been validly concluded if the parties exchange a written claim and a written defence in which one of the parties asserts and the other party does not deny the existence of an arbitration agreement.⁵

Ukrainian case law suggests that the arbitration agreement should expressly indicate the full name of an arbitral institution or the choice of *ad hoc* arbitration and the types of disputes that the parties have agreed to refer to the arbitration. As a matter of practice, the Ukrainian courts tend to adopt a strict and formalistic approach and invalidate the arbitration agreement in case of misspelling of the name of an arbitral institution. The same risk exists for *ad hoc* arbitration in a case of misspelling the applicable arbitration rules, e.g. PUNCITRAL rather than UNCITRAL. Therefore, it is important to ensure the clear and unambiguous wording of the arbitration clause.

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

Under the ICA Law as interpreted by the courts, a third party to the contract containing the arbitration agreement may not be bound by it.⁶

⁴ ICA Law, Part 1, Article 16.

⁵ ICA Law, Part 2, Article 7.

⁶ See, e.g., ruling of the Supreme Court of 16 February 2018 in case court docket No. 910/13318/16.

2.5 Are there any restrictions to arbitrability? If the affirmative:

2.5.1 Do these restrictions relate to specific domains (such as IP, corporate law, etc.)?

2.5.2 Do these restrictions relate to specific persons (i.e., state entities, consumers, etc.)?

The ICA Law restricts eligibility of disputes to be submitted to arbitration by both eligible persons (subjective arbitrability) and the subject matter of the disputes (subject matter arbitrability). In particular, a dispute is deemed subjectively arbitrable where it involves at least:

- (i) one foreign party; or
- (ii) a Ukrainian party which has at least 10% of direct foreign shareholding.⁷

The ICA Law further provides that where a dispute in question involves a foreign party only foreign trade and other foreign economic disputes can be arbitrable.⁸ At the same time, the ICA Law explicitly provides that this is without prejudice to the arbitrability provisions in other statutes⁹ which include the Commercial Procedure Code as revised by Court Procedures Reform Law, in force from 15 December 2017. The Commercial Procedure Code provides that the following subject matters are not capable of being submitted to international arbitration:

- (i) public law disputes, including protection of economic competition and anti-trust, public procurement, unfair competition, privatisation of state assets, protection of patents, trademarks and copyright, unless purely civil law aspects (damages, repudiation of contract, etc.) are in dispute;
- (ii) disputes over invalidation of (government) acts;
- (iii) disputes involving state registries such as those involving the state registration of title to real estate, the intellectual property rights, rights to securities, unless such disputes are derivative from the dispute over underlying rights to tangible or intangible property;
- (iv) disputes concerning the bankruptcy proceeding and disputes related to property claims against the borrower in bankruptcy, including disputes over invalidation of contract made by the borrower, and other aspects of bankruptcy;
- (v) disputes over challenging of the acts (decisions) of business entities or individuals – entrepreneurs, including their corporate bodies and company officials, in commercial activities sphere;
- (vi) disputes over setting aside of awards issued by domestic arbitration courts (the Treteyski courts),¹⁰ decisions and over the challenging of the writs of execution over the domestic arbitration award;
- (vii) derivative actions by shareholders against directors of the company.¹¹

Finally, the Ukrainian Commercial Procedural Code sets forth another restriction to arbitrability and provides that disputes relating to corporate governance, including disputes between shareholders of a

⁷ ICA Law, Part 2, Article 1.

⁸ ICA Law, paragraph 2 Part 2, Article 1.

⁹ ICA Law, Part 4, Article 1.

¹⁰ Domestic arbitration courts (Treteyski courts) are regulated by special law on Domestic Arbitration Courts (Treteyski Courts). The framework for arbitration proceeding in Domestic Arbitration Courts significantly differs from the one provided for international commercial arbitration, *i.e.* it sets forth different rules on arbitrability of disputes, enforcement of awards, etc.

¹¹ Commercial Procedure Code, Article 22.

legal entity or the shareholders and the legal entity by itself related to the incorporation, functioning, management and dissolution of such legal entity can be submitted to international commercial arbitration only if the arbitration agreement is entered into between the legal entity and *all* of its shareholders.

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

3.1.1 If the place of the arbitration is inside of the jurisdiction?

3.1.2 If the place of the arbitration is outside of the jurisdiction?

In Ukraine, national courts, must discontinue proceedings and refer the parties to arbitration as soon as the respondent objects against its jurisdiction on the basis of a binding arbitration agreement. This rule applies independently of the place of arbitration.

However, if the respondent does not object, the court will proceed to hearing the case on the merits. If the arbitral tribunal seized with the matter ultimately rules on the absence of jurisdiction based on invalidity of arbitration agreement, such ruling will not have *res judicata* effect for the Ukrainian court. The Ukrainian court will have to conduct an independent review of the validity and existence of the arbitration agreement. However, courts will likely have certain deference to the ruling of the arbitral tribunal.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

National courts in Ukraine will not stay litigation proceeding if arbitrators issue an anti-suit injunction, unless such injunction is formally recognised by the Ukrainian court. Such recognition would have to be pursued in accordance with the Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "**1958 New York Convention**"). To the best of our knowledge, no attempts to have such orders recognised in Ukraine have ever been made. However, recent attempts to have the decisions of emergency arbitrators rendered under the auspices of the Stockholm Chamber of Commerce enforced in Ukraine have shown that Ukrainian courts are prepared to treat such decisions as well as interim awards issued by foreign arbitral tribunals as "awards" enforceable under the New York Convention.¹²

Legally speaking, Ukrainian courts have a final say in the decision to stay proceedings based on the existence of a valid arbitration agreement. Therefore, the only option to achieve the discontinuance of the court proceeding is a request of either of the parties submitted to the court before its first statement on the substance of the dispute. The request should argue the existence of a valid arbitration agreement.

3.3 On what ground(s) can the court intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)

The ICA Law prohibits national courts from intervening in arbitral proceedings except in the cases expressly prescribed by the ICA Law. Such cases include the powers of the court to:

- (i) order interim measures in support of arbitration;¹³
- (ii) request the production of evidence, examine of a witness or otherwise preserve evidence;¹⁴
- (iii) set aside negative findings of the arbitral tribunal on its jurisdiction;¹⁵
- (iv) set aside final arbitral awards issued in Ukraine.¹⁶

¹² Cases of *JKX Oil & Gas v. v. The State of Ukraine* represented by the Ministry of Justice of Ukraine, No. 757/5777/15-ц; and *Ostchem Holding Limited v. Public Joint Stock Company "Odessa Port Plant"*, No. 519/459/16-ц.

¹³ CPC, Article 149(3), 150-159.

¹⁴ ICA Law, Article 27; CPC, Articles 84(11), 85(9), 94, 116(7,8).

¹⁵ ICA Law, Article 16(3).

¹⁶ ICA Law, Article 5.

Because the ICA Law only regulates international commercial arbitration seated in Ukraine, it does not allow Ukrainian courts to intervene in arbitrations seated outside of the country, unless the court assists parties or the arbitral tribunal in submission of evidence related to the arbitration proceeding or examination of witnesses. Generally, as a matter of court practice, the Ukrainian courts follow this rule, endorse the pro-arbitration stance and do not intervene in arbitrations other than when expressly authorised by the ICA Law.

However, we are aware of cases where Ukrainian courts unlawfully issued anti-arbitration injunctions in relation to an arbitration seated outside Ukraine.¹⁷ Those injunctions were affirmed on appeal by the Higher Commercial Court of Ukraine, whose decisions have not since been reversed. In some other cases, Ukrainian courts effectively intervened in arbitral proceedings by accepting and upholding claims for invalidation of the arbitration agreement which had been brought in parallel to arbitration proceedings. By doing so, Ukrainian courts simultaneously blocked further recognition and enforcement of any arbitral award based on invalidated arbitration agreement in Ukraine on public policy grounds. The problem was so common in the past that it was at issue in at least two investment arbitrations involving Ukraine, namely, *Western NIS Enterprise Fund v. Ukraine* (ICSID Case No. ARB/04/2) and *GEA Group Aktiengesellschaft v. Ukraine* (ICSID Case No. ARB/08/16). Both dealt with the issue of impossibility to enforce foreign arbitral award in Ukraine.

4. The conduct of the proceeding

4.1 Can parties retain outside counsel or be self-represented?

The ICA Law does not address the issue of the parties' representation. However, we are not aware of any practical difficulties with outside counsels representing clients or even with self-representation.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstance justify this outcome?

Ukrainian courts are not explicitly authorised to control arbitrators' independence and impartiality. The issue of arbitrators' independence and impartiality will be resolved in accordance with rules of arbitration applicable in institution or the rules of *ad hoc* arbitrations. However, arguably, any doubts relating to arbitrator's independence and impartiality might result in setting the arbitral award aside in pursuant to Article 34 of the ICA Law.

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of ad hoc arbitration)?

The ICA Law does not provide for the courts' intervention or assistance in the constitution of the arbitral tribunal. Hence, Ukrainian courts are not allowed to intervene to assist in the constitution of the arbitral tribunal. The ICA Law vests in the President of the Ukrainian Chamber of Commerce and Industry certain functions of the appointment authority when parties have failed to agree on appointment of arbitrators, either in one arbitrator or three arbitrator proceedings, or if the two arbitrators have failed to agree on the third arbitrator.

4.4 Do courts have the power to issue interim measures in connection with arbitrations? If so, are they willing to consider ex parte requests?

Until recently Ukrainian courts were not allowed to impose any interim measures due to lack of proper statutory authorisation. However, the Court Procedure Reform Law has vested Ukrainian courts with the power to issue interim measures in support of international arbitration,¹⁸ specifically injunctions with

¹⁷ See, e.g., in the broadly reported case of *Telenor Mobile Communications AS v. Storm LLC*, 584 F.3d 396 (2d Cir. 2009).

¹⁸ CPC, Part 1, Article 149.

regard to the subject of an arbitration proceeding (e.g. freezing orders) as well as injunctions requesting submission of evidence related to the arbitration proceeding or examination of witnesses based on a request from the arbitral tribunal or from a party to the arbitration proceeding.

Also, Ukrainian courts are empowered to issue interim measures in the course of proceedings on the recognition and enforcement of the arbitral award.¹⁹ Such measures may include freezing of the assets, prohibition to perform some actions, etc.

The motion for interim measures is considered by the court on *ex-parte* basis. However, in exceptional cases the court may ask both parties to appear.²⁰

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

4.5.1 Does it provide for confidentiality of arbitration proceedings?

The ICA Law is silent on the confidentiality issues of the arbitration proceeding. It is advised to include confidentiality provision in the arbitration agreement.

4.5.2 Does it regulate the length of arbitration proceedings?

The ICA Law itself does not regulate the length of arbitration proceedings.

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

Under the ICA Law, the parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. An arbitral tribunal may also meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.²¹

4.5.4 Does it allow for arbitrators to issue interim measures? If the affirmative, under what conditions?

The ICA Law allows an arbitral tribunal to grant interim measures upon a party's request.²² Such interim measure may be imposed either before the commencement of an arbitral proceeding by the ICAC President or at any stage of the arbitral proceeding by the arbitral tribunal. The ICA Law does not address the issue of the conditions under which the interim measures may be imposed.

At the same time, the degree to which parties will comply with such interim measures remains largely voluntary. This is because the chances for a party to have such interim measures enforced by a state court are rather remote due to the absence of procedural provisions entitling the parties to apply to local courts for this purpose. As a matter of practice, interim measures are frequently issued by arbitral tribunals but there is no good record to assess whether these interim measures are in fact observed by the parties.

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?

The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.²³ The ICA Law does not set forth any restrictions as to

¹⁹ CPC, Part 1, Article 394.

²⁰ CPC, Part 1, Article 153.

²¹ ICA Law, Parts 1-2, Article 20.

²² ICA Law, Article 17.

²³ ICA Law, Part 2, Article 19.

the admissibility of specific types of evidence, such as restrictions with regard to presentation of testimony by a party employee.

4.5.6 Does it make mandatory to hold hearings?

Under the ICA Law, an arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted only on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.²⁴

4.5.7 Does it prescribe principles governing the awarding of interest?

The ICA Law does not address the issue of granting pre-award interest by the arbitral tribunal. As a matter of practice, such interest must be determined in accordance with the provisions of the contract and the law applicable to the merits of the dispute.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

The ICA Law is silent on the allocation of costs of the arbitration between the parties. The default rules of court proceedings, according to which legal costs are apportioned to either claimant or respondent in proportion to the satisfaction of the claim, do not apply to the international commercial arbitration.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

The ICA Law does not address the issue of responsibility and/or immunity from civil liability of arbitrators for acts related to their decision-making function.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

Arbitrators and parties to the arbitral proceeding may be held liable for certain criminal offences.²⁵ Under the Criminal Code of Ukraine, arbitrators may be held liable for abuse of their powers, issuing fake documents or making false statements in arbitral awards or other documents, gross negligence, unlawful enrichment, taking bribes and extortion of a bribe.²⁶ In turn, parties may be prosecuted for bribing, offering or promising a bribe to the arbitrators.²⁷ We are not aware of any instances where arbitrators or parties to the arbitral proceeding were prosecuted for such criminal offences.

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Pursuant to the ICA Law, the award shall contain the reasoning upon which it is based.²⁸ This provision is mandatory and cannot be waived.

²⁴ ICA Law, Part 1, Article 24.

²⁵ The Law of Ukraine "On Prevention Corruption", Article 3.

²⁶ Criminal Code of Ukraine, Articles 364, 366, 367, 368-2, 369, 370.

²⁷ Criminal Code of Ukraine, Article 369.

²⁸ ICA Law, Parts 1-3, Article 31.

5.2 Can parties waive the right to seek the annulment of the award? If yes, under what conditions?

The arbitral award shall be final and binding on the parties of the proceeding. At the same time, the parties cannot waive the right to seek the annulment of the award under the Ukrainian legislation.²⁹

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

There are no atypical requirements to the rendering of a valid award in Ukraine.

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)? If yes, what are the grounds for appeal?

No, it is not. The award made by the arbitral tribunal shall be final and subject to no further appeal. It can only be subject to annulment on limited grounds.³⁰

5.5 What procedures exist for the recognition and enforcement of awards, what time limits apply and is there a distinction to be made between local and foreign awards?

Recognition and enforcement of foreign arbitral awards in Ukraine, as well as enforcement of international arbitral awards rendered in Ukraine, are governed by the Code of Civil Procedure (the "CPC"), the ICA Law and applicable treaties, including, most importantly, the 1958 New York Convention.

According to the CPC, the Ukrainian courts shall grant enforcement of foreign arbitral awards provided that:

- (i) recognition and enforcement are permitted under a treaty ratified by the Ukrainian Parliament; or
- (ii) there is reciprocity, *i.e.* courts of the state of the seat of arbitration would similarly recognize Ukrainian arbitral awards. At the same time, the CPC states that it shall be presumed that reciprocity exists between Ukraine and such other state unless it is proved otherwise.³¹

To this end, it should also be noted that when ratifying the 1958 New York Convention, Ukraine made the following reservation: "*[t]he Ukrainian Soviet Socialist Republic will apply the provisions of this Convention in respect of arbitral awards made in the territories of non-contracting States only to the extent to which they grant reciprocal treatment.*"³² On 11 November 2015, the Secretary-General of the United Nations communicated a notification of the Ministry of Foreign Affairs of Ukraine, stating that the application and implementation by Ukraine of the obligations under the New York Convention in relation to the Autonomous Republic of Crimea and certain districts of the Donetsk and Luhansk oblasts of Ukraine is limited and is not guaranteed due to acts of illegal occupation and aggression by the Russian Federation.³³

It is not clear whether the CPC presumption of reciprocity applies to the reciprocity reservation made under the New York Convention. The correct interpretation would be to assume that those are entirely different concepts which could yield similar results.

The Court Procedures Reform Law brought some serious changes designed to simplify the procedure of recognition and enforcement of arbitral awards. Jurisdiction to recognise and enforce foreign arbitral

²⁹ Neither ICA Law nor CPC provide for such an option.

³⁰ ICA Law, Article 34.

³¹ CPC, Part 1, Article 390.

³² United Nation Treaty Collection, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&clang=_en#EndDec.

³³ <https://treaties.un.org/doc/Publication/CN/2015/CN.597.2015-Eng.pdf>.

awards has been vested exclusively in the Kyiv City Court of Appeal as the court of the first instance.³⁴ The decision on granting or denying recognition and enforcement may be appealed only to the Supreme Court. The decision of the Supreme Court is final and subject to no further appeal.³⁵ An arbitral award may be applied for recognition and enforcement within three years after its entry into force.³⁶ The application for setting aside of arbitral award shall not automatically suspend the enforcement of the award.

The ICA Law prescribes the grounds upon which a Ukrainian court may refuse to recognise and enforce a foreign award which duplicate the provisions of Article 5 of the 1958 New York Convention.³⁷

There is no distinction in procedures of recognition and enforcement of local and foreign international arbitral awards.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce award?

The application for annulment of the award does not automatically suspend the exercise of the right to enforce the award. However, the ICA Law provides that the court where the recognition and enforcement of arbitral award is sought may, if deems necessary, postpone rendering the ruling until the proceeding for annulment of the award is completed.³⁸

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Under the ICA Law, a court may refuse to recognise and enforce a foreign award if the foreign award has been annulled at its seat.³⁹ There have been no precedents of attempts to enforce annulled awards in Ukraine. However, in our view, the annulment of the award at the jurisdiction of its seat would likely be regarded by Ukrainian courts as a bar to recognition and enforcement.

5.8 Are foreign awards readily enforceable in practice?

As a matter of court practice, the Ukrainian courts enforce foreign arbitral awards readily. As experience shows, proceedings for enforcement and recognition of foreign arbitral award may last for three to six months before the court of first instance and about six months before the court of appeal.

6. Funding arrangements

6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction? If so, what is the practical and/or legal impact of such restrictions?

Ukrainian legislation neither imposes any restriction on the use of contingency or alternative fee arrangements nor regulates the issues of third-party funding. Therefore, making such alternative funding arrangements is not prohibited in Ukraine. At the same time, arrangements such as third-party funding are rarely used for the financing of arbitral proceedings in Ukraine.

³⁴ CPC, Part 3, Article 475. Before the revision, the courts competent to decide in the first instance on recognition and enforcement of foreign arbitral awards were the general courts at the seat of the debtor, and where the debtor did not have a seat in Ukraine.

³⁵ CPC, Part 2, Article 351; Part 3, Article 419.

³⁶ CPC, Article 391.

³⁷ ICA Law, Part 1, Article 36.

³⁸ ICA Law, Part 2, Article 36.

³⁹ ICA Law, Part 1, Article 36.

7. Is there likely to be any significant reform of the arbitration law in the near future?

Ukraine is currently undergoing a far-reaching court reform. As mentioned above, the Ukrainian Parliament adopted the Court Procedures Reform Law restating a number of the procedural codes and amending several statutes, including the ICA Law. Although the Court Procedures Reform Law is aimed at overhauling the national court system in the first place, it also introduces a number of helpful changes in the arbitration sector. The Court Procedures Reform Law became effective on 15 December 2017.

7.1 Introduction of court assistance to arbitral tribunals

As explained above, the ICA Law provides that it is not incompatible with an arbitration agreement for a party to request from a court an interim measure of protection.⁴⁰ However, until recently, the Ukrainian procedural legislation did not provide for any practical tools to implement this provision effectively before Ukrainian courts.

The situation changed when the Court Procedures Reform Law came into force. In particular, the Ukrainian courts now are empowered to support the arbitration proceeding by:

- (i) imposing an interim injunction with regard to the subject of an arbitration proceeding; and
- (ii) requesting evidence related to the arbitration proceeding and examining witnesses based on a request from the arbitral tribunal or from a party to the arbitration proceeding.

7.2 Formal validity requirements for arbitration agreements

As described above, the attitude of the Ukrainian state courts towards the invalidation of arbitration agreements due to inaccuracies therein has been rather controversial mostly because of an overly formalistic approach.⁴¹ In order to eliminate this ambiguity, the amendments to the ICA Law introduced by the Court Procedures Reform Law provide that any inaccuracies in the text of the arbitration agreement or doubts regarding its validity, effect and enforceability shall be interpreted by the court in favour of its validity, effect and enforceability.

The Court Procedures Reform Law also revises the formal requirements for the arbitration agreement by allowing the electronic messages, which contain information that is available for further transfer, to be considered as a written form of arbitration agreement. Also, the Court Procedures Reform Law advances the ICA Law by introducing an arbitral tribunal's right to draw adverse inferences if either of the parties does not submit the evidence requested by the arbitral tribunal, depending on which party avoids such submission and/or the probative value that this evidence may have.⁴²

7.3 Post-award interest and foreign currency

The Court Procedures Reform Law expressly authorises Ukrainian courts to recognise awards with post-award interest. The post-award interest will continue to accrue until the award is fully enforced.

This amendment simultaneously resolves the issue of foreign currency in which such post-award interest may be determined. If the arbitral award is denominated in some currency/ currencies other than Ukrainian Hryvnia, the Court Procedures Reform Law authorises the enforcing court to indicate this amount in such foreign currency/currencies or, upon the creditor's request, to determine this amount in Ukrainian Hryvnia at the exchange rate of National Bank of Ukraine as of the date of the leave to enforce.

⁴⁰ ICA Law, Article 9. See Section 4.4 above.

⁴¹ See Section 2.3 above.

⁴² ICA Law, Part 4, Article 25: "*the arbitral tribunal may, if either of the parties does not submit the evidence requested by the arbitral tribunal, depending on which party avoids such submission and/or the probative value that this evidence may have, acknowledge the fact, for confirmation of which this evidence should have been submitted, or reject such fact, or consider the case with evidence already on the record.*"

At the same time, the ICA Law does not authorise Ukraine-seated arbitral tribunals to order post-award interest.

7.4 Consolidation of annulment and enforcement procedures

In addition, the Court Procedures Reform Law authorises Ukrainian courts to consider applications for setting aside of the arbitral award and application for recognition and enforcement of the arbitral award in a single consolidated proceeding. In practice, this should save a successful claimant significant time and cost when attempting to enforce a Ukrainian arbitral award and prevent inconsistent findings in annulment and enforcement proceedings.

This novelty is especially important given the recent change in the jurisdiction of Ukrainian courts over recognition and enforcement cases of foreign arbitral awards as well as cases of annulment of international arbitral awards issued in Ukraine. The Court Procedures Reform Law vests the right to recognise and enforce the foreign arbitral award to the Kyiv City Court of Appeal, as the court of the first instance.⁴³ The decision on granting or denying recognition and enforcement may be appealed only to the Supreme Court. The cases for annulment of arbitral awards rendered in international arbitration seated in Ukraine will be considered by the appeal court of the region where such arbitration was seated. However, given the fact that ICAC seated in Kyiv is the only arbitral institution authorised to administer international commercial disputes in Ukraine, practically the Kyiv City Court of Appeal alone will hear the annulment cases in Ukraine.

⁴³ CPC, Part 3, Article 475.

UNITED STATES OF AMERICA (USA)

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CALIFORNIA CONTRIBUTION PREPARED BY

LEE M. CAPLAN, JEFFREY R. MAKIN AND DIANE B. ROLDÁN
OF ARENT FOX LLP

FLORIDA CONTRIBUTION PREPARED BY

NICOLAS SWERDLOFF, JEFFREY B. GOLDBERG AND MALIK HAVALIC
OF HUGHES HUBBARD & REED LLP

NEW YORK AND WASHINGTON D.C. CONTRIBUTION PREPARED BY

INA C. POPOVA, ELIZABETH NIELSEN AND MEGAN CORRARINO
OF DEBEVOISE & PLIMPTON LLP

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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

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4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

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WASHINGTON D.C.



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IN-HOUSE AND CORPORATE COUNSEL SUMMARY

The United States is one of the most sought-after arbitration venues in the world. The United States is known for vigorous enforcement of arbitral awards, neutral dispute resolution, and judicial preferences in favor of arbitration. The United States also has a reputation for permitting more invasive discovery than other jurisdictions, even in streamlined arbitration proceedings.

Many arbitrations in the United States are governed by the Federal Arbitration Act (“FAA”), which applies to any arbitration affecting interstate commerce (*i.e.*, commerce between one of the U.S. states) or international commerce. Each state typically has its own arbitration statute as well. However, a state statute generally applies only where the FAA is silent or if the dispute is entirely local to a particular state. The FAA bears some similarity to the UNCITRAL Model Law on International Commercial Arbitration. However, there are important differences. Unlike the Model Law, the FAA provides different grounds for vacating an award and few default rules of procedure where the parties fail to agree to a governing set of rules.

When considering arbitration in the United States, corporate and in-house counsel should consider the following factors about this jurisdiction:

Key places of arbitration in the jurisdiction	Popular venues include New York, Miami, San Francisco, Los Angeles, and Houston.
Civil law / Common law environment?	The U.S. is a common law country. Arbitrators are more likely to be persuaded by case law than in civil law countries.
Confidentiality of arbitrations?	U.S. arbitrations are not automatically confidential, but the parties may agree to keep the proceedings confidential.
Requirement to retain (local) counsel?	Each U.S. state separately governs the practice of law within its borders, and may prohibit foreign attorneys or attorneys from other U.S. states from participating in arbitrations located in that state.
Ability to present party employee witness testimony?	Arbitrators generally have broad discretion on evidentiary rulings, subject to any contrary agreement by the parties or applicable arbitration rules.
Ability to hold meetings and/or hearings outside of the seat?	Typically, there is an ability to hold meetings and/or hearings outside the seat.
Availability of interest as a remedy?	Parties in U.S. arbitrations may claim the full panoply of potential remedies, including pre- and post-judgment interest, costs, and potentially even punitive damages. However, the default “American Rule” is that each side pays its own attorney’s fees.
Ability to claim for reasonable costs incurred for the arbitration?	Parties are generally required to bear their own costs and legal fees, barring statutory provisions or an agreement to the contrary.
Restrictions regarding contingency fee arrangements and/or third-party funding?	The terms and legality of funding arrangements are governed by U.S. state laws. Each state has attorney ethical and possibly other rules (<i>e.g.</i> , champerty) that should be consulted.

Party to the New York Convention?	The U.S. is a party to the New York Convention and U.S. courts are empowered to enforce arbitral awards, including through injunctions and judgments.
Other key points to note	<p>U.S. law strongly favors arbitration, with limited avenues for challenging an arbitral award through judicial intervention</p> <p>U.S. arbitrators are considered more likely to grant extensive discovery, including potentially interrogatories and witness depositions, particularly in the case of domestic arbitration. However, the United States also offers robust protections for evidentiary and testimonial privileges.</p>
WJP Civil Justice score (2017-2018)	0.73

ARBITRATION PRACTITIONER SUMMARY

While the Federal Arbitration Act (“FAA”) is the primary arbitration statute in the United States, each state typically has its own arbitration statute as well. The FAA generally applies broadly—reaching any arbitration agreement or award which touches on interstate commerce (*i.e.*, commerce between one of the U.S. states) or international commerce. Typically, the FAA, when applicable, will pre-empt any contrary state law provisions. However, if the FAA is silent with respect to a particular issue, the applicable state law will control. The state arbitration law will also apply to the extent an arbitration agreement or award does not implicate interstate or international commerce—for instance, a purely local dispute that does not involve federal law. Moreover, the FAA itself is subject to interpretation by the courts, which may reach differing interpretations in areas in which the U.S. Supreme Court has not ruled.

In this context, the following are key questions for legal practitioners to consider when engaged in arbitrations in the United States. As these questions are answered, the parameters of the arbitration will take shape, and practitioners will know what to expect as the arbitral proceedings move forward.

Date of arbitration law?	The FAA was enacted in 1925. Typically, each U.S. state also has its own arbitration law, and the enactment dates vary from state to state.
UNCITRAL Model Law? If so, any key changes thereto?	The FAA bears some similarity to the UNCITRAL Model Law on International Commercial Arbitration. However, there are important differences. Unlike the Model Law, the FAA provides different grounds for vacating an award and few default rules of procedure where the parties fail to agree to a governing set of rules.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	The availability of specialised courts or judges varies across the U.S. For example, New York has implemented specific procedures to help its courts develop arbitration expertise, including by designating a specialized judge to handle all of the New York County Commercial Division’s international arbitration cases.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Most U.S. Federal and state courts permit some form of pre-arbitration interim measures. Whether the procedure is purely <i>ex parte</i> or requires some notice to the parties varies.
Courts’ attitude towards the competence-competence principle?	U.S. courts typically have a favourable view of the competence-competence principle.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The typical grounds for annulment of awards in the U.S. are: (i) the award was procured through corruption, fraud, or undue means; (ii) the arbitrators exhibited bias or acted corruptly; (iii) the arbitrators engaged in misconduct in the course of proceedings, prejudicing the parties or otherwise raising due process concerns; and (iv) the arbitrators exceeded their power or imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.
Courts’ attitude towards the recognition and enforcement of	Foreign awards are readily confirmed and enforced in the U.S., consistent with the policy of the New York Convention.

foreign awards annulled at the seat of the arbitration?	Depending on the circumstances, U.S. courts typically would not enforce an award that was annulled at the seat of the arbitration.
Other key points to note?	<ol style="list-style-type: none"> 1. <u>What type of court intervention, if any, can be expected during the arbitral proceedings?</u> U.S. federal and state courts may intervene in select circumstances to facilitate arbitration of claims. 2. <u>In what format should the award be?</u> Typically, awards under the FAA and state arbitration laws are written, but the FAA does not require that they be signed, dated, or reasoned. 3. <u>What are the requirements for a valid and enforceable award?</u> Typically, under the FAA and state arbitration laws, an award is valid and enforceable so long as it is written and the arbitral process is conducted in accordance with due process.

JURISDICTION DETAILED ANALYSIS

The Federal Arbitration Act (“FAA”) is the primary arbitration statute in the United States. It was enacted by the U.S. in 1925 to set forth the national policy of encouraging arbitration as an alternative dispute resolution mechanism. The FAA thus applies broadly, reaching any arbitration agreement or award which touches on interstate commerce (*i.e.*, commerce between one of the U.S. states) or international commerce. While states also have their own arbitration statutes, most of which are modelled on the FAA or the UNCITRAL Model Law, the FAA will pre-empt any contradictory state law provisions. However, if the FAA is silent with respect to a particular issue, the applicable state law will apply. The state arbitration law will also apply to the extent an arbitration agreement or award does not implicate interstate or international commerce – for instance, a purely local dispute that does not involve federal law. Moreover, the FAA itself is subject to interpretation by the courts, which may reach differing conclusions in the absence of U.S. Supreme Court intervention.

The FAA is divided into three Chapters: Chapter 1 is the principal chapter, setting forth the basic operation of federal arbitration law; Chapter 2 incorporates the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), which requires signatory states to enforce and recognize arbitration agreements and awards issued by other contracting states; and Chapter 3 incorporates the Inter-American Convention on International Commercial Arbitration of 1975 (“Panama Convention”), which applies a very similar, but more specific regime amongst signatory states in North, Central, and South America. Significantly, the provisions of Chapter 1 are applied in all cases unless a more specific provision of Chapter 2 or 3 conflicts with Chapter 1. Chapter 3 also incorporates the majority of Chapter 2 into Chapter 3.

The key provisions of Chapter 1 (Sections 1-10) are as follows:

- Section 2 provides that arbitration agreements are valid and enforceable just as any other contract provision.
- Sections 3 and 4 provide courts with authorization to, respectively, (a) stay any judicial proceedings that are properly the subject of arbitration, and (b) compel parties to arbitrate pursuant to the terms of their agreement. In theory, courts are authorized to conduct an analysis as to whether a particular dispute, or a particular party, is properly subject to the arbitration agreement unless there is “*clear and unmistakable evidence*” that the parties agreed to let the arbitrators decide their own jurisdiction (*i.e.*, “*competence-competence*”). In practice, however, many arbitral institution rules provide the arbitrators with such authorization, so that an agreement referencing those rules will preclude U.S. courts from an exacting inquiry into the applicability of the arbitration agreement.
- Section 5 grants judges authority to appoint arbitrators, but only in the event that the parties fail to do so notwithstanding a valid arbitration agreement, and without specifying any particular method for doing so.
- Section 7 permits courts to assist arbitrators with witnesses and evidence through the issuance of subpoenas, but, as discussed below, many other measures in aid of arbitration (*i.e.*, interim relief) are left to provisions of state law.
- Sections 9 and 10 respectively govern confirmation and vacatur (known in other jurisdictions as “set-aside” or “annulment”) of any award rendered in the U.S., whether domestic or international. Section 10 enumerates four, limited grounds for vacatur or non-confirmation: (i) the award was procured through corruption, fraud, or undue means; (ii) the arbitrators exhibited bias or acted corruptly; (iii) the arbitrators engaged in misconduct in the course of proceedings, prejudicing the parties or otherwise raising due process concerns; and (iv) the arbitrators exceeded their power or “*so imperfectly execut[ed] them that a mutual, final, and definite award upon the subject matter was not made.*” Some federal courts recognize an additional, judicially-created basis for vacatur when the arbitrators

act in “*manifest disregard of the law.*” While this latter ground has been the subject of significant debate and controversy, it is widely accepted that courts are not to review an arbitrator’s findings on the merits, and that even clear errors in applying or interpreting the relevant substantive law of the dispute do not provide a basis for vacatur.

- Significantly, Chapter 1 does **not** confer subject matter jurisdiction on the federal courts, which require an independent basis for such jurisdiction over the case.

The key additional provisions of Chapters 2 (Sections 201-208) and 3 (Sections 301-307) are as follows:

- Sections 201 and 301 confirm the New York Convention and Panama Convention, respectively, as U.S. law. Accordingly, if a party seeks to enforce an award rendered in a New York or Panama Convention signatory state (outside of the United States), a U.S. court must confirm the award unless one of the bases for non-recognition set forth in those Conventions applies. The two Conventions contain nearly identical provisions for non-enforcement, broadly summarized as follows:
 - The agreement to arbitrate was invalid or void under the law to which the parties have subjected it, or the parties were under some incapacity;
 - The party against whom the award is being invoked did not have proper notice or was otherwise unable to present its case;
 - The award deals with subject matter outside of the scope of the parties’ agreement;
 - The composition of the arbitral tribunal was not in accordance with the parties’ agreement or, failing such agreement, with the procedural law governing the arbitration;
 - The award has been set aside by the “competent authority” (generally, the courts at the seat of arbitration).
 - The dispute deals with subject matter that is not arbitrable in the place where the award is to be confirmed.
 - Recognition or enforcement of the award would contravene public policy in the place where the award is to be confirmed.
- While (unlike the New York Convention) the Panama Convention does not on its face limit its applicability to agreements and awards rendered in other contracting states, Chapter 3 (Section 304) inserts this reciprocity requirement into the FAA.
- Chapters 2 and 3 provide for federal court subject matter jurisdiction in certain circumstances involving arbitration agreements and awards subject to the New York and Panama Conventions (*i.e.*, international arbitration agreements and awards).

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law?

No. The Federal Arbitration Act (the “FAA”),¹ was enacted in 1925 and largely predates the Model Law. However, eight U.S. states have adopted arbitration laws based on the UNCITRAL Model Law.²

¹ 9 U.S.C. §§ 1–16, 201–208, 301–307. When enacted in 1925, the law was titled the “United States Arbitration Act.” 68th Cong., ch. 213, 143 Stat. 883 (1925). The unofficial name “Federal Arbitration Act” is more widely used today.

² UN Comm’n on Int’l Trade Law, *Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html. California, Connecticut, Florida, Georgia, Illinois, Louisiana, Oregon, and Texas have adopted legislation based on the UNCITRAL Model Law. Florida adopted the Model Law with its 2006 amendments, and the other seven states adopted the original 1985 version.

Florida Supplement: Florida has two arbitrations statutes: (1) an international statute, the Florida International Arbitration Act (“Florida FIAA”),³ enacted in 2010 based on the Model Law; and (2) a domestic statute, the Revised Florida Arbitration Code (“Revised Code”),⁴ based on the Revised Uniform Arbitration Act. The Florida FIAA adopts the Model Law’s definition of international arbitration;⁵ any arbitration seated in Florida that does not fall within that definition is governed by the Revised Code.

1.1.1 If yes, what key modifications have been made to it?

The FAA pre-empts any inconsistent state law provisions,⁶ including any provisions based on the Model Law. States with laws based on the UNCITRAL Model Law have generally adopted its key provisions, sometimes with modifications appropriate to the local jurisdiction. For example, California (discussed in more detail in a separate section) adopted the first six chapters of the 1985 Model Law and added a provision on conciliation aimed at Pacific Rim businesses that prefer a less formal dispute resolution process.⁷

Florida Supplement: As noted above, Florida adopted the Florida FIAA in 2010. The Florida FIAA is based upon, and nearly identical to, the Model Law, making only a few minor, procedural additions.

1.1.2 If no, what form does the arbitration law take?

International commercial arbitrations in the United States are governed by the FAA. FAA Chapter 1 applies to commercial arbitration generally, FAA Chapter 2 implements the New York Convention, and FAA Chapter 3 implements the Panama Convention. The FAA differs from the Model Law in the default selection rules for and number of arbitrators,⁸ certain grounds for setting aside an award,⁹ the authority of a court to modify and correct an award,¹⁰ and the level of procedural detail provided.¹¹

As noted above, under the U.S. federal system, federal arbitration law supersedes any inconsistent state law. In addition, U.S. federal courts often, but not always, have jurisdiction over international arbitration-related disputes. Consequently, state law will almost never provide the primary source of law for an international arbitration. However, the interpretation of the FAA on some questions has developed differently in different federal circuits, and between the federal courts and the courts of some of the states.¹²

Each state has its own arbitration laws, which may occasionally be used to fill gaps in the FAA.¹³ For example, New York’s arbitration law, codified at Article 75 of the New York Civil Procedure Practice and Rules, applies to both domestic and international arbitrations.¹⁴ New York has also implemented specific procedures to

³ Fla. Stat. §§ 684.0001-684.0048.

⁴ Fla. Stat. §§ 682.01-682.25.

⁵ See Fla. Stat. § 684.002(3); Article 1(3) of the UNCITRAL Model Law.

⁶ *Preston v. Ferrer*, 552 U.S. 346, 353 (2008).

⁷ Albert Golbert & Daniel Koley, “California’s Adoption of a Code for International Commercial Arbitration and Conciliation”, 10 *LOY. L.A. INT’L & COMP. L.J.* 583, 583, 588 (1988).

⁸ Compare 9 U.S.C. § 5 (stating that the default number of arbitrators is one and, if no method of arbitrator is provided in the parties’ agreement, the court may appoint arbitrators) with UNCITRAL Model Law on International Commercial Arbitration, 24 I.L.M. 1302 (1985), as amended in 2006 (“Model Law”) art. 10(2), 11 (stating that the default number of arbitrators is three, and that arbitrators are chosen through a process involving party selection).

⁹ Compare 9 U.S.C. § 10 with Model Law art. 12 (setting out grounds for setting aside an award).

¹⁰ Compare 9 U.S.C. § 11 (permitting a court to modify or correct an award under limited circumstances) with Model Law art. 33 (allowing only the arbitral tribunal to modify or correct an award).

¹¹ Compare generally, e.g., 9 U.S.C. §§ 1-16 with Model Law ch. V, VI (laying out detailed procedural rules for the conduct of arbitral proceedings and the making of an award that are not covered by the FAA).

¹² See, e.g., n. 29–n. 31, *infra*, discussing circuit split on the requirement that an agreement to arbitrate be “in writing.”

¹³ Washington D.C., however, does not have a local arbitration law that applies in international arbitration. See D.C. Code §§ 16-4401–16-4432 (outlining rules for domestic arbitration only). Accordingly, international arbitration in Washington, D.C. is governed only by the FAA.

¹⁴ N.Y. C.P.L.R. §§ 7501–7514.

help its courts develop arbitration expertise, including by designating a specialized judge to handle all of the New York County Commercial Division's international arbitration cases.¹⁵

1.2 When was the arbitration law last revised?

The FAA has not undergone an overall revision since it was first enacted in 1925.¹⁶ Significant additions to the FAA were made in 1970 to implement the New York Convention¹⁷ and in 1990 to implement the Panama Convention.¹⁸ Two separate enactments in 1988 made minor updates to the general provisions.¹⁹ Many state laws, including in UNCITRAL Model Law states, have been revised more recently.²⁰

Florida Supplement: The Florida FIAA was last amended in 2013 to, *inter alia*, incorporate another statute providing that a party that initiates arbitration, or is party to an agreement to arbitrate, in Florida consents to *in personam* jurisdiction in Florida with respect to any action arising out of or in connection to the arbitration and any resulting order or award.²¹

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

The FAA provides the procedural law for arbitrations seated in the United States,²² with gaps filled by state law where applicable.

Principles of ordinary contract law, which may be the law of a U.S. or foreign jurisdiction, govern the validity, revocability, and enforceability of arbitration agreements.²³ State law that imposes more onerous requirements on arbitration agreements than on other agreements is pre-empted as inconsistent with the FAA.²⁴ If the parties' underlying contract contains a choice of law provision, a court will generally apply the law selected by the parties to any questions concerning the arbitration agreement.²⁵ Where the contract does not contain a choice of law provision, a court will conduct a conflict of laws analysis, applying the conflict of laws rules of the state in which it sits to determine which law to apply.²⁶ These rules vary from state to state; the traditional approach was to apply the law of the place where the contract was made, but most states now weigh which jurisdiction has the most significant relationship to the transaction or the greatest interest in applying its own laws.²⁷

¹⁵ Administrative Order, Unified Court System, First Judicial District, Supreme Court, Civil Branch (A. Gail Prudenti, Chief Administrative Judge) (Oct. 3, 2013).

¹⁶ 68th Cong., ch. 213, 43 Stat. 883 (1925) (original enactment of FAA); see, also 80th Cong., ch. 392, § 2, 61 Stat. 674 (1947) (reenacting FAA without substantive change as Title 9, United States Code).

¹⁷ Pub. L. 91-368, § 1, 84 Stat. 692 (1970).

¹⁸ Pub. L. 101-369, § 2, 104 Stat. 450 (1990).

¹⁹ Pub. L. 100-669, § 1, 102 Stat. 3969 (1988) (excluding application of the Act of State doctrine in proceedings to enforce arbitral agreements or awards); Pub. L. 100-702, title X, § 1019(a), 102 Stat. 4670 (1988) (allowing immediate appeal from orders refusing to enforce an arbitral agreement or award); see, also Pub. L. 101-650, title III, § 325(a)(2), 104 Stat. 5120 (1990) (correcting a technical numbering error in the 1988 amendments).

²⁰ See, e.g., UN Comm'n on Int'l Trade Law, *supra* note 2 (showing eight states' adoption of the UNCITRAL Model Law between 1988 and 2012).

²¹ 2013 Fla. Sess. Law Serv. Ch. 2013-164 (C.S.S.B. 186) (WEST); see, also Fla. Stat. § 684.0049.

²² *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (noting that the FAA governs both domestic and international arbitration proceedings).

²³ 9 U.S.C. § 2; See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

²⁴ *Preston*, 552 U.S. at 353 (2008); *Perry*, 482 U.S. at 491.

²⁵ See, e.g., *Telenor Mobile Comm'ns AS v. Storm LLC*, 584 F.3d 396, 411 n.11 (2d Cir. 2009) ("[C]hoice of law clause [in the underlying contract] governs Storm's arbitrability challenge.").

²⁶ See, e.g., *Progressive Casualty Insurance Co. C.A. v. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 45, 46 (2d Cir. 1993); *St. Paul Fire & Marine Ins. Co. v. Employers Reinsurance Corp.*, 919 F. Supp. 133, 136 (S.D.N.Y. 1996) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)).

²⁷ See, e.g., *Hammersmith v. TIG Insurance Co.*, 480 F.3d 220 (3d Cir. 2007); *Progressive Casualty*, 991 F.2d at 46 n.6.

Florida Supplement: Florida follows the traditional approach, applying, in the absence of any choice-of-law provision contained in the arbitration agreement, the law of the place where the arbitration agreement was reached to interpret questions about the agreement's nature, interpretation, and validity.²⁸ At least one federal court in Florida has ruled that, because arbitration agreements are severable under federal law, arbitration agreements that do not themselves contain a choice-of-law clause are subject to the law in which they were formed—even where the underlying agreement contains a separate choice-of-law clause selecting the laws of a different state.²⁹

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Yes. An arbitration provision is severable from the contract in which it is included.³⁰ Thus, a challenge to the underlying contract as a whole does not prevent a court from enforcing a specific agreement to arbitrate.³¹ Unless there is a challenge to the validity of the arbitration clause itself, the arbitrator resolves questions concerning the validity of the underlying contract in the first instance.³² This federal rule of severability applies in state as well as federal courts and pre-empts inconsistent state law.³³

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

The FAA requires that the arbitration agreement be in writing.³⁴ Courts within the United States are divided on the specific requirements that must be met for an agreement to satisfy the “in writing” requirement.³⁵ For example, the United States Court of Appeals for the Second Circuit (which includes New York) has held that an arbitration clause in a contract signed by only one party did not satisfy the writing requirement,³⁶ while the United States Courts of Appeals for the Fifth Circuit (which includes Texas) and the Eleventh Circuit (which includes Florida) have held that an unsigned writing may be sufficient in some cases.³⁷

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

As arbitration is fundamentally a matter of contract,³⁸ arbitration agreements are subject to ordinary principles of law that allow a contract to be enforced by or against non-parties in limited circumstances.³⁹ These principles include estoppel, incorporation by reference, assumption, waiver, agency, third-party beneficiary, and alter ego or veil piercing.⁴⁰

²⁸ *State Farm Mut. Auto. Ins. Co. v. Roach*, 845 So. 2d 1160 (Fla. 2006); *Higgins v. West Bend Mut. Ins. Co.*, 85 So. 3d 1156, 1158 (Fla 5th DCA 2012). Questions about the contract's performance are governed by the law of the place of performance. *Higgins*, 85 So. 3d at 1158; *Prou v. Giarla*, 62 F. Supp. 3d 1365, 1383 (S.D. Fla. 2014).

²⁹ *Rimel v. Uber Technologies, Inc.* 246 F. Supp. 3d 1317 (M.D. Fla. 2017).

³⁰ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006).

³¹ *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010).

³² See *Buckeye Check Cashing*, 546 U.S. at 446; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967).

³³ See *Preston v. Ferrer*, 552 U.S. 346, 353 (2008) (citing *Buckeye Check Cashing*, 546 U.S. at 447-48).

³⁴ 9 U.S.C. § 2.

³⁵ See S.I. Strong, “What Constitutes An “Agreement in Writing” in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act”, 48 *STAN. J. INT'L L.* 47(2012) (discussing different definitions of “agreement in writing” under the FAA and the New York Convention and inconsistent treatment of a signature requirement by U.S. courts).

³⁶ *Kahn Lucas Lancaster v. Lark International*, 186 F.3d 210, 216-18 (2nd Cir 1999).

³⁷ *Todd v. SS Mut Underwriting Association* (Bermuda), 601 F.3d 329, 335 n.11 (5th Cir 2010); *Sphere Drake Insurance v. Marine Towing*, 16 F.3d 666, 669 (5th Cir 1994); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1369 (11th Cir. 2005).

³⁸ *Rent-A-Ctr.*, 561 U.S. at 67.

³⁹ See *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31 (2009) (quoting 21 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 57:19 (4th ed. 2001)).

⁴⁰ See *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31 (2009) at 631; *Merrill Lynch Inv. Managers v. Optibase, Ltd.*, 337 F.3d 125, 129 (2d Cir. 2003); *Lawson v. Life of the South Ins. Co.*, 648 F.3d 1166, 1168 (11th Cir. 2011).

2.5 Are there restrictions to arbitrability?

There are no restrictions to arbitrability as to a class of disputes or persons in the FAA itself.⁴¹ The central purpose of the FAA is to ensure that agreements to arbitrate are enforced in accordance with their terms and are treated no less favourably than other contracts.⁴² The FAA pre-empts state law – statutory or common – that prohibits arbitration of a particular type of claim.⁴³

Accordingly, parties may agree to arbitrate claims based on statutory rights, including those that arise in connection with arbitrable contract issues in the absence of a federal statute excluding the specific statutory claims from arbitration.⁴⁴ Congress has enacted such exclusions only in very limited circumstances.⁴⁵ In general, claims arising under securities laws, antitrust laws and other statutes enacted to protect the public interest are fully arbitrable if they fall within the scope of a contractual arbitration clause.

2.5.1 Do these restrictions relate to specific domains (such as IP, corporate law etc.)?

No.

2.5.2 Do these restrictions relate to specific persons (i.e. State entities, consumers etc.)?

No. Although some states have attempted to create rules limiting the ability of corporations to include agreements to arbitrate in consumer contracts, the U.S. Supreme Court has struck down such provisions as contrary to the FAA's principle of non-discrimination against arbitration agreements.⁴⁶

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

Yes. Upon application of a party, a U.S. court where litigation is pending is required to stay the litigation if the court is satisfied that the issue involved is referable to arbitration, unless the applicant for a stay has waived the right to arbitrate.⁴⁷

When a case contains claims that the parties have agreed to submit to arbitration and other claims, the court may, in its discretion, stay litigation of the entire matter or stay only the claims covered by the arbitration agreement.⁴⁸

Florida Supplement: The Florida FIAA is similar to the FAA in that it allows a court to refer to arbitration any matter that is subject to an arbitration agreement, provided a party so requests before submitting its first statement on the substance of the dispute.⁴⁹

3.1.1 If the place of the arbitration is inside of the jurisdiction?

Yes.

⁴¹ See *Mitsubishi Motors*, 473 U.S. at 627.

⁴² *Stolt-Nielsen*, 559 U.S. at 682.

⁴³ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2001); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012).

⁴⁴ See *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987).

⁴⁵ Most notably, predispute arbitration agreements in motor vehicle dealer franchise contracts are not enforceable. See 15 U.S.C. § 1226. In addition, the Sarbanes-Oxley Act, which regulates public company accounting, excludes the applicability of predispute arbitration provisions to suits under the act by whistleblowers. See 18 U.S.C. § 1514A(e)(2). However, courts have applied this exception narrowly, holding it does not apply to the similar whistleblower cause of action under the Dodd-Frank Act, 15 U.S.C.A. § 78u-6. See, e.g., *Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488, 493 (3d Cir. 2014).

⁴⁶ See, e.g., *Kindred Nursing Centers, L.P. v. Clark*, 581 U.S. ___ (2017); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2001).

⁴⁷ 9 U.S.C. § 3.

⁴⁸ *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 856 (2d Cir. 1987).

⁴⁹ Fla. Stat. § 684.0009.

3.1.2 If the place of the arbitration is outside of the jurisdiction?

Yes. The FAA does not distinguish between a stay in favour of arbitration inside or outside of the jurisdiction.

A motion for a stay is often brought together with a motion to compel arbitration.⁵⁰ For agreements covered by the New York Convention or Panama Convention, the FAA permits courts to compel arbitration at any place provided for in the parties' agreement, whether "*within or without the United States.*"⁵¹ For agreements not covered by the New York Convention, there is disagreement as to whether courts may compel arbitration outside their own judicial district, even when the parties' agreement provides otherwise.⁵² This distinction is seldom if ever important, because the courts still must stay proceedings even if they do not directly order the parties to arbitrate. Virtually all modern arbitration rules recognize that arbitration may proceed in the absence of a party, and therefore a court order compelling a party to arbitrate is rarely necessary once a court has determined that a dispute is subject to arbitration and has stayed a court proceeding in favour of arbitration.

Florida Supplement: Although arbitrations subject to the Florida FIAA typically take place in Florida, the law does not distinguish between a referral for arbitration inside or outside of the state.⁵³

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

The FAA requires a U.S. court to stay litigation proceedings only when the court is satisfied that the issue is referable to arbitration under the parties' agreement.⁵⁴ Therefore, a party seeking to enforce an anti-suit injunction from an arbitrator would still need to convince the U.S. court independently that the parties intended to submit the issue to arbitration.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)

U.S. courts may not intervene directly in an arbitration seated outside of the jurisdiction. However, a U.S. court may issue injunctions in aid of arbitration seated anywhere against a party in its jurisdiction.

Before issuing an injunction, a U.S. court must first satisfy itself of its jurisdiction over the party to be enjoined. When the party to be enjoined is not a citizen or resident of the state where the court is located, and has not consented to the court's jurisdiction, there must be sufficient minimum contacts between that party and the forum state such that a U.S. court's exercise of personal jurisdiction over that party does not offend due process.⁵⁵

Ordinarily, to obtain an injunction in aid of arbitration, a party must show that it will suffer irreparable harm in the absence of an injunction, that it is likely to succeed on the merits of its claims, and that the balance of hardships tips in its favour.⁵⁶ Courts may also consider the public interest and the interest of comity to foreign nations. Courts are frequently reluctant to issue injunctive relief in aid of arbitration if such relief can be timely obtained from the arbitration tribunal.⁵⁷ When, after a U.S. court grants an injunction, the arbitrator

⁵⁰ 9 U.S.C. § 4.

⁵¹ 9 U.S.C. §§ 206, 303.

⁵² *Seaman v. Private Placement Capital Notes II, LLC*, 2017 WL 1166336, at *6 (S.D. Cal. Mar. 29, 2017). Courts in other circuits have rejected this view. See *Ansari v. Qwest Commc'ns Corp.*, 414 F.3d 1214, 1220 (10th Cir. 2005) (collecting cases).

⁵³ Fla. Stat. §§ 684.0002(2), 684.0009.

⁵⁴ 9 U.S.C. § 3. There does not appear to be case law on the enforceability of an anti-suit injunction issued by an arbitrator.

⁵⁵ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

⁵⁶ See, e.g., *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 895 (2d Cir. 2015).

⁵⁷ See, e.g., *Smart Techs. ULC v. Rapt Touch Ireland Ltd*, 2016 WL 3871179 (N.D. Cal. July 15, 2016); *A & C Disc. Pharmacy, L.L.C. v. Caremark, L.L.C.*, 2016 WL 3476970, at *6 (N.D. Tex. June 27, 2016).

subsequently decides to modify or terminate the injunction, several U.S. courts have recognized the arbitrator's authority to do so and have declined to further intervene to enforce the injunction.⁵⁸

A court's power to issue injunctions in aid of arbitration includes the power to issue an anti-suit injunction restraining a party subject to its jurisdiction from proceeding in a foreign lawsuit over a claim that the party has agreed to arbitrate.⁵⁹ Some courts have held that they have the authority to grant anti-arbitration injunctions as well, if they determine that a dispute is not subject to arbitration.⁶⁰ For an arbitration agreement governed by the New York Convention or the Panama Convention, a U.S. court may appoint arbitrators in accordance with the terms of the parties' agreement on application of a party, even for arbitration outside of the jurisdiction.⁶¹

By statute, U.S. courts may compel discovery for use in foreign or international tribunals.⁶² The Second and Fifth Circuits have held that this does not include arbitral tribunals.⁶³ Relying on subsequent dicta from the U.S. Supreme Court,⁶⁴ however, several district courts have held that they could order such discovery,⁶⁵ with some courts drawing a distinction between "private" commercial arbitrations and investor-State arbitrations.⁶⁶ Circuit courts have so far declined to address the issue and uncertainty remains as to the availability and scope of such discovery in aid of arbitration.⁶⁷

Florida Supplement: The Florida FIAA states that: "*It is not incompatible with an arbitration agreement for a party to request from a court, before or during arbitral proceedings, an interim measure of protection and for a court to grant such a measure.*" Florida courts have not had occasion to interpret this provision, although it is expressly not limited to arbitral proceedings within Florida.⁶⁸

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

The FAA does not address the representation of parties. Parties should consult the rules governing counsel in the state in which the arbitration is seated. Those rules generally provide that individuals may be represented by counsel or represent themselves on a *pro se* basis. However, many states, including New York

⁵⁸ See, e.g., *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049 (2d Cir. 1990); *In re S.W. Ranching Inc.*, 2017 WL 4274309, at *3 (S.D. Tex. Sept. 22, 2017).

⁵⁹ *Paramedics Electromedicina Comercial, Ltda. v. GE Medical Sys. Information Techs., Inc.*, 369 F.3d 645, 658 (2d Cir. 2004); see also *Canon Latin America, Inc. v. Lantech*, 507 F.3d 597 (11th Cir. 2007).

⁶⁰ See *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1099, 1103 (11th Cir. 2004) (issuing an anti-arbitration injunction under the All Writs Act, 28 U.S.C. § 1651); *Societe Generale de Surveillance, S.A. v. Raytheon European Mgmt. & Sys. Co.*, 643 F.2d 863, 868 (1st Cir. 1981) (holding that the authority to grant an anti-arbitration injunction is "concomitant of the power to compel arbitration" under 9 U.S.C. § 3).

⁶¹ 9 U.S.C. §§ 206, 303.

⁶² See 28 U.S.C. § 1782 (authorizing U.S. courts to order discovery (i) upon request of an "interested person," (ii) over a person or entity "found" in the United States, (iii) "for use" in a proceeding "in a foreign or international tribunal").

⁶³ *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 190-91 (2d Cir. 1999); *In re Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999).

⁶⁴ *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 257 (2004) (citing with approval a statement that "[t]he term 'tribunal' . . . includes administrative and arbitral tribunals") (quoting Smit, *International Litigation under the United States Code*, 65 Colum. L.Rev. 1015, 1026-1027 & nn.71, 73 (1965)) (emphasis added).

⁶⁵ See, e.g., *In re Application of Chevron Corporation*, Case N. 10-MC-00002 (S.D.N.Y. Nov. 5, 2010); *In re the Republic of Ecuador*, Case No. 10-80225 (N.D. Cal. Sept. 15, 2010) (both applying the multifactor test developed by the Supreme Court in *Intel* to grant requests for discovery to be used in investor-state arbitrations).

⁶⁶ See, e.g., *In re Ex Parte Application of Kleimar N.V.*, No. 16-MC-355, 2016 WL 6906712 (S.D.N.Y. Nov. 16, 2016) (declining to follow prior Second Circuit case law prohibiting the taking of evidence for use in a foreign arbitration, noting that dicta from *Intel* "suggests the Supreme Court may consider private foreign arbitrations, in fact, within the scope of Section 1782" and that several other courts, following *Intel*, found private foreign arbitrations to be "tribunals" for the purposes of Section 1782).

⁶⁷ See *Chevron v. Berlinger*, 629 F.3d 297 (2d Cir. 2011); *Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA)*, 747 F.3d 1262, 1270 n.4 (11th Cir. 2014); *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 Fed.Appx. 31, 34 (5th Cir. 2009).

⁶⁸ Fla. Stat. §§ 684.00002(2), 684.001.

and Florida, require corporations and business entities to be represented by counsel.⁶⁹ In addition, some states have other rules that may bear on the representation of parties by an out-of-state or foreign lawyer. In New York, for instance, courts have permitted a foreign attorney to represent a party in an arbitration on the theory that such attorney is not engaging in the unauthorized practice of law due to the unique nature of arbitration.⁷⁰

Florida Supplement: The Rules Governing the Florida Bar specifically permit a foreign attorney to represent a party to an arbitration, provided that either (1) such foreign attorney is associated with a lawyer admitted to the Florida Bar;⁷¹ (2) such foreign attorney is representing a client that resides in or has an office in the attorney's home state; or (3) the arbitral proceeding is reasonably related to the foreign attorney's practice in a jurisdiction in which he or she is admitted.⁷²

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

The institution administering the arbitration is the platform for parties to initially challenge and vet arbitrators' independence and impartiality, through the appointment process and throughout the proceeding. While some courts maintain that they retain the inherent power to monitor issues of arbitrator impartiality, courts are generally reluctant to interfere with arbitration proceedings. The FAA instead provides for the vacatur of an arbitration award when an arbitrator has demonstrated "evident partiality."⁷³

The Supreme Court established the "evident partiality" standard in *Commonwealth Coatings v. Continental Casualty Co.*⁷⁴ Writing for a plurality, Justice Black found that arbitrators not only needed to avoid actual bias, but must also "avoid even the appearance of bias."⁷⁵ Thus, a failure to disclose information that could create such an appearance could lead to vacatur, even in the absence of actual bias. In a concurring opinion, however, Justice White added that arbitrators need not be disqualified if they have business relationships with the litigants but disclose them in advance, or if they fail to disclose what is otherwise a "trivial" relationship. This plurality opinion has led to differing interpretations of the standard by the federal courts. For example, in the Second Circuit, which includes New York, "[e]vident partiality may be found only where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration" and a failure to disclose a relationship which would not meet the standard is not on its own a basis for vacatur.⁷⁶ The Eleventh Circuit, which includes Florida, in contrast, finds "'evident partiality' of an arbitrator only when either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists."⁷⁷

⁶⁹ See, e.g., CPLR § 321, requiring a corporation in a New York action to be represented by an attorney. *Szteinbaum v. Kaes Inversiones y Valores, C.A.*, 476 So.2d 247, 248 (Fla.3d DCA 1985) (holding that common law requires corporations to be represented by an attorney).

⁷⁰ See *Williamson v. John D Quinn Construction Corp.*, 537 F.Supp. 613, 626 (S.D.N.Y. 1982).

⁷¹ 4-5.5(c)(1), (d)(1) of the Rules Regulating the Florida Bar.

⁷² Rules 1-3.11(a) and 4-5.5(c), (d) of the Rules Regulating the Florida Bar.

⁷³ 9 U.S.C. § 10(a)(2). Indeed, where a district court removed an arbitrator in a purportedly "extreme" case, the Ninth Circuit overturned that decision and further observed that "[t]he majority of our sister circuits expressly preclude any mid-arbitration intervention." *In re Sussex*, 781 F.3d 1065, 1073 (9th Cir. 2015).

⁷⁴ *Commonwealth Coatings v. Continental Casualty Co.*, 393 U.S. 145 (1968).

⁷⁵ *Commonwealth Coatings v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968).

⁷⁶ *Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire and Marine Ins. Co.*, 668 F.3d 60, 64, 77 (2d Cir. 2012) (internal citations omitted) ("The nondisclosure does not by itself constitute evident partiality. The question is whether the facts that were not disclosed suggest a material conflict of interest.").

⁷⁷ *Gianelli Money Purchase Plan and Tr. v. ADM Inv'r Services, Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998).

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

The FAA makes clear that courts are intended only as a last resort for the constitution of an arbitral tribunal, which should otherwise be handled by the parties' agreement or the administering institution. However, courts can appoint arbitrators under two scenarios: (1) where an agreement calls for appointment to be handled by an institution that either does not exist, or has ceased to exist; and (2) where the parties' agreement does not provide for a method of appointment and the parties "*fail to avail [themselves] of such a method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators...*"⁷⁸ Under such circumstances, the FAA generally permits courts to appoint arbitrators, assign an arbitral institution to administer the proceedings, or develop an *ad hoc* method for appointment. However, where the arbitration agreement is subject to Chapter 3 of the FAA (*i.e.*, the Panama Convention), the FAA and the Panama Convention call for appointment pursuant to the rules of procedure of the Inter-American Commercial Arbitration Commission.⁷⁹

Florida Supplement: The Florida FIAA authorizes the Florida courts to appoint an arbitrator where an arbitration agreement provides for one arbitrator and the parties are unable to agree on an appointee.⁸⁰ Additionally, the courts can intervene at the request of a party where (1) an arbitration agreement provides for three arbitrators and one of the parties fails to nominate one of the arbitrators or the two arbitrators nominated by the parties are unable to agree on a third arbitrator;⁸¹ (2) the parties, their appointed arbitrators, or a third party fails to act or reach an agreement pursuant to the chosen appointment procedure;⁸² (3) a party that has unsuccessfully challenged an arbitrator's appointment seeks the circuit court's review within 30 days of its initial, unsuccessful challenge;⁸³ or (4) an arbitrator becomes unable to perform his or her functions or for other reasons fails to act without undue delay and does not withdraw from the arbitration.⁸⁴

4.4 Do courts have the power to issue interim measures in connection with arbitrations?

4.4.1 If so, are they willing to consider *ex parte* requests?

While the FAA itself is silent on interim relief, most federal circuits permits injunctive relief pending arbitration under the usual test applicable to injunctions.⁸⁵ Furthermore, state arbitration statutes often expressly provide for such measures. For example, New York law contains a specific statute dealing with attachments or preliminary injunctions in aid of an arbitration anywhere in the world, so long as a party can show that any eventual award might be rendered ineffectual but for the interim relief.

Florida Supplement: The Florida FIAA grants Florida courts the same power as they have in court proceedings to issue interim relief in aid of an international arbitration anywhere in the world, provided they exercise that power in accordance with the applicable requirements and in consideration of the specific features of international arbitration.⁸⁶

⁷⁸ 9 U.S.C. § 5.

⁷⁹ See 9 U.S.C. § 303.

⁸⁰ Fla. Stat. § 684.0012(b).

⁸¹ Fla. Stat. § 684.0012(3)(a).

⁸² Fla. Stat. § 684.0012(4).

⁸³ Fla. Stat. § 684.0014(3).

⁸⁴ Fla Stat. 684.0015(1)

⁸⁵ See, *e.g.*, *Ortho Pharm. Corp. v. Amgen, Inc.*, 882 F.2d 806, 812 (3d Cir. 1989) (we hold that a district court has the authority to grant injunctive relief in an arbitrable dispute, provided that the traditional prerequisites for such relief are satisfied.").

⁸⁶ Fla. Stat. § 684.0028

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

The FAA does not expressly address many of the specific issues raised in the questions set out in this section. U.S. courts, however, have developed case law interpreting the FAA to grant broad discretion to the parties and arbitrators.

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

The FAA does not address confidentiality. Ordinarily, confidentiality is either left to party agreement or addressed in accordance with the rules of an arbitral institution. In practice, arbitral proceedings are generally conducted in private facilities, making public access a non-issue even in the absence of express confidentiality. However, parties should be aware that court proceedings to compel arbitration, or confirm and enforce an award, will require parties to append their arbitration agreement or award to court pleadings. Such court pleadings are publically accessible unless independent grounds exist to keep them sealed from the public (e.g., they contain trade secrets, medical information, etc.).

4.5.2 Does it regulate the length of arbitration proceedings?

The FAA is silent on length of proceedings; this is left to the parties and arbitrators.

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

Section 4 of Chapter 1 of the FAA provides that federal courts may enforce an agreement to arbitrate by issuing a compulsory "*order directing that such arbitration proceed in the manner provided for in such agreement*" but also specifying that the "*hearing and proceedings, under such agreement, shall be within the [judicial] district in which the petition for an order directing such arbitration is filed.*" Most courts have interpreted this provision to mean that the court-compelled arbitration can only take place in the judicial district in which the petition to compel arbitration was filed.⁸⁷ Some of these courts have applied this limitation even where the parties have selected a different arbitration seat in the agreement.⁸⁸ This restriction, however, only applies to domestic U.S. arbitrations. Chapters 2 and 3 of the FAA governing agreements falling under the New York and Panama Conventions, respectively, are broader and expressly provide that courts may direct arbitration to be held at the agreed upon place, "*whether that place is within or without the United States.*"⁸⁹

4.5.4 Does it allow for arbitrators to issue interim measures? In the affirmative, under what conditions?

The FAA does not address the issuance of interim relief by arbitrators. Courts, however, take the view that arbitrators have the implied power to grant interim measures, absent the expression of a contrary intent in

⁸⁷ *Control Screening LLC v. Technological Application and Production Co. (Tecapro), HCMC-Vietnam*, 687 F.3d 163 (3d Cir. 2012); *Ansari v. Qwest Communications Corp.*, 414 F.3d 1214 (10th Cir. 2005); *Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007 (6th Cir. 2003); *Jain v. Mere*, 51 F.3d 686 (7th Cir. 1995). But see *Sanchez v. Nitro-Lift Technologies, LLC*, 762 F.3d 1139, 1152-53 (10th Cir. 2010) (§ 4 is a venue requirement that parties waive when they do not raise the issue before the district court).

⁸⁸ *Homestake Lead Co. of Missouri v. Doe Run Resources Corp.*, 282 F. Supp.2d 1131 (N.D. Cal. 2003); *Indian Harbor Ins. Co. v. Global Transport Sys.*, 197 F. Supp.2d 1, 3 (S.D.N.Y. 2002) (compelling arbitration in same district despite different seat specified in arbitration agreement).

⁸⁹ 9 U.S.C. §§ 206, 303. These sections apply when (1) the agreement is covered by the New York Convention or the Panama Convention and (2) the agreement specified an arbitral seat in the territory of a Convention signatory. See *Jain v. Mere*, 51 F.3d 686 (7th Cir. 1995); *Bauhinia Corp v. China National Machinery & Equipment Import Corp.*, 819 F.2d 247 (9th Cir. 1987); *Internaves de Mexico s.a. de C.V. v. Andromeda Steamship Corporation*, 247 F. Supp.3d 1294, 1300 (S.D. Fla. 2017) (citing *Jain*, 51 F.3d at 691).

the arbitration agreement.⁹⁰ Furthermore, many arbitral institution rules specifically authorize arbitrators to issue interim relief.⁹¹

Florida Supplement: The Florida FIAA provides that an arbitrator overseeing an international arbitration has the power, which can be waived by an agreement between the parties, to issue interim relief to maintain or restore the “status quo” pending the determination of the dispute, to prevent imminent harm or prejudice to the arbitral process, to provide a means of preserving assets that might satisfy an award, and to preserve evidence that might be relevant to the dispute.⁹²

4.5.5 Does it regulate the arbitrators’ right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?

The FAA does not regulate an arbitrator’s right to admit or exclude evidence. Arbitrators generally have broad discretion on evidentiary rulings, subject to any contrary agreement by the parties or applicable arbitration rules.⁹³

Section 7 of the FAA does, however, grant arbitrators subpoena power to summon witnesses and evidence, and authorizes courts to compel attendance of those refusing to testify.⁹⁴ The courts’ power is in turn constrained by the applicable rules of civil procedure, such as Federal Rule of Civil Procedure 45(b)(2), which limits a district court’s subpoena power to a 100-mile territorial limit outside of its own jurisdiction. Indeed, some courts have held that this territorial limitation also applies to an arbitrator’s subpoena power.⁹⁵

There are other potential limits on an arbitrator’s power to subpoena non-parties. In particular, federal courts have disagreed about whether Section 7 of the FAA applies to pre-hearing discovery or is limited to attendance at the hearing. For example, the Second and Third Circuits have held that the Section 7 is restricted to situations in which a non-party is asked to physically appear before the arbitrator(s) and hand over documents and testify.⁹⁶

Florida Supplement: The Florida FIAA grants an arbitrator overseeing an international arbitration the power to determine the admissibility, relevance, materiality, and weight of evidence.⁹⁷

⁹⁰ *Toyo Tire Holdings of Am., Inc. v. Continental Tire N. Am., Inc.*, 609 F.3d 975 (9th Cir. 2010); *Arrowhead Global Solutions, Inc. v. Datapath, Inc.*, 166 Fed. Appx. 39, 44 (4th Cir. 2006) (“arbitration panels must have the power to issue temporary equitable relief in the nature of a preliminary injunction”); *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255 (2d Cir. 2003).

⁹¹ AAA Commercial Rules, Rule 37 (“The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.”), available at https://www.adr.org/sites/default/files/commercial_rules.pdf; Delos Rules of Arbitration, Article 7(4)(c) (“The Tribunal’s powers shall include, but are not limited to, the following: . . . to order interim or conservatory measures.”), available at: <https://delosdr.org/index.php/rules/>; ICDR International Arbitration Rules, Article 24 (“At the request of any party, the arbitral tribunal may order or award any interim or conservatory measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.”), available at: <https://www.icdr.org/icdr/ShowProperty?nodeId=/UCM/ADRSTAGE2020868&revision=latestreleased>; JAMS Comprehensive Arbitration Rules, Rule 24(e) (The Arbitrator may grant whatever interim measures are deemed necessary, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods.), available at: <https://www.jamsadr.com/rules-comprehensive-arbitration/>; ICC Arbitration Rules, Article 28 (“Unless the parties have otherwise agreed [...] the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate.”), available at: <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>.

⁹² Fla. Stat. § 684.0018.

⁹³ *Compania Panemena Maritima San Gerassimo, SA v. J.E. Hurley Lumber Co.*, 244 F.2d 286, 288 (2d Cir. 1957) (“It should not be the function of the District Court, after having ordered an arbitration to proceed, to hold itself open as an appellate tribunal to rule upon any questions of evidence that may arise in the course of the arbitration”); *Bailey Shipping Ltd. v. American Bureau of Shipping*, 2014 WL 3605606 (S.D.N.Y. 2014).

⁹⁴ 9 U.S.C. § 7.

⁹⁵ See, e.g., *Re Security Life Insurance Co. of America*, 228 F.3d 865, 872 (8th Cir. 2000).

⁹⁶ *Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 215 (2d Cir. 2008); *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004).

⁹⁷ Fla. Stat. § 684.003.

4.5.6 Does it make it mandatory to hold a hearing?

The FAA does not expressly require a hearing, and courts recognize the parties' freedom to design their own arbitral procedures.⁹⁸ However, an arbitral award is subject to vacatur under the FAA if it violates tenets of due process, including "*refusing to hear evidence pertinent and material to the controversy.*"⁹⁹ Courts interpreting this standard have required arbitrations to satisfy certain basic requirements, including procedural fairness, notice, a hearing or other meaningful opportunity to be heard, or otherwise risk vacatur.¹⁰⁰ Grounds for vacatur have also been found when hearings were scheduled in a fundamentally unfair manner.¹⁰¹

4.5.7 Does it prescribe principles governing the awarding of interest?

The FAA does not provide for the award of interest – a matter left to the discretion of the arbitrator. However, upon confirmation of the award, the post-award interest rate set forth in the award will generally cease to accrue, and is replaced by the statutory interest rate of the relevant jurisdiction applicable to judgments.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

In the United States, parties to a litigation are generally required to bear their own costs and legal fees, barring statutory provisions to the contrary. While the FAA itself is silent on the issue of party costs and attorney fees, courts have upheld awards of costs and attorney fees provided that they are authorized by the parties' agreement.¹⁰²

5. Liability

5.1 Do arbitrators benefit from immunity to civil liability?

The FAA does not expressly address arbitrator immunity. However, courts generally grant arbitrators immunity from civil liability for actions undertaken within the scope of their capacity as arbitrators.¹⁰³

Florida Supplement: Florida law grants arbitrators "judicial immunity,"¹⁰⁴ which grants arbitrators absolute immunity for actions taken while acting in their capacity as arbitrators except those taken in the clear absence of jurisdiction.¹⁰⁵

5.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

No, to the best of our knowledge, there are no special concerns relating to criminal liability that arise out of participation in arbitration proceedings.

⁹⁸ *Sec. Ins. Co. of Hartford v. TIG Ins. Co.*, 360 F.3d 322, 325 (2d Cir. 2004) ("*FAA requires 'arbitration proceed in the manner provided for in [the parties'] agreement'*") (emphasis in original).

⁹⁹ 9 U.S.C. § 10(a)(3).

¹⁰⁰ *China Nat'l Bldg. Material Inv. Co. v. BNK International, LLC.*, 2009 WL 4730578, at *6 (W.D. Tex. 2009) ("*the hearing should 'meet the minimal requirements of due process: adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator. . . The parties must have an opportunity to be heard 'at a meaningful time and in a meaningful manner'*") (quoting *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Hegara*, 364 F.3d 274, 298-99 (5th Cir. 2004)).

¹⁰¹ See, e.g., *Tempo Shain Corp. v. Bertek*, 120 F.3d 16, 20 (2d Cir. 1997) (finding arbitrator misconduct justifying vacatur when the arbitrator refused to adjourn the hearing for a key witnesses whose wife fell gravely ill); *Tube & Steel Corp. of America v. Chicago Carbon Steel Products*, 319 F. Supp. 1302, 1304 (SDNY 1970) (vacating when an arbitrator set hearings at a time when a party specifically indicated they were unavailable).

¹⁰² *Painewebber v. Bybyk*, 81 F.3d 1193, 1201 (2d Cir. 1996).

¹⁰³ *Austern v. Chicago Bd. Options Exchange, Inc.*, 898 F.2d 882, 886 (2d Cir. 1990).

¹⁰⁴ Fla. Stat. § 684.0045.

¹⁰⁵ See *Sibley v. Lando*, 473 F. 3d 1067, 1070 (11th Cir. 2005).

6. The Award

6.1 Can parties waive the requirement for an award to provide reasons?

Although the FAA presumes that awards will be written, it does not require that they will be signed, dated, or reasoned. Nor do courts interpreting the FAA require that arbitral awards be reasoned.¹⁰⁶ Rather, they generally deem unreasoned awards valid and enforceable, provided the relevant institutional rules or arbitration agreement do not require otherwise.¹⁰⁷

Florida Supplement: The Florida FIAA provides that the award must state reasons unless the parties agree that no reasons are to be given or the award is one on agreed terms.¹⁰⁸

6.2 Can parties waive the right to seek the annulment of the award?

6.2.1 If yes, under what conditions?

The federal courts are divided over whether parties can completely waive the statutory right to seek annulment (*i.e.*, vacatur) of arbitral awards, with most holding that they cannot do so.¹⁰⁹ Challenges for specific reasons, however, may be waived when the challenging party did not raise the challenge during the arbitration proceedings despite being aware of the relevant facts.¹¹⁰

Florida Supplement: A party can waive its right to have an award “set aside” if it fails to comply with the technical conditions set out in Section 684.0046 of the Florida FIAA for seeking to annul an award.

6.2.2 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction

As set forth above, the FAA does not impose any form requirements, although state laws or institutional rules may do so.

6.3 Is it possible to appeal an award (as opposed to seeking its annulment)?

6.3.1 If yes, what are the grounds for appeal?

While some arbitral institutions can provide for appeal-like mechanisms under their rules, the FAA does not provide for an appeal from an award and only provides limited grounds for vacating, modifying, or correcting the award.

Florida Supplement: Florida law does not provide for an appeal. It only provides for a limited application to set aside an award as the “*exclusive recourse against [an] arbitral award*”.¹¹¹

¹⁰⁶ *United Steelworkers of Am. v. Enter. Wheel Car Corp.*, 363 U.S. 593, 598 (1960) (“Arbitrators have no obligation to the court to give their reasons for an award.”).

¹⁰⁷ *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 n.4 (1956); *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006).

¹⁰⁸ Fla. Stat. 684.0042(2).

¹⁰⁹ See, e.g., *In re Wal-Mart Wage & Hour Employment Practices Litig.*, 737 F.3d 1262, 1267-68 (9th Cir. 2013); *Hoelt v. MVL Grp., Inc.*, 343 F.3d 57, 65 (2d Cir. 2003).

¹¹⁰ *JCI Comm'ns, Inc. v. Int'l Bhd of Elec. Workers, Local 103*, 324 F.3d 42, 51 (1st Cir. 2003) (“Absent exceptional circumstances, a court will not entertain a claim of personal bias where it could have been raised at the arbitration proceedings but was not.”); *Lippert Tile Co., Inc. v. Int'l Union of Bricklayers & Allied Craftsmen*, 724 F.3d 939, 945 (7th Cir. 2013) (“waiver rule applies equally to questions concerning arbitrability . . . we have repeatedly disapproved of the practice of remaining silent on an arbitrability issue during arbitration proceedings, only to play the arbitrability card in federal court after the party loses.”).

¹¹¹ Fla. Stat. 684.0046.

6.4 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

A party seeking to confirm an award under the FAA must file an application with the court within one year of the issuance of the award.¹¹² However, awards subject to the New York Convention or the Panama Convention may be confirmed within three years of the award.¹¹³ In each case, parties seeking to enforce an award must attach to their filing both a copy of the award and a copy of the arbitration agreement.¹¹⁴

Florida Supplement: The Florida FIAA states that, upon application in writing to the court, an arbitral award *"irrespective of the country in which it was made, shall be recognized as binding"* and shall be enforced¹¹⁵ except in the following circumstances:

A party to the arbitration agreement was under some incapacity or the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; 2) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case; 3) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; 4) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or 5) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.¹¹⁶

A court may also refuse to recognize or enforce an award if it finds (1) the subject matter of the dispute is not capable of settlement by arbitration in Florida, or if (2) recognizing or enforcing the award would be contrary to Florida public policy.¹¹⁷

6.5 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

For an award to become enforceable, it must first be confirmed pursuant to the FAA, whereupon it becomes binding as if it were a judgment rendered by a U.S. court. A party seeking to vacate the award in the U.S. must therefore seek to do so before the award becomes confirmed. In practice, therefore, confirmation and vacatur determinations will tend to take place simultaneously in the same court proceeding.

However, when the award was rendered abroad, Chapter 2 of the FAA incorporates the New York Convention, Article IV of which provides courts with discretion to stay U.S. confirmation proceedings if an application for vacatur has been made at the seat of the competent authority. Even in such a scenario, however, the court still has discretion to deny the stay and may additionally require the party seeking it to post security.

Florida Supplement: Section 48 of the Florida FIAA authorizes a party to request a stay of enforcement when the award has been set aside by the issuing court.¹¹⁸ That decision is subject to the court's discretion, and

¹¹² 9 U.S.C. § 9.

¹¹³ 9 U.S.C. §§ 207, 302.

¹¹⁴ 9 U.S.C. §§ 13, 208, 307.

¹¹⁵ Fla. Stat. 684.0047(1) (emphasis added).

¹¹⁶ Fla. Stat. 684.0048(1)(a).

¹¹⁷ Fla. Stat. 684.0048(1)(b).

¹¹⁸ Fla. Stat. 684.0048(1)(a)(5).

the Florida FIAA does not contemplate suspending the right to enforce an award simply because there are proceedings to annul or set aside an award.

6.6 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Although the text of the New York Convention suggests that a court has discretion to confirm an award even if it has been vacated, a U.S. court will not enforce an international award that has been vacated at the seat of arbitration (*i.e.*, by the “competent authority”) absent extraordinary circumstances. In a notable exception, however, the Second Circuit affirmed the confirmation of an award that had been vacated in Mexico – the seat of the arbitration – because the Mexican court retroactively applied the law, an act deemed contrary to “*fundamental notions of what is decent and just*” in the United States.¹¹⁹

Florida Supplement: The Florida FIAA follows the New York Convention, theoretically granting courts discretion to confirm an award even if it has been annulled (“*recognition or enforcement [...] may be refused*”). As a practical matter, however, a Florida court is unlikely to enforce an award that has been annulled.¹²⁰

6.7 Are foreign awards readily enforceable in practice?

Yes. U.S. courts embrace a policy favoring the recognition and enforcement of arbitral awards.¹²¹ As such, foreign awards are readily confirmed and enforced in the U.S., consistent with the policy of the New York Convention. Courts have even imposed sanctions on parties seeking to vacate or delay confirmation of an award without a substantial basis for doing so.¹²²

7. Funding Arrangements

7.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction? If so, what is the practical and/or legal impact of such restrictions?

The terms and legality of funding arrangements are governed by U.S. state laws, whether or not an arbitration falls under the FAA. Each state has attorney ethical and possibly other rules (*e.g.*, champerty) that should be consulted.

Florida Supplement: While the Florida FIAA and Florida law do not directly bar the use of contingency fees, alternative fee arrangements, or third-party funding for arbitrations, the ethical rules in Florida impose certain restrictions. For example, Rule 4-1.5 of the Florida Rules of Professional Conduct states that attorneys “*shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee.*” This Rule also sets out factors for determining if fees are reasonable.¹²³ Moreover, attorneys are required to put contingent fee agreements in writing and provide details on the terms of any such agreement.¹²⁴

In addition, the Florida Bar has stated that it “*discourages the use of non-recourse advance funding companies.*”¹²⁵ Indeed, although the Florida Bar has advised that an attorney may provide a client with information about companies that offer non-recourse advance funding, the Bar concluded that “[t]he attorney

¹¹⁹ *Thai-Lao Lignite (Thailand) Co., Ltd. v. Government of the Lao People's Democratic Republic*, 864 F.3d 172, 186 (2d Cir. 2017).

¹²⁰ Fla. Stat. 684.0048(1)(a)(5) (emphasis added).

¹²¹ *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013) (“*Under the FAA, courts may vacate an arbitrator's decision only in very unusual circumstances*”) (internal citation omitted).

¹²² *World Bus. Paradise, Inc. v. Suntrust Bank*, 403 Fed. Appx. 468, 470 (11th Cir. 2010); *Prospect Capital Corp. v. Enmon*, 2010 WL 907956 (S.D.N.Y. 2010).

¹²³ Florida Rule of Professional Conduct 4-1.5.

¹²⁴ Florida Rule of Professional Conduct 4-1.5(f).

¹²⁵ Florida Bar Ethics Opinion 00-3 (March 15, 2002) (revised August 24, 2011), available at: <https://www.floridabar.org/news/tfb-journal/?durl=%2Ftfb%2Ftfbetopin.nsf%2F840090c16eedaf0085256b61000928dc%2Ff40a54f76a7da5a585256b800057b541>.

*shall not recommend the client's matter to the funding company nor initiate contact with the funding company on a client's behalf."*¹²⁶

7.2 Is there likely to be any significant reform of the arbitration law in the near future?

There have been several proposals to amend the FAA in recent years, primarily to curtail the arbitrability of certain types of disputes, such as consumer credit card cases, and labor and employment issues. However, few of these proposals have made any significant progress towards becoming law.¹²⁷ Furthermore, because the U.S. is a common law system, binding case law continues to develop and inform the application of the FAA. Most notably, the Supreme Court has shown an interest in addressing issues relating to class action arbitration, and is likely to continue opining on the FAA in the coming years.

Florida Supplement: There are no expected revisions to the Florida FIAA at this time.

¹²⁶ Florida Bar Ethics Opinion 00-3 (March 15, 2002) (revised August 24, 2011), available at: <https://www.floridabar.org/news/tfb-journal/?durl=%2Ftfb%2Ftfbetopin.nsf%2F840090c16eedaf0085256b61000928dc%2Ff40a54f76a7da5a585256b800057b541>.

¹²⁷ See https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/lsadr_august2016.authcheckdam.pdf

DOMESTIC ARBITRATION IN CALIFORNIA

1. The legal framework

California's International Commercial Arbitration and Conciliation Act ("the Act") is based on the 1985 UNCITRAL Model Law.¹²⁸ However, California's domestic arbitration law—the California Arbitration Act ("CAA")—is a separate law, and it is not based on the UNCITRAL Model Law.¹²⁹

The CAA is based on the Uniform Arbitration Act, which is a model law that the Uniform Law Commission created. Although the California Legislature regularly amends or updates small portions of the CAA, most provisions of the CAA have not been revised since it was first passed in its entirety in 1961.

2. The Arbitration Agreement

As with all arbitrations, the arbitration agreement is the centerpiece of arbitration under the CAA. California courts will interpret an arbitration agreement to determine whether the parties intended to use the CAA rather than the FAA.¹³⁰ *"There is a 'strong default presumption that the Federal Arbitration Act, not state law, supplies the rules for arbitration."*¹³¹ *"To overcome that presumption, parties to an arbitration agreement must evidence a 'clear intent' to incorporate state law rules for arbitration."*¹³² Where an arbitration agreement provides that California law applies, the courts will presume the parties elected to apply California state law on *substantive* matters, but federal law for the arbitration procedures.¹³³

Typically, an agreement's arbitration clause is considered separately. Courts evaluate the arbitration clause, as compared to the contract as a whole, to determine arbitrability. Challenges to the validity of the underlying contract (i.e., ambiguous, unclear, lack of consideration, mutual mistake) are not considered.¹³⁴

Under the CAA, there are no specific, unique requirements for an arbitration clause. In general, a written agreement to submit a controversy to arbitration *"is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract."*¹³⁵ The question of whether a valid agreement to arbitrate exists is determined by reference to the law applicable to contracts generally.¹³⁶ Arbitration agreements are subject to rescission on the same grounds as other contracts, and a petition to compel arbitration *"is not to be granted when there are grounds for rescinding the agreement."*¹³⁷

Generally, because arbitration is based on a contract, only parties to the arbitration agreement can be compelled to arbitrate.¹³⁸ However, in certain instances, a third-party can be bound by the arbitration agreement where: (1) the nonsignatory is a third-party beneficiary of the contract containing the arbitration agreement; or (2) *"a preexisting relationship existed between the nonsignatory and one of the parties to the*

¹²⁸ See Cal. Civ. Proc. Code § 1297.11 *et seq.*

¹²⁹ See Cal. Civ. Proc. Code § 1280 *et seq.*

¹³⁰ See *Fid. Fed. Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306, 1311-12 (9th Cir. 2004); *Cronus Investments, Inc. v. Concierge Servs.*, 35 Cal. 4th 376, 387 (2005).

¹³¹ *Fid. Fed. Bank, FSB*, 386 F.3d at 1311.

¹³² *Fid. Fed. Bank, FSB*, 386 F.3d at 1311.

¹³³ *Fid. Fed. Bank, FSB*, 386 F.3d at 1311.

¹³⁴ See *Phillips v. Sprint PCS*, 209 Cal. App. 4th 758, 774 (2012) (*"An arbitration provision is severable from the remainder of the contract; a challenge to the contract as a whole, without a focused challenge to the arbitration provision, does not preclude arbitration."* (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-446 (2006))).

¹³⁵ Cal. Civ. Proc. Code § 1281.

¹³⁶ See *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 972 (1997), as modified (July 30, 1997).

¹³⁷ *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 972 (1997), as modified (July 30, 1997), at 973.

¹³⁸ See *Crowley Mar. Corp. v. Boston Old Colony Ins. Co.*, 158 Cal. App. 4th 1061, 1069 (2008).

arbitration agreement, making it equitable to compel the nonsignatory to also be bound to arbitrate his or her claim."¹³⁹

With regard to whether claims are arbitrable, the U.S. Supreme Court has held that the FAA preempts state laws that prohibit outright the arbitration of a particular types of claims.¹⁴⁰ Generally, under the CAA, if the arbitration clause is broadly worded, most contract and tort claims are arbitrable.¹⁴¹ However, the court will determine whether an agreement to arbitrate has been entered into before compelling arbitration. For example, in *Long v. Provide Commerce*, the court declined to compel arbitration where the arbitration agreement was contained in a browserwrap agreement.¹⁴² The court held that the website at issue failed to put a reasonably prudent user on inquiry notice of the terms of the supposed contract.

Additionally, for some domains, California has additional statutory requirements for enforceable arbitration agreements.¹⁴³

Further, certain types of claims are not subject to arbitration as a matter of law, including, for example: residential leases that seek to waive a tenant's rights in litigation;¹⁴⁴ injury or death claims in real property purchase agreements;¹⁴⁵ construction subcontracts requiring arbitration outside of California¹⁴⁶; and employment contracts requiring employees residing and working in California to litigate or arbitrate disputes outside of California.¹⁴⁷

California law also requires that any waiver of the right to seek judicial redress must be knowing, voluntary and expressly not made as a condition of entering into a contract or as a condition of providing or receiving goods or services.¹⁴⁸

3. Intervention of Domestic Courts

Generally, California courts will stay litigation if there is a valid arbitration agreement covering the dispute.¹⁴⁹ However, a court may deny a petition to compel arbitration where a party to an arbitration agreement is also (1) a party to a pending court action or special proceeding with a third party (2) arising out of the same transaction or series of related transactions and (3) there is the possibility of conflicting rulings on a common issue of law or fact.¹⁵⁰

Additionally, a party seeking to stay court proceedings should seek a stay in California while an arbitration is pending in another jurisdiction. Under California law, after a petition to compel arbitration has been granted and a lawsuit stayed, "*the arbitrator takes over. It is the job of the arbitrator, not the court, to resolve all questions needed to determine the controversy.*"¹⁵¹

¹³⁹ *Crowley Mar. Corp. v. Boston Old Colony Ins. Co.*, 158 Cal. App. 4th 1061, 1069 (2008), at 1069-70.

¹⁴⁰ *AT&T Mobility v Conception*, 563 U.S. 321 (2011).

¹⁴¹ See *EFund Capital Partners v. Pless*, 150 Cal. App. 4th 1311, 1322 (2007).

¹⁴² *Long v. Provide Commerce*, 245 Cal. App. 4th 855 (2016).

¹⁴³ See, e.g., Cal. Civ. Proc. Code, § 1295 (medical malpractice); § 1298 (disputes arising from real estate contracts).

¹⁴⁴ Cal. Civ. Proc. Code § 1953(a)(4).

¹⁴⁵ Cal. Civ. Proc. Code §§ 337.1, 337.5.

¹⁴⁶ Cal. Civ. Proc. Code § 410.42.

¹⁴⁷ Cal. Labor Code § 925(a), (b), (c), (f).

¹⁴⁸ See Cal. Civ. Code §§ 51.7, 52, 52.1; see, also *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017) (holding that the arbitration agreement could not be enforced because it violated California's anti-waiver statute (Cal. Civ. Code § 3513) prohibiting contractual terms waiving a party's "public rights").

¹⁴⁹ Cal. Civ. Proc. Code § 1281.4.

¹⁵⁰ Cal. Civ. Proc. Code § 1281(c).

¹⁵¹ *MKJA, Inc. v. 123 Fit Franchising, LLC*, 191 Cal. App. 4th 643, 662 (2011) (reversing trial court lifting of stay for arbitration pending in Colorado); Cal. Civ. Proc. Code § 1281.4 (providing for stay when arbitration has been ordered).

Under California law, “an arbitration provision does not oust the court of jurisdiction to hear the matter but merely means if one party chooses to arbitrate, a petition may be filed to stay the proceedings, order arbitration and then confirm the award.”¹⁵² Even when a stay has been issued, the court retains limited jurisdiction over the dispute.¹⁵³ Additionally, California courts have the power to enjoin proceedings in another jurisdiction when there are exceptional circumstances that outweigh the threat to judicial restraint and where principles of comity warrant such a solution.¹⁵⁴

4. The conduct of the proceedings

Parties have the right to be represented by an attorney at any arbitration proceeding, although parties are not required to retain counsel in every instance.¹⁵⁵ However, California law strictly limits the ability of parties to retain foreign and out-of-state attorneys in connection with California-based arbitration.¹⁵⁶ In domestic arbitrations seated in California, a party may only be represented by (a) a California-licensed attorney; or (b) an attorney licensed in another U.S. state. If the attorney is licensed in a different U.S. state, the attorney must receive the arbitrators’ explicit approval to participate in the proceeding and must file a *pro hac vice* “certificate” with the arbitrators, the State Bar, and all parties. Foreign attorneys—i.e. attorneys licensed in another country but not licensed in a U.S. state—may not represent clients in either domestic or international arbitration based in California.¹⁵⁷ The unlawful practice of law in California is a criminal misdemeanor.¹⁵⁸ In April 2017, a specially-formed Working Group of the California Supreme Court issued a strong recommendation in favor of lifting these restrictions, thus the rules may be changed in the near future.

In international arbitrations seated in California, a party may only be represented by a California-licensed attorney.¹⁵⁹ California law prohibits attorneys who not licensed in California from practicing law in California.¹⁶⁰ And although out-of-state attorneys may apply for a *pro hac vice* exception in domestic arbitrations held in California, there is no equivalent exception for *international* arbitrations.¹⁶¹ Accordingly, even U.S.-licensed attorneys from other states may not represent a party in an international commercial arbitration in California.

With regard to arbitrators, California courts closely guard the impartiality of arbitrators. California law requires neutral arbitrators to disclose, within 10 days of being nominated, “all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial.”¹⁶² Unlike the UNCITRAL Model Law, the CAA includes a lengthy list of specific circumstances that must be disclosed.¹⁶³ These required disclosures are extensive; for example, a neutral arbitrator must disclose any professional or personal relationship with any lawyer or law firm retained by any party.¹⁶⁴

¹⁵² *Dial 800 v. Fesbinder*, 118 Cal. App. 4th 32, 46 (2004), as modified (May 5, 2004) (citation omitted).

¹⁵³ See *Titan/Value Equities Group, Inc. v. Superior Court*, 29 Cal. App. 4th 482, 487 (1994) (explaining that after a stay is issued, court retains “vestigial” jurisdiction to appoint arbitrators if the method selected by the parties fails, to provide a provisional remedy, and to confirm, correct, or vacate the award).

¹⁵⁴ See *Advanced Bionics Corp. v. Medtronic, Inc.*, 29 Cal. 4th 697, 708 (2002), as modified (Mar. 5, 2003); *TSMC N. Am. v. Semiconductor Mfg. Int’l Corp.*, 161 Cal. App. 4th 581, 589 (2008).

¹⁵⁵ Cal. Civ. Proc. Code § 1282.4(a).

¹⁵⁶ See Cal. Bus. & Prof. Code § 6125.

¹⁵⁷ Cal. Civ. Proc. Code § 1282.4; Cal. Rules of Court, Rule 9.43; see also California Bar, Out-of-State Attorney Arbitration Counsel, <http://www.calbar.ca.gov/Admissions/Special-Admissions/Out-of-State-Attorney-Arbitration-Counsel-OSAAC>.

¹⁵⁸ See Cal. Bus. & Prof. Code § 6126.

¹⁵⁹ See California Supreme Court International Commercial Arbitration Working Group, Report and Recommendations (Apr. 25, 2017), p. 7.

¹⁶⁰ Cal. Bus. & Prof. Code § 6125.

¹⁶¹ See Cal. Civ. Proc. Code § 1282.4 (*pro hac vice* exception for domestic arbitrations); Cal. Civ. Proc. Code § 1297.17 (explicitly superseding §1282.4 without replacement).

¹⁶² Cal. Civ. Proc. Code §§ 170.1, 1281.9.

¹⁶³ See Cal. Civ. Proc. Code §§ 170.1, 1281.9.

¹⁶⁴ Cal. Civ. Proc. Code § 1281.9(a)(6).

Neutral arbitrators must also disclose if they have previously served as an arbitrator in any matter that involved one of the parties' counsel.¹⁶⁵ Once appointed, arbitrators in California enjoy absolute immunity from civil liability for acts arising from the arbitral process.¹⁶⁶

If an arbitrator fails to file the required disclosures within 10 days, the arbitrator "shall be disqualified."¹⁶⁷ Moreover, an arbitrator's failure to disclose facts which "*could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial*" warrants vacation of his or her award, even without any show of prejudice.¹⁶⁸

California courts will assist the parties with the appointment of an arbitrator if necessary, as follows:

If the arbitration agreement provides a method of appointing an arbitrator, that method shall be followed. If the arbitration agreement does not provide a method for appointing an arbitrator, the parties to the agreement who seek arbitration and against whom arbitration is sought may agree on a method of appointing an arbitrator and that method shall be followed. In the absence of an agreed method, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails to act and his or her successor has not been appointed, the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator.¹⁶⁹

California courts may also order interim measures, "*but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without provisional relief.*"¹⁷⁰ And there is no limitation on *ex parte* requests. However, the CAA does not grant arbitrators independent powers to issue interim measures, but the parties' agreement or the agreed-upon arbitration rules may allow for some interim or provisional relief.¹⁷¹

The CAA does not provide for the confidentiality of the arbitral proceedings. It also does not regulate the length of the arbitration, the location of proceedings, the arbitrators' ability to admit or exclude evidence, and it does not make a hearing mandatory.¹⁷²

Regarding available procedures, either the parties or the arbitrator may issue subpoenas for witness testimony or may require the production of documents to facilitate the arbitration.¹⁷³ In some cases, the CAA requires the arbitral panel to permit depositions. Any arbitration relating to "*any injury to, or death of, a person caused by the wrongful act or neglect of another,*" the arbitral panel must permit the parties to take depositions of witnesses.¹⁷⁴

Regarding costs of arbitration, the CAA states: "*Unless the arbitration agreement otherwise provides or the parties to the arbitration otherwise agree, each party to the arbitration shall pay his pro rata share of the expenses and fees of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or witness fees or other expenses incurred by a party for his own benefit.*"¹⁷⁵ However, special protections apply in consumer arbitrations. California law prevents arbitrators from "*requiring that a consumer who is a party to the arbitration pay the fees and costs incurred by an opposing*

¹⁶⁵ Cal. Civ. Proc. Code § 1281.9(a)(4).

¹⁶⁶ *La Serena Properties v. Weisbach*, 186 Cal. App. 4th 893, 897 (2010).

¹⁶⁷ *La Serena Properties v. Weisbach*, 186 Cal. App. 4th 893, 897 (2010) § 1281.91(a).

¹⁶⁸ See, e.g., *Benjamin, Weill & Mazer v. Kors*, 195 Cal. App. 4th 40, 46 (2011).

¹⁶⁹ Cal. Civ. Proc. Code § 1281.6.

¹⁷⁰ Cal. Civ. Proc. Code, § 1281.8.

¹⁷¹ Cal. Civ. Proc. Code § 1281.8.

¹⁷² Cal. Civ. Proc. Code § 1282.2.

¹⁷³ Cal. Civ. Proc. Code § 1282.6.

¹⁷⁴ Cal. Civ. Proc. Code §§ 1283.1, 1283.05.

¹⁷⁵ Cal. Vic. Proc. Code § 1284.2.

party if the consumer does not prevail in the arbitration, including, but not limited to, the fees and costs of the arbitrator, provider organization, attorney, or witnesses.”¹⁷⁶

5. The Award

Under the CAA, the arbitral award must be in writing and signed by the arbitrators concurring therein. “It shall include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy.”¹⁷⁷ Absent an agreement by the parties, “[a]rbitrators are not required to explain their awards or provide reasons for their conclusions.”¹⁷⁸

With regard to annulling or vacating the award, a party may waive the right to seek the annulment of the award if it does not comply with the requirements of California Code of Civil Procedure Section 1286.4, which outlines the conditions to vacation of an award:

The court may not vacate an award unless:

(a) A petition or response requesting that the award be vacated has been duly served and filed; or

(b) A petition or response requesting that the award be corrected has been duly served and filed and:

(1) All petitioners and respondents are before the court; or

(2) All petitioners and respondents have been given reasonable notice that the court will be requested at the hearing to vacate the award or that the court on its own motion has determined to vacate the award and all petitioners and respondents have been given an opportunity to show why the award should not be vacated.¹⁷⁹

Through its conduct, or failing to assert its rights, a party may otherwise waive its right to seek annulment of an award.¹⁸⁰

With regard to appealing an award, generally, “[a]bsent an express agreement to the contrary, a court has no authority to ‘review the merits of the controversy, the validity of the arbitrator’s reasoning or the sufficiency of the evidence supporting the arbitrator’s award.’”¹⁸¹

California Code of Civil Procedure Section 1286.2 sets forth exceptions to this general rule of non-reviewability. By enacting the exceptions, the Legislature sought to permit judicial review when the circumstances show “serious problems with the award itself, or with the fairness of the arbitration process.”¹⁸²

Under California Code of Civil Procedure Section 1286.2, a court shall vacate an arbitration award if the court determines the following:

(1) The award was procured by corruption, fraud or other undue means.

¹⁷⁶ Cal. Civ. Proc. Code § 1284.3.

¹⁷⁷ Cal. Civ. Proc. Code § 1283.4.

¹⁷⁸ *Arco Alaska, Inc. v. Superior Court*, 168 Cal. App. 3d 139, 148 (1985) (citing *Sapp v. Barenfeld*, 34 Cal. 2d 515, 523 (1949)).

¹⁷⁹ Cal. Civ. Proc. Code § 1286.4.

¹⁸⁰ See, e.g., *Int’l All. of Theatrical Stage Employees & Moving Picture Mach. Operators of U.S. & Canada, Local No. 16 v. Laughon*, 118 Cal. App. 4th 1380, 1387 (discussing waiver with regard to arbitration).

¹⁸¹ *Emerald Aero, LLC v. Kaplan*, 9 Cal. App. 5th 1125, 1137–38 (2017), as modified on denial of reh’g (Mar. 21, 2017), review denied (June 14, 2017) (quoting *Hoso Foods, Inc. v. Columbus Club, Inc.*, 190 Cal. App. 4th 881, 887 (2010) and citing *Richey v. AutoNation, Inc.*, 60 Cal. 4th 909, 916 (2015); *Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal. 4th 1334, 1339 (2008)).

¹⁸² *Emerald Aero, LLC v. Kaplan*, 9 Cal. App. 5th 1125, 1137–38 (2017), as modified on denial of reh’g (Mar. 21, 2017), review denied (June 14, 2017) (quoting *Haworth v. Superior Court*, 50 Cal. 4th 372, 380 (2010)).

- (2) There was corruption in any of the arbitrators.
- (3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator.
- (4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.
- (5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.
- (6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision. However, this subdivision does not apply to arbitration proceedings conducted under a collective bargaining agreement between employers and employees or between their respective representatives.¹⁸³

With regard to confirming an award, “[a]ny party to an arbitration in which an award has been made may petition the court to confirm, correct or vacate the award. The petition shall name as respondents all parties to the arbitration and may name as respondents any other persons bound by the arbitration award.”¹⁸⁴ “A petition to confirm an award shall be served and filed not later than four years after the date of service of a signed copy of the award on the petitioner. A petition to vacate an award or to correct an award shall be served and filed not later than 100 days after the date of the service of a signed copy of the award on the petitioner.”¹⁸⁵ And “[n]o petition may be served and filed ... until at least 10 days after service of the signed copy of the award upon the petitioner.”¹⁸⁶

“If an award is confirmed, judgment shall be entered in conformity therewith.”¹⁸⁷ The judgment has the same force and effect as a judgment in a civil action, and it may be enforced like any other court judgment.

6. Funding arrangements

Under the CAA, there are no specific restrictions on funding arrangements—whether contingency or alternative fee arrangements, nor third-party funding. However, attorneys must navigate their ethical obligations.¹⁸⁸

¹⁸³ Cal. Civ. Proc. Code § 1286.2.

¹⁸⁴ Cal. Civ. Proc. Code § 1285.

¹⁸⁵ Cal. Civ. Proc. Code § 1288.

¹⁸⁶ Cal. Civ. Proc. Code § 1288.4.

¹⁸⁷ Cal. Civ. Proc. Code § 1287.4.

¹⁸⁸ See Lica Miller, “Perils of Third-Party Funding”, *Los Angeles Lawyer*, March 2017, <http://www.lacba.org/docs/default-source/lal-magazine/2017-test-articles/march2017testarticle.pdf>

ZAMBIA

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

JOSEPH A. JALASI AND MWAPE I. KOPULANDE
OF ERIC SILWAMBA, JALASI & LINYAMA LEGAL PRACTITIONERS

ERIC SILWAMBA, JALASI &
LINYAMA
LEGAL PRACTITIONERS
ADVOCATES, SOLICITORS,
COMMISSIONERS FOR OATHS &
NOTARIES PUBLIC

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

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 - a. Framework ●
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5. Accessibility and safety ●
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VERSION: 24 MAY 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

The prevailing law governing arbitration in Zambia is the Arbitration Act No. 19 of 2000 (the “**Act**”) which was enacted on 29 December 2000.¹ Subsidiary legislation includes the Arbitration (Code of Conduct and Standard) Regulations in Statutory Instrument No. 12 of 2007,² the Arbitration (Recognition of Arbitral Institutions) Regulations, 2001, in Statutory Instrument No. 73 of 2001,³ and the Arbitration (Court Proceedings) Rules, 2001, in Statutory Instrument No. 75 of 2001.⁴

Key places of arbitration in the jurisdiction	Lusaka
Civil law / Common law environment?	Common law
Confidentiality of arbitrations?	Yes
Requirement to retain (local) counsel?	Yes
Ability to present party employee witness testimony?	Yes
Ability to hold meetings and/or hearings outside of the seat?	Yes
Availability of interest as a remedy?	Yes, whether simple or compound. Where Zambian law is applicable to the issue, the Act limits the interest rate to the current lending rate as determined by the Bank of Zambia.
Ability to claim for reasonable costs incurred for the arbitration?	Yes
Restrictions regarding contingency fee arrangements and/or third-party funding?	Zambian practitioners may not claim contingency fees in an action, except in a suit or other contentious proceedings in any country other than Zambia to the extent that the local lawyer in that country would be permitted to receive a contingency fee in these proceedings.
Party to the New York Convention?	Yes
Other key points to note	ϕ
WJP Civil Justice score (2017-2018)	0.47

¹ The Arbitration Act No. 19 of 29 December 2000. Available at: <https://www.ciarb.org/docs/default-source/default-document-library/the-arbitration-act-zambia.pdf?sfv>.

² Arbitration (Code of Conduct and Standard) Regulations in Statutory Instrument No. 12 of 2007. Available at: <https://www.ciarb.org/docs/default-source/default-document-library/code-of-conduct-amp-standards-regulations-zambia.pdf?sfvrsn=2> and www.parliament.gov.zm/sites/default/files/documents/acts/Arbitration%20Act.pdf.

³ Arbitration (Recognition of Arbitral Institutions) Regulations, 2001, in Statutory Instrument No. 73 of 2001. Available at: faolex.fao.org/docs/pdf/zam42364.pdf.

⁴ Arbitration (Court Proceedings) Rules, 2001, in Statutory Instrument No. 75 of 2001. Available at: www.judiciaryzambia.com/2016/11/02/statutory-instrument-no-75-of-2001/.

ARBITRATION PRACTITIONER SUMMARY

Date of arbitration law?	29 December 2000.
UNCITRAL Model Law? If so, any key changes thereto?	Yes, the Zambian Arbitration Act (the “ Act ”) is based on the 1985 UNCITRAL Model Law. Key deviations concern: <ul style="list-style-type: none"> • Broader provisions in case of default of the claimant • Broader grounds for the setting aside of awards • Broader grounds for refusing recognition of awards
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Yes
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes
Courts’ attitude towards the competence-competence principle?	Arbitrators may rule on their own jurisdiction, including on any objection with respect to the existence or validity of the arbitration agreement.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	In addition to the grounds set out in the New York Convention, the Act also provides that recognition and enforcement may be refused if the court finds that the making of the award was induced by fraud, corruption or misrepresentation.
Courts’ attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	Courts may refuse the recognition and enforcement of awards annulled at the seat of the arbitration upon request of the party against which enforcement is sought.
Other key points to note?	∅

JURISDICTION DETAILED ANALYSIS

1. The legal framework

1.1 Is the arbitration law based on the UNCITRAL Model Law?

Yes, the Act is modelled after the 1985 UNCITRAL Model Law. The title of the Act provides that the Act is “an act to repeal and replace the Arbitration act provision for domestic and international arbitration through the adoption, with modifications, of the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on the 21st June, 1985”.

The key modifications to the UNCITRAL Model Law are as follows:

- Under the Act, if, without showing sufficient cause, the claimant fails to prosecute the claim within a reasonable time, the arbitral tribunal may make an award dismissing the claim or give directions, with or without conditions, for the speedy determination of the claim;⁵
- Grounds for the setting aside of an award include (i) the circumstance that the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made,⁶ and (ii) the making of the award was induced or effected by fraud, corruption or misrepresentation.⁷
- Recognition or enforcement of an award may be refused if the court finds that the making of the award was induced or effected by fraud, corruption or misrepresentation.⁸

1.2 When was the arbitration law last revised?

The law that governs Arbitration in Zambia was last revised on 29 December 2000.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

The Zambian courts would most likely follow the approach adopted by the English courts.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Yes.⁹ This principle has been recognized in Zambian law long before the Act’s adoption. In the case of *Heyman and Another v. Darmins Limited*,¹⁰ the court found that an arbitration clause is distinct from the other clauses stipulated in the contract. Indeed, while the other clauses set out obligations which the parties undertake towards each other, the arbitration clause does not impose on one of the parties an obligation in favour of the other. The court further held that if any dispute arose with regard to the obligations which the other party had undertaken to the other, that dispute was to be settled by an arbitral tribunal. In other words, the arbitration clause survives for determination of the mode of dispute settlement.

2.3 What are the formal requirements (if any) of an enforceable arbitration agreement?

An arbitration agreement must be in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication that provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is

⁵ Section 15 of the Act.

⁶ Section 17(2)(a)(v) of the Act.

⁷ Section 17(2)(b)(iii) of the Act.

⁸ Section 19(1)(b)(ii) of the Act.

⁹ Section 8(1) of the Act, and Article 16(1) of the First Schedule of the Act.

¹⁰ *Heyman and Another v. Darmins Limited* (1942) AC 356. Available at: <http://uniset.ca/other/css/1942AC356.html>.

alleged by one party and not denied by the other. In addition, a reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, provided that the contract is in writing and the reference is such as to make the clause part of the contract.¹¹

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by the said arbitration agreement?

The position of the Zambian courts was set out in the case of *Odys Oil Company Limited v The Attorney General and others*,¹² where it was held that a party who is not a party to the arbitration agreement cannot be bound by the terms and outcomes of an arbitration agreement.

In terms of the alter-ego/group of companies doctrine, the Zambian courts will most likely follow the approach adopted by the English courts.

2.5 Are there restrictions to arbitrability? In the affirmative, do these restrictions apply to specific domains (such as IP, corporate law, etc.) or specific persons (i.e., State entities, consumers, etc.)?

Yes. Restrictions to arbitrability are provided for under Section 6(2) of the Act, and apply to disputes in respect of the following matters:

- An agreement that is contrary to public policy;
- A dispute which, in terms of any law, may not be determined by arbitration;
- A criminal matter or proceeding except insofar as permitted by written law or unless the court grants leave for the matter or proceeding to be determined by arbitration;
- A matrimonial cause, or a matter incidental to a matrimonial cause unless the court grants leave for the matter to be determined by arbitration;
- The determination of paternity, maternity or parentage of a person; and
- A matter affecting the interests of a minor or an individual under a legal incapacity, unless the minor or individual is represented by a competent person.

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

3.1.1 If the place of arbitration is inside of the jurisdiction?

Section 10 of the Act provides for the possibility for a court to stay proceedings and refer the parties to arbitration upon request by a party. Such request may be filed at any stage of the proceedings and notwithstanding any written law. The court may decline the request if it finds that the agreement is null and void, inoperative or incapable of being performed.¹³

Rule 4 of the Arbitration (Court Proceedings) Rules, 2001 Statutory Instrument No. 75 of 2001 further explains that the application for the stay of legal proceedings to the High Court, Industrial Relations Court, or the Lands Tribunal must be made by summons in the same proceedings to the Registrar of the court or, if the proceedings are pending before a judge, to a judge. The application must be supported by an affidavit.¹⁴

¹¹ Section 9 of the Act.

¹² *Odys Oil Company Limited v The Attorney General and others* (2012) ZR 164, Volume 1, p. 182.

¹³ Section 10 of the Act.

¹⁴ Arbitration (Court Proceedings) Rules, 2001 Statutory Instrument No. 75 of 2001, Rule 4.

In the case of *Zambia National Holdings limited and another v The Attorney General*,¹⁵ it was held that where parties have agreed to settle any dispute between them by arbitration, the court's jurisdiction is ousted unless the agreement is null and void. The decision reinforces party autonomy to arbitrate as opposed to being forced to litigate whenever there is a dispute. This principle was reaffirmed in the case of *Leonard Ridge Safaris Limited v Zambia Wildlife Authority*.¹⁶

Interestingly, in the recent case of *Savenda v. Stanbic Bank (Appeal No. 16/17)*¹⁷ it was held that arbitration proceedings cannot be stayed by ordinary courts.

3.1.2 If the place of arbitration is outside of the jurisdiction?

Section 10 of the Act provides for the possibility for a court to stay proceedings and refer the parties to arbitration upon request by a party, irrespective of the place of arbitration, including where such is outside of Zambia.

3.2 How do courts treat injunctions by parties enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

The position of the Zambian courts is that if an agreement has an arbitration clause, then no further proceeding can take place before the High Court. Under the provisions of Section 14 of the Act, an arbitrator can issue an injunction enjoining Zambian courts to stay litigation proceedings.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)

Anti-suit injunctions are yet to be tested in Zambia. However, in the event of an application for an anti-suit injunction, the Zambian courts will be guided by English law principles pursuant to the provisions of Section 10 of the High Court Act of 1960 which extends the principles of English common law and equity.

4. The conduct of proceedings

4.1 Can the parties retain counsel or be self-represented?

Section 21 of the Act states that unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the proceedings by a legal practitioner or another person of that party's choice.¹⁸

4.2 How strictly do courts control arbitrators' independence and impartiality?

Zambian courts control the independence and impartiality of arbitrators by using Section 17(2)(b)(ii) of the Act, which provides for setting aside on grounds of public policy. In the case of *Zambia Telecommunications Company v Celtel*,¹⁹ the Supreme Court set aside the award due to the perceived bias of the tribunal president.

The requirements for arbitrators to be independent and impartial may be found as follows:

- Section 12(6) of the Act provides that the court or arbitral institution, in appointing an arbitrator, shall have due regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator. Also, in the case of a sole or presiding arbitrator, the court or

¹⁵ *Zambia National Holdings limited and another v The Attorney General* (1993/1994) Z.R 115.

¹⁶ *Leonard Ridge Safaris Limited v Zambia Wildlife Authority* (2008) Z.R 97.

¹⁷ *Savenda v. Stanbic Bank* (Appeal No. 16/17). Available at: <https://zambialii.org/zm/judgment/2018//Savenda%20v%20Stanbic%20-%20Supreme%20Court%20Judgment.pdf>

¹⁸ Section 21 of the Act.

¹⁹ *Zambia Telecommunications Company v Celtel* (2008) ZMSC 23. Available at: <https://www.zambialii.org/zm/judgment/supreme-court/2008/23/23.pdf>.

arbitral institution shall take into account as well the advisability of appointing an arbitrator of a nationality other than any of the nationalities of the parties.²⁰

- Section 1 of the Arbitration (Code of Conduct and Standards) Regulations, Statutory Instrument No. 12 of 2007 states that “an arbitrator shall act fairly and impartially between the parties”. These Regulations also provide rules aimed at ensuring the impartiality and fairness of arbitrators. These rules govern the disclosures by arbitrators (Section 2), the conflicts of interests (Section 3), the acceptance of appointments (Section 4) and the arbitrators’ qualifications (Section 9). With respect to standards set out in the Regulations, arbitrators are to give each party a reasonable opportunity to put their case and sufficiently deal with that of the party’s opponent; adopt procedure which are suitable to the case; and avoid unnecessary delay and expense in resolving the dispute.

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

Pursuant to Section 12(2) of the Act, the parties are free to agree on a procedure to appoint the arbitral tribunal.

Where the parties have an agreed procedure and it fails, any party may request the court to step in and take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment.²¹

The application to the court is made pursuant to Rule 10 of the Arbitration (Court Proceedings) Rules, 2001 Statutory Instrument No. 75 of 2001, by ordinary summons supported by an affidavit before the Registrar of the High Court.²²

If the parties do not reach an agreement on the appointment procedure, the Act provides the procedure for the appointment of the arbitral tribunal, which may be composed of a sole arbitrator or a three-arbitrator panel. Where a party fails to appoint an arbitrator as required under the legal procedure, the other party may request the appointment by an arbitral institution, *i.e.*, either the Zambia Arbitration Association (‘ZAA’) or the Chartered Institute of Arbitrators (‘CIARB’) Zambia Branch²³ as provided under Section 11(4) and (4) of the Arbitration (Code of Conduct) in Statutory Instrument No. 12.²⁴ The Act, however, does not expressly state that the institutions mentioned above must be referred to before making an application to the court. It does, however, provide a definition of arbitral institution, and the ZAA and the Chartered Institute of Arbitrators Zambia Branch are the only two arbitral institutions registered in Zambia.

If after referring the matter to an arbitral institution, there is still a deadlock in terms of designating a tribunal, then any party may apply to the High Court for its assistance,²⁵ in the manner described above.

4.4 Do courts have the power to issue interim measures in connection with arbitrations?

Courts are entitled to issue interim measures in connection with arbitrations. Pursuant to Section 11 of the Act, courts may grant the following preliminary or interim relief:

- An order for the preservation, interim custody, sale or inspection of any goods, which are the subject-matter of the dispute;
- An order securing the amount in dispute or the costs and expenses of the arbitral proceedings;

²⁰ Section 12(6) of the Act.

²¹ Section 12(4)(c) of the Act.

²² Arbitration (Court Proceedings) Rules, 2001, Statutory Instrument No. 75 of 2001, Rule 10.

²³ Section 12(3)(a) of the Act.

²⁴ Section 11(4) and (4) of the Arbitration (Code of Conduct) in Statutory Instrument No. 12. Available at: <https://www.ciarb.org/.../code-of-conduct-amp-standards-regulations-zambia.pdf>

²⁵ Section 12(4) of the Act.

- An interim injunction or other interim order; or
- Any other order to ensure that an award which may be made in the arbitral proceedings is not rendered ineffectual.

The above may be illustrated with the case of *U&M Mining Zambia Ltd v Konkola Copper Mines plc*,²⁶ in which a Zambian court granted an interim measure in circumstances where the arbitration agreement provided that any arbitration would be seated in London. This was challenged in the English High Court, which found that, whilst English courts would have primary jurisdiction to hear applications in support of arbitral proceedings, parties may nevertheless seek interim relief or conservatory measures from other national courts where, for practical reasons, the application can only sensibly be made there.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

Yes, the legislation applicable in Zambia with respect to the procedure of arbitration is the Act, Arbitration (Code of Conduct & Standards) Regulations contained in Statutory Instrument No. 12 of 2007, and the United Nations Commission on International Trade Law (UNCITRAL) Model Law (United Nations Document A/40/17, Annex 1) as adopted by UNCITRAL on 21st June 1985 by virtue of the provisions of Section 8 of the Act.

Specifically, the Arbitration (Code of Conduct & Standards) Regulations contained in Statutory Instrument No. 12 of 2007 provide for the professional conduct of arbitrators under Part I of the Regulations. Paragraph 5 specifically provides for regulation of the conduct of arbitration proceedings. Paragraph 5 provides as follows:

"5. (1) An arbitrator shall –

(a) take reasonable steps to ensure that the parties understand the arbitration process before the arbitration commences;

(b) accord all parties the right to appear in person and to be heard after due notice of the time and place of hearing; and

(c) allow any party the opportunity to be represented by counsel; and

(2) An arbitrator who is a lawyer shall not represent any party to the arbitration or provide legal advice to the parties.

(3) An arbitrator shall conduct the arbitration with reasonable dispatch and shall attend hearings and participate in deliberations. An arbitrator shall follow the procedure agreed by the parties and shall deal with all the issues.

(4) Where there is more than one arbitrator, the arbitrators shall accord each other an opportunity to participate in all aspects of the proceedings."

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

Yes – arbitrators, parties and their counsel are all bound by duties of confidentiality. As far as arbitrators are concerned, according to Regulation 7 of the Arbitration (Code of Conduct) and Standard Regulations Statutory Instrument Act No. 12 of 2007, an arbitrator cannot disclose to anyone who is not a party to the arbitration any information or documents that are exchanged in the course of proceedings except with the consent of the parties or when ordered to do so by a court. Regulations 25 and 26 of the Arbitration (Court

²⁶ *U&M Mining Zambia Ltd v Konkola Copper Mines plc* (2013) EWHC 260 (Comm). Available at: <http://www.bailii.org/ew/cases/EWHC/Comm/2013/260.html>.

Proceedings) Rules, 2001 Statutory Instrument No. 75 of 2001 extends confidentiality to custody of records and documents by a court.

4.5.2 Does it regulate the length of arbitration proceedings?

The Act does not contain any provision as to the length of arbitration proceedings.

However, in accordance with Rule 1(b) of the Arbitration Code of Conduct, arbitrators must adopt procedures which are suitable to the case and will avoid unnecessary delay in resolving the dispute.

Rule 17 of the Arbitration Code of Conduct further provides that it is a basic professional responsibility of an arbitrator to plan a work schedule so that present and future commitments will be fulfilled in a timely manner. It also states that arbitrators must cooperate with the parties in avoiding delays. Finally, once the case record has been closed, an arbitrator shall adhere to the time limits for an award, as stipulated in the submission to arbitrate or the order for directions.

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

There is no regulation addressing this issue.

4.5.4 Does it allow for arbitrators to issue interim measures?

Under Section 14 of the Act, unless otherwise agreed by the parties, arbitrators are allowed to grant interim measures in respect of the subject-matter of the dispute. Arbitrators may, *inter alia*:

- grant an interim injunction or other interim order; and
- order the parties to make a deposit in respect of the fees, costs and expenses of the arbitration.

In addition, the arbitral tribunal may require any party to provide appropriate security in connection with any such measure.

4.5.5 Does it regulate the arbitrator's right to admit/exclude evidence?

Article 19 of the UNCITRAL Model Law applies. The parties are expected to agree on the procedure which includes the mode of receiving evidence. If the parties do not agree, the arbitral tribunal will determine the procedure in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

It should be noted that Article 15(c) of the Act provides that where a party fails to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

4.5.6 Does it make it mandatory to hold a hearing?

There is no mandatory requirement to hold a hearing.

4.5.7 Does it prescribe principles governing the awarding of interest?

Section 16(6) of the Act makes a difference between domestic and international arbitrations.

If the arbitration is international as defined in Article 1(3) of the 1985 UNCITRAL Model Law, the arbitral tribunal may award simple or compound interest in accordance with the law applicable to the arbitration.²⁷

If the arbitration is domestic, the Act regulates the principles governing the awarding of interest by reference to the law applicable in Zambia to judgment debts, *i.e.*, Section 2 of the Judgements Act of 1961.²⁸ This provision is used as a guide and caps interest at the current lending rate as determined by the Bank of

²⁷ Section 16(6)(a) of the Act.

²⁸ Chapter 81 of the Laws of Zambia.

Zambia. The Act gives the arbitral tribunal discretionary power to award simple or compound interest in accordance with said Judgments Act.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

Parties are entitled to recover their costs.²⁹

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

Under Section 28 of the Act, arbitrators are immune for anything done or omitted in good faith in the discharge of their function as arbitrators.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

Section 28 of the Act grants indemnity from both criminal and civil liability. The criminal liability aspect is yet to be tested in court.

5. The Award

5.1 Can parties waive the requirement for an award to provide reasons?

Pursuant to Article 16(2) of the Act, the parties may agree that no reasons are to be given as basis of the award, or that the award is an award on agreed terms under Article 30 of the UNCITRAL Model Law.³⁰

5.2 Can parties waive the right to seek the annulment of the award?

No. Under Section 17 of the Act, a party has a right to seek the annulment or setting aside of the award,³¹ and no exceptions or possibility of waiver has been provided.

5.3 What are typical mandatory requirements that apply to the rendering of a valid award rendered at a seat in the jurisdiction?

Under the provisions of Section 16(1) of the Act, 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 signature of the majority of all members of 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 1985 UNCITRAL Model Law.³² The Award shall state its date and the place of arbitration.³³

Once the award is made, a copy signed by the arbitrators shall be delivered to each party.³⁴

²⁹ Section 16(5) of the Act.

³⁰ Section 16(2) of the Act.

³¹ The grounds include incapacity, lack of proper notice to appoint the arbitral tribunal, award deals with issues not within the scope of the reference to arbitration, irregular composition of the arbitral tribunal or where the award has not yet become binding or has been set aside by the court of the country which, or under the law of which, it was made.

³² Section 16(2) of the Act.

³³ Section 16(3) of the Act.

³⁴ Section 16(4) of the Act.

5.4 Is it possible to appeal to an award (as opposed to seeking an annulment)?

There is no provision in the Act nor in any other legislation pertaining to an appeal against an award. Section 17 of the Act provides that the only recourse to a court against an arbitral award may be made by an application to set aside the award.

This was confirmed in the case of *Savenda Management Ltd v Stanbic Bank Zambia* (Appeal No. 002/2015) is instructive.³⁵ At page J24 of the ruling, the judges stated as follows:

[...] allowing the said application would amount to changing the decision of the Arbitrator with regard to the period within which the payment should have been made. In our view, Courts do not have jurisdiction to sit as appellate courts to review and alter arbitral decisions.

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

The general rule according to Section 18 of the Act is that an award is recognized and enforced provided that the award does not fall within the provisions of Section 19 of the Act, which makes provisions for the grounds for refusing recognition or enforcement.

According to Section 18 of the Act, there is no distinction between a local and foreign award.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

There is no provision to stay the enforcement of an arbitration award. In other words, if a party seeks to set aside an award, the award will remain enforceable pending the decision of the High Court.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Section 19(1)(a)(v) of the Act provides the grounds on which recognition and enforcement may be refused. It provides that recognition or enforcement may be refused if the requesting party furnishes proof that the award has been set aside or suspended by a court of country in which, or under the law of which, that award was made.

5.8 Are foreign awards readily enforceable in practice?

Foreign awards are enforceable in practice.

6. Funding arrangements

6.1 Are there restrictions on the use of contingency or alternative fee arrangements or third-party funding in the jurisdiction? If so, what is the practical and/or legal impact of restrictions?

The Zambia Legal Practitioner's Act³⁶ prohibits contingency fees. However, fee arrangements are allowed if they are permissible in the jurisdiction of the seat of arbitration.

7. Is there likely to be any significant reform of the arbitration law in the near future?

There is no significant reform anticipated to any of the laws of arbitration in the near future.

³⁵ *Savenda Management Ltd v Stanbic Bank Zambia* (Appeal No. 002/2015). Available at: <https://www.zambialii.org/zm/judgment/2017//Savenda-Management-Services-Limited-Vs-Stanbic-Bank-Zambia-Limited-31%20Aug-2017.pdf>.

³⁶ Zambia Legal Practitioner's Act. Available at: https://www.zambialii.org/zm/legislation/consolidated-act/30/consol-act_30.RTF.

APPENDICES

DELOS GUIDE TO ARBITRATION PLACES (GAP)

DELOS MODEL CLAUSES / DELOS LIST OF SAFE SEATS

GAP COMBINED SUMMARIES FOR IN-HOUSE AND
CORPORATE COUNSEL

GAP COMBINED SUMMARIES FOR ARBITRATION
PRACTITIONERS

MODEL CLAUSES

Model DELOS arbitration clause

DELOS suggests that the following model arbitration clause be inserted into the contract. It is expressly designed to support the cost-effective and rapid arbitration proceedings of DELOS; it should be inserted into contracts without modification, and parties are invited to choose **one** among the seats, or legal places, of arbitration, listed in Schedule 1.

1. Any dispute arising out of or in connection with this contract shall be exclusively and finally resolved by arbitration in accordance with the DELOS Rules of Arbitration in force on the date of commencement of the arbitration.

*2. The seat of arbitration shall be [parties to choose **one** of the seats of arbitration listed in Schedule 1], but the parties agree to hold hearings and/or meetings (if any) in any suitable location and/or by any suitable means of simultaneous communication. The language of arbitration is to be [parties to choose **one** of the languages listed in Schedule 2]. The arbitration tribunal shall consist of a sole arbitrator appointed in accordance with the DELOS Rules of Arbitration.*

3. By submitting their dispute to arbitration under the DELOS Rules of Arbitration, the parties agree to comply with any award without delay and waive their right to any form of recourse insofar as such waiver can validly be made.

Please note that, if parties agree to DELOS arbitration but use a different arbitration clause (or submission agreement – see below) from the model provided, or if parties modify the wording of the model arbitration clause (or submission agreement), or if parties choose a seat and/or language of arbitration different from any of those proposed in the Schedules, DELOS may exercise its discretion to apply any time and costs scale to the dispute and/or vary the dispute timetable, as necessary. If parties prefer the arbitration tribunal to consist of three arbitrators instead of a sole arbitrator, DELOS draws their attention to Article 2 of Appendix 4 of its Rules of Arbitration.

Negotiation option before arbitration

If, when negotiating their contract, parties require a period of formal negotiations to be initiated before an arbitration can be commenced, DELOS proposes that they insert the following wording at the beginning of the model arbitration clause. This pre-arbitration time is important for parties carefully to assess their positions and, potentially, settle their dispute. In case of DELOS arbitration, such an assessment

will assist parties with engaging in an active process designed to ensure the efficient resolution of their dispute.

DELOS draws the parties' attention in this regard to Article 4(1) of its Rules of Arbitration, which provides that, “[f]rom the day following the date of (deemed) receipt by Respondent of the Notice of Arbitration and of the Filing Fee payment receipt, whichever is latest, Respondent will have 7 days for Tier 1 disputes, 14 days for Tier 2 and Tier 3 disputes or 21 days for Tier 4 disputes to submit a “Notice of Defence” or a “Notice of Defence and Counterclaim [...]”.

Two parties to the contract

1. In the event of any dispute arising out of or in connection with this contract, either party shall invite the other party to commence negotiations to resolve the dispute. Any invitation to negotiate shall be issued in writing, in the usual manner in which the parties communicate in writing.

2. If the parties do not reach a settlement within [14 calendar days – parties to define appropriate time period] of one party having invited the other in writing to negotiate, the dispute shall be exclusively and finally resolved [continue with “by arbitration in accordance with...” in the model arbitration clause above]

Three or more parties to the contract

1. In the event of any dispute arising out of or in connection with this contract, any party may invite the other parties to commence negotiations to resolve the dispute. Any invitation to negotiate shall be issued in writing, in the usual manner in which the parties communicate in writing.

2. If the parties do not reach a settlement within [14 calendar days – parties to define appropriate time period] of one or more parties having invited the other parties in writing to negotiate, the dispute shall be exclusively and finally resolved [continue with “by arbitration in accordance with...” in the model arbitration clause above]

Model confidentiality clause

Parties may also want to keep their arbitration and its outcome confidential. In this case, DELOS suggests using the following language:

The parties agree to keep confidential the existence and contents of the arbitration and the written and oral pleadings and all documents produced for or arising from the arbitration, save as may be required by legal duty or to protect or pursue a legal right.

Model governing law clause

A contract which does not clearly specify a governing law may complicate the resolution of a dispute arising under the contract. DELOS therefore recommends inserting a governing law clause into the contract, such as the following:

This contract shall be governed by, and construed in accordance with, the laws of [jurisdiction].

Note: remember to **register your contract** with DELOS (by e-mailing a copy of it to DELOS at contract-registration@delosdr.org) once it has been finalised and signed. DELOS will send you a contract registration number (CRN) which will give you access to [its reduced costs schedule](#) (see Appendix 4 to the DELOS Rules of Arbitration).

Model agreement for submitting existing disputes to DELOS arbitration

If a dispute has already arisen and the parties wish to submit it to DELOS arbitration, the parties would generally enter into a submission agreement to this effect. DELOS suggests that the submission agreement contain the following clause:

- 1. The parties agree that the following dispute shall be exclusively and finally resolved by arbitration in accordance with the DELOS Rules of Arbitration in force on the date of this agreement: [insert description of the dispute and the parties to the dispute].*
- 2. The seat of arbitration shall be [parties to choose **one** of the seats of arbitration listed in Schedule 1], but the parties agree to hold hearings and/or meetings (if any) in any suitable location and/or by any suitable means of simultaneous communication. The language of the arbitration is to be [parties to choose **one** of the languages listed in Schedule 2]. The arbitration tribunal shall consist of a sole arbitrator appointed in accordance with the DELOS Rules of Arbitration.*
- 3. By submitting their dispute to arbitration under the DELOS Rules of Arbitration, the parties agree to comply with any award without delay and waive their right to any form of recourse insofar as such waiver can validly be made.*

SEAT AND LANGUAGES SCHEDULES

(AS OF 1 JULY 2018)

Schedule 1. DELOS seats of arbitration

Parties are invited to choose **one** of the following (ordered alphabetically) as the seat, or legal place, of arbitration designated in their arbitration agreement:

Amsterdam (The Netherlands)	Munich (Germany)
Auckland (New Zealand)	New York (USA)
Berlin (Germany)	Oslo (Norway)
Calgary (Canada)	Ottawa (Canada)
Copenhagen (Denmark)	Paris (France)
Frankfurt (Germany)	Port Louis (Mauritius)
Geneva (Switzerland)	Porto (Portugal)
The Hague (The Netherlands)	Rotterdam (The Netherlands)
Hamburg (Germany)	Seoul (South Korea)
Helsinki (Finland)	Singapore (Singapore)
Hong Kong (PRC)	Stockholm (Sweden)
Lisbon (Portugal)	Sydney (Australia)
London (UK)	Toronto (Canada)
Madrid (Spain)	Vancouver (Canada)
Miami (USA)	Vienna (Austria)
Montreal (Canada)	Zurich (Switzerland)

Schedule 2. DELOS language of arbitration

Parties are invited to choose **one** of the following languages (ordered alphabetically) as the language of arbitration designated in their arbitration agreement:

English
French
Spanish

DELOS GUIDE TO ARBITRATION PLACES (GAP)

1ST EDITION

PROFESSOR DAVID D CARON & PROFESSOR MAXI SCHERER
CHAIRS

THOMAS GRANIER & HAFEZ R VIRJEE
GENERAL EDITORS



**GAP COMBINED SUMMARIES
FOR IN-HOUSE AND CORPORATE COUNSEL**

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DELOS DISPUTE RESOLUTION

Palais Brongniart, 16 place de la Bourse, 75002 Paris, France
www.delosdr.org . safeseats@delosdr.org

#ACTIVATINGARBITRATION

This first edition was published on 18 June 2018. Every effort has since been made to maintain the GAP up-to-date of key developments in all of the jurisdictions covered. Please note, however, that the GAP does not constitute legal advice and the chapter authors, the contributing law firms and Delos Dispute Resolution decline all responsibility in this regard. Furthermore, the views expressed and the statements made in the jurisdiction chapters of the GAP are those of their stated authors and may not be construed as creating any duty, liability or obligation on the part of Delos Dispute Resolution.

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ALBANIA, BY HOXHA, MEMI & HOXHA

Albania is a civil law country which has transitioned, during these last 20 years, from a centrally planned to a market-oriented economy. Albania has received EU candidate status in June 2014. Foreign investments play a key role for the integration and economic development of Albania but then foreign investors need also an attractive legal environment, especially in terms of legal certainty, fair treatment and dispute resolution mechanism.

Although arbitration is considered as the most important and advantageous dispute resolution mechanism for commercial disputes, Albania does not currently have a domestic arbitral institution and as it shall be further detailed below, since year 2013 the Albanian Parliament is expected to approve a law regulating domestic and international arbitration procedures. Actually, the only domestic law provisions related to arbitration that are in force in Albania concern the recognition and enforcement of international arbitration awards. Albania being also a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the only possibility offered to parties willing to submit disputes to arbitration, is to opt for foreign arbitration and thereafter have the foreign arbitration award recognised in Albania.

Lacking an arbitration law, this arbitration guide for Albania shall focus mostly on the issue of recognition of international arbitration awards in Albania.

Key places of arbitration in the jurisdiction	Tirana
Civil law / Common law environment?	Civil law
Confidentiality of arbitrations?	ϕ
Requirement to retain (local) counsel?	ϕ
Ability to present party employee witness testimony?	ϕ
Ability to hold meetings and/or hearings outside of the seat?	ϕ
Availability of interest as a remedy?	ϕ
Ability to claim for reasonable costs incurred for the arbitration?	ϕ
Restrictions regarding contingency fee arrangements and/or third-party funding?	ϕ
Party to the New York Convention?	Yes
Other key points to note	ϕ
WJP Civil Justice score (2017-2018)	0.45

ALGERIA, BY BENNANI & ASSOCIÉS LLP

Disputes in Algeria may be resolved through arbitration and litigants are free to choose an arbitral institution and arbitrators at their sole discretion.

Key places of arbitration in the jurisdiction	Arbitrations in Algeria are generally in Algiers. In practice, for disputes relating to international contracts, parties often choose Paris or Geneva as the seat.
Civil law / Common law environment?	Civil law
Confidentiality of arbitrations?	The confidentiality of arbitration is a fundamental principle guaranteed by Algerian law.
Requirement to retain (local) counsel?	Algerian arbitration law does not require that parties to an arbitration be represented by external counsel. Parties can be self-represented should they so wish.
Ability to present party employee witness testimony?	A party may present witness testimony from employees which, under certain circumstances, is made under oath.
Ability to hold meetings and/or hearings outside of the seat?	Parties are free to choose the seat of arbitration as well as the venue for hearings and meetings.
Availability of interest as a remedy?	Yes.
Ability to claim for reasonable costs incurred for the arbitration?	It is possible for the winning party to claim the reimbursement of reasonable costs incurred for the arbitration.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Contingency fee arrangements and/or third-party funding are possible under Algerian regulation.
Party to the New York Convention?	Algeria ratified the New York Convention on 7 February 1989.
Other key points to note	<ul style="list-style-type: none"> • Matters related to Public Order and/or status and legal capacity of persons cannot be resolved via arbitration nor mediation. • The State and its organs are authorized to have recourse to local and international arbitration only if arbitration is provided for by an international treaty or in a procurement contract. • State-owned companies are authorized to have recourse to international arbitration in their international commercial relationships.
WJP Civil Justice score (2017-2018)	ϕ

ARGENTINA, BY RIVERA & ASOCIADOS

Law No. 27.449 regarding international commercial arbitration was passed on 25 July 2018 and published in the official bulletin on 26 July 2018. It since governs any and all questions regarding international commercial arbitration under Argentinian law as of its publications and implements substantial changes in this regard. This GAP Chapter on Argentina is currently being updated to incorporate the provisions and implications of the new law and will be published shortly.

Argentine arbitration law is composed of two different regulations: (i) a chapter on the Arbitration Agreement contained in the Civil and Commercial Code enacted by the National Congress and applicable nation-wide; (ii) regulations of the procedural aspects of the arbitration contained in the Civil and Commercial procedural Codes (enacted by each province) and in the National Civil and Commercial Procedural Code respectively applicable in each province and in the federal jurisdiction. These procedural codes provide for the recourses available after an award has been rendered (such as annulment and clarification requests) and the terms, grounds, and conditions for their filing.

Key places of arbitration in the jurisdiction	Buenos Aires.
Civil law / Common law environment?	Civil law jurisdiction.
Confidentiality of arbitrations?	Not explicitly stated but parties may agree on it.
Requirement to retain (local) counsel?	Not necessary.
Ability to present party employee witness testimony?	Not forbidden.
Ability to hold meetings and/or hearings outside of the seat?	Yes.
Availability of interest as a remedy?	This matter is regarded as a part of substantive law.
Ability to claim for reasonable costs incurred for the arbitration?	The National Civil and Commercial Procedural Code provide that arbitrators must allocate costs to the losing party unless they find that the circumstances of the case do not justify it. Parties may agree on a different cost allocation (either directly or through the adoption of institutional rules).
Restrictions regarding contingency fee arrangements and/or third-party funding?	Local bar rules allow lawyers to agree on contingency fees for up to 30% of the value of the awarded amount. There is no provision on third-party funding.
Party to the New York Convention?	Yes, with reservations with regard to reciprocity and commercial disputes.
Other key points to note	φ
WJP Civil Justice score (2017-2018)	0.57

AUSTRIA, BY CERHA HEMPEL SPIEGELFELD HLAWATI RECHTSANWÄLTE GMBH (CHSH)

Vienna offers an excellent environment for arbitration proceedings: Supported by arbitration-friendly and reliable state courts and its central, easy-accessible, cost-efficient location in the heart of Europe, Vienna managed to steadily increase its importance as an arbitration hub, in particular for the CEE region.

Key places of arbitration in the jurisdiction	The key place of arbitration in Austria is Vienna.
Civil law / Common law environment?	Civil law.
Confidentiality of arbitrations?	Not expressly provided.
Requirement to retain (local) counsel?	It is not required to engage a (local) counsel.
Ability to present party employee witness testimony?	It is possible to present a party employee as witness.
Ability to hold meetings and/or hearings outside of the seat?	It is possible to hold meetings and/or hearings outside the seat.
Availability of interest as a remedy?	Interest is generally available as a remedy (as a matter of substantive law).
Ability to claim for reasonable costs incurred for the arbitration?	It is possible to claim reasonable costs incurred for purposes of the arbitration.
Restrictions regarding contingency fee arrangements and/or third-party funding?	There are certain restrictions regarding contingency fee arrangements. Third-party funding is not restricted. Strict consumer protection and labour law provisions.
Party to the New York Convention?	Austria is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").
Other key points to note	<ul style="list-style-type: none"> – Austrian arbitration law closely follows the UNCITRAL Model Law on International Commercial Arbitration ("Model law"). – The procedure for challenging an arbitral award has recently been reformed: The Supreme Court now decides on a challenge as the first and last instance. – The Supreme Court is known for its high-quality judgments and reliably upholds the rule of law in respect to arbitration.
WJP Civil Justice score (2017-2018)	0.81

BRAZIL, BY TOZZINI FREIRE ADVOGADOS

Arbitration is a consolidated dispute resolution mechanism in Brazil. The Brazilian Arbitration Law (“BAL”) is well developed and has been recently modified to adapt it to some important demands,¹ such as interim measures (Arts. 22-A and 22-B) and arbitrations with the public administration (Art. 1 §1), which were already accepted by the local case law.

Key places of arbitration in the jurisdiction	The key places in Brazil for arbitration are the cities of São Paulo (State of São Paulo), Rio de Janeiro (State of Rio de Janeiro), Porto Alegre (State of Rio Grande do Sul), Curitiba (State of Paraná) and Belo Horizonte (State of Minas Gerais).
Civil law / Common law environment?	Civil Law
Confidentiality of arbitrations?	Although there is no general legal provision dealing with the topic, confidentiality can be agreed by the parties. The BAL eliminates confidentiality in cases in which public administration parties are involved, imposing the publicity of the procedure (Art. 2 § 3).
Requirement to retain (local) counsel?	There is no restriction for foreign counsel to act as a party representative in domestic arbitral procedures. It differs from litigation in national courts, where an official registration of the counsel and the local law firm before the Brazilian Bar Association (“ <i>Ordem dos Advogados do Brasil</i> ”) is required.
Ability to present party employee witness testimony?	There is no restriction to present party employee witness testimony under the BAL.
Ability to hold meetings and/or hearings outside of the seat?	The BAL does not limit arbitral tribunals’ powers or parties’ choice to hold meetings and hearings outside of the seat. Parties can agree to different places in which the arbitral proceedings can occur (Art. 11, I, BAL) and these places can even be different from the seat. ²
Availability of interest as a remedy?	It is possible to recover interest as a remedy in Brazil (Brazilian Civil Code, Art. 407; Brazilian Supreme Court jurisprudence). ³
Ability to claim for reasonable costs incurred for the arbitration?	The Arbitral Tribunal can freely decide on the costs allocation in its decision (Art. 27, BAL).

¹ See the translated version of the Brazilian Arbitration Law at: <http://cbar.org.br/site/legislacao-nacional/lei-9-30796-em-ingles/>.

² Carlos Alberto CARMONA, *Arbitragem e Processo*. 3 ed. São Paulo: Atlas, 2009, p. 208.
Entry nº 254 of the Prevaling Case Law (“*Súmula da Jurisprudência Dominante*”). There is a huge list of precedents confirming such entry: Extraordinary Appeal nº 162890 ED, Justice Ilmar Galvão, 1st Section, date: 03/06/1997; Extraordinary Appeal nº 115123, Justice Sydney Sanches, 1st Section, date: 12/02/1988; Extraordinary Appeal nº 109462, Justice Rafael Mayer, 1st Section, date: 24/06/1986. This is also the understanding of the Brazilian High Court of Justice (“*Superior Tribunal de Justiça*”); See, also, Appeal nº 1133023/PE, Justice Og Fernandes, 6^{ts} Section, date: 17/09/2009; Appeal nº 979708/PE, Justice Og Fernandes, 6th Section, date: 02/09/2008; Special Appeal nº 464.234/PR, Justice João Otávio de Noronha, 2nd Section, date: 03/08/2006.
Available at: <http://www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=254.NUME.%20NAO%20S.FLSV.&base=baseSumulas>.

Restrictions regarding contingency fee arrangements and/or third-party funding?	Brazilian Law is silent on agreements regarding contingency fees or third-party funding. Moreover, there is no ethical or legal barrier to the funding arrangements. ⁴ The dominant opinion supports the possibility to make these arrangements. Accordingly, they are an option worth being considered. ⁵
Party to the New York Convention?	Brazil is a party to the New York Convention since 2002. ⁶
Other key points to note	<p>It is possible for an arbitrator to be criminally liable in Brazil. Arbitrators are treated as public officers when it comes to criminal liability (Art. 17 of the BAL). Arbitral awards rendered by an arbitrator who has been proven to be corrupt in a criminal procedure can be annulled on the grounds of the BAL (Art. 32, VI). When it comes to civil liability, arbitrators can also be condemned to pay damages as a consequence of the criminal offence.⁷</p> <p>Courts in Brazil are friendly to arbitration. Brazil is one of the leading countries in Latin America to facilitate the development of arbitration.⁸</p> <p>The duration of annulment proceedings may vary depending on whether a party appeals the decision on the validity of the award. A number of appeals can be submitted in an annulment proceeding, since it follows the regular procedure for civil actions. There are two ordinary degrees of jurisdiction in Brazil; thus, the decision in an annulment proceeding can be appealed. There are also extraordinary appeals, which can be made both to the High Court of Justice (“<i>Superior Tribunal de Justiça</i>”) and to the Supreme Court (“<i>Supremo Tribunal Federal</i>”), when there are violations of federal legislation or to the Federal Constitution respectively.</p> <p>As a general rule, annulment proceedings do not suspend the enforcement of awards, except if the State judge understands that the annulment application is likely to succeed and that there is a risk that the enforcement causes irreparable or serious injury, according to the standards set forth by the Brazilian Code of Civil Procedure (Art. 294 <i>et seq.</i>). The annulment can also be required by the defendant in an enforcement proceeding by way of a mean of defense (BAL, Art. 33 §3).</p>
WJP Civil Justice score (2017-2018)	0.53

⁴ Arnaldo WALD, Some positive and negative aspects of arbitration financing, *Revista de Arbitragem e Mediação*, vol. 49/2016, pp. 33-41.

⁵ Arnaldo WALD, Some positive and negative aspects of arbitration financing, *Revista de Arbitragem e Mediação*, vol. 49/2016, pp. 33-41.

⁶ Available at: http://www.planalto.gov.br/ccivil_03/decreto/2002/d4311.htm.

⁷ BAL Art. 14: “Individuals somehow linked to the parties or to the submitted dispute, by any of the relationships that characterize the impediment or suspicion of judges, are prevented from serving as arbitrators and become subject, as the case may be and to the applicable extent, to the same duties and responsibilities incurred by court judges, as set up in the Code of Civil Procedure”.

⁸ Eleonora COELHO PITOMBO, Arbitragem e o Poder Judiciário: aspectos relevantes, in Luiz Fernando do Vale de ALMEIDA GUILHERME, *Aspectos Práticos da Arbitragem*, São Paulo, Editora Quartier Latin, 2006, p. 122.

BRITISH VIRGIN ISLANDS, BY WALKERS

Key places of arbitration in the jurisdiction	Road Town (Tortola).
Civil law/common law environment?	Common law.
Confidentiality of arbitrations?	Arbitration proceedings conducted are private and confidential to the parties.
Requirement to retain (local) counsel?	There are no restrictions on foreign law firms engaging in and advising on arbitration in the BVI.
Ability to present party employee witness testimony?	An arbitral tribunal in the BVI is not bound by the rules of evidence of the Court and may receive any evidence that it considers relevant to the proceedings, including employee witness testimony.
Ability to hold meetings and/or hearings outside of the seat?	Hearings and meetings do not have to be held in the BVI.
Availability of interest as a remedy?	Section 78 of BVI Arbitration Act 2013 (the " Act ") prescribes that, unless the award made by an arbitral tribunal provides otherwise, interest is payable on money awarded by the tribunal from the date of the award and at the 5% rate specified in section 7 of the Judgments Act 1907.
Ability to claim for reasonable costs incurred for the arbitration?	An arbitral tribunal may direct that costs, including the fees and expenses of the tribunal, be paid by one party to another. The arbitral tribunal may only allow costs that are reasonable having regard to all of the circumstances (Sections 72-78 of the Act).
Restrictions regarding contingency fee arrangements and/or third-party funding?	There is no statutory provision for contingency fee arrangements or third-party funding in the BVI. As such, the BVI follows the English common law position where third-party funding of litigation is permitted, provided that it does not offend common law principles; however legal practitioners in the BVI are prevented from entering into contingency fee arrangements.
Party to the New York Convention?	The BVI is a signatory to the New York Convention.
Other key points to note	<p>The issue of whether anti-arbitration injunctions are available in the BVI was recently addressed by the Court of Appeal in <i>Sonera Holding BV v. Cukurova Holding AS</i>.⁹ In limited circumstances, such injunctions are available in BVI.</p> <p>These proceedings concerned the attempts by Sonera Holding BV ("Sonera") to enforce an ICC arbitration award made in Geneva in 2011. There have been hearings in this matter up to the Privy Council (the highest appellate court for BVI) and the facts are complex. In summary, Sonera appealed against the decision of</p>

⁹ BVIHCM(COM)2011/119.

the BVI Court at first instance to dismiss its application for an anti-arbitration injunction in connection with Cukurova Holding AS's ("CH") claim in a second arbitration relating to the same dispute.

The Court considered Section 3(2)(b) of the Act, which states that *'the Court shall not interfere in the arbitration of a dispute, save as expressly provided in this Act'*. The judge at first instance held that the BVI Court had no discretion to interfere with the ongoing arbitral proceedings.

Sonera appealed on the grounds that, despite the wording of the Act, the BVI Court had jurisdiction to grant injunctions under Section 24(1) of the West Indies Associated States Supreme Court (Virgin Islands) Act (the Supreme Court Act) and that it ought to have exercised that jurisdiction in this case.

The Court of Appeal agreed with *Sonera* that the Court retained a general power and jurisdiction to grant an anti-arbitral injunction. The Court held that the Act expressed a principle of non-intervention that did not remove the Court's independent jurisdiction under the Supreme Court Act, stating:

Any provision of a statute which seeks to oust the Court's jurisdiction must be expressed in clear terms. The statement of policy contained in Section 3(2)(b) of the Act does not meet this standard.

The Court then held that the jurisdiction to grant injunctions to restrain foreign arbitral proceedings should be exercised with caution and only granted in exceptional circumstances, being an infringement of a legal or equitable right of a party, or if the proceedings were vexatious, oppressive or unconscionable.

Despite this apparently high bar, the Court held that *Sonera's* appeal should be allowed and the injunction granted. It appears from the judgment that the Court's decision was influenced by its perception that the second arbitration pursued by CH was designed to avoid the results of the first arbitration award and to nullify the BVI Court's decision. The Court held that CH's actions in bringing the second arbitration were:

"specifically aimed [...] at interfering with the Court's judgment and ought not to be permitted. The Court is duty bound to step in to protect its processes and judgments."

CH's appeal to the Privy Council against the decision was withdrawn, as a result of the final award coming out before the appeal could be heard.

Consolidation of Arbitral Proceedings

Section 6 and Schedule 2 of the Act provide that the BVI Court may consolidate two or more arbitral proceedings, if the parties expressly agree to that procedure. The consolidation may be ordered if, upon the application of a party to the arbitral proceedings, it appears to the BVI Court that:

	<ul style="list-style-type: none"> a) a common question of law or fact arises in both or all of the arbitral proceedings, b) the rights to relief claimed in those arbitral proceedings are in respect, or arise out, of the same transaction or series of transactions, or c) for any other reason it is desirable to make an order.
<p>WJP Civil Justice score (2017-2018)</p>	<p>φ</p>

BULGARIA, BY KAMBOUROV & PARTNERS

A jurisdiction with a strong tradition in commercial arbitration, Bulgaria was among the first to implement the 1985 Model Law. Although it has not implemented the 2006 revision of the Model Law, the Bulgarian legislator consistently develops the local environment in a pro-arbitration direction. The recent demonstration of such development is the 2017 reform which reduced the grounds for annulment of awards and partially decentralised jurisdiction among regional courts.

Easy access to *ex parte* pre-arbitration interim measures issued by local courts, respect by local judges of the *competence-competence* doctrine, readily granted assistance by state courts in support of arbitration and a large set of remedies (including interest) available to arbitral tribunals make Bulgaria an appropriate venue for resolution by arbitration of a large variety of disputes.

Key places of arbitration in the jurisdiction	<p>Currently featuring more than 25 institutions, the leading institutional arbitrations are based in the capital, Sofia. The Arbitration court with the Bulgarian Chamber of Commerce and Industry is the most frequently used institution.</p> <p>There are also institutions active in Varna and Bourgas (the seaport towns) and in Plovdiv (the second largest city), which, however, have limited impact on the arbitration climate in the country.</p>
Civil law / Common law environment?	Civil law. Sharing common features with all Eastern-Europe countries. Bulgaria is also a Member State of the European Union.
Confidentiality of arbitrations?	The Arbitration Act is silent on confidentiality; yet it is commonly accepted as a key distinguishing feature of arbitration. The rules of the leading arbitration institutions provide for confidentiality of the proceedings.
Requirement to retain (local) counsel?	<p>There are no restrictions on representation in arbitral proceedings.</p> <p>In arbitration related court proceedings (<i>e.g.</i>, annulment, recognition and enforcement, interim measures and gathering of evidence), the parties need to be represented by a lawyer or in-house counsel engaged on employment contract and having a law degree.¹⁰ In proceedings before the Supreme Court of Cassation, the lawyer shall have at least 5 years of experience.¹¹</p> <p>A lawyer admitted to the bar in a foreign non-EU country may appear before Bulgarian courts only upon receiving special authorization, subject to specific conditions and only together with a Bulgarian lawyer.¹² A lawyer from an EU country may appear before local courts without specific authorization, but only together with a Bulgarian lawyer.¹³</p>

¹⁰ Article 32 of the Civil Proceedings Act.

¹¹ Article 24(2) of the Advocacy Act.

¹² Article 10 of the Advocacy Act.

¹³ Articles 11 and 12 of the Advocacy Act.

Ability to present party employee witness testimony?	Party employees may give witness testimony; arbitral tribunals may take the witnesses' relations with the parties into consideration when determining the probative value of their statements.
Ability to hold meetings and/or hearings outside of the seat?	The parties may agree on the place of the hearing, including outside of the seat. Absent such agreement, the tribunal will determine the place of the hearing considering all circumstances of the case and the convenience of the parties. ¹⁴
Availability of interest as a remedy?	Bulgarian law explicitly recognizes interest as an available remedy.
Ability to claim for reasonable costs incurred for the arbitration?	The leading principle in the allocation of costs is "the costs follow the event", save for excessive lawyers' fees, which the tribunal or the court may refuse to allocate entirely to the losing party.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Contingency fee arrangements are permitted and frequently used in practice. The only restriction in court proceedings is that the court would refuse to award costs that the parties did not incur prior to the closing of the proceedings. Third party funding is not regulated, and is yet rarely used.
Party to the New York Convention?	The New York Convention has been in force in Bulgaria since 1965. Bulgaria adheres to the New York Convention, under the reservations that: (i) it applies the Convention to awards made in the territory of other contracting states; and (ii) regarding awards made in the territory of non-contracting states, Bulgaria applies the Convention subject to strict reciprocity.
Other key points to note	<p>The Arbitration Act limits the freedom of the parties in domestic arbitration to choose foreign law applicable to their arbitration agreement. Thus, in domestic arbitration only the Arbitration Act governs the arbitration agreement.</p> <p>The Arbitration Act requires that an arbitrator sitting in Bulgaria shall be a citizen of full age, not convicted for deliberate capital offence, has university degree, at least 8 years of professional experience and high morals. The Act, however, does not require qualification in law.</p> <p>Further, a foreign citizen may not sit as arbitrator in domestic arbitration, but only in international arbitration.¹⁵</p> <p>The consolidation and/or joinder of arbitral proceedings are subject to very strict interpretation as the Bulgarian legal tradition pays significant tribute to the importance of the right of the parties to participate in the appointment of the tribunal. Consequently, unless the parties clearly agree on the provisions and rules beforehand, consolidation and/or joinder would be possible only upon explicit consent of all parties.</p>
WJP Civil Justice score (2017-2018)	0.56

¹⁴ Article 25 of the Arbitration Act.

¹⁵ Article 11(2) in conjunction with para.3 of the Transitory and conclusive provisions of the Arbitration Act.

CANADA, BY BORDEN LADNER GERVAIS LLP

Canada is consistently recognised as an arbitration-friendly jurisdiction, and for good reason. First, the legislative framework governing international commercial arbitration and the enforcement of foreign arbitral awards closely mirrors the Model Law and New York Convention, and severely limits the ability of courts to intervene with decisions made by arbitrators. Secondly, Canadian courts are supportive of arbitration, and continue to uphold the integrity of the arbitral process by affording broad deference to tribunals on issues of jurisdiction, findings of fact and law, and with respect to relief granted in partial and final arbitral awards. The approach of the Canadian judiciary to complex issues in international commercial arbitration should instil confidence in practitioners that Canada will remain a leader in the field of international commercial arbitration policy and jurisprudence.

Key places of arbitration in the jurisdiction	From West to East: Vancouver, BC; Calgary, AB; Toronto, ON; Ottawa, ON; Montreal, QC.
Civil law / Common law environment?	Common law, except the Province of Quebec which is a civil law jurisdiction.
Confidentiality of arbitrations?	Confidentiality is not addressed in the legislation, other than in Quebec which does provide for confidentiality. On 17 May 2018, British Columbia enacted amendments to its international commercial arbitration legislation which explicitly provide for privacy and confidentiality. In the other Canadian jurisdictions, arbitral confidentiality is presumed through the “implied undertaking” rule from court practice. Moreover, confidentiality obligations flow from the arbitration rules adopted by the parties or express confidentiality agreements entered into by the parties. That said, the open-court principle applied in Canada means that the ability to maintain confidentiality if a party resorts to court to challenge an award or otherwise seek assistance is limited; the principle requires that court proceedings presumptively be open and accessible to the public and to the media. Parties may apply to maintain confidentiality but the jurisprudence limits the circumstances in which a court will grant such protection.
Requirement to retain (local) counsel?	No.
Ability to present party employee witness testimony?	There is no bar to evidence from parties or party officers in the legislation.
Ability to hold meetings and/or hearings outside of the seat?	Yes.
Availability of interest as a remedy?	Yes, generally.
Ability to claim for reasonable costs incurred for the arbitration?	Yes, which generally includes: <ul style="list-style-type: none"> • The fees and expenses of the arbitration includes those of the arbitrator and any administering institution; • The parties’ reasonable legal fees and expenses, including witnesses and experts; and

	<ul style="list-style-type: none"> • More broadly, any other expenses incurred in connection with the proceedings.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Contingency fee arrangements have long been accepted in Canada. Third-party funding is widely used but the jurisprudence on its acceptability is limited.
Party to the New York Convention?	<p>Yes, the New York Convention entered into force in Canada on 10 August 1986.</p> <p>Canada declared that it would apply the convention only to differences arising out of legal relationships, whether contractual or not, which are considered commercial under the laws of Canada, except in the case of the province of Quebec, where the law did not provide for such limitation.</p>
Other key points to note	φ
WJP Civil Justice score (2017-2018)	0.81

CHINA (MAINLAND), BY HERBERT SMITH FREEHILLS

Arbitration is a commonly used dispute resolution mechanism for Sino-foreign disputes in China. It is a key characteristic of the Chinese arbitration regime that PRC law draws a distinction between "foreign-related" disputes (broadly, where one or more party is domiciled or habitually resides outside mainland China, or where the subject matter of the dispute is outside mainland China) and purely domestic disputes (where all parties and other elements of the dispute are based in mainland China). This critical distinction affects many aspects of the arbitration. The regime for foreign-related disputes is considerably more flexible.

Key places of arbitration in the jurisdiction	The principal institution of relevance to non-Chinese parties is the China International Economic and Trade Arbitration Commission (CIETAC), headquartered in Beijing and with sub-commissions in Shanghai, Shenzhen, Chongqing, Tianjin, Hangzhou, Wuhan and Fuzhou within mainland China, as well as an arbitration centre in Hong Kong.
Civil law / Common law environment?	PRC law largely adopts features from the civil law tradition. Precedents have no binding authority on future cases and are only of referential value.
Confidentiality of arbitrations?	PRC Arbitration Law provides that arbitration proceedings are confidential unless the parties agree otherwise.
Requirement to retain (local) counsel?	The parties can be represented by counsel, agents or themselves. The Ministry of Justice also allows foreign law firms to represent clients in arbitration cases conducted in China and/or governed by PRC law. However, only locally qualified and licensed lawyers may express official "opinions" on PRC law during an arbitration in mainland China.
Ability to present party employee witness testimony?	ϕ
Ability to hold meetings and/or hearings outside of the seat?	The place of hearing is regulated by the rules of the arbitral institutions. Generally, parties are able to hold hearings outside of the seat by agreement or when so directed by the tribunal.
Availability of interest as a remedy?	In practice, arbitral tribunals seated in China usually award simple or compound interest, calculated from the date due until the date of full payment.
Ability to claim for reasonable costs incurred for the arbitration?	In arbitrations seated in mainland China, the losing party is generally ordered to compensate the winning party for the reasonable costs incurred in the arbitration. There are no express statutory limits on the amount of costs that a tribunal can order the losing party to reimburse.
Restrictions regarding contingency fee arrangements and/or third-party funding?	PRC lawyers are allowed to enter into success fee arrangements or pure contingency fee arrangements, or a combination of both with their clients. Where contingency fees are allowed, such fees are not permitted to exceed 30% of the amount in dispute. Third party funding in arbitration is not prohibited in mainland China.

Party to the New York Convention?	In 1987, China became a party to the New York Convention subject to the reciprocity and commercial reservations.
Other key points to note	ϕ
WJP Civil Justice score (2017-2018)	0.50, though this is believed to be not very objective due to unfamiliarity with the jurisdiction or largely due to perceived bias.

CZECH REPUBLIC, BY BŘÍZA & TRUBAČ ATTORNEYS AT LAW

In the Czech Republic, arbitration is considered and widely used as a speedy and cost-effective alternative to judicial dispute resolution of B2B disputes in court proceedings. The Czech state courts have been mostly supportive of the process of integrating arbitration in the the Czech legal system. The rise in the use of arbitration in the Czech Republic in recent years is mostly due to the importance of Czech businesses in the global economy. As a result, there has been a steady increase in the number of institutional arbitrations under various rules. In contrast, the caseload of the Czech arbitral institutions¹⁶ is on the decline.¹⁷

Key places of arbitration in the jurisdiction	Prague is considered to be the key place of arbitration in the Czech Republic. Other cities in the Czech Republic are seldom used.
Civil law / Common law environment?	The Czech Republic is a Civil law country, where most of the rules are codified in statutes and regulations, among which the Czech Civil Code plays a major role.
Confidentiality of arbitrations?	Parties to a dispute are not obligated by law to keep the proceedings confidential but it is prevailing good practice to do so. Pursuant to the Arbitration Act, arbitrators are bound by a duty of confidentiality. ¹⁸ Arbitrators are subject to a duty of confidentiality for all information in connection with the case acquired during the term of their office, which can only be lifted upon the agreement of the parties to the dispute or by an order of the state court. Releasing an arbitrator from confidentiality is decided on a case-by-case basis. Nevertheless, if not released, the obligation to keep confidential any facts and issues that come to the arbitrator's attention during the term of his/her office ¹⁹ lasts without time limitations. However, an arbitrator is certainly

¹⁶ Most commercial disputes in the Czech Republic are referred to the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic. The Arbitration Court has gained international recognition mainly for arbitration of domain-name disputes (it is the only institution in the world to be authorized to arbitrate EU domain disputes). Other arbitration courts established by law are the Exchange Court of Arbitration at the Prague Stock Exchange or Arbitration Court attached to the Czech-Moravian Commodity Exchange Kladno.

¹⁷ There may be various reasons for this decline including the lesser flexibility of the arbitration rules attached to the Czech institutions (e.g., as regards the selection of arbitrators not registered in the list of arbitrators maintained by the institution), less concerns for the costs of such arbitration (the lesser costs involved in a dispute administered by Czech arbitral institution arguably may have been the main driving force for choosing the Czech institution) or overall reputation.

¹⁸ Section 6 of Act No. 216/1994 Coll., on arbitral proceeding and on enforcement of arbitral awards ("Arbitration Act") reads as follows: "(1) The arbitrators shall be bound to maintain confidentiality of any circumstances they have learnt of in connection with their office of arbitrator unless they are released of their duty. (2) Arbitrators may be released from confidentiality by the parties. If the parties do not release the arbitrator from the confidentiality obligation, the decision on the release from confidentiality for serious reasons shall be made by the Chairman of the District Court with jurisdiction over the district in which the arbitrator has his or her permanent residence. If the arbitrator does not have his or her permanent residence in the territory in the Czech Republic, or if the arbitrator's residence cannot be established, the decision on the release from confidentiality shall be made by the Chairman of the District Court with jurisdiction over the district in which the arbitral award was made. If the place where the arbitral award was made cannot be established or if the award was not made in the Czech Republic, the decision shall be made by the Chairman of the District Court for Prague 1." [all quotations of the Czech regulations contained herein are unofficial translations thereof].

¹⁹ Starting from the appointment of the arbitrator until the arbitral proceeding is concluded.

	obliged to provide information about the case in the event of a review ²⁰ or execution of the award by the regular court.
Requirement to retain (local) counsel?	There is no requirement to retain counsel in the arbitral proceeding under the Arbitration Act. By way of analogy, the respective provisions of the Czech Civil Procedure Code ²¹ apply, hence a party may act on its own or through a representative using a power of attorney. The Czech Act on the Legal Profession must be observed; it follows that if a party is represented by remunerated counsel, such counsel must maintain a status within the Czech Bar Association. ²²
Ability to present party employee witness testimony?	There are no limitations to offering witness testimony from employees of parties to the dispute.
Ability to hold meetings and/or hearings outside of the seat?	The parties are free to agree on any place for the hearing even outside the place of arbitration. In the absence of such agreement, the arbitrators have the power to decide this issue taking into consideration the interest of both parties.
Availability of interest as a remedy?	The Arbitration Act does not lay down specific rules on interest. Interest is considered as tied to a main claim and thus governed by substantive law. It follows that except if the parties agree otherwise, a claim decided under the Czech law as substantive law covers also interest (either on a contractual basis or on the statutory basis). No interest is awarded on the costs of proceedings.
Ability to claim for reasonable costs incurred for the arbitration?	As a general rule, the arbitral tribunal seated in the Czech Republic will always fix the costs of the arbitral proceedings in an award and apportion them on the basis of the principle of costs follow the event. Arbitral tribunals usually take into account each party's rate of success where either of them was partially successful in the dispute. The tribunal has the power to rule that each party shall bear their own costs, if the circumstances require so. Generally, legal expenses are calculated on the basis of the rates fixed in the Decree of the Ministry of Justice, ²³ thus they might be different from the actual legal costs incurred by a party. The parties may agree on a different way to allocate the costs provided the agreement is reasonable under the circumstances.

²⁰ Such review may be in the form of a state court proceeding initiated upon a motion to set aside an award or a motion to stop execution.

²¹ Act No. 99/1963 Coll., Civil Procedure Code, as amended.

²² The lawyers of EU member states may obtain a status within the Czech Bar Association on basis of Council Directive 77/249/EEC of 22 March 1977 and Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 or subject to limited requirements related to personal and professional integrity (*see*, Sections 35f – 35n of Act No. 85/1996 Coll., on the Legal Profession. Other foreign lawyers would usually need to pass an exam testing the knowledge of the Czech laws).

²³ Decree of the Ministry of Justice No. 177/1996 Coll., of 4th June 1996, on fees and remuneration of lawyers for the provision of legal services (the Lawyer's Tariff). The reference to the Lawyer's Tariff results from application the Civil Procedure Code applies by way of analogy.

<p>Restrictions regarding contingency fee arrangements and/or third-party funding?</p>	<p>There are no restrictions on third-party funding. Arbitral proceedings are usually funded by the parties themselves. However, it is also possible to seek assistance in financing arbitration expenses, including lawyers' and other fees. This may take the form of a standard loan or an arrangement relating to an agreed proportion of an awarded sum. As far as the contingency fee is concerned, a Czech attorney (or any other counsel maintaining status with the Czech Bar Association) must observe the Code of Professional Conduct.²⁴ Counsel's compensation may be limited (in case of a dispute between a counsel and a client) to the amount which is reasonable under the given circumstances,²⁵ (a success fee of more than 25% of the amount at stake is usually not permitted).²⁶ The common types of contractual remunerations include time-based remuneration, remuneration based on number of conducted legal actions, success fee, monthly rate and others.</p>
<p>Party to the New York Convention?</p>	<p>The Czech Republic is a party to the New York Convention by way of succession since 30 September 1993 (its predecessor Czechoslovakia acceded on 10 July 1959). In accordance with the reservation made by Czechoslovakia at the time the New York Convention was adopted, the Convention does not apply to the recognition and enforcement of foreign awards (awards where the place of arbitration is outside of the territory of Convention member states), unless reciprocity is granted.</p>
<p>Other key points to note</p>	<ul style="list-style-type: none"> • The Czech Republic pays particular respect to the rule of law. In the WJP Rule of Law Index 2016 the Czech Republic ranks the 17th globally with a score amongst the top in the CEE region. • The Arbitration Act does not grant the arbitral tribunals the power to order interim measures (e.g., injunctions). The arbitral tribunals have to seek assistance of the state courts.
<p>WJP Civil Justice score (2017-2018)</p>	<p>0.74</p>

²⁴ See, Resolution of the Board of Directors of the Czech Bar Association No. 1/1997 of 31 October 1996.

²⁵ The Lawyer's Tariff sets forth the basic principle in its Section 4(3): "Contractual remuneration must be reasonable and must not be in a clear disparity with the value and complexity of the matter."

²⁶ Section 10(5) of the Code of Professional Conduct reads as follows: "The attorney is free to agree on a contractual remuneration determined by a share in the value of the matter or the outcome of the matter if the amount of the remuneration thus agreed is adequate according to the provisions of paragraphs 2 and 3. However, as a rule, the contractual remuneration determined by the share in the result of a matter, shall not exceed 25%."

DENMARK, BY PLESNER

Arbitration is a fully recognized dispute resolution mechanism in Denmark, considered on an equal footing with litigation in terms of enforceability and procedural guarantees. Denmark enacted its first statute dedicated to arbitration in 1972, which is also the year it acceded to the New York Convention on the Recognition and Enforcement of Foreign Awards. Following the 2005 revision of the Danish Arbitration Act (“DAA”), Denmark became a UNCITRAL Model Law country. Denmark ranked as number one overall out of 113 jurisdictions worldwide in the 2016 and 2017-2018 WJP Rule of Law Indexes, and is thus a very safe and modern forum for arbitration proceedings. With a legal reform currently in the pipelines, Denmark is arguably becoming an even more apparent alternative to the more traditional arbitration venues in Europe.

Key places of arbitration in the jurisdiction	Copenhagen, with its concentration of large firms and convenient access for foreign travelers, is usually the preferred venue for international arbitration proceedings seated in Denmark. Several of the Copenhagen-based law firms have facilities that will accommodate the needs of larger hearings. A selection of hotels and conference venues also offer good facilities.
Civil law / Common law environment?	Civil law. In order to identify the relevant rule(s) of law, it will often be necessary to also look to case law, custom and - to a lesser extent doctrine. This feature, together with the language barrier, makes Danish law somewhat inaccessible to foreign practitioners unfamiliar with the Nordic legal tradition.
Confidentiality of arbitrations?	The DAA does not specifically provide for the confidentiality of the arbitration proceedings but the Code of Conduct of the Danish Bar Association places Danish lawyers under a duty of professional secrecy. If the parties wish to ensure that they and the arbitral tribunal are bound by a duty of confidentiality, they should set this out in the arbitration agreement directly or request that the arbitral tribunal order the confidentiality of the proceedings.
Requirement to retain (local) counsel?	The DAA does not compel parties to retain counsel for the arbitration proceedings, but it will often be advisable to be assisted by counsel familiar with Scandinavian law and language, especially when the dispute is to be adjudicated under Danish law. Denmark belongs to the Nordic Civil law tradition and has a relatively strong tradition for codifying the law. In order to identify the relevant rule(s) of law, it will often be necessary to also look to case law, custom and - to a lesser extent doctrine. This feature, together with the language barrier, makes Danish law somewhat inaccessible to foreign practitioners unfamiliar with the Nordic legal tradition.
Ability to present party employee witness testimony?	Upon conferring with the parties, the arbitral tribunal may determine the permitted means of discovery, including whether party employees, other fact witnesses and experts shall be allowed to give testimony.

Ability to hold meetings and/or hearings outside of the seat?	Upon conferring with the parties, the arbitral tribunal may conduct meetings and hearings outside the designated legal seat.
Availability of interest as a remedy?	Upon conferring with the parties, the arbitral tribunal may decide on appropriate remedies, including whether to add simple or compound interest on any sums awarded.
Ability to claim for reasonable costs incurred for the arbitration?	Upon conferring with the parties, the arbitral tribunal may award and allocate reasonable costs.
Restrictions regarding contingency fee arrangements and/or third-party funding?	The DAA does not set forth any restrictions regarding contingency fees or third-party funding. Under the Code of Conduct of the Danish Bar Association, lawyers may not charge a percentage of the sums awarded to the client as such, but their fees may otherwise reflect the outcome of a case, and lawyers are free to operate on a "no cure, no pay" basis.
Party to the New York Convention?	Yes.
Other key points to note	ϕ
WJP Civil Justice score (2017-2018)	0.86 – ranked second (Overall score: 0.89 – ranked first globally).

DOMINICAN REPUBLIC, BY JIMÉNEZ CRUZ PEÑA ABOGADOS

The Dominican Republic occupies the eastern two-thirds of the Caribbean island of Hispaniola, which it shares with Haiti. With a population of about 10.41 million, the Dominican Republic is a middle-income country, with the largest economy of Central America and the Caribbean.

The laws of the Dominican Republic are essentially based on the Roman law tradition, as transmitted through French and Spanish law. Although arbitration was contemplated in the French Code of Civil Procedure of 1807 which was adopted by the Dominican Republic in 1884, the use and acceptability of this alternative dispute resolution mechanism amongst business people and amongst local courts began to take form in the early 1990s, and it is still evolving. The Centers for Alternative Dispute Resolution of the Chamber of Commerce and Production of Santo Domingo and Santiago are the most prominent arbitral institutions in the country.

Key places of arbitration in the jurisdiction	Santo Domingo, the capital, and Santiago, the second most important city in terms of economy.
Civil law / Common law environment?	Civil law jurisdiction.
Confidentiality of arbitrations?	Arbitration proceedings, both <i>ad hoc</i> and institutional, are confidential.
Requirement to retain (local) counsel?	There is no express legal provision on whether a foreign lawyer may assist a client before an arbitral tribunal, when such assistance is the result of a particular case and not aimed at establishing a practice in the Dominican Republic. Our view is that a foreign lawyer may assist a client in an international arbitration taking place in the Dominican Republic.
Ability to present party employee witness testimony?	Not forbidden.
Ability to hold meetings and/or hearings outside of the seat?	Permitted, unless the parties agreed otherwise.
Availability of interest as a remedy?	Interest is available as an additional remedy under the legal system of the Dominican Republic. Law No. 183-02 dated 1 November 2002, repealed the order that established legal interest; however, the Civil Chamber of the Supreme Court of Justice decided that Law 183-02 does not govern nor limit the authority of judges to award interest as additional indemnity in damages claims. The Supreme Court of Justice further stated that in matters of civil liability, the victim has a right to receive full compensation for the damages suffered, appraised at the time of a definite decision. Awarding interest complies with this rule, given that it is a mechanism for indexation of the indemnity (SCJ, 17 September 2012). Indirect and punitive damages are not allowed under Dominican law.
Ability to claim for reasonable costs incurred for the arbitration?	Parties may claim reimbursement of costs incurred in arbitration proceedings. Upon the request of the parties, the arbitral tribunal

	may fix the costs of the arbitration in the award; these costs include the fees and expenses of the arbitrators, the costs for legal representation of the parties, fees and expenses of the arbitral institution and any such costs incurred in connection with the proceedings.
Restrictions regarding contingency fee arrangements and/or third-party funding?	There is no express provision in the law prohibiting contingency fee arrangements or third-party funding for international arbitration claims.
Party to the New York Convention?	Yes.
Other key points to note	φ
WJP Civil Justice score (2017-2018)	0.47

EGYPT, BY ZULFICAR & PARTNERS

Arbitration is the prominent mechanism for the settlement of investment and commercial disputes in Egypt. With the growing number of investors in the country and the parties to commercial transactions ultimate resort to arbitration, Egypt adopts, by the year, measures and reforms aimed at aligning itself with best practices in international arbitration. By enacting the Egyptian Arbitration Act No. 27 of 1994 (the “**Arbitration Act**”), Egypt took a colossal step towards supporting arbitration and becoming an arbitration friendly jurisdiction.

Key places of arbitration in the jurisdiction	Cairo.
Civil law / Common law environment?	Civil law.
Confidentiality of arbitrations?	Arbitral awards are confidential by law and may not be published. However, confidentiality of the proceedings is compromised at the stages of eventual annulment or enforcement of awards.
Requirement to retain (local) counsel?	There is no requirement to retain local counsel in an international arbitration seated in Egypt.
Ability to present party employee witness testimony?	There is no legal restriction as to the submission of testimony by party employees except if one party is a public entity, and consequently its employee a public officer, in which case the party's approval is necessary by law.
Ability to hold meetings and/or hearings outside of the seat?	Hearings and meetings taking place during the arbitration may take place inside or outside of Egypt depending on the parties' agreement and the tribunal's power to assess convenience. Egyptian courts carefully and clearly distinguish “geographical venues” from “legal seats”.
Availability of interest as a remedy?	Under the law, the arbitral tribunal has the ultimate power to decide on issues of compensation and interest. However, a legal cap of 7% interest rate exists as a public policy rule as characterized by Egyptian courts.
Ability to claim for reasonable costs incurred for the arbitration?	The parties are free to claim the costs they incurred during the arbitral proceedings to the extent that these costs are reasonable and justifiable in the arbitral tribunal's view.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Alternative fee arrangements and contingency fees are permissible under Egyptian law with a limit of a recoverable 20% from the outcome of the dispute. There are no restrictions as to third-party funding in arbitrations although Egyptian courts have not yet addressed this issue and no legislative policy or regulation exist to address this evolving practice.
Party to the New York Convention?	Egypt is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and has

	neither made a commerciality nor a reciprocity reservation. Egyptian courts apply the provisions of the Convention for purposes of enforcement of awards rendered outside Egypt.
Other key points to note	φ
WJP Civil Justice score (2017-2018)	0.36

ENGLAND & WALES, BY EVERSHEDES SUTHERLAND

Arbitration in England and Wales is subject to a sophisticated legal regime, supported by knowledgeable, efficient and commercially astute local courts, and practiced by experienced local practitioners.

Arbitral proceedings are governed by the English Arbitration Act 1996 (the “**1996 Act**”) and are founded upon the principles of party autonomy, fairness and the non-intervention of the courts. English law recognises the confidentiality of arbitral proceedings, subject to limited exceptions.

The 1996 Act provides English courts with a wide range of powers exercisable in support of arbitral proceedings seated in England and Wales. English courts, which have a well-deserved reputation for fairness and impartiality, generally show deference to arbitral tribunals and proceedings and refrain from intervening, save in limited circumstances. English courts will enforce arbitral awards, both local awards rendered under the 1996 Act and foreign awards enforceable pursuant to the New York Convention 1958, again subject to very limited exceptions.

The 1996 Act confers wide powers on an arbitral tribunal, including as regards its powers to decide on matters relating to its jurisdiction, the conduct of arbitral proceedings, evidentiary and procedural matters and the remedies it may impose.

Key places of arbitration in the jurisdiction	London.
Civil law / Common law environment?	Common law.
Confidentiality of arbitrations?	The 1996 Act is silent on confidentiality, but English law recognises the confidentiality of arbitral proceedings subject to limited exceptions.
Requirement to retain (local) counsel?	There is no requirement to retain local counsel for arbitral proceedings, although local counsel (barristers or solicitor-advocates) must be retained to appear before the English courts for any court proceedings in support of arbitrations seated in England. ²⁷
Ability to present party employee witness testimony?	Not specifically, but tribunals have wide powers to decide on evidentiary matters, including the power to summon witnesses (both resident and non-resident in England and Wales) (section 34 of the 1996 Act).
Ability to hold meetings and/or hearings outside of the seat?	Yes, parties are free to decide on all procedural matters, including whether the meetings and/or hearings are to be held outside of the seat (section 34(2)(a) of the 1996 Act).
Availability of interest as a remedy?	Yes. Unless otherwise agreed by the parties, the 1996 Act confers a wide discretion on arbitral tribunals regarding interest (section 49 of the 1996 Act).
Ability to claim for reasonable costs incurred for the arbitration?	Yes. Unless the tribunal or the court determines otherwise, the successful party will be allowed to claim a “ <i>reasonable amount in</i>

²⁷ The higher courts include the various divisions of the High Court, the Court of Appeal and the Supreme Court.

	<i>respect of all costs reasonably incurred</i> " (section 63(5)(a) of the 1996 Act). A pre-dispute agreement on the allocation of costs is unenforceable (section 60 of the 1996 Act).
Restrictions regarding contingency fee arrangements and/or third-party funding?	Conditional fee arrangements ("CFAs") and damages-based agreements ("DBAs") may be entered into under English law. Third party funding is also available.
Party to the New York Convention?	Yes.
Other key points to note	An unsuccessful party has the right to challenge an arbitral award to an English court for a " <i>serious irregularity</i> " affecting the award and causing it " <i>substantial injustice</i> ", and, unless the parties agree otherwise, to appeal to a court on a point of English law determined in the arbitral award. However, the vast majority of such actions do not succeed and parties may agree to exclude the right to appeal on a point of law either expressly in their contract or waive it as a result of their choice of institutional rules.
WJP Civil Justice score (2017-2018)	0.81

FINLAND, BY CASTRÉN & SNELLMAN

Finland is an arbitration friendly jurisdiction. Finland has a long history of arbitration, and in commercial disputes between business entities, arbitration is the rule rather than the exception. A majority of the arbitrations in Finland are institutional. Finland is a party to, *inter alia*, the New York convention and the Washington convention on the settlement of investment disputes between States and nationals of other States.

Key places of arbitration in the jurisdiction	Helsinki.
Civil law / Common law environment?	Civil law jurisdiction.
Confidentiality of arbitrations?	Arbitrations are not public, but also not automatically confidential. Confidentiality requires an agreement between the parties. Institutional rules may also provide for confidentiality.
Requirement to retain (local) counsel?	There is no requirement to retain local counsel. In-house counsel may also be used.
Ability to present party employee witness testimony?	There are no limitations as to who can act as a witness. Thus, for example, employee witness testimony is allowed. However, special legislation may prevent certain people such as doctors, priests and attorneys from giving testimony about issues that are confidential.
Ability to hold meetings and/or hearings outside of the seat?	The Finnish Arbitration Act (967/1992, 'FAA') explicitly allows hearings to be held outside the seat. Meetings can also be held at any location without restrictions.
Availability of interest as a remedy?	Interest can and normally is awarded. The parties can agree on the interest rate.
Ability to claim for reasonable costs incurred for the arbitration?	Generally, the losing party bears the cost of the arbitration. However, an arbitral tribunal is free to apportion the costs between the parties in such a manner as it considers appropriate having regard to the circumstances of the case.
Restrictions regarding contingency fee arrangements and/or third-party funding?	The most common fee arrangement for counsel is based on hourly rates, but a party and its counsel may also agree on contingency fees and other alternative fee arrangements.
Party to the New York Convention?	Yes
Other key points to note	None.
WJP Civil Justice score (2017-2018)	0.87

FRANCE, BY AUGUST DEBOUZY

French law is globally known to be one of the most arbitration-friendly in the world. Several important factors were brought together so that Paris can be perceived today as one of the safest and most convenient seats of arbitration. Nowadays, some of the most renowned arbitration practitioners in the world and arbitral institutions have set up offices in Paris.

France is one of the oldest homes of the civil law system. Most of the rules applicable to arbitration are set forth in the Code of Civil Procedure (“**CCP**”). The French arbitration law distinguishes between rules applicable to domestic and international arbitration even though some provisions are applicable to both by virtue of Article 1506 CCP. Pursuant to Article 1504 CCP, arbitration is considered to be "international" when the interests of international trade are at stake. The distinction is important, as rules applicable to international arbitration are more liberal.

Key places of arbitration in the jurisdiction	Paris holds a strong reputation as being the capital of international arbitration with the support of French arbitration law, which is well-known as one of, if not the most, arbitration-friendly in the world. As such, it is a home to leading arbitral institutions and prominent practitioners.
Civil law / Common law environment?	France is a civil law system, but many arbitrations seated in Paris are subject to foreign laws such as Swiss or English law. Arbitral practitioners, including arbitrators, are familiar with general common law concepts.
Confidentiality of arbitrations?	<p><u>Domestic arbitration</u>: pursuant to Article 1464 CCP, arbitration is confidential unless otherwise agreed upon by the parties. The scope of confidentiality is not defined but it is considered to extend to the names of the arbitrators, the arbitral institution, the legal counsel, and the seat. In addition, Article 1479 CCP provides that members of the arbitral tribunal must keep their deliberations secret.</p> <p><u>International arbitration</u>: no French legal provision imposes an obligation of confidentiality on the parties. In order to secure confidentiality, parties can, <i>inter alia</i>, enter into a separate confidentiality agreement, provide for confidentiality in their arbitration agreement or choose an institution whose rules expressly state that the arbitral proceedings are confidential. The deliberations of the tribunal must be kept confidential as Article 1479 CCP also applies to international arbitration.</p>
Requirement to retain (local) counsel?	There is no formal requirement to retain a local counsel for the arbitration itself. However, should the need arise to request a French judge to decide on certain arbitration-related issues (such as for instance the constitution of the arbitral tribunal or emergency injunctive relief), retaining a local counsel would be recommended.
Ability to present party employee witness testimony?	Pursuant to Article 1467 CCP applicable to domestic arbitration and extended to international arbitration, the arbitral tribunal may hear any person to provide testimony. Witnesses are

	generally not sworn in. The French Bar Council allows witness preparation in international arbitral procedures (Paris Bar Council Resolution, dated 26 February 2008). It is uncertain whether the same applies to domestic procedures. As a general rule, the subornation of perjury is a criminal offence under Article 434-15 of the French Criminal Code.
Ability to hold meetings and/or hearings outside of the seat?	Yes, unless otherwise provided by the parties.
Availability of interest as a remedy?	Arbitrators may award interest on any monetary claim, which will be added to the principal upon enforcement in France. Furthermore, pursuant to Article 1231-7 of the French Civil Code and established case law, interest at the French statutory rate will automatically apply and be added to the principal when the enforcement of an international award is sought in France, unless moratory interest has already been granted under the award.
Ability to claim for reasonable costs incurred for the arbitration?	There is no legal provision limiting the jurisdiction of the arbitral tribunal to render a decision on costs incurred in the arbitration (including counsel and expert's legal fees). As such, parties may claim before the arbitral tribunal for costs incurred in the scope of the arbitration.
Restrictions regarding contingency fee arrangements and/or third-party funding?	There are no specific legal provisions governing <u>third-party funding</u> . However, the Paris Bar Council has recently adopted a resolution confirming that third-party funding is a positive development for access to justice and does not contravene French Law (Paris Bar Council Resolution, dated 21 February 2017). Disclosure of third-party funding is recommended but not compulsory. Under French law, <u>contingency fee arrangements</u> where the entirety of attorney's remuneration is dependent on the outcome of the case (<i>quota litis</i> pacts) are prohibited. However, the Paris Court of Appeal held that such "pure" success fee arrangements in international arbitration procedures are not contrary to the French definition of international public policy if the agreed fees are not manifestly excessive. The National Council of the French Bars recently published a status report reflecting on the evolution of the <i>quota litis</i> pact and the possible lifting of its prohibition (National Council of the French Bars Resolution, dated 6-7 October 2017).
Party to the New York Convention?	France signed the New York Convention on 25 November 1958. It was ratified on 26 June 1959 and it entered into force on 24 September 1959.
Other key points to note	(1) An arbitration agreement entered into by the parties to international arbitration is deemed to be valid; (2) Annulment of an arbitral award at the seat of the arbitration does not prevent the award from being enforced in France.
WJP Civil Justice score (2017-2018)	0.70

THE GAMBIA, BY FARAGE ANDREWS LAW PRACTICE

The Gambia is a generally arbitration friendly jurisdiction that has adopted pro-arbitration laws (most importantly the [Alternative Dispute Resolution Act 2005](#) (“ADR Act 2005”)), the spirit of which have been respected by its judiciary and administration. That said, as a consequence of the country’s relatively small size, the jurisdiction does not benefit from of surfeit of arbitration related practice and precedent, meaning that arbitration in The Gambia may give rise to issues that are novel in the jurisdiction. Many of the cases thus far which required arbitration involved construction disputes between contractor and client or supply agreements between supplier and purchaser.

Key places of arbitration in the jurisdiction	Banjul.
Civil law / Common law environment?	Primarily a common law jurisdiction, although customary law and sharia law are applicable to issues of land, inheritance and family law in many circumstances.
Confidentiality of arbitrations?	Yes, subject to certain exceptions.
Requirement to retain (local) counsel?	No, parties may be represented by any person of their choice.
Ability to present party employee witness testimony?	Yes.
Ability to hold meetings and/or hearings outside of the seat?	Permitted unless the parties agree otherwise.
Availability of interest as a remedy?	Yes.
Ability to claim for reasonable costs incurred for the arbitration?	Yes.
Restrictions regarding contingency fee arrangements and/or third-party funding?	None.
Party to the New York Convention?	No, but the ADR Act 2005 (ss. 52-53) provides for the recognition and enforcement of awards irrespective of the country in which they were made.
Other key points to note	Φ
WJP Civil Justice score (2017-2018)	Φ

GERMANY, BY CMS HASCHE SIGLE

Germany is an attractive option for domestic as well as international arbitration proceedings as it is known to provide an arbitration-friendly legal environment. The jurisprudence of German courts is consistent, and the German Civil Code of Procedure provides a functional and balanced arbitration law closely modelled on the UNCITRAL Model Law. The German Institute for Arbitration (“DIS”) is a well-functioning arbitration institution with modern rules (including Supplementary Rules for Expedited Proceedings and for Corporate Law Disputes) and an increasing (international) caseload.

Key places of arbitration in the jurisdiction	Frankfurt, Düsseldorf, Hamburg and Munich. Berlin, as capital city, has the potential to become an important seat for international arbitrations.
Civil law / Common law environment?	Civil law; the German arbitration law is contained in the 10 th book of the Civil Code of Procedure (“ZPO”).
Confidentiality of arbitrations?	German arbitration law does not provide for express confidentiality obligations. Hearings are usually held in closed session and awards are not published.
Requirement to retain (local) counsel?	Common but no legal requirement.
Ability to present party employee witness testimony?	Parties may submit witness testimonies of their employees. It lies in the arbitral tribunal’s discretion to weigh such evidence.
Ability to hold meetings and/or hearings outside of the seat?	Parties may choose to hold meetings at a different venue. Unless the parties have agreed on a specific venue, the tribunal has discretion to decide where to hold meetings.
Availability of interest as a remedy?	Interest is a matter of the applicable substantive law. Compounded interest applied under foreign law does not violate German public policy (“ <i>ordre public</i> ”).
Ability to claim for reasonable costs incurred for the arbitration?	The arbitral tribunal has discretion in respect of the allocation of costs but must take into consideration the circumstances of the case.
Restrictions regarding contingency fee arrangements and/or third-party funding?	German lawyers (“ <i>Rechtsanwälte</i> ”) may only enter into contingency fee agreements under very limited conditions. Third party funding is not codified in German arbitration law, but it is accepted and increasingly used.
Party to the New York Convention?	Yes, with reservations with regard to reciprocity, commercial disputes and retroactive application.
Other key points to note	Germany is a Member State since 1961.
WJP Civil Justice score (2017-2018)	Germany ranks 6 th out of 113 countries with a score of 0.86.

GHANA, BY N. DOWUONA & COMPANY

Arbitration is quickly becoming the preferred method of settling disputes arising under commercial contracts in Ghana. The state’s efforts to promote alternatives to litigation as the primary means of resolving disputes led to the repeal of the Arbitration Act, 1961 (Act 38) and its replacement with the Alternative Dispute Resolution Act, 2010 (Act 798) (the “**ADR Act**”). The ADR Act provides a modern framework which governs the commencement and conduct of arbitral proceedings as well as the enforcement of foreign and domestic arbitral awards in Ghana. Recognising the expediency of arbitration over litigation, several legislations in Ghana also encourage and/or require the settlement of disputes by arbitration as well other ADR methods. It must be noted that matters relating to national or public interest, the environment, the enforcement and interpretation of the Constitution, and any other matter that by law cannot be settled by an alternative dispute resolution method are all outside the scope of the ADR Act. The Ghana Arbitration Centre is the most widely-used arbitration centre in Ghana. Other centres include the Ghana Association of Certified Mediators and Arbitrators, the National Labour Commission and the Marian Dispute Resolution Centre. Ghana is a Common Law jurisdiction and it has incorporated into the ADR Act, the rules of the New York Convention, which it acceded to on 9th April 1968.

The ADR Act generally leaves the decision on most issues concerning the arbitral proceedings to the parties to determine and provides default rules that are applicable where the parties neglect or fail to agree on a matter. Under the ADR Act, unless otherwise agreed by the parties, the arbitration proceedings shall be private and arbitrators are required to keep the arbitration as well as the arbitral award confidential subject to the consent of the parties and the provisions of law. There is no requirement to retain local counsel but, unless the parties otherwise agree, a party may be represented by counsel or any other person chosen by the party. Parties are permitted to present employee witness testimony; however, before the hearing, a party is required to give the arbitrator and the other party personal particulars of the witnesses that the party intends calling and the substance of the testimony of each witness. The parties may also agree on the place where proceedings or hearings are to be held and in the absence of an agreement, the tribunal shall determine the venue for meetings or hearings, taking into account the convenience of the parties and circumstances of the case. The ADR Act makes provision for expedited arbitration proceedings under which parties may choose a fast track route to resolving their dispute.

The tribunal has the power to award interest as part of an arbitral award and may impose simple or compound interest at a rate determined by it in accordance with the terms of the contract and the applicable law. A party may claim and the tribunal may include reasonable expenses in any award it renders. Unless the parties agree otherwise, all expenses of the arbitration shall be paid for equally by the parties. There are no restrictions against contingency fee arrangements and/or third-party funding under the laws of Ghana.

Key places of arbitration in the jurisdiction	Accra
Civil law / Common law environment?	Common law.
Confidentiality of arbitrations?	Yes. Unless otherwise agreed by the parties or otherwise provided by law, arbitration proceedings and the arbitral award are confidential.
Requirement to retain (local) counsel?	None. A party may be represented by counsel or any other person, unless the parties agree otherwise.

Ability to present party employee witness testimony?	Yes. Parties are permitted to present employee witness testimony.
Ability to hold meetings and/or hearings outside of the seat?	Yes. The parties may agree to hold meetings or hearings outside the seat.
Availability of interest as a remedy?	Yes. The tribunal may grant a monetary award at simple or compound interest in accordance with the terms of the contract and the applicable law.
Ability to claim for reasonable costs incurred for the arbitration?	Yes. A party may claim and the tribunal may include reasonable expenses in the award against a party.
Restrictions regarding contingency fee arrangements and/or third-party funding?	None. Contingency fee arrangements and/or third-party funding are not restricted under the laws of Ghana.
Party to the New York Convention?	Yes. Ghana acceded to the New York Convention on April 9, 1968.
Other key points to note	<ul style="list-style-type: none"> • Non-arbitrable matters include matters relating to national or public interest, the environment, the enforcement and interpretation of the Constitution, and any other matter that by law cannot be settled by an alternative dispute resolution method. • The ADR Act makes provision for expedited arbitration proceedings under which parties may choose as a fast track to resolving their dispute.
WJP Civil Justice score (2017-2018)	0.59. Ghana is ranked 1 out of 18 in Sub-Saharan Africa and 43 out of 113 globally.

GUINEA, BY THIAM & ASSOCIÉS

The Republic of Guinea is a member of the Organization for the Harmonization of Business Law in Africa (“OHADA”). OHADA provides for a uniform system of business law directly applicable in its Member States through “Uniform Acts” (Uniform Acts are sets of material rules adopted to regulate a specific legal field (i.e., commercial contracts) which are designed to apply in all OHADA States once they have been adopted by the OHADA’s Council of Ministers). There are currently ten Uniform Acts, all largely inspired by French law, covering matters such as corporate law, securities, bankruptcy and arbitration. The Uniform Act on Arbitration sets out the basic rules applicable to arbitrations having their seat in an OHADA Member State.

Parties seeking to arbitrate under OHADA may choose between ad hoc arbitration under the Uniform Act on arbitration, and institutional arbitration according to the Arbitration Rules of the Common Court of Justice and Arbitration (“CCJA”), located in Abidjan (Ivory Coast), which is the key place for arbitration hearings. CCJA also serves as OHADA supra-national court to enforce uniformity in judgements and recognition of process and can be seized as a last resort.

In addition, since August 17, 1998, the Republic of Guinea benefits from its own national arbitration institution, namely the Chamber of Arbitration of Republic of Guinea (“CAG”), located in Conakry.

Given that the Republic of Guinea is a member of OHADA, *ad hoc* arbitrations are governed by the Uniform Act on Arbitration. Until recently, all OHADA arbitrations were governed by the Uniform Act on Arbitration of March 11th, 1999 (“Uniform Act on Arbitration”). The Uniform Act on Arbitration is based on a combination of the UNCITRAL Model Law of June 1985, the French Code of Civil Procedure, and the Arbitration Rules of the International Chamber of Commerce of 1988. It was last amended on November 23rd, 2017 (the “Revised Arbitration Act”). The Revised Arbitration Act entered into force on March 15, 2018 and shall apply to all arbitrations commenced after that date.

Key places of arbitration in the jurisdiction	Conakry.
Civil law / Common law environment?	Civil law.
Confidentiality of arbitrations?	<p>There are no provisions prescribing confidentiality of arbitrations under Guinean law. Parties wishing their arbitrations to be confidential should therefore expressly so provide in their underlying agreement. This provision will bind the parties, counsels and arbitrators.</p> <p>Article 6 of the Guinean Arbitration Rules provides that the arbitration procedure is confidential. The confidentiality extends to any person participating to the procedure and the arbitral awards cannot be published without consent of all the parties to the arbitration procedure.</p>
Requirement to retain (local) counsel?	<p>There are no provisions relating to the choice of counsel concerning <i>ad hoc</i> arbitrations. Nor are there specific provisions in the CCJA Arbitration Rules. As a consequence, it is possible for the parties to retain outside counsel or to be self-represented.</p> <p>Article 19 of the Guinean Arbitration Rules provides that the parties can retain any counsel of their choice, subject to the communication of the names and addresses of said counsel(s) to the opposing party and to the Secretariat of the Chamber of</p>

	Arbitration of Guinea. Given that there is no provision to the contrary, the parties may represent themselves.
Ability to present party employee witness testimony?	Article 21-4 of the Guinean Arbitration Rules provides that the arbitral tribunal can decide to hear witnesses, party-appointed experts, or any other person, in the presence or absence of the parties. Given this, it seems possible to produce party employee witness testimony.
Ability to hold meetings and/or hearings outside of the seat?	There are no provisions relating to this subject-matter, neither for <i>ad hoc</i> arbitrations, nor in the Guinean Arbitration Rules. However, we understand that it may be possible to hold meetings outside the seat of arbitration, with the agreement of all parties to the arbitration procedure. Pursuant to Article 13 of the CCJA Arbitration Rules, an arbitrator acting under the CCJA Arbitration Rules may decide to hold meetings outside the seat of the arbitration, after consulting the parties.
Availability of interest as a remedy?	There is no specific provision relating to the awarding of interests as a remedy.
Ability to claim for reasonable costs incurred for the arbitration?	There is no specific provision relating to the allocation of costs.
Restrictions regarding contingency fee arrangements and/or third-party funding?	To the best of our knowledge, there are no restrictions in Guinea regarding contingency fee arrangements and/or third-party funding.
Party to the New York Convention?	Yes. The Republic of Guinea is party to the NY Convention following its ratification on 23 January 1991. The NY convention entered into force on 23 April 1991.
Other key points to note	
WJP Civil Justice score (2017-2018)	N.A.

ICELAND, BY LEX LAW

The Icelandic Arbitration Act (“IAA”) entered into force in 1 January 1990. The Act’s sources of inspiration was the arbitration law of neighbouring jurisdictions, *i.e.* the Norwegian, Danish and Swedish arbitration acts in force at the time as well as the original 1985 version of the UNCITRAL Model Law. Legal practitioners as well as users of arbitration have in recent years been calling for a comprehensive reform of the legal framework of arbitration in Iceland, this is corollary to the increased interest in arbitration as a dispute resolution mechanism in recent years. Thus, it is likely that a comprehensive legislative reform (based on the UNCITRAL Model Law) modernizing the legal framework for arbitration in Iceland is due in the near future.

Key places of arbitration in the jurisdiction	Reykjavik
Civil law / Common law environment?	Civil law
Confidentiality of arbitrations?	Not addressed in the IAA but there is an underlying assumption and expectation of confidentiality
Requirement to retain (local) counsel?	Not required
Ability to present party employee witness testimony?	Permitted
Ability to hold meetings and/or hearings outside of the seat?	Permitted, unless the parties agreed otherwise
Availability of interest as a remedy?	The IAA does not prescribe any principles on awarding interest. This matter is generally regarded as a part of substantive law.
Ability to claim for reasonable costs incurred for the arbitration?	According to IAA the Arbitral Tribunal has discretion to allocate the arbitration costs as it deems appropriate.
Restrictions regarding contingency fee arrangements and/or third-party funding?	The IAA is silent on contingent fees, alternative fee arrangements and third-party funding. It should be noted that the Act on Professional Attorneys specifically permits contingent fees.
Party to the New York Convention?	Yes, since 2002.
Other key points to note	Comprehensive legislative reform modernizing the legal framework for arbitration in Iceland is expected in the near future.
WJP Civil Justice score (2017-2018)	ϕ

INDONESIA, BY KARIMSYAH

Key places of arbitration in the jurisdiction	Jakarta.
Civil law / Common law environment?	Indonesia's legal system is based on civil law, inherited from the Dutch, who ruled Indonesia until 1945. As in civil law jurisdictions, the courts do not strictly follow precedent, but rely primarily upon written codes and/or laws.
Confidentiality of arbitrations?	Although it is generally considered that arbitration should be confidential, the Arbitration Law does not expressly provide for a very high degree of confidentiality. It requires only that the hearings be closed to the public. Thus if the Parties wish to address the confidentiality of their arbitration with more clarity, or to provide for a higher degree of confidentiality, they should include relevant language in their agreement to arbitrate.
Requirement to retain (local) counsel?	There is no requirement to engage local counsel, although if the matter is governed by Indonesian law it would be advisable to do so.
Ability to present party employee witness testimony?	The general rule under Indonesian law is that an employee or family member of a party is not considered as a 'witness' but as part of such party. This does not prevent any such person from appearing as a witness in arbitration, but the relationship will be taken into consideration by the tribunal in evaluating the veracity of the testimony.
Ability to hold meetings and/or hearings outside of the seat?	∅
Availability of interest as a remedy?	Interest on a debt may be awarded only if the parties have agreed for interest to apply to an unpaid indebtedness. There is no such prohibition against imposing interest on late or unsatisfied awards.
Ability to claim for reasonable costs incurred for the arbitration?	Generally, the costs of an arbitration proceeding in Indonesia shall be borne by the losing party, but the award may rule otherwise. The parties' legal costs, however, can only be shifted if the Parties have so agreed in their agreement to arbitrate or otherwise.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Contingency fees and third-party funding are generally not utilised in Indonesia, but there is no prohibition against either.
Party to the New York Convention?	Indonesia has been a party to the New York Convention since 1981. There is only one Arbitration Law and its procedures that apply to all arbitrations held in Indonesia, all of which are defined as

	<p>“domestic” regardless of nationality of the parties or other factors. With respect to foreign-rendered awards, i.e. awards made outside Indonesia, only the enforcement provisions of the Arbitration Law are applicable. These differ in some respect from those mentioned in the UNCITRAL Model Law, as well as the New York Convention</p> <p>Enforcement differs slightly between domestic and international awards, specifically the court to which one applies and the time limit to register the award, a prerequisite for enforceability (there is no time limit for international awards). Note that registration of foreign-rendered awards requires a certificate from the Indonesian diplomatic mission in the place of arbitration to the effect that that state and Indonesia are both signatories to the New York Convention.</p>
<p>Other key points to note</p>	<p>Under the Arbitration Law, anyone over 35 with over 15 years of experience in their field, and not a court or government official, may act as arbitrator.</p> <p>Arbitration in Indonesia is regulated by Law No. 30 of 1999 (the “Arbitration Law”). The Arbitration Law deals with matters such as the requirements for an arbitration agreement, qualification of arbitrators and also contains skeleton rules in case the parties have not designated others. It is not based on the UNCITRAL Model Law but has many similarities with it.</p> <p>Where Parties have agreed in writing to arbitrate their disputes, the Indonesian courts have no jurisdiction over such disputes. The only involvement of the courts is with the annulment and/or enforcement of final and binding awards, and the appointment of arbitrators, in cases where no other appointing authority has been designated by the parties or in rules chosen by the parties. Although the Arbitration Law gives arbitral tribunals the power to issue interlocutory or interim relief, such relief will not be enforced by the courts.</p> <p>The Arbitration Law provides that the Parties are free to hold their arbitration pursuant to whatever procedural rules or under whatever arbitral institution they may agree. Failing agreement, the Arbitration Law includes some procedural rules of its own. The Parties may choose <i>ad hoc</i> arbitration, the most common rules for which are the UNCITRAL Rules, or they may opt to have it administered by an arbitral institution (locally or elsewhere). They are also free to hold hearings or meetings wherever they may mutually agree. If the parties have not agreed upon a different language, the arbitral proceedings and hearings will be conducted in Indonesian.</p>
<p>WJP Civil Justice score (2017-2018)</p>	<p>0.52</p>

IRAN, BY GHEIDI & ASSOCIATES

Arbitration laws were included as part of the Iranian Civil Procedure Law (“**CPL**”) up until 1997, when arbitration was further codified under the Law on International Commercial Arbitration (“**LICA**”). The LICA and the CPL (last modified in 2001) are the latest applicable laws governing international commercial disputes and local disputes respectively. Chapter 7 of the CPL deals with arbitration. The provisions of this chapter are applicable only to arbitration where both parties to the dispute have Iranian nationality.

In 1997, in order to harmonize and facilitate the provision of arbitration with international practice, the Iranian Parliament passed the LICA, which is largely based on the UNCITRAL Model Law. According to Article 1(B) of the LICA, *“International arbitration is the case where one of the parties, at the time of conclusion of the arbitration agreement, is not a national of Iran under the Iranian laws.”* The LICA applies to arbitration in international commercial relationships including, *inter alia*, sale of goods and services, transportation, insurance, financial matters, consulting, investment, technical cooperation, representation, factoring or similar activities as per Article 2(1).²⁸ In practice, accepted principles and procedures of international arbitration are recognized and applied by arbitral tribunals seated in Iran. For example, although confidentiality of arbitration is not held as a requirement under the LICA, it is an accepted principle applied within arbitration proceedings.

In the years following the enactment of the LICA, Iran ratified the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (the “**New York Convention**”) in 2001, taking a noteworthy further step towards enhancing the climate for foreign investment in Iran. The accession to the New York Convention has paved the way for the referral of disputes by foreign investors to international arbitration outside of Iran; foreign arbitral awards are recognized and may be enforced in Iran, provided that there is no ground for annulment or refusal in accordance with Article V of the New York Convention.²⁹

As per the reservation rights provided under the New York Convention, Iran applies the Convention only to commercial disputes, whether contractual or non-contractual, and to awards issued in other contracting states on the basis of reciprocity. It is also worth noting that when public and state properties are involved, there are fundamental challenges to arbitrability. In particular, Article 139 of the Iranian Constitutional Law mandates as follows: *“The settlement of claims relating to public and state property or the referral thereof to arbitration is in every case contingent on the approval of the Board of Ministers, and the Parliament must be informed of these matters. In cases where one party to the dispute is a foreigner, as well as in important domestic cases, the approval of the Parliament must also be obtained. Law will specify the cases which are considered to be important.”* In line with Article 139 of the Constitutional Law, the CPL also establishes exactly the same restriction in terms of arbitrability. Therefore, legal scholars and professionals have endeavoured to limit the applicability of this provision, as it may discourage foreign investors seeking to refer their disputes to arbitration rather than Iranian domestic courts.³⁰

The adoption of a Comprehensive Arbitration Law is currently on the agenda of the Iranian Parliament. The Arbitration Center of the Iran Chambers (“**ACIC**”) was tasked by the Judiciary with drafting this law, which is intended to replace current regulations on arbitration and provide a comprehensive package of laws thereon. The ACIC was established on 3 February 2002, pursuant to the approval of the “ Law on Articles of Association of ACIC” by the Iranian Parliament. Although ACIC is organized as an affiliate to the Iran Chamber of Commerce, it has an independent legal personality. It is the first Iranian independent arbitration institution established for the purpose of settlement of both domestic and international disputes through arbitration

²⁸ Available at: <https://efilablog.org/2016/12/08/arbitration-in-iran-with-focus-on-international-commercial-arbitration/>.

²⁹ Available at: <https://efilablog.org/2016/12/08/arbitration-in-iran-with-focus-on-international-commercial-arbitration/>.

³⁰ Available at: <https://efilablog.org/2017/04/11/arbitration-in-iran-with-focus-on-international-commercial-arbitration-2/>.

or conciliation.³¹ Besides ACIC, the other major and active arbitration institution in Iran is the Tehran Regional Arbitration Center ("**TRAC**"). It is an independent international organization established under the auspices of the Asian-African Legal Consultative Organization ("**AALCO**"), pursuant to the Agreement signed on 3 May 1997 between the Islamic Republic of Iran and AALCO. TRAC enjoys the privileges and immunities applicable to international organizations. The TRAC Rules of Arbitration are essentially based on the UNCITRAL Rules of Arbitration.³²

Key places of arbitration in the jurisdiction	Tehran.
Civil law / Common law environment?	The Iranian legal system is now based on Sharia, which is integrated into a civil law system.
Confidentiality of arbitrations?	Confidentiality is not explicitly indicated in the laws, however it is recognized and applied as an accepted principle in practice.
Requirement to retain (local) counsel?	No.
Ability to present party employee witness testimony?	Yes, in accordance with Articles 19 and 20 of the LICA, the parties may agree on the rules of procedure, including presentation of party employee witness testimony. Failing such agreement, the arbitrator shall conduct the procedure in an appropriate manner. Relevance, materiality and weight of evidence offered are at the arbitrator's discretion.
Ability to hold meetings and/or hearings outside of the seat?	Yes. In accordance with Article 20 of the LICA, arbitration may take place at a venue mutually agreed to by the parties; failing such agreement, the venue of arbitration shall be determined by the arbitrator with due consideration given to the circumstances of the case and to the accessibility for the parties.
Availability of interest as a remedy?	Yes.
Ability to claim for reasonable costs incurred for the arbitration?	Yes, in practice, it is possible to claim reasonable costs sustained in the course of the arbitration proceedings.
Restrictions regarding contingency fee arrangements and/or third-party funding?	No.
Party to the New York Convention?	Yes.
Other key points to note	<p>The LICA does not contain any provisions on criminal liability of arbitrators or experts. However, under the Iranian Penal Code, criminal liability has been defined for arbitrators and experts in the event of bribery or breach of confidentiality.</p> <p>In case one of the parties requests the annulment of the arbitral award from the court and the other party demands its recognition</p>

³¹ See <http://arbitration.ir/En/Home/index>.

³² Available at: <http://www.trac.ir/Staticpages/ShowPage.aspx?staticpageID=6>.

	<p>or enforcement, the court shall provide that the party demanding nullification pay the eventual damages, if so requested by the party demanding recognition or enforcement (Article 35 of the LICA).</p> <p>Moreover, based on Article 6 of the Law concerning the Accession of Iran to the New York Convention, an application for the setting aside or suspension of the award must be made before a competent authority. The authority may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.</p>
<p>WJP Civil Justice score (2017-2018)</p>	<p>0.48</p>

ITALY, BY CASTALDIPARTNERS

Italian arbitration law is a so-called “monistic” system, whereby the same set of rules applies to both domestic and international arbitrations. Most provisions governing arbitration are contained in the Code of Civil Procedure. In 2006, the arbitration law was entirely revamped to better reflect the principles of the UNCITRAL Model Law.

Ever since, the legislator has continued to make efforts to favour the recourse to arbitration. For example, tailored rules for arbitration in specific sectors have been adopted, such as the rules for arbitration concerning public contracts or arbitrations founded on arbitral clauses contained in companies’ bylaws. In addition, in 2014, the legislator has introduced the possibility to “migrate” from court proceedings to arbitral proceedings.

Overall, Italy can thus be considered as offering an arbitration-friendly environment.

Key places of arbitration in the jurisdiction	Milan, Rome.
Civil law / Common law environment?	Civil law.
Confidentiality of arbitrations?	Not explicitly provided.
Requirement to retain (local) counsel?	No.
Ability to present party employee witness testimony?	Parties are free to determine their own rules on taking of evidence.
Ability to hold meetings and/or hearings outside of the seat?	Yes.
Availability of interest as a remedy?	Yes.
Ability to claim for reasonable costs incurred for the arbitration?	Yes.
Restrictions regarding contingency fee arrangements and/or third-party funding?	The Code of Ethics of the Italian National Bar Association prevents lawyers from applying contingency fees only. However, lawyers are allowed to calculate part of their fees on the value of the compensation awarded. Third-party funding is reserved to entities meeting certain legal requirements (such as banks or financial institutions).
Party to the New York Convention?	Yes. Italy has been party to the New York Convention since 1969 with no reserves.
Other key points to note	Arbitrators are deprived of any power to issue interim measures, except where otherwise provided by the law.
WJP Civil Justice score (2017-2018)	0.65

JAPAN, BY MORI, HAMADA & MATSUMOTO

Japan is an arbitration friendly jurisdiction. Japanese arbitration law is currently regulated by the Arbitration Act (Act No. 138 of 2003), which is based on the 1985 UNCITRAL Model Law, with some additions as specified further below. The main commercial arbitration institution in Japan is the Japan Commercial Arbitration Association (“JCAA”), which has offices in Tokyo and Osaka.

Key places of arbitration in the jurisdiction	Tokyo and Osaka.
Civil law / Common law environment?	Japan is a Civil law environment.
Confidentiality of arbitrations?	The Japanese Arbitration Act (the “ Act ”) does not provide any specific stipulations in relation to the confidentiality of arbitrations. However, based on the mutual agreement between the parties or the rules of the arbitration institutions involved in the cases, most of the arbitration cases in Japan are held in private, and all records shall be closed to the public. The arbitrators, the arbitration institutions, the parties, their counsel and assistants, and other persons involved in the arbitral proceedings shall usually be subject to confidentiality obligations.
Requirement to retain (local) counsel?	Parties to an arbitration can retain counsel or be self-represented. In relation to the qualification of counsel, under certain conditions a registered foreign lawyer may represent the parties in arbitration proceedings in Japan (in addition to Japanese qualified lawyers) (Article 5-3 of the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers).
Ability to present party employee witness testimony?	It is permissible to present a party employee as a witness in arbitration proceedings and to provide oral testimony.
Ability to hold meetings and/or hearings outside of the seat?	There is no restriction on the ability to hold meetings and/or hearings outside the seat.
Availability of interest as a remedy?	There is no provision in the Act as to whether or not the parties are entitled to recover interest. This issue is usually resolved in accordance with the substantive rules or law, which are applicable to the subject matter of the arbitration.
Ability to claim for reasonable costs incurred for the arbitration?	The costs of the arbitration, including the administrative fee, the arbitrator(s)’ remuneration and expenses, and other reasonable expenses incurred with respect to the arbitral proceedings, and the Parties’ legal fees, may be allocated by the tribunal between the parties.
Restrictions regarding contingency fee arrangements and/or third-party funding?	There is no restriction on a party’s ability to enter into contingency fee arrangements and/or third-party funding arrangements.

Party to the New York Convention?	Japan has been a party to the New York Convention since June 20, 1961.
Other key points to note	In Japan, court proceedings are still more common in comparison to arbitration proceedings, partially because of high respects for and reliance on Japanese courts and judges, and relatively cheaper costs for court proceedings. However, the number of arbitrations is gradually increasing.
WJP Civil Justice score (2017-2018)	0.79

LATVIA, BY LAW OFFICE OF INGA KAČEVSKA

There are 69 registered arbitral institutions in Latvia.³³ Until the adoption of the new Arbitration Law in 2015 (the "**Arbitration Law**"),³⁴ the number of arbitral institutions was above 200. Thus, the trust towards arbitration was not, and still is not very high. Notably, Latvia has not adopted the UNCITRAL Model Law, there are no setting aside procedures nor any type of assistance from the courts during the arbitration proceeding. The Arbitration Law applies to both domestic and international arbitration.

Latvia is a party to the European Convention on International Commercial Arbitration and to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**").

Key places of arbitration in the jurisdiction	Riga.
Civil law / Common law environment?	Civil law.
Confidentiality of arbitrations?	The arbitral procedure is confidential. However, if a party applies for the compulsory execution of the arbitral award before State courts, the matter becomes public.
Requirement to retain (local) counsel?	Natural persons may either choose to be represent themselves, or they may choose to be represented by an attorney at law or any authorized representative. Legal entities may choose to be self-representing through its official representative acting within the scope of his/her authorization, or by any authorized representative of the legal entity (including foreigners). Any natural person may act as an authorized representative, except for persons who (i) have not attained the age of legal majority; (ii) are under trusteeship; (iii) have been deprived of the right to conduct the matters of other persons; (iv) are in a relationship of kinship up to the third degree, or in a relationship of affinity up to the second degree with one of the arbitrators; (v) have provided legal assistance to the opposing party in this matter or in another related matter; (vi) have participated in mediation in this matter or in another related matter.
Ability to present party employee witness testimony?	Traditionally, parties are not allowed to present witness testimony in the course of arbitration proceedings. This is due to the fact that arbitral tribunals are not legally entitled to take the oath of witnesses – such right belongs exclusively to State court judges. Therefore, in practice, the person who testifies will formally do so as a representative of the party, and not as a witness.
Ability to hold meetings and/or hearings outside of the seat?	If the parties have not agreed otherwise, the tribunal has the right to freely determine the seat of arbitration, taking into account considerations such as efficiency.

³³ See: Register of Arbitral Institutions at Register of Enterprises (in Latvian): <http://www.ur.gov.lv/skirejtijasas.html>.

³⁴ Šķīrējtiesu likums [Arbitration Law], OP No. 2014/194.1 (in English): http://vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Arbitration_Law.pdf.

Availability of interest as a remedy?	The tribunal may grant interest to the winning party for the period prior to the execution of the award, at the rate of 6% per year.
Ability to claim for reasonable costs incurred for the arbitration?	The costs for arbitration are determined by the rules of each arbitral institution. However, the arbitral tribunal shall have the right to determine the costs for arbitration taking into account the amount claimed, the complexity of the dispute, the provisions of the arbitration agreement and other significant circumstances.
Restrictions regarding contingency fee arrangements and/or third-party funding?	There are no restrictions regarding third party funding but in practice, the use of third party founding is not very common yet in Latvia.
Party to the New York Convention?	Yes, the New York Convention is applied directly as the Civil Procedure Law, ³⁵ which only prescribes technical provisions for the submission of the application to recognize and enforce the arbitral award.
Other key points to note	<p>The new Arbitration Law introduced very specific rules concerning arbitral institutions and arbitrators. Every permanent arbitral institution shall be registered with the Enterprise Register and shall satisfy several requirements: (i) it must have separate premises suitable for the operation of a court of arbitration; (ii) it must have the necessary personnel; (iii) it must have a website; (iv) it must have a closed list of arbitrators, including the names of at least 10 arbitrators. Arbitrators shall be trained lawyers, with a good reputation and at least three years of practical legal work experience. In order to verify that an arbitrator's qualifications are in conformity with the requirements of the law, the documents confirming such qualifications must be submitted to the Enterprise Register by the arbitral institution. One arbitrator cannot be included in more than three lists of arbitral institutions. In practice, this creates several issues. First, parties cannot appoint non-lawyers as arbitrators. Second, parties may only appoint arbitrators that are included in the lists of arbitral institutions. Third, due to the small number of arbitrators on the lists of arbitral institution, there is a high risk of conflict of interests among arbitrators and counsels.</p> <p>The Arbitration Law does not forbid the parties to agree on ad hoc arbitration. However, given that law is not favourable to <i>ad hoc</i> arbitration, it would not be recommended. For example, the signature of arbitrators on an <i>ad hoc</i> arbitral award must be approved by a notary public. Most importantly, a party cannot request the domestic court to issue the writ of execution of the <i>ad hoc</i> award, as the law only provides for compulsory execution of institutional awards.</p>
WJP Civil Justice score (2017-2018)	φ

³⁵ Civilprocesa likums [Civil Procedure Law] (in English): <http://vvc.gov.lv/image/catalog/dokumenti/Civil%20Procedure%20Law.docx>.

LEBANON, BY OBEID LAW FIRM

Lebanon is an arbitration-friendly jurisdiction. Its arbitration legislation reflects contemporary practice and embraces well-established principles of international arbitration. In addition, the Lebanese judiciary is generally supportive of the arbitral process and respectful of the parties' choice of arbitration as their method for settlement of disputes.

Key places of arbitration in the jurisdiction	Beirut
Civil law / Common law environment?	Civil law. The civil legal tradition was inherited from the French during their mandate over Syria and Lebanon between 1920 and 1943.
Confidentiality of arbitrations?	Under Lebanese law, there are no provisions dealing with the confidentiality of arbitral proceedings per se. However, in practice, arbitral proceedings are treated as confidential as long as the parties agree to specific confidentiality obligations and no legal proceedings before the local courts are filed (requests for the assistance of the judge of summary proceedings, recourse for annulment of the award, etc.).
Requirement to retain (local) counsel?	There are no restrictions as to the nationality of persons who could act as counsel or arbitrators in international arbitrations seated in Lebanon.
Ability to present party employee witness testimony?	Employee witness testimony is not admissible in domestic arbitrations unless agreed otherwise by the parties. Save where specified otherwise in the applicable procedural rules, arbitral tribunals in international arbitrations seated in Lebanon have the discretion to call a party employee for inquiry and clarification purposes.
Ability to hold meetings and/or hearings outside of the seat?	When a city in Lebanon is selected as the seat of an arbitration, it is permissible to conduct hearings and procedural meetings elsewhere.
Availability of interest as a remedy?	In Lebanon, interest can be applied to the principal claim as well as to costs. The legal interest rate is 9 percent in civil and commercial matters (irrespective of the prevailing interest rate) unless agreed otherwise by the parties. In commercial matters, the parties can freely determine the interest rate in their agreement.
Ability to claim for reasonable costs incurred for the arbitration?	The parties to an arbitration seated in Lebanon can recover legal fees paid and other reasonable costs incurred for the purposes of the arbitration. The arbitral tribunal has discretion to decide whether it will apply the "loser pays" rule.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Lebanese law does not expressly regulate or forbid contingency fee arrangements or third-party funding.

Party to the New York Convention?	Lebanon is a party to the New York Convention, which entered into force in Lebanon on 9 November 1998. Lebanon has made a reciprocity reservation under the Convention, declaring that it will apply the Convention on a reciprocal basis to the recognition and enforcement of awards made only in the territory of another contracting state.
Other key points to note	Lebanon ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (" ICSID Convention ") and the Arab Convention on Commercial Arbitration
WJP Civil Justice score (2017-2018)	0.47

LITHUANIA, BY ELLEX VALIUNAS

Lithuania has one the most progressive arbitration laws in the region. The law is based on the UNCITRAL Model Law, including the 2006 amendments, and is consistent with pro-arbitration case law on the recognition and enforcement of arbitral awards and set-aside of awards. Lithuanian courts refuse to recognise awards and set aside awards only in very exceptional cases and tend to follow best international practices related to the interpretation and application of the New York Convention and the UNCITRAL Model Law. The latest amendments to the Lithuanian Law on Commercial Arbitration ("Arbitration Law") came into force in July 2017 and help demonstrate that Lithuania constantly aims to improve its arbitration-related legislation. For example, the Arbitration Law now provides that documents produced in arbitration-related proceedings before the State courts shall remain confidential (the law provides that arbitration is confidential). In addition, the Arbitration Law provides a 90-day limitation for the Court of Appeal of Lithuania to hear a set-aside application (ruling of the Court of Appeal is, however, subject to further appeal before the Supreme Court of the Republic of Lithuania). In addition to its progressive arbitration law, Lithuania and its capital city, Vilnius, have an easy access to by a number of international airlines connecting it to major European airport hubs, offering a number of other advantages for a seat of arbitration: free access from all EU and EFTA countries (Lithuania is a Schengen country), a number of business class hotels offering modern hearing facilities, high safety level (Lithuania ranks 16 in the global Doing Business ranking of the World Bank in 2018) and multi-lingual (English, Russian, French, Polish, German, etc.) arbitration practitioners with vast experience in both international investment and commercial arbitration. Expertise of Lithuanian practitioners is represented by the fact that not only leading Lithuanian professionals in this field are included in the lists of recommended arbitrators by major arbitration institutions (including ICSID) and are often appointed by the parties and global arbitral institutions (including ICC) as arbitrators and / or experts in international proceedings (even having no relation to Lithuania at all), Lithuania has its own representatives in major arbitration institutions (including ICC Court and PCA Court).

Key places of arbitration in the jurisdiction	Vilnius.
Civil law / Common law environment?	Civil law.
Confidentiality of arbitrations?	Confidential by law, but advisable to agree separately.
Requirement to retain (local) counsel?	No.
Ability to present party employee witness testimony?	Yes.
Ability to hold meetings and/or hearings outside of the seat?	Yes.
Availability of interest as a remedy?	Yes.
Ability to claim for reasonable costs incurred for the arbitration?	Yes.
Restrictions regarding contingency fee arrangements and/or third-party funding?	According to very limited regulations, conditional fee arrangements are permitted. There is no regulation regarding third-party funding.

Party to the New York Convention?	Yes.
Other key points to note	φ
WJP Civil Justice score (2017-2018)	φ

LUXEMBOURG, BY LUTGEN + ASSOCIÉS

Several legal, historical and cultural advantages make the Grand-Duchy of Luxembourg a safe and stable seat for conducting arbitration proceedings. A first-class European business centre and home to the world's leading financial and banking institutions, Luxembourg enjoys a high degree of political and regulatory stability.

Located in the heart of Europe, Luxembourg is naturally and historically an arbitration-friendly venue. Given that legal professionals and judges are trained in France, Belgium and, to a lesser extent, Germany, the pro-arbitration law and politics of these neighbouring jurisdictions often influence the arbitration scholarship and case law in Luxembourg. Moreover, multicultural and multilingual local practitioners regularly confront and are comfortable with dealing and solving intricate issues of comparative and private international law.

Key places of arbitration in the jurisdiction	Luxembourg City is the main centre for business and arbitration in the Grand Duchy. The Chamber of Commerce of the Grand-Duchy of Luxembourg established its own Arbitration Centre in 1987 under the patronage of the International Chamber of Commerce (ICC). The Arbitration Centre conducts proceedings under its own arbitration rules. ³⁶ Additionally, the Arbitration Centre may conduct proceedings under the ICC Rules of Arbitration.
Civil law / Common law environment?	Luxembourg is a civil law country. French and Belgian law and case law have a persuasive value in courts and are taken into account by the legislator during the law-making process. Rules governing arbitration are codified in the New Code of Civil Procedure ("NCPC"), under Part II, Book III, Title I "On Arbitration", Articles 1224 to 1251.
Confidentiality of arbitrations?	Absent specific provisions and case law on confidentiality, scholars consider that parties may provide for confidentiality in the arbitration agreement. Arbitrator confidentiality falls under criminal law rules on professional secrecy (see section 4.5.1 below).
Requirement to retain (local) counsel?	There is no requirement to retain local counsel in proceedings before an arbitral tribunal.
Ability to present party employee witness testimony?	For the conduct of arbitration proceedings, the NCPC (Article 1230) defers to the rules of civil procedure applied before Luxembourg courts. Courts consider that arbitrators do not have to apply these rules strictly, provided that general principles of civil procedure are upheld (<i>i.e.</i> principe du contradictoire, see section 4.5 below). Given that courts often rely on employee testimonies, arbitrators may assume a similar approach.
Ability to hold meetings and/or hearings outside of the seat?	Absent specific rules on the matter, commentators consider that parties may dissociate the legal seat from the place where the hearings have been materially held (see section 4.5.3 below).

³⁶ Accessible on the chamber's website at: <http://www.cc.lu/services/avis-legislation/centre-darbitrage>.

Availability of interest as a remedy?	Availability of interest as a remedy would depend on the applicable law. Interest is available as a remedy under Luxembourg law, if applicable.
Ability to claim for reasonable costs incurred for the arbitration?	Nothing precludes arbitrators from awarding reasonable costs. Under recent Luxembourg case law legal fees may be recovered as part of the loss suffered.
Restrictions regarding contingency fee arrangements and/or third-party funding?	There are no restrictions regarding contingency fee arrangements and/or third-party funding.
Party to the New York Convention?	Party to the New York Convention since 1983.
Other key points to note	∅
WJP Civil Justice score (2017-2018)	∅

MALTA, BY CAMILLERI PREZIOSI

Historically, Malta has always been considered a civil law jurisdiction with the main civil, commercial and criminal laws having been based and structured around the continental European system. However, 160 years of British rule have influenced an increasing number of laws particularly in the administrative, financial, fiscal and corporate law fields, which are largely influenced by the common law system. This has led to the general body of Maltese Law resulting in a mixed or 'hybrid' system influenced by both common law and civil law.

Key places of arbitration in the jurisdiction	Valetta.
Civil law / Common law environment?	Mixed system.
Confidentiality of arbitrations?	Yes, for domestic arbitrations; not specified for international arbitrations
Requirement to retain (local) counsel?	No.
Ability to present party employee witness testimony?	Yes.
Ability to hold meetings and/or hearings outside of the seat?	Yes.
Availability of interest as a remedy?	Yes, but compound interest is not permitted.
Ability to claim for reasonable costs incurred for the arbitration?	Yes.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Not allowed.
Party to the New York Convention?	Yes.
Other key points to note	ϕ
WJP Civil Justice score (2017-2018)	ϕ

MAURITIUS, BY PEEROO CHAMBERS

Mauritius is a stable, accessible, reliable, efficient and neutral arbitration seat. It is a welcoming and inclusive bilingual place which benefits from both civil law and common law legal cultures and which possesses all infrastructural and logistical requirements for the efficient conduct of arbitral proceedings.

While it has a separate domestic arbitration regime, its international arbitration law, set forth in the International Arbitration Act 2008, is based on the UNCITRAL Model Law, which is widely acknowledged as representing the best standards in the field worldwide. In addition, its law contains provisions which further enhance arbitral autonomy, confidentiality in appropriate cases, and above all, neutrality.

Local courts have a reduced role in relation to international arbitration proceedings. Only in very exceptional cases will the courts verify arbitration clauses before or during arbitration proceedings, thus avoiding parallel proceedings. Arbitrator appointments or challenges are decided upon by the Permanent Court of Arbitration of The Hague. Interim measures must normally be requested from arbitrators directly and the courts will order such measures strictly in support of arbitral proceedings. Any case relating to an international arbitration that is put to a local court is heard expeditiously by a panel of three specialised judges and parties have a direct right of appeal to the Judicial Committee of the Privy Council (UK).

Key places of arbitration in the jurisdiction	Port Louis.
Civil law / Common law environment?	Mauritius has a combination of both common law and civil law so that lawyers from both jurisdictions will be at least familiar with its legal system.
Confidentiality of arbitrations?	Confidentiality clauses will be upheld and arbitration-related cases before domestic courts may be heard in private.
Requirement to retain (local) counsel?	Parties are free to choose foreign or non-legal counsel for arbitration proceedings.
Ability to present party employee witness testimony?	Party employee witness testimony is not prohibited.
Ability to hold meetings and/or hearings outside of the seat?	Hearings and meetings may be held outside the seat as the arbitral tribunal considers appropriate.
Availability of interest as a remedy?	Interest may be awarded.
Ability to claim for reasonable costs incurred for the arbitration?	Reasonable costs incurred for the arbitration may be claimed.
Restrictions regarding contingency fee arrangements and/or third-party funding?	No restrictions exist on contingency fee arrangements and/or third-party funding.
Party to the New York Convention?	Yes.
Other key points to note	Awards in French and English do not have to be translated in order to be enforced.
WJP Civil Justice score (2017-2018)	ϕ

THE NETHERLANDS, BY KENNEDY VAN DER LAAN

The Netherlands have been always at the heart of international trade. With its location and infrastructure (including English as a working language), The Netherlands have also become a hub for financial services. This has led to a thriving cross-border industry that, given its nature, requires suitable means of resolving disputes.

Accordingly, arbitration has become widely accepted and is commonly used to settle disputes in the Netherlands, both where it concerns international as well as complex domestic disputes. To facilitate arbitration even further, the Dutch Arbitration Act (“DAA”) has been updated and modernized in 2015. With its highly-specialized and internationally-trained lawyers, the Dutch legal profession manages to deliver high-quality work at competitive rates.

Key places of arbitration in the jurisdiction	Amsterdam, The Hague and Rotterdam.
Civil law / Common law environment?	Civil law
Confidentiality of arbitrations?	While there are no Dutch statutory rules regarding confidentiality, it is generally assumed - and confirmed in legislative history - that arbitration proceedings are, as a rule, confidential.
Requirement to retain (local) counsel?	There is no requirement to retain local legal counsel in arbitrations. Parties can represent themselves or have themselves represented by an attorney or other representative.
Ability to present party employee witness testimony?	No restrictions apply with respect to the possibility to present party employee witness testimonies.
Ability to hold meetings and/or hearings outside of the seat?	Meetings and/or hearings can be held outside of the seat of arbitration.
Availability of interest as a remedy?	Φ
Ability to claim for reasonable costs incurred for the arbitration?	While the DAA does not contain rules with respect to the allocation of arbitration costs, this is typically addressed in the arbitration rules (e.g., the rules of the Dutch arbitration institute provide that the losing party will be ordered to pay legal fees in full as long as they are reasonable and were necessary).
Restrictions regarding contingency fee arrangements and/or third-party funding?	Dutch law does not restrict the use of contingency or alternative fee arrangements. However, restrictions apply with respect to ‘no cure no pay’ arrangements to attorneys who are admitted to the Dutch Bar. There are no prohibitions on the use of third-party funding.
Party to the New York Convention?	Φ
Other key points to note	Annulment is only possible based on a narrowly defined and exhaustive list of annulment grounds (art. 1065 DCCP).
WJP Civil Justice score (2017-2018)	0.85

NIGERIA, BY BRODERIK BOZIMO

Nigerian arbitration law is embodied both in common law (case law) and statute. Three statutory instruments regulate commercial arbitration in Nigeria: The Arbitration and Conciliation Act (the “ACA”),³⁷ the Lagos State Arbitration Law 2009,³⁸ and the 1914 Arbitration Law,³⁹ which is applicable in the other thirty-five States of the Federation.

Key places of arbitration in the jurisdiction	The key places of arbitration within Nigeria are Lagos State and Abuja, the Federal Capital Territory.
Civil law / Common law environment?	Common law.
Confidentiality of arbitrations?	Under Nigerian law, it is an implied term of the arbitration agreement that the arbitral proceedings are private and confidential and, therefore, subject to privilege.
Requirement to retain (local) counsel?	Parties may choose to retain counsel in arbitral proceedings. Where the arbitration rules in the first schedule to the ACA apply, this has been interpreted to mean counsel qualified to practice in Nigeria. Parties may circumvent these rules in international arbitration.
Ability to present party employee witness testimony?	There are no restrictions as to the presentation of witness testimony. The ACA allows the arbitrators to determine the admissibility, relevance, materiality and weight of any evidence placed before it.
Ability to hold meetings and/or hearings outside of the seat?	Unless the parties agree otherwise, the tribunal may meet at any place it considers appropriate.
Availability of interest as a remedy?	Interest may be awarded based on the parties’ agreement.
Ability to claim for reasonable costs incurred for the arbitration?	Parties may claim reasonable costs incurred for the arbitration.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Funding agreements that include the provision of funding an arbitration in return for a proportion of any recoveries are potentially, although not necessarily, champertous.
Party to the New York Convention?	Nigeria is a party to the New York Convention.
Other key points to note	A comprehensive Bill to repeal and re-enact the ACA is awaiting third reading at the Senate of the Federal Republic of Nigeria.
WJP Civil Justice score (2017-2018)	0.44

³⁷ Enacted in 1988 and republished as Cap. A18, Laws of the Federation of Nigeria, 2004. The ACA governs international and inter-state commercial arbitration.

³⁸ Lagos State Arbitration Law No. 18 of 2009. The Law governs arbitration where all elements arise within Lagos State, unless the parties agree otherwise.

³⁹ The 1914 Law is modelled on the English Arbitration Act of 1889 and governs commercial arbitration where all elements arise within the respective States.

NORWAY, BY WIKBORG REIN

Most disputes in Norway are resolved before the ordinary courts. Nonetheless, arbitration plays an important role in the country's dispute resolution system. It is of importance in large and complex cases and is often used in the oil and gas sector, offshore and onshore construction and the shipbuilding and maritime sector. Arbitration is often chosen as the dispute resolution mechanism in contracts because of the possibility to set a panel of arbitrators with the desired professional background.

Key places of arbitration in the jurisdiction	Oslo
Civil law/common law environment?	Norway is primarily a civil law jurisdiction, but generally has more common law features than many other civil law countries. As Norway is a member of the European Economic Area (EEA), Norwegian laws are substantially influenced by regulation from the European Union, including (but not limited to), for instance, competition law.
Confidentiality of arbitrations?	If no agreement regarding confidentiality exists, the arbitral proceedings and the award are as a starting point not confidential. The parties are, however, free to agree on confidentiality arrangements for the dispute which has materialized. It is commonly presumed that the courts may accept an agreement on confidentiality in the arbitration clause as well.
Requirement to retain (local) counsel?	There is no requirement to retain (local) counsel.
Ability to present party employee witness testimony?	The parties may present witness testimony from employees of a party.
Ability to hold meetings and/or hearings outside of the seat?	Although the seat of arbitration is Norway, there are no restrictions to conduct meetings or hearings outside of Norway as part of the arbitral proceedings.
Availability of interest as a remedy?	The arbitral tribunal may award interest in accordance with the law applicable to the dispute.
Ability to claim for reasonable costs incurred for the arbitration?	The parties are jointly liable for the tribunal's costs. The arbitral tribunal may order security for its own costs, but not for the parties' costs. The arbitral tribunal may order a party to pay the other party's costs to the extent it deems appropriate.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Conditional fee is permitted in Norway. Contingency fees for attorneys are permitted only to a limited extent. The Code of Ethics for Lawyers contains a general prohibition against percentage share fees; a fee based on a share of the outcome or subject matter of the action is not permitted, while non-excessive success fees are accepted.
Party to the New York Convention?	Yes

Other key points to note	φ
WJP Civil Justice score (2017-2018)	Norway's Civil Justice score is 0.89 and ranks as number 2.

PAKISTAN, BY RAJA MOHAMMED AKRAM & CO. (RMA&CO)

In Pakistan, the 1940 Arbitration Act ("**Arbitration Act**"), a colonial era legislation, is the main law governing the arbitration agreements, procedures, and awards. Pakistan has recently implemented the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 2011 as the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act (the "**New York Convention Act**"). The law and practice of arbitration in Pakistan is in a state of flux, and various judges, lawyers, and academics have strongly suggested updating the arbitration laws and procedures prevailing in the country. At present, there are no major centres/institutions for arbitration in Pakistan.

Key places of arbitration in the jurisdiction	Lahore, Karachi, and Islamabad.
Civil law / Common law environment?	Common law jurisdiction.
Confidentiality of arbitrations?	Not expressly prescribed under the Arbitration Act; once the arbitral award is filed in court for enforcement, the confidentiality of the award is lost because court proceedings are open to the public.
Requirement to retain (local) counsel?	Not expressly provided.
Ability to present party employee witness testimony?	Not restricted.
Ability to hold meetings and/or hearings outside of the seat?	Permitted, unless the parties agreed otherwise.
Availability of interest as a remedy?	Section 29 of the Arbitration Act provides that where and insofar as an award is for the payment of the money, the court may in the decree order interest, from the date of the decree at such rate as the court deems reasonable, to be paid on the principal sum as adjusted by the award.
Ability to claim for reasonable costs incurred for the arbitration?	Permitted.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Contingency fee arrangement is not permitted. Third party funding is not <i>per se</i> illegal and permitted where the funding arrangement is not against public policy, lead to vexatious litigation, or extortionate.
Party to the New York Convention?	Yes.
Other key points to note	ϕ
WJP Civil Justice score (2017-2018)	0.39

PARAGUAY, BY GROSS BROWN ESTUDIO JURÍDICO

In Paraguay, the practice of having in-house counsel is mostly reserved to large corporations (e.g., banks, telecommunication companies, etc.). Companies usually work with law firms as well as with their own in-house counsel.

Key places of arbitration in the jurisdiction	Asunción.
Civil law / Common law environment?	Civil law.
Confidentiality of arbitrations?	<p>The Paraguayan Arbitration and Mediation Act (the “Arbitration Act”) does not provide for the confidentiality of arbitration proceedings.</p> <p>Accordingly, parties to arbitration proceedings are not bound by any legal duty to keep the proceedings confidential. Parties have the right to enter into a confidentiality agreement, except for procedures to which the State is a party, which are public.</p> <p>It is an accepted practice that arbitrators must refrain from disclosing any information regarding cases in which they act. This obligation applies to all aspects of an arbitration, including the details of the dispute, the information disclosed by the parties during the proceedings and the deliberations. Arbitrators remain bound by this obligation after the award has been rendered.</p>
Requirement to retain (local) counsel?	There is no specific requirement for a party to hire local counsel to be represented in arbitral proceedings seated in Paraguay.
Ability to present party employee witness testimony?	Parties are entitled to produce this type of evidence based on the broad scope of the parties’ autonomy to determine the rules of procedure pursuant to Article 22 of the Arbitration Act. It falls to the arbitral tribunal to determine the admissibility, relevance and weight of a witness’s testimony, provided that the arbitral tribunal takes into account the applicable arbitration rules, and the parties’ agreement in this respect.
Ability to hold meetings and/or hearings outside of the seat?	<p>Under Article 23 of the Arbitration Act, parties have the right to agree upon the place of arbitration. Absent such an agreement, the arbitral tribunal has the power to determine the place of the arbitration. In doing so, it must take into account the circumstances of the case, including the options that would be most convenient for the parties.</p> <p>In addition, unless otherwise agreed by the parties, the arbitral tribunal may meet at any place it deems appropriate to hold deliberations, to hear witnesses, experts or parties, or to examine goods or documents.</p>
Availability of interest as a remedy?	Paraguayan law does not restrict the right of arbitrators to award interest.

<p>Ability to claim for reasonable costs incurred for the arbitration?</p>	<p>Arbitrators have the power to allocate the costs that the parties have incurred for the arbitration. In general, arbitrators tend to apply the “costs follow the event” principle pursuant to which the losing party shall bear all or part of the costs which the winning party has had to incur for the arbitration. However, arbitrators may also depart from that rule, for example, in deciding that each party shall bear its own costs. Such decision must be reasoned.</p>
<p>Restrictions regarding contingency fee arrangements and/or third-party funding?</p>	<p>Paraguayan law does not restrict the parties’ right to agree upon contingency fee arrangements with their counsel. Nor does it prohibit third-party funding. In fact, the Paraguayan law contains no provision on third-party funding. However, as things currently stand, third-party funding is not a common practice in Paraguay.</p>
<p>Party to the New York Convention?</p>	<p>Paraguay is a party to the New York Convention, pursuant to Law No. 948/1996. Since 1976, it is also a party to the inter-American convention on extraterritorial validity of foreign judgments and arbitral awards (“Panama Convention”). The Panama Convention is a convention of the Organization of American States regulating the enforcement of judgements and arbitral awards in other member states. It has entered into force in Paraguay on 16 August 1985 and aims at facilitating the recognition and enforcement of arbitral awards rendered in a member-State in the other member States.</p>
<p>Other key points to note</p>	<p>∅</p>
<p>WJP Civil Justice score (2017-2018)</p>	<p>∅</p>

PERU, BY MIRANDA & AMADO, ABOGADOS

During the last two decades, Peru has adopted free-market policies to promote private investment. Several relevant changes were made in the Peruvian legal framework to implement those policies, which included the arbitration framework. After approximately 12 years of existence, in 2008, the 1996 General Arbitration Act ("**Law 26572**") based on the 1985 UNCITRAL Model Law was replaced by Legislative Decree 1071 based on the 2006 UNCITRAL Model Law. The current Peruvian Arbitration Law ("**PAL**") introduced several improvements in order to secure independence of the tribunal by limiting judicial intervention, expediting the setting aside, recognition and enforcement procedures, and providing an efficient set of rules applicable unless the parties agreed otherwise.

Key places of arbitration in the jurisdiction	Lima.
Civil law / Common law environment?	Civil law.
Confidentiality of arbitrations?	Arbitrations are confidential unless otherwise is agreed.
Requirement to retain (local) counsel?	No restrictions to use of foreign counsel.
Ability to present party employee witness testimony?	Yes.
Ability to hold meetings and/or hearings outside of the seat?	Yes.
Availability of interest as a remedy?	Yes.
Ability to claim for reasonable costs incurred for the arbitration?	Yes.
Restrictions regarding contingency fee arrangements and/or third-party funding?	No restrictions.
Party to the New York Convention?	Yes, without the reciprocity and commercial reservation.
Other key points to note	φ
WJP Civil Justice score (2017-2018)	0.52

THE PHILIPPINES, BY SYCIP SALAZAR HERNANDEZ & GATMAITAN

Arbitration in the Philippines is primarily governed by Republic Act No. 9285 ("RA 9285"). It is also known as the Alternative Dispute Resolution Act of 2004. RA 9285 primarily adopted (1) Republic Act No. 876 (otherwise known as the Arbitration Law), which was enacted on June 19, 1953 to govern domestic arbitration, and (2) the UNCITRAL Model Law to govern international commercial arbitration.

RA 9285 was enacted as part of the State's policy to actively promote party autonomy in the resolution of disputes. Thus, parties are free to agree on, among other things: (a) the seat of arbitration, (b) the law governing the arbitration agreement, (c) the place where arbitration hearings shall be held, (d) the language of the arbitration, (e) the procedure for the appointment of arbitrators, and (f) the procedure for the arbitration proceedings. The Philippines is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Key places of arbitration in the jurisdiction	Metro Manila is the key place of arbitration in the Philippines.
Civil law / Common law environment?	Civil law
Confidentiality of arbitrations?	Arbitration proceedings are confidential.
Requirement to retain (local) counsel?	There is no requirement to retain counsel or local counsel in the arbitration proceedings.
Ability to present party employee witness testimony?	ϕ
Ability to hold meetings and/or hearings outside of the seat?	The parties are free to agree on the place where the arbitration hearings may be held.
Availability of interest as a remedy?	Interest may be awarded in cases involving breach of contract. The present legal rate of interest is 6% <i>per annum</i> .
Ability to claim for reasonable costs incurred for the arbitration?	Generally, arbitration costs shall 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.
Restrictions regarding contingency fee arrangements and/or third-party funding?	There are no restrictions or regulations on the use of contingency or alternative fee arrangements or third-party funding for arbitration conducted in the Philippines.
Party to the New York Convention?	ϕ
Other key points to note	The principles of party autonomy, competence-competence, and separability of the arbitration agreement are recognized by Philippine law. Parties are not prohibited from waiving their right to seek the setting aside of an arbitral award.
WJP Civil Justice score (2017-2018)	0.47

POLAND, BY CLIFFORD CHANCE

Key places of arbitration in the jurisdiction	The key place of arbitration is Warsaw, where the most reputable arbitration institutions in Poland are based. The cases typically concern M&A transactions, construction disputes and disputes arising from commercial leases.
Civil law / Common law environment?	Civil law.
Confidentiality of arbitrations?	Arbitration is confidential (this is not specifically regulated by Polish law, but typically the rules of arbitration of the Polish courts of arbitration provide for confidentiality).
Requirement to retain (local) counsel?	There is no requirement to retain legal counsel.
Ability to present party employee witness testimony?	The parties can present the testimony of their own employees.
Ability to hold meetings and/or hearings outside of the seat?	Meetings and/or hearings can be held outside of the seat.
Availability of interest as a remedy?	The arbitral tribunals typically award interest on the principal amounts claimed.
Ability to claim for reasonable costs incurred for the arbitration?	A party typically can claim any reasonable costs incurred in the course of arbitration including the arbitrators' fees and expenses, the party's costs of legal representation, costs of expert opinions and translations.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Lawyer's fees cannot be based solely on a contingency basis.
Party to the New York Convention?	Yes.
Other key points to note	The arbitration agreement must be in writing (or in electronic communications exchanged between both parties). The arbitration proceedings usually last from between six and eighteen months.
WJP Civil Justice score (2017-2018)	0.67

PORTUGAL, BY MORAIS LEITÃO, GALVÃO TELES, SOARES DA SILVA & ASSOCIADOS

The choice of the seat of the arbitration is one of the most consequential decisions in any arbitration agreement. The arbitration law of the arbitral seat will typically govern a wide range of issues concerning both the internal procedural conduct of the arbitral proceedings, as well as the external relationship between the arbitration and national courts. The seat may affect not only the way how the arbitration is conducted, but also its final outcome *e.g.*, as to the possibility of enforcement. It is also a main driver of time and cost.

Portugal has a pro-arbitration and modern arbitration law, enacted in 2012, which is based on the 2006 UNCITRAL Model Law, with certain improvements mostly based on the experience of other leading jurisdictions and/or on demands by users (*e.g.*, providing specific rules governing multi-party and multi-contract arbitrations, expressly allowing for interim measures and preliminary orders, prohibiting state entities from relying on domestic law to evade from an arbitration agreements and a liberal attitude towards the validity of arbitration agreements).

Key places of arbitration in the jurisdiction	Lisbon / Porto.
Civil law / Common law environment?	Portuguese legal system is a civil law jurisdiction with a significant influence in other Portuguese speaking jurisdictions including Angola, Brazil, Cabo Verde, Guinea-Bissau, Macau, Mozambique, S. Tomé e Príncipe and Timor Leste and a long-lasting tradition on international arbitration.
Confidentiality of arbitrations?	Yes.
Requirement to retain (local) counsel?	The issue is not regulated by the Portuguese Voluntary Arbitration Law ("PAL") and is not entirely settled. Some authors consider that, unlike in court litigation, representation by counsel is not mandatory, unless the parties agreed otherwise and, thus, according to this understanding, absent agreement by the parties on the matter, each of them is free to decide whether they wish to be represented by counsel or not.
Ability to present party employee witness testimony?	Yes.
Ability to hold meetings and/or hearings outside of the seat?	Yes. Under Article 31(2) of the PAL the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate to hold hearings, to allow the production of evidence, or to deliberate.
Availability of interest as a remedy?	Yes. The PAL does not prescribe for any rules governing the awarding of interest as, under Portuguese law, that is a substantive matter.
Ability to claim for reasonable costs incurred for the arbitration?	Yes. According to Article 42(5) of the PAL, unless otherwise agreed by the parties, the award shall determine the proportions in which the parties shall bear the costs directly resulting from the arbitration.

<p>Restrictions regarding contingency fee arrangements and/or third-party funding?</p>	<p>∅The Code of Ethics of the Portuguese Bar Association expressly prohibits the use of fee arrangements according to which the right to lawyer’s fees is dependent on the success of the claim (“<i>quota litis</i>”).</p> <p>Third-party funding is not specifically regulated and there are no particular restrictions to its use.</p>
<p>Party to the New York Convention?</p>	<p>Portugal is a party to the most important international treaties governing international arbitration, including the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Geneva Convention on the Execution of Foreign Arbitral Awards and the Inter-American Convention on International Commercial Arbitration making arbitral awards rendered in Portugal readily enforceable worldwide.</p>
<p>Other key points to note</p>	<p>Portuguese Courts are renowned for their independence and impartiality and are generally supportive of arbitration.</p> <p>Portugal has a highly committed, specialized, experienced, multilingual and culturally and legally diverse arbitration community capable of conducting all kinds of arbitration. Portugal has a unique geographical location at the cross-roads of Europe, America and Africa. Portugal is a relatively less expensive jurisdiction when compared to other major international seats, with all necessary equipment and infrastructures.</p>
<p>WJP Civil Justice score (2017-2018)</p>	<p>0.69</p>

ROMANIA, BY IORDACHE PARTNERS

Romania has a history in commercial arbitration, including international arbitration: arbitration has been regulated in Romania since 1865 (under the old Civil Procedure Code and now under the new Civil Procedure Code, which entered into force on 15 February 2013). Romanian legal provisions applicable to domestic and international arbitration are compatible with the UNCITRAL Model Law as they are based on the same main principles, but without following the text of the Model Law. Due to the modern legal framework, more and more investors and state entities are choosing arbitration to settle disputes in Romania. Below are some key aspects of Romanian arbitration law.

Key places of arbitration in the jurisdiction	ϕ
Civil law / Common law environment?	Civil law. It is important to note that EU law is considered to be part of the national order.
Confidentiality of arbitrations?	Although not expressly provided, the arbitrators have the obligation to keep the proceeding confidential, otherwise they can be held liable.
Requirement to retain (local) counsel?	No legal obligation to hire counsels.
Ability to present party employee witness testimony?	There are no restrictions, but the relationship would be relevant to the evidentiary weight granted.
Ability to hold meetings and/or hearings outside of the seat?	Yes.
Availability of interest as a remedy?	The arbitral tribunal can award interest if requested and if the law applicable to the merits allows it.
Ability to claim for reasonable costs incurred for the arbitration?	Yes.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Under Romanian law, lawyers are not allowed to conclude <i>quota litis</i> agreements.
Party to the New York Convention?	Yes.
Other key points to note	ϕ
WJP Civil Justice score (2017-2018)	0.65

RUSSIA, BY FRESHFIELDS BRUCKHAUS DERINGER

<p>Key places of arbitration in the jurisdiction</p>	<p>As a practical matter, Moscow is the key place for arbitration in Russia. At the time of writing, there are just four institutions eligible to administer arbitrations under Russia’s new arbitration legislation, and all of them located in Moscow. These are the two institutions which obtained a governmental permit required under the country’s new arbitration legislation (the Arbitration Centre with the Institute of Modern Arbitration and the Arbitration Centre with the Russian Union of Industrialists and Entrepreneurs) and the two institutions which were exempted from the permit requirement: Russia’s most important arbitration institution, the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC), and the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation. Some of these institutions have established or are establishing branches in the Russian regions. For example, the ICAC opened branches in Rostov-on-Don, Irkutsk, Ufa and Kazan, with plans for further regional expansion, and the Arbitration Centre with the Institute of Modern Arbitration opened a Far East branch with offices in Vladivostok and Petropavlovsk-Kamchatsky. Numerous other arbitral institutions have been established in Moscow and Russia’s regions before adoption of the new Russian arbitration legislation in late 2015, but at the time of writing, none of them holds a governmental permit as required under the new legislation, which presently bars them from administering arbitrations. (See also Other key points to note below.) Hearings can generally be conducted outside of the location of the institution (subject to any provisions to the contrary in the applicable arbitration rules), and <i>ad hoc</i> proceedings can take place anywhere in the country.</p>
<p>Civil law / Common law environment?</p>	<p>Russia is a civil law country. Legislative acts are the primary sources of law. Court decisions are not officially regarded as sources of law, but guidance from the highest level of courts (<i>i.e.</i>, the Constitutional Court, the Supreme Court and – prior to its dissolution – the Higher Arbitrazh Court) determines how laws are to be interpreted.</p>
<p>Confidentiality of arbitrations?</p>	<p>Russia has separate statutes for “international” and domestic arbitrations. The former generally applies to Russia-seated arbitrations with significant cross-border elements and to the recognition and enforcement of foreign awards in Russia, while the latter regulates domestic arbitration of “intra-Russian” disputes.</p> <p>The new Russian statute on domestic arbitration expressly establishes the confidentiality of arbitral proceedings, but the statute on international commercial arbitration does not include analogous provisions. In practice, confidentiality is sometimes</p>

	addressed in arbitration rules (for instance, there are confidentiality provisions in the ICAC arbitration rules).
Requirement to retain (local) counsel?	<p>There is no requirement for parties to be represented by external counsel in Russian arbitrations.</p> <p>Federal Law of 31 May 2002 'On Advocate Activities and Advocacy in the Russian Federation' regulates foreign advocates' activities in Russia. According to Article 2 of that law, foreign advocates may provide legal assistance in the Russian Federation on matters of law of the country from which they come, provided that they are registered in a special Russian registry of foreign advocates. 'Advocate' is a special subcategory of Russian legal professional (essentially, a trial attorney being a member of advocates' bar organization, to some extent akin to barristers in English court practice). Most lawyers in Russia (including trial lawyers) are not advocates. Russian law does not require lawyers (including trial lawyers) to be advocates, does not require admission to the advocates' bar as a pre-condition to practicing law, and does not state that Russian or foreign legal professionals who represent clients in courts or arbitration are automatically deemed to be advocates. While Article 2 appears to apply to representation of clients in Russian courts, it is unclear whether it also applies to representation in arbitration.</p>
Ability to present party employee witness testimony?	It is possible to present party employee witness testimony. There are no specific rules in Russian law regulating witness testimony in arbitration.
Ability to hold meetings and/or hearings outside of the seat?	Russia's arbitration laws do not prohibit holding meetings and/or hearings outside of the seat.
Availability of interest as a remedy?	There are no procedural rules in Russian law specifically regulating the interest that a tribunal may or should award. Assuming Russian substantive law applies to the dispute, interest can be awarded as a remedy for non-performance of financial obligations; in the absence of the parties' agreement to the contrary, interest is to accrue at the "key rate" (ключевая ставка) of the Bank of Russia for the relevant default periods (Article 395(1) of the Civil Code).
Ability to claim for reasonable costs incurred for the arbitration?	As a matter of practice, costs are usually borne by the losing party, with the successful party recovering arbitrators' fees and expenses, fees and expenses of the arbitration institution and its own reasonable legal costs and expenses. Cost allocation is subject to agreement between the parties and the applicable arbitration rules, and usually tribunals have wide discretion in this regard.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Contingency fees of lawyers are not expressly prohibited as a matter of law, but courts have repeatedly held such fee arrangements to be unenforceable. Third-party funding of arbitration is not expressly regulated. Russian parties are increasingly considering seeking third party funding available

	<p>from foreign funders, at least in respect of proceedings seated outside Russia. Funder firms have also started to appear domestically.</p>
<p>Party to the New York Convention?</p>	<p>Russia is a party to the New York Convention, as the legal successor to the USSR. The USSR made a reservation that it will apply the Convention in respect of arbitral awards made in the territories of non-contracting states only on a reciprocal basis.</p>
<p>Other key points to note</p>	<p>Russia's arbitration laws were overhauled by reform legislation passed on 29 December 2015 (in force from 1 September 2016). According to the reform legislation, all Russian arbitration institutions except the ICAC and the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation (MAC) must receive a special permit from the Government and deposit their rules before 1 November 2017, otherwise they are not eligible to administer arbitrations in Russia. At the time of writing, only two arbitration institutions received such permits: the Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs and the Arbitration Center at the Institute of Modern Arbitration. Permits may also be issued after 1 November 2017 (including to institutions that have had their filings rejected), and the number of eligible arbitral institutions in Russia is expected to grow with time. Ad hoc arbitrations are not prohibited, except in respect of corporate disputes in respect of Russian companies, which is a defined term encompassing all disputes relating to the incorporation, management and participation in a Russian corporation, and may in practice include post-M&A disputes in respect of Russian companies.</p> <p>As a matter of Russian law, corporate disputes can only be arbitrated in arbitral institutions (Russian or foreign) holding a Russian Government permit (as above), and cannot be arbitrated ad hoc. While it can be argued that foreign arbitral institutions can administer Russian corporate arbitrations without a permit, the more conservative reading of the reform legislation suggests that resulting awards would not be enforceable in Russia. In addition, some types of corporate disputes (<i>e.g.</i>, most types of disputes relating to "strategic" Russian companies, as defined in Russian legislation on foreign investment, <i>i.e.</i> entities engaged in certain listed types of sensitive businesses such as the atomic industry, defense industry, mining at major mineral deposits, major mass media and dominant telecommunications companies, and more), are non-arbitrable. Foreign arbitral awards are generally enforceable in Russia based on the New York Convention, but as noted a foreign award is likely to be refused recognition and enforcement in Russia if rendered in respect of a Russian corporate dispute at a foreign arbitral institution holding no Russian Government permit, or in foreign-seated ad hoc proceedings.</p>

	<p>It is important to be aware of whether a dispute will qualify as 'domestic' or 'international' for Russian law purposes. It is arguable that domestic disputes are not capable of being referred to arbitration abroad. If the dispute qualifies as corporate, it is also important to check when the arbitration clause was made. The new Russian arbitration legislation only allows the parties to make arbitration clauses in respect of Russian corporate disputes (including post-M&A disputes) from 1 February 2017 and suggests that earlier arbitration clauses relating to such disputes are non-enforceable.</p>
<p>WJP Civil Justice score (2017-2018)</p>	<p>0.53</p>

SERBIA, BY MORAVČEVIĆ VOJNOVIĆ AND PARTNERS IN COOPERATION WITH SCHOENHERR

Serbian arbitration law is currently framed by the 2006 Arbitration Act ("SAA"), modelled after the 1985 UNCITRAL Model Law, with some additions as specified further below. However, before the SAA was enacted, arbitration law was governed by the more general legislation, such as the former Codes of Civil Procedure. In that sense, it could be said that Serbian law is traditionally accepting arbitral dispute resolution, as also evidenced in the operation of, at the moment, two distinct arbitral institutions: one attached to the Serbian Chamber of Commerce, and the other established by the Serbian Arbitration Association.

Key places of arbitration in the jurisdiction	Belgrade
Civil law/Common law environment?	Civil law
Confidentiality of arbitrations?	Not explicitly prescribed under the Serbian Arbitration Act.
Requirement to retain (local) counsel?	Not explicitly provided.
Ability to present party employee witness testimony?	Not forbidden
Ability to hold meetings and/or hearings outside of the seat?	Permitted, unless the parties agreed otherwise.
Availability of interest as a remedy?	The SAA is silent on the matter of interest. This matter is generally regarded as a part of substantive law.
Ability to claim for reasonable costs incurred for the arbitration?	The SAA does not provide explicit rules for the allocation of costs. In practice, arbitrators take into consideration all the facts of the case, including the outcome, before costs allocation.
Restrictions regarding contingency fee arrangements and/or third-party funding?	The SAA does not regulate contingency fee arrangements and/or third-party funding. Local bar rules allow lawyers to agree on type of contingency fees for up to 30% of the value of the dispute (not the value of awarded amount).
Party to the New York Convention?	Yes, with reservations with regard to reciprocity, commercial disputes and retroactive application.
Other key points to note	None
WJP Civil Justice score (2017-2018)	0.49

SINGAPORE, BY RAJAH & TANN SINGAPORE LLP

Arbitration law in Singapore is consistent with the Model Law regime – it is generally pro-arbitration focused, premised on minimal curial intervention. Arbitration awards – both domestic (generally, arbitrations seated in Singapore) and international (generally, where at least one of the parties has its place of business in any state other than Singapore, or the place with which the subject-matter of the dispute is most closely connected is situated outside of the state in which the parties have their place of business) are readily enforceable before the Singapore courts.

Courts are also an avenue for support during, and before, the arbitration process. For instance, parties may apply to the Singapore court for interim measures in support of the arbitration (for instance the seeking of injunctions). Where possible, however, these applications should first be made to the tribunal.

Recently, Singapore has embraced third-party funding, legalising it in the realm of arbitration. Parties involved in arbitration (as well as mediation and arbitration related court proceedings) may now avail themselves of third party funding, subject to certain restrictions as provided for in the applicable regulation.

Key places of arbitration in the jurisdiction	Singapore is a city-state.
Civil law / Common law environment?	Common law.
Confidentiality of arbitrations?	Whilst the duty of confidentiality in arbitration is not expressly embodied in statute, case law confirms that there is an implied common law duty of confidentiality of arbitrations. ⁴⁰
Requirement to retain (local) counsel?	Parties can either retain outside counsel or be self-represented. However, in arbitration-related proceedings in court, all companies need to be represented by counsel.
Ability to present party employee witness testimony?	There is nothing in Singapore law that prohibits this <i>per se</i> .
Ability to hold meetings and/or hearings outside of the seat?	There is nothing in Singapore law that prohibits this <i>per se</i> .
Availability of interest as a remedy?	Yes. There are no restrictions prescribed in respect of the awarding of interest. ⁴¹

⁴⁰ See *Myanma Yang Chi Oo Co Ltd v Win Win Nu and another* [2003] 2 SLR(R) 547 at [17]: “The first issue that is to be resolved is whether there is an implied duty of confidentiality. I prefer the English position over the Australian. Parties who opt for arbitration rather than litigation are likely to be aware of and be influenced by the fact that the former are private hearings while the latter are open hearings. Rather than to say that there is nothing inherently confidential in the arbitration process, it is more in keeping with the parties’ expectations to take the position that the proceedings are confidential, and that disclosures can be made in the accepted circumstances.” See also *International Coal Pte Ltd v Kristle Trading Ltd and another and another suit* [2009] 1 SLR(R) 945 at [82]: “As a matter of law, an obligation of confidentiality is to be implied in arbitration proceedings due to the private nature of such proceedings”; and *AAY and others v AAZ* [2011] 1 SLR 1093 at [55]: “... as a principle of arbitration law at least in Singapore and England, the obligation of confidentiality in arbitration will apply as a default to arbitrations where the parties have not specified expressly the private and/or confidential nature of the arbitration. While parties anticipating international arbitration would remain well advised to agree prospectively on the obligation of confidentiality, there is no need to do so where Singapore is to be the seat of the arbitration because confidentiality will apply as a substantive rule of arbitration law, not through the IAA or the AA, but from the common law.”

⁴¹ See section 35 of the AA; section 20 of the IAA.

Ability to claim for reasonable costs incurred for the arbitration?	Yes. Case law confirms that costs are for the tribunal to decide.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Third-party funding is generally allowed in arbitration, mediation and arbitration-related court matters. Contingency fee arrangements are not allowed.
Party to the New York Convention?	Yes.
Other key points to note	φ
WJP Civil Justice score (2017-2018)	0.80

SLOVAKIA, BY ALLEN & OVERY

Key places of arbitration in the jurisdiction	Bratislava. It is also common for local parties to submit their dispute to the Vienna International Arbitration Centre, due to its proximity and well-known reputation.
Civil law / Common law environment?	Slovakia is a civil law jurisdiction.
Confidentiality of arbitrations?	Arbitrators are bound by law to keep all the information they come across during the arbitral proceedings confidential. However, this duty does not apply to parties to an arbitration or their representatives.
Requirement to retain (local) counsel?	Parties to arbitrations seated in Slovakia are free to engage an outside counsel or be self-represented.
Ability to present party employee witness testimony?	There are no statutory restrictions as to the evidence that can be presented to the arbitral tribunal, which has wide discretion in determining which evidence will be admitted.
Ability to hold meetings and/or hearings outside of the seat?	It is accepted that arbitral hearings and procedural meetings may take place in a different country from the seat of arbitration.
Availability of interest as a remedy?	Interest on the principal claim can be awarded. It is unlikely that interest on costs of the arbitration would be ordered.
Ability to claim for reasonable costs incurred for the arbitration?	Parties to an arbitration are able to recover costs incurred in the arbitration. Generally, the 'costs follow the event' principle applies.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Legally speaking, there are no restrictions regarding third party funding arrangements. Contingency fee arrangements are allowed up to 20 % of the amount in dispute.
Party to the New York Convention?	Slovakia is a party to the New York Convention, subject to the reciprocity reservation.
Other key points to note	∅
WJP Civil Justice score (2017-2018)	∅

SPAIN, BY GARRIGUES

The importance of both domestic and international arbitration have increased in Spain since the Arbitration Act⁴² (" the SAA") was passed in 2003, and the Spanish courts have generally displayed a pro-arbitration approach. In this regard, it is important to note that arbitration in Spain is mainly based on the principle of party autonomy and thus, the parties may decide how most part of the procedure will be developed. Consequently, the arbitral proceeding is characterized, as per its own nature, for its flexibility and efficiency. However, there are certain mandatory provisions on procedure from which the parties may not deviate (i.e. impair number of arbitrators).

Key places of arbitration in the jurisdiction	The key places of arbitration in Spain are Madrid and Barcelona.
Civil law / Common law environment?	Spain has a civil law system based on comprehensive legal codes and laws rooted in Roman Law.
Confidentiality of arbitrations?	According to Article 24(2) SAA, arbitrators, the parties and the arbitral institutions shall keep confidential any information received in the course of the arbitral proceedings. Although this provision seems to apply only to substantive information received during the proceedings, it is however extended to any kind of document and information provided during the arbitration (that is, the submissions, award, etc.).
Requirement to retain (local) counsel?	No requirements exist.
Ability to present party employee witness testimony?	There are no specific rules either on who can or cannot appear as a witness. Therefore, there is no restriction on the ability to present party employee witness testimony.
Ability to hold meetings and/or hearings outside of the seat?	Pursuant to Article 26 SAA, the parties are free to agree on the place of arbitration. However, arbitrators may, after consulting the parties and unless otherwise agreed by them, meet at any place they deem appropriate for hearing witnesses, experts or the parties, examining or recognising goods, documents or persons.
Availability of interest as a remedy?	Interest is allowed under Spanish law. As to the principal amount, it includes the interest agreed by the parties or, failing such agreement, the legal interest rate published in the Official Gazette (the interest rate provided in the Spanish Act 3/2004, of 29 December, against late payment in commercial transactions, also applies to certain commercial transactions).
Ability to claim for reasonable costs incurred for the arbitration?	Pursuant to Article 37(6) SAA, the award will include the arbitrators' decision on costs related to the arbitration, which will include their own fees and expenses and, where appropriate, the fees and expenses of counsels or representatives of the parties, the cost of the service provided by the institution administering

⁴² Act 20/2003, of 23 December 2003, on Arbitration (*Ley 20/2003, de 23 de diciembre, de Arbitraje*).

	<p>the arbitration, as well as any other costs incurred during the arbitration proceedings. Such costs do not usually include travel and/or accommodation arrangements for witnesses or experts. The SAA remains silent regarding the apportionment of arbitration costs. Consequently, the criteria established under the Spanish Civil Procedure Act, which, in general terms, only provides for the recoverability of the costs by a party who is entirely successful (in case of partial success, each party bears its own expenses and the common costs are split), does not always apply. In order to decide on such costs, the arbitrators will take into account the parties' agreement; but if such agreement does not exist, the arbitrators are not bound by any specific rules in this regard. Generally, arbitrators take into consideration not only the outcome of the arbitration, but also the behaviour of the parties during the proceedings and if there has been frivolous disregard to the other party's rights.</p>
Restrictions regarding contingency fee arrangements and/or third-party funding?	<p>No restrictions regarding contingency fee arrangements exist. Contingency and success fees were historically banned, but were recently accepted as a pro-competitive measure (the prohibition of contingency fee arrangements under Article 16 of the Code of Conduct of Spanish Advocates was suspended by the agreements passed by the Plenary of the General Council of Spanish Advocates on 10 December 2002 and 21 July 2010). The SAA does not govern third-party funding. Although in practice this type of funding is being used (particularly after the prohibition of contingency fees was lifted), there is still scope for improvement and development.</p>
Party to the New York Convention?	<p>Spain is a Contracting State to the New York Convention since 12 May 1977 and no reservations or declarations were made. The Convention entered into force in Spain on 10 August 1977.</p>
Other key points to note	<p>φ</p>
WJP Civil Justice score (2017-2018)	<p>0.70 (23rd position in the global ranking).</p>

SWEDEN, BY MANNHEIMER SWARTLING

Traditionally as well as today, Sweden is one of the favorite places for international arbitration. The Arbitration Institute of the Stockholm Chamber of Commerce, founded in 1917, has been seen as a preferred neutral venue for arbitrations in East/West disputes involving parties from the USA and Russia (including former Soviet Union), and later also from Asia. Stockholm has also become a much-used venue for energy related disputes and investor-state disputes. The Swedish Arbitration Act is highly developed and in line with best practices of international arbitration. The arbitral proceedings are safeguarded by arbitration-friendly courts.

Key places of arbitration in the jurisdiction	Stockholm.
Civil law / Common law environment?	<p>Unique Scandinavian legal environment with roots in Civil law tradition in substantive law but also features of Common law in procedural law.</p> <p>The prevailing Civil law traditions are evident in the dependence on statutory law as the primary source of law and in the non-binding, yet authoritative, nature of court judgments. The area of contract law has a special close connection with Civil law traditions.</p> <p>Common law features are particularly evident in the adversarial nature of court and arbitral proceedings. It is for the parties to outline the facts of the case and present the evidence they deem necessary, with judges and arbitrators rarely embarking on fact-finding or appointing their own experts.</p>
Confidentiality of arbitrations?	<p>Arbitrations are private but not confidential unless so agreed. Arbitrators have a duty of confidentiality. Parties do not have a duty of confidentiality, unless expressly agreed.</p> <p>No third-party participation. No duty to register Swedish awards.</p>
Requirement to retain (local) counsel?	No.
Ability to present party employee witness testimony?	Admissible.
Ability to hold meetings and/or hearings outside of the seat?	Yes, if not otherwise agreed by the parties.
Availability of interest as a remedy?	Yes.
Ability to claim for reasonable costs incurred for the arbitration?	Yes.
Restrictions regarding contingency fee arrangements and/or third-party funding?	<p>Contingency fees are generally prohibited for members of the Swedish bar, but no general restriction for foreign counsel.</p> <p>No restrictions on third party financing.</p>
Party to the New York Convention?	Yes.

Other key points to note	φ
WJP Civil Justice score (2017-2018)	Sweden's score is 0.86 ranking it 4 th in the world.

SWITZERLAND, BY LEVY KAUFMANN-KOHLER

With its longstanding tradition and experience in international arbitration, Switzerland remains one of the preferred arbitral seats in the world. Swiss arbitrators continue to be among the most frequently appointed and Swiss substantive law among the most frequently chosen laws to govern international contracts. Chapter 12 of the Swiss Private International Law Act (“PILA”) is a modern and innovative arbitration law. Its main strengths include its clarity and conciseness, making it easily accessible for (foreign) lawyers and non-lawyers alike, as well as the great importance afforded to party autonomy, meaning that the parties are free to fashion the proceedings in accordance with their specific needs. Switzerland’s reputation for neutrality and stability and its courts’ consistent pro-arbitration approach further explain why parties often choose Switzerland as a place of arbitration and why numerous arbitration institutions are based here.

Key places of arbitration in the jurisdiction	Geneva and Zurich.
Civil law / Common law environment?	Civil law
Confidentiality of arbitrations?	Absent an express agreement to the contrary, the arbitrator’s contract implies a duty of confidentiality for the arbitrators. It is controversial whether the arbitration agreement implies a duty of confidentiality for the parties. They may enter into an express confidentiality agreement. ⁴³
Requirement to retain (local) counsel?	There is no requirement to retain Swiss counsel for arbitration proceedings with a seat in Switzerland. By contrast, applications to the Swiss Supreme Court must be signed by the party or an attorney who is authorised to represent parties before the Swiss courts pursuant to the Swiss Federal Lawyers’ Act (“LLCA” or “ <i>Loi fédérale sur la libre circulation des avocats</i> ” in French, “ <i>Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte</i> ” in German) or in accordance with an international treaty (Article 40(1) of the Swiss Supreme Court Act (“SCA”). Concerning proceedings before the <i>juge d’appui</i> , the Swiss Code of Civil Procedure (“CCP”) does not require the parties to be professionally represented by an attorney (Article 68(1) CCP). As under Article 40(1) SCA, pursuant to Article 68(2) CCP, they may however choose to be represented by a “ <i>lawyer admitted to represent parties before the Swiss courts under the [LLCA]</i> ”. ⁴⁴

⁴³ Gabrielle KAUFMANN-KOHLER/Antonio RIGOZZI, *International Arbitration – Law and Practice in Switzerland*, Oxford 2015, paras. 3.34, 4.188, 7.177; Noradèle RADJAI, Confidentiality of Arbitration in Switzerland, *Arbitration in Switzerland – The Practitioner’s Guide*, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands 2013, paras. 18-23.

⁴⁴ Attorneys qualified in a Member State of the European Union (“EU”) or the European Free Trade Association (“EFTA”) may under certain conditions represent parties before the Swiss courts (Articles 21 to 29 LLCA), subject to the relevant provisions of cantonal law. In Geneva, attorneys qualified in a non-EU/EFTA Member State may under certain conditions obtain an *ad hoc* authorization to assist a party before the Geneva courts. However, in order to represent the party before the Geneva courts, the non-EU/EFTA attorney must act with an attorney registered with a Swiss bar (Article 23 of the Geneva Lawyers’ Act (“*Loi sur la profession d’avocat*” or “LPAV”).

Ability to present party employee witness testimony?	As a rule, any person capable of testifying about the facts based on his or her own perception may be a witness, including the parties themselves. ⁴⁵
Ability to hold meetings and/or hearings outside of the seat?	Meetings and/or hearings can be conducted outside of Switzerland.
Availability of interest as a remedy?	Yes, generally.
Ability to claim for reasonable costs incurred for the arbitration?	The parties have a right to a decision on costs and the arbitral tribunal has an obligation to make such a decision, at the latest in the final award.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Swiss law does not prohibit third party funding. Under Article 12(1)(e) LLCA, Swiss attorneys cannot enter into a prior agreement with their clients providing for a contingency fee based entirely on the outcome of the case (<i>pactum de quota litis</i>); nor can they agree to waive legal fees in the event of an unfavourable outcome. A fee arrangement containing elements of a contingency fee (<i>pactum de palmario</i>) is allowed under certain conditions.
Party to the New York Convention?	Switzerland is a party to the New York Convention. There is no reservation of reciprocity.
Other key points to note	∅
WJP Civil Justice score (2017-2018)	∅

⁴⁵ Christian OETIKER, Ad Hoc Arbitration in Switzerland, *Arbitration in Switzerland – The Practitioner’s Guide*, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands 2013, para. 44.

TOGO, BY MARTIAL AKAKPO & ASSOCIÉS

Key places of arbitration in the jurisdiction	Lomé, as the capital city.
Civil law / Common law environment?	Civil law. The Uniform Arbitration Act is a treaty which applies in all member-States of the OHADA, to which the Togo is a party.
Confidentiality of arbitrations?	The Uniform Arbitration Act does not expressly provide for confidentiality, although certain set of arbitral rules on which the parties can agree (such as the CATO Rules and the CCJA rules provide for confidentiality. Hearings are usually held in closed session and awards are not published.
Requirement to retain (local) counsel?	Common, but no legal requirement.
Ability to present party employee witness testimony?	Parties may submit witness testimonies of their employees. It lies in the arbitral tribunal's discretion to weigh such evidence.
Ability to hold meetings and/or hearings outside of the seat?	Parties may choose to hold meetings at a different venue. Unless the parties have agreed on a specific venue, the tribunal has discretion to decide where to hold meetings.
Availability of interest as a remedy?	Interest is a matter of the applicable substantive law.
Ability to claim for reasonable costs incurred for the arbitration?	The arbitral tribunal has discretion in respect of the allocation of costs but must take into consideration the circumstances of the case.
Restrictions regarding contingency fee arrangements and/or third-party funding?	The Togolese bar rules prohibit fee arrangements pursuant to which the lawyers' fees are exclusively determined on the basis of the outcome of the dispute. Otherwise, they provide that the lawyers' fees are freely agreed upon between a lawyer and its client. Third-party funding is not codified in Togolese arbitration law, but it is likely to be accepted.
Party to the New York Convention?	No
Other key points to note	∅
WJP Civil Justice score (2017-2018)	0.81

UKRAINE, BY REDCLIFFE PARTNERS

Ukraine is an arbitration-friendly jurisdiction with detailed regulation of courts' control over and support to international commercial arbitration. International and domestic arbitration are regulated in separate statutes: international commercial arbitration is regulated in the Law of Ukraine On International Commercial Arbitration (the "ICA Law") while domestic arbitration is subject to the Law on Domestic Arbitration Courts. In practice, the only international commercial arbitration institution in Ukraine that administers international commercial arbitration disputes is the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (the "ICAC"), however there is no legal restriction to set up an institution for administering international commercial arbitrations.

Key places of arbitration in the jurisdiction	Kyiv.
Civil law / Common law environment?	Civil law.
Confidentiality of arbitrations?	The ICA Law does not address confidentiality and it is therefore advisable to insert confidentiality provisions into the arbitration agreement.
Requirement to retain (local) counsel?	No.
Ability to present party employee witness testimony?	Yes.
Ability to hold meetings and/or hearings outside of the seat?	Yes.
Availability of interest as a remedy?	Interest as a remedy is considered to be a substantive rather than a procedural matter and an award of interest is therefore determined in accordance with the applicable substantive law. If Ukrainian substantive law applies, (i) pre-award interest shall be determined on the basis of the agreement of the parties; absent such agreement, the defaulting party, in case of breach of a monetary obligation, shall pay 3% statutory interest plus interest linked to the official inflation rate; (ii) post-award interest is not envisaged. The law expressly authorises Ukrainian courts to recognise awards with post-award interest that shall continue to accrue until the award is fully enforced. At the same time, the ICA Law does not authorise Ukraine-seated arbitral tribunals to order post-award interest.
Ability to claim for reasonable costs incurred for the arbitration?	Yes.
Restrictions regarding contingency fee arrangements and/or third-party funding?	No.
Party to the New York Convention?	Yes. Ukraine is a party to the New York Convention subject to the reciprocity reservation, and the communication dated 20 October

	<p>2015 that application and implementation by Ukraine of the obligations under the Convention, as applied to the occupied and uncontrolled territory of Ukraine, is limited and is not guaranteed, due to acts of illegal occupation and aggression by the Russian Federation.</p>
<p>Other key points to note</p>	<p>Disputes between Ukrainian entities with foreign investments and Ukrainian parties may be referred either to international arbitration, or to domestic arbitration. The restrictions of arbitrability of certain categories of disputes can be found in the Commercial Procedural Code of Ukraine. The legal framework for arbitration has undergone serious overhaul that (i) allowed court-awarded interim measures and taking of evidence in support of international arbitration, (ii) expanded the scope of arbitrable disputes, (iii) relaxed formal validity requirements for arbitration agreement, (iv) granted the possibility of consolidation of annulment and enforcement proceedings, and (v) introduced regulation of enforcement in foreign currencies.</p>
<p>WJP Civil Justice score (2017-2018)</p>	<p>0.51</p>

UNITED ARAB EMIRATES, BY AL TAMIMI & COMPANY

UAE Federal Arbitration Law No. 6 of 2018 on Arbitration has been recently issued and gazetted. It repeals the Arbitration Chapter of the UAE Civil Procedures Law No. 11 of 1992. The new law came into effect on 16 June 2018 and will apply to all ongoing and future arbitral proceedings. The new law is expected to significantly revamp arbitration in the UAE.

This GAP chapter on UAE is currently being updated to incorporate the provisions of the new UAE Federal Arbitration Law.

Arbitration has become a popular method of dispute resolution in the United Arab Emirates ("UAE"). The UAE has a number of popular seats for arbitration, including onshore Dubai and Abu Dhabi and the offshore financial centres such as the Dubai International Financial Centre ("DIFC") and Abu Dhabi Global market ("ADGM"). The recent trends have shown parties' willingness to submit their commercial disputes to arbitration, rather than only specialized disputes (e.g. construction). The arbitration rules of the UAE arbitration centres, such as the Dubai International Financial Centre-London Court of International Arbitration ("DIFC-LCIA") and Dubai International Arbitration Centre ("DIAC"), are generally modern and reflect the best practices of the international arbitration institutions.

Key places of arbitration in the jurisdiction	Dubai and Abu Dhabi.
Civil law / Common law environment?	The UAE is a civil law environment (excluding DIFC and ADGM, which are common law environments).
Confidentiality of arbitrations?	The UAE law does not provide for confidentiality of the arbitrations.
Requirement to retain (local) counsel?	There is no requirement to retain counsel. Parties can either retain outside (local or non-local) counsel or be self-represented.
Ability to present party employee witness testimony?	The UAE Civil Procedure Law No.11 of 1992 ("CPC") permits parties to present party employee witness testimony.
Ability to hold meetings and/or hearings outside of the seat?	Parties can hold meetings and hearings at any location of their choosing. However, for the arbitral award to be enforceable, it must be signed and issued in the UAE.
Availability of interest as a remedy?	The parties can recover interest as a remedy, subject to the provisions in the CPC.
Ability to claim for reasonable costs incurred for the arbitration?	The CPC does not confer a general right in relation to claims for costs. The ability to claim for reasonable costs incurred throughout the course of the arbitration depends on the parties' agreement and/or the applicable rules of the arbitration institution.
Restrictions regarding contingency fee arrangements and/or third-party funding?	The UAE law does not prohibit third-party funding in general. For example, the UAE permits subrogation of claims by insurers (Article 1030 of the UAE Civil Transaction Code). However, contingency fee arrangements are prohibited.

Party to the New York Convention?	The UAE is a signatory of the New York Convention. The New York Convention entered into force in the UAE on 19 November 2006.
Other key points to note	The UAE has few unusual features. The CPC requires UAE arbitral awards to be physically signed in the UAE to comply with the technical requirements required for a valid award and be enforceable. In addition, a corporate party to an agreement must be expressly and strictly authorised to agree to arbitration as a means of resolving disputes under the agreement. More recently, in 2016, Article 257 of the Federal Penal Code No.3 of 1987, as amended by Federal Decree Law No.7 of 2016 (the “Penal Code”) expanded potential criminal liability of arbitrators in the UAE. Previously, Article 257 only applied to experts. At present, Article 257 states that an arbitrator and an expert may be punished with imprisonment for issuing a decision or report “ <i>in contravention of the requirements of the duty of neutrality and integrity</i> ”. The potential criminal liability extends to arbitrators and experts sitting in the DIFC and ADGM since they are also subject to the criminal laws of the UAE.
WJP Civil Justice score (2017-2018)	0.68

**UNITED STATES, BY ARENT FOX LLP, DEBEVOISE & PLIMPTON LLP,
AND HUGHES HUBBARD & REED LLP**

The United States is one of the most sought-after arbitration venues in the world. The United States is known for vigorous enforcement of arbitral awards, neutral dispute resolution, and judicial preferences in favor of arbitration. The United States also has a reputation for permitting more invasive discovery than other jurisdictions, even in streamlined arbitration proceedings.

Many arbitrations in the United States are governed by the Federal Arbitration Act (“FAA”), which applies to any arbitration affecting interstate commerce (*i.e.*, commerce between one of the U.S. states) or international commerce. Each state typically has its own arbitration statute as well. However, a state statute generally applies only where the FAA is silent or if the dispute is entirely local to a particular state. The FAA bears some similarity to the UNCITRAL Model Law on International Commercial Arbitration. However, there are important differences. Unlike the Model Law, the FAA provides different grounds for vacating an award and few default rules of procedure where the parties fail to agree to a governing set of rules.

When considering arbitration in the United States, corporate and in-house counsel should consider the following factors about this jurisdiction:

Key places of arbitration in the jurisdiction	Popular venues include New York, Miami, San Francisco, Los Angeles, and Houston.
Civil law / Common law environment?	The U.S. is a common law country. Arbitrators are more likely to be persuaded by case law than in civil law countries.
Confidentiality of arbitrations?	U.S. arbitrations are not automatically confidential, but the parties may agree to keep the proceedings confidential.
Requirement to retain (local) counsel?	Each U.S. state separately governs the practice of law within its borders, and may prohibit foreign attorneys or attorneys from other U.S. states from participating in arbitrations located in that state.
Ability to present party employee witness testimony?	Arbitrators generally have broad discretion on evidentiary rulings, subject to any contrary agreement by the parties or applicable arbitration rules.
Ability to hold meetings and/or hearings outside of the seat?	Typically, there is an ability to hold meetings and/or hearings outside the seat.
Availability of interest as a remedy?	Parties in U.S. arbitrations may claim the full panoply of potential remedies, including pre- and post-judgment interest, costs, and potentially even punitive damages. However, the default “American Rule” is that each side pays its own attorney’s fees.
Ability to claim for reasonable costs incurred for the arbitration?	Parties are generally required to bear their own costs and legal fees, barring statutory provisions or an agreement to the contrary.
Restrictions regarding contingency fee arrangements and/or third-party funding?	The terms and legality of funding arrangements are governed by U.S. state laws. Each state has attorney ethical and possibly other rules (<i>e.g.</i> , champerty) that should be consulted.

Party to the New York Convention?	The U.S. is a party to the New York Convention and U.S. courts are empowered to enforce arbitral awards, including through injunctions and judgments.
Other key points to note	<p>U.S. law strongly favors arbitration, with limited avenues for challenging an arbitral award through judicial intervention</p> <p>U.S. arbitrators are considered more likely to grant extensive discovery, including potentially interrogatories and witness depositions, particularly in the case of domestic arbitration. However, the United States also offers robust protections for evidentiary and testimonial privileges.</p>
WJP Civil Justice score (2017-2018)	0.73

ZAMBIA, BY ERIC SILWAMBA, JALASI & LINYAMA LEGAL PRACTITIONERS

The prevailing law governing arbitration in Zambia is the Arbitration Act No. 19 of 2000 (the “**Act**”) which was enacted on 29 December 2000.⁴⁶ Subsidiary legislation includes the Arbitration (Code of Conduct and Standard) Regulations in Statutory Instrument No. 12 of 2007,⁴⁷ the Arbitration (Recognition of Arbitral Institutions) Regulations, 2001, in Statutory Instrument No. 73 of 2001,⁴⁸ and the Arbitration (Court Proceedings) Rules, 2001, in Statutory Instrument No. 75 of 2001.⁴⁹

Key places of arbitration in the jurisdiction	Lusaka
Civil law / Common law environment?	Common law
Confidentiality of arbitrations?	Yes
Requirement to retain (local) counsel?	Yes
Ability to present party employee witness testimony?	Yes
Ability to hold meetings and/or hearings outside of the seat?	Yes
Availability of interest as a remedy?	Yes, whether simple or compound. Where Zambian law is applicable to the issue, the Act limits the interest rate to the current lending rate as determined by the Bank of Zambia.
Ability to claim for reasonable costs incurred for the arbitration?	Yes
Restrictions regarding contingency fee arrangements and/or third-party funding?	Zambian practitioners may not claim contingency fees in an action, except in a suit or other contentious proceedings in any country other than Zambia to the extent that the local lawyer in that country would be permitted to receive a contingency fee in these proceedings.
Party to the New York Convention?	Yes
Other key points to note	ϕ
WJP Civil Justice score (2017-2018)	0.47

⁴⁶ The Arbitration Act No. 19 of 29 December 2000. Available at: <https://www.ciarb.org/docs/default-source/default-document-library/the-arbitration-act-zambia.pdf?sfv>.

⁴⁷ Arbitration (Code of Conduct and Standard) Regulations in Statutory Instrument No. 12 of 2007. Available at: <https://www.ciarb.org/docs/default-source/default-document-library/code-of-conduct-amp-standards-regulations-zambia.pdf?sfvrsn=2> and www.parliament.gov.zm/sites/default/files/documents/acts/Arbitration%20Act.pdf.

⁴⁸ Arbitration (Recognition of Arbitral Institutions) Regulations, 2001, in Statutory Instrument No. 73 of 2001. Available at: faolex.fao.org/docs/pdf/zam42364.pdf.

⁴⁹ Arbitration (Court Proceedings) Rules, 2001, in Statutory Instrument No. 75 of 2001. Available at: www.judiciaryzambia.com/2016/11/02/statutory-instrument-no-75-of-2001/.

DELOS GUIDE TO ARBITRATION PLACES (GAP)

1ST EDITION

PROFESSOR DAVID D CARON & PROFESSOR MAXI SCHERER
CHAIRS

THOMAS GRANIER & HAFEZ R VIRJEE
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**GAP COMBINED SUMMARIES
FOR ARBITRATION PRACTITIONERS**

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Palais Brongniart, 16 place de la Bourse, 75002 Paris, France
www.delosdr.org . safeseats@delosdr.org

#ACTIVATINGARBITRATION

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ALBANIA, BY HOXHA, MEMI & HOXHA

Chapter IX, Title III of the Second Part of the Albanian Civil Procedure Code (the “ACPC”),¹ Articles 393 to 399 contain the provisions relating to the recognition and enforcement of foreign judgements. These are also applicable to international arbitration awards.

Under Article 394 of the ACPC, foreign judgements are not recognized and enforced in the Republic of Albania, if:

- (a) according to Albanian law, the foreign court was not competent for the matter; or
- (b) the claim and the claim notice has not been properly and timely notified to the defaulting defendant, to allow it to organise its defense; or
- (c) the Albanian courts have already issued a diverging decision between the same parties in relation to the same matter and scope;
- (d) a claim is pending before Albanian courts and has been filed prior to the date on which the foreign judgement became final; or
- (e) the foreign judgement became final contrary to the law of the jurisdiction in which it has been taken; or
- (f) the foreign judgement is contrary to the fundamental principles of the Albanian legislation (i.e. public policy).

Pursuant to Article 399 of the ACPC, the provisions of Article 394 of the ACPC shall apply *mutatis mutandis* to international arbitration awards.

The ACPC further provides that if specific agreements exist between the Republic of Albania and foreign countries, then the terms of the international agreement shall apply regarding the recognition and enforcement of judgements of that country.

As a matter of fact, under Article 122 of the Albanian Constitution,² any international agreement ratified by law becomes part of the domestic legislation upon its publication on the Official Gazette of the Republic of Albania. Article 122 of the Albanian Constitution further provides that in case of conflicts between the provisions of the domestic laws, and those of ratified international agreements, the provisions of the latter shall prevail.

As the Republic of Albania ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, self-executing provisions of the New York Convention are part of the domestic legislation in Albania. Moreover, in compliance with the Albanian Constitution³ and the ACPC, in case of conflict, provisions of the New York Convention shall prevail.

Under the New York Convention, Albania has undertaken to accomplish, *inter alia*, the following obligations: recognize and enforce foreign arbitral awards and recognize agreements to submit disputes to international arbitration.

Date of arbitration law?	ϕ
UNCITRAL model law? If so, any key changes thereto?	ϕ

¹ Available at: <http://qbz.gov.al/botime/kodi%20i%20procedures%20civile.html>.

² Available at: <https://www.parlament.al/wp-content/uploads/2015/10/kushtetuta-perditesuar-1.pdf>.

³ Under Article 122 of the Albanian Constitution, any international agreement ratified by law becomes part of the domestic legislation upon its publication on the Official Gazette of the Republic of Albania.

Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	ϕ
Availability of <i>ex parte</i> pre-arbitration interim measures?	ϕ
Courts' attitude towards the competence-competence principle?	ϕ
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	<p>Under Article 394 of the ACPC, foreign judgements are not recognized and enforced in the Republic of Albania, if:</p> <ul style="list-style-type: none"> (a) according to Albanian law, the foreign court was not competent for the matter; or (b) the claim and the claim notice has not been properly and timely notified to the defaulting defendant, to allow it to organise its defense; or (c) the Albanian courts have already issued a diverging decision between the same parties in relation to the same matter and scope; (d) a claim is pending before Albanian courts and has been filed prior to the date on which the foreign judgement became final; or (e) the foreign judgement became final contrary to the law of the jurisdiction in which it has been taken; or (f) the foreign judgement is contrary to the fundamental principles of the Albanian legislation (<i>i.e.</i>, public policy). <p>Pursuant to Article 399 of the ACPC, the provisions of Article 394 of the ACPC shall apply <i>mutatis mutandis</i> to international arbitration awards.</p>
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	ϕ
Other key points to note?	ϕ

ALGERIA, BY BENNANI & ASSOCIÉS LLP

Arbitration procedures are governed by the Algerian Civil and Administrative Procedures Code, in which most of the general rules applicable to litigation proceedings are provided. This includes the principle of equal treatment between parties, the right of the parties to a fair trial, due process and an adversarial hearing, along with the adoption of the relevant characteristics of arbitration procedures such as the exclusion of the right to appeal arbitral awards and confidentiality and privacy in arbitration.

Date of arbitration law?	The Algerian Civil and Administrative Procedures Code, which entered into force on 25 February 2008, exclusively regulates arbitration procedures.
UNCITRAL Model Law? If so, any key changes thereto?	Arbitration procedures are not based on the UNCITRAL Model law.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Algerian courts and judges are not specialised in arbitration-related matters. Arbitration-related matters are usually handled by commercial judges and chairmen of first instance and appellate courts.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Unless otherwise agreed in the arbitration agreement, a diligent party may have recourse to pre-arbitration interim measures enforceable by Algerian courts.
Courts' attitude towards the competence-competence principle?	A court cannot claim jurisdiction over the subject-matter of a dispute already pending before an arbitral tribunal or subject to an arbitration pursuant to a valid arbitration agreement.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The enforcement of an arbitral award may be rejected if the arbitral A party resisting enforcement of a foreign arbitral award in Algeria may request from the Algerian court a stay of enforcement until annulment proceedings are complete. award is contrary to international public order.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	A party resisting enforcement of a foreign arbitral award in Algeria may request from the Algerian court a stay of enforcement until annulment proceedings have been concluded. If the award is eventually annulled by the courts of the seat, the party who has obtained the annulment of the award seek to enforce in Algeria the foreign judgment which has annulled the award in order to preclude attempt at enforcing the annulled award, pursuant to article 605 of the CAPC.
Other key points to note?	∅

ARGENTINA, BY RIVERA & ASOCIADOS

Law No. 27.449 regarding international commercial arbitration was passed on 25 July 2018 and published in the official bulletin on 26 July 2018. It since governs any and all questions regarding international commercial arbitration under Argentinian law as of its publications and implements substantial changes in this regard. This GAP Chapter on Argentina is currently being updated to incorporate the provisions and implications of the new law and will be published shortly.

The new Civil and Commercial Code, which has been in force since August 1st, 2015, contains a chapter on the arbitration agreement, which applies to both international and domestic arbitration. It does not apply to arbitrations to which the State or the Provinces are parties.

This chapter includes provisions on the: definition, form, content and effects of the arbitration agreement; types of disputes that may not be subject to arbitration; interim measures; appointment of arbitrators and challenging their appointment; and duties and compensation of arbitrators.

The National Civil and Commercial Code’s chapter on the arbitration agreement does not regulate the procedural aspects of the arbitration. So, the chapter on the arbitration agreement is complemented with the existence of procedural regulations of arbitration in provincial procedural codes and in the National Civil and Commercial Procedural Code (1968), respectively applicable in each province and in the federal jurisdiction. These procedural codes provide for the recourses available after an award has been made (such as appeal, annulment and clarification requests) and the terms, grounds, and conditions for their filing.

The recognition and enforcement of foreign arbitral awards is primarily governed by the treaties signed and ratified by Argentina, notably the New York Convention, the OAS Inter-American Convention on International Commercial Arbitration 1975 (Panama Convention) and the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards 1979.

Date of arbitration law?	The new Civil and Commercial Code, which has been in force since August 1 st , 2015.
UNCITRAL Model Law? If so, any key changes thereto?	Currently the Executive Power has drafted a bill based on the Model Law that would apply exclusively to international commercial arbitrations. It has been approved by the Senate and is currently being analyzed by the House of Representatives.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	There are no specialized courts or judges for arbitration-related matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	<p>A tribunal may adopt <i>ex parte</i> interim measures (Article 1655 of the National Civil and Commercial Code) that are expressly allowed in domestic proceedings. In this regard, the power of judges to grant interim measures is very broad since the National Civil and Commercial Procedural Code expressly authorizes to grant any measure that may be necessary to provisionally ensure the enforcement of the final judgment under the circumstances (Section 230 of the NCCPC).</p> <p>However, the arbitrators’ duty to ensure the equal treatment of the parties (Article 1662, Civil and Commercial Code) may be</p>

	<p>interpreted as imposing some limitations on their ability to adopt <i>ex parte</i> interim measures and arbitrators may decide to hear both parties before adopting any measure. That is why, in practice, Argentine lawyers prefer to request interim measures before domestic courts.</p>
<p>Courts' attitude towards the competence-competence principle?</p>	<p>Unless otherwise stated in the arbitration agreement, the arbitrators have the power to decide on their own jurisdiction, which includes the power to rule on the existence or the validity of the arbitration agreement (Article 1654, Civil and Commercial Code).</p> <p>Article 1656 of the Code recognizes the concept of <i>Kompetenz-Kompetenz</i>. It states that courts must refuse jurisdiction if the dispute is brought before them, unless the arbitral tribunal has not been constituted yet and the arbitration agreement is manifestly void or inapplicable. In <i>Francisco Ctibor SACI v. Walmart</i> (2016) the Commercial Court of Appeal held that, according to this article 1656, the courts' intervention prior to the constitution of the arbitral tribunal is limited to cases in which the nullity of the arbitration agreement is evident and clear.</p>
<p>Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?</p>	<p>According to Articles 760 and 761 of the National Civil and Commercial Procedural Code, an award issued in an arbitration at law may be annulled on the following grounds:</p> <ul style="list-style-type: none"> • Essential procedural errors: Courts may only annul an award based on the existence of procedural flaws that affect due process but may not review the merits of the case. It is similar to Article V.1.b) of the New York Convention. • Award rendered after the term to do so has elapsed. • Award decides issues not submitted to the Arbitral Tribunal. It is similar to Article V.1.c) of the New York Convention. • Award is inconsistent or contains contradictory decisions. This ground is limited to the dispositive part of the award. <p>Apart from these statutory grounds, in cases where a State entity is a party to the arbitration, the Argentine Supreme Court has held that an award may also be annulled if it is contrary to public policy or it is illegal, unreasonable or unconstitutional (<i>Cartellone. c. Hidroeléctrica Norpatagónica S.A.</i>, 2004). The 2015 reform has not affected the existence of this non-statutory ground.</p> <p>Concerning arbitration in equity (<i>amiable compositeur</i>), the award may not be appealed and it may be annulled if it was rendered after the time limit or if it decides issues not submitted to the arbitral tribunal (Section 771 of the National Civil and Commercial Procedural Code). Argentine commentators consider that the existence of essential procedural errors constitutes a non-statutory ground of annulment.</p>
<p>Courts' attitude towards the recognition and enforcement of</p>	<p>There are no precedents from Argentine Courts interpreting the New York Convention on this issue.</p>

foreign awards annulled at the seat of the arbitration?	
Other key points to note?	<ul style="list-style-type: none">• Argentine Commercial courts, in general, do not interfere with arbitration proceedings between private parties and have consistently refused to review the merits of awards. There are some isolated precedents in which the Commercial Court reviewed the interpretation of the contract made by the arbitral tribunal (<i>EDF International v. Endesa Internacional</i>, 2009) on the ground that the award had disregarded the applicable Argentine Law. However, no similar decision has been issued since. In disputes involving the Argentine State or other State parties, the risk of unreasonable domestic court intervention is significantly higher.• The existence of multiple – and sometimes contradictory – sources of law (Civil and Commercial Code and Civil and Commercial Procedural Codes in each province) hinders the existence of a modern arbitration law. The recent Arbitration Bill sent to Congress based on the UNCITRAL Model Law would provide a uniform regulation of international arbitration (for disputes primarily based on private law) thus limiting the scope of the Civil and Commercial Code and of all the provincial procedural codes to domestic arbitration.• Argentina still lacks a regulatory framework for the arbitration of disputes not primarily governed by private law –such as disputes concerning State parties based on public law– since the current Civil and Commercial Code does not apply to this type of dispute. It would be desirable to have a predictable legal framework for arbitration with state-owned companies or with the Argentine State.

AUSTRIA, BY CERHA HEMPEL SPIEGELFELD HLAWATI RECHTSANWÄLTE GMBH (CHSH)

The Austrian Arbitration Act offers high flexibility in respect to arbitration proceedings: There are few mandatory provisions, which particularly ensure the fair and equal treatment of the parties and provide for minimal state supervision. Generally, the state courts have proven to be reluctant to intervene in arbitration proceedings or to reverse decisions of arbitral tribunals. Jointly with the reliability and effectiveness of Austrian state courts, the legal and procedural framework in Austria offers strong arguments in favour of conducting arbitration proceedings in Austria.

Date of arbitration law?	The Austrian Arbitration Act setting out the current framework for arbitration entered into force on 1 July 2006.
UNCITRAL Model Law? If so, any key changes thereto?	The Model Law has mostly been implemented. Key differences are consumer and employee protection provisions, which practically make it impossible for sellers and employers to pursue claims against consumers or employees in arbitration.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	At the lower courts, there are no specialized arbitration judges. However, the Supreme Court has a specialized department and serves as the first and final instance for the adjudication of challenges to an award.
Availability of <i>ex parte</i> pre-arbitration interim measures?	<i>Ex parte</i> interim measures cannot be issued by an arbitral tribunal.
Courts' attitude towards the competence-competence principle?	State courts are generally arbitration-friendly and fully recognize the principle of competence-competence. The decision of the arbitral tribunal on its own competence is only subject to review in case of a challenge of the award.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	There are no additional grounds of annulment compared to the New York Convention.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	State courts generally do not recognize or enforce foreign awards that have been annulled at the seat of arbitration; if the ground for annulment have been a lack of arbitrability or a violation of <i>ordre public</i> , the state courts decide themselves if these grounds are also established under Austrian arbitration law.
Other key points to note?	Austrian arbitration law offers high flexibility in respect to the conduct of arbitration proceedings.

BRAZIL, BY TOZZINI FREIRE ADVOGADOS

Arbitration is a consolidated dispute resolution method in Brazil. Courts and scholars are informed on the subject, leading to uniform and safe decisions. High Courts and District Courts located in the key seats are friendly to arbitration.

Date of arbitration law?	The Brazilian Arbitration Law (“ BAL ”) ⁴ was passed on 23 September 1996, with its constitutionality declared by the Brazilian Supreme Court (“ <i>Supremo Tribunal Federal</i> ”) in 2001 ⁵ and lastly reviewed in 2015 (Law 13,129/2015).
UNCITRAL Model Law? If so, any key changes thereto?	The BAL’s working group got inspiration from UNCITRAL Model Law, the 1988 Spanish Arbitration Law, the 1958 New York Convention and the 1975 Panama Convention, without literally adopting their terms. While the UNCITRAL Model Law is one of the basis for the BAL, Brazil did not officially adhere to it and is not part of the official list of Model Law countries.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	All the Brazilian key seats have arbitration-specialized first instance courts, ⁶ and São Paulo has a specialized business section at the appellate level to judge arbitration-related matters ⁷ .
Availability of <i>ex parte</i> pre-arbitration interim measures?	Parties to a future arbitration seek interim measures from courts, such as a pre-arbitral procedure (Art. 22-A BAL), which can be granted <i>ex parte</i> when the legislative requirements are fulfilled (Art. 300 §2, Code of Civil Procedure). The requirements are the likelihood of success of the claim on the merits and the risk of irreparable or serious injury, if the measure sought is not granted (Art. 300, Code of Civil Procedure).
Courts’ attitude towards the competence-competence principle?	The BAL (Art. 20) and Brazilian Courts recognize the competence-competence principle, giving preference to arbitral tribunals over national courts to decide on objections to the jurisdiction of the arbitral tribunal ⁸ .
Grounds for annulment of awards additional to those based on the criteria for the recognition and	Art. 32 of the BAL provides for additional and more general grounds for the annulment of awards. These are the following: the nullity of the arbitral agreement (section I); an award rendered by a person that had not right to serve as an arbitrator (section II);

⁴ See the translated version of the Brazilian Arbitration Law at: <http://cbar.org.br/site/legislacao-nacional/lei-9-30796-em-ingles/>.

⁵ Supreme Court, Recognition Procedure n.º 5.206, Justice Sepúlveda Pertence, date: 12/12/2001. Available at: <http://stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=%28SE%24%2ESCLA%2E+E+5206%2ENUME%2E%29+OU+%28SE%2EACMS%2E+ADJ2+5206%2EACMS%2E%29&base=baseAcordaos&url=http://tinyurl.com/c7wyaxt>.

⁶ In 2015, the National Council of Justice (“*Conselho Nacional de Justiça*”, “*CNJ*”, the public entity that supervises the judiciary in Brazil) made available a list of specialized Brazilian Courts in almost every state capitals: <http://www.cnj.jus.br/noticias/cnj/80374-corregedoria-divulga-lista-de-varas-especializadas-em-arbitragem>.

⁷ Creation of the Reserved Section for Business Law (“*Câmara Reservada de Direito Empresarial*”) for arbitration-related matters: <https://api.tjsp.jus.br/Handlers/Handler/FileFetch.ashx?codigo=31267>.

⁸ E.g.: High Court of Justice, Competence Conflict nº 139519/RJ, Justice Regina Helena Costa, date: 11/10/2017. Available at: <http://www.stj.jus.br/SCON/jurisprudencia/toc.jsp?livre=%22compet%EAncia-compet%EAncia%22&&b=ACOR&thesaurus=JURIDICO&p=true>.

<p>enforcement of awards under the New York Convention?</p>	<p>an award without the formal requirements set forth by Art. 26 of the BAL (summary of the case, legal grounds, decision, date and place) (section III); an award that exceeds the limits of the arbitration agreement (section IV); the substantiated proof of unfaithfulness, extortion or corruption of the arbitrator (section VI); an award rendered after the time limit has expired (section VII); and an award that violates the principles set forth by Art. 21 §2 of the BAL (adversarial, equality, impartiality and free conviction principles) (section VIII).</p> <p>As far as the enforcement of foreign awards is concerned, Art. 38 of the BAL contains similar provisions to those of the New York Convention.</p>
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>According to Art. 38, VI, of the BAL, an award which has been annulled at the seat of arbitration cannot be recognized or enforced in Brazil. The High Court rendered a leading case on this matter in 2015, denying enforcement to an award that had been rendered and annulled in Argentina⁹.</p>
<p>Other key points to note?</p>	<p>According to Art. 33 of the BAL, the 90-day time limit for the party to seek annulment of the final or partial award is triggered with the notification of the award. This time limit will start to run also for the annulment of partial awards. When there is a request for clarifications of the award, the time limit runs from the decision on the clarifications is notified to the parties</p> <p>Partial and interim awards are enforceable according to Art. 23, §1 of the BAL.</p>

⁹ High Court of Justice, Special Section, Recognition Procedure nº 5782, date: 02/12/2015. Available at: https://ww2.stj.jus.br/processo/revista/inteiroteor?num_registro=201101290847&dt_publicacao=16/12/2015.

BRITISH VIRGIN ISLANDS, BY WALKERS

Date of arbitration law?	The Act came into force on 1 October 2014.
UNCITRAL Model Law? If so, any key changes thereto?	The Act incorporates the UNCITRAL Model Law on International Commercial Arbitration (the " Model Law "), with minor additions and modifications.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	The BVI has a dedicated Commercial Court which was established in 2009 as a division of the Eastern Caribbean Supreme Court. The Commercial Court currently has two judges sitting full time and is experienced in dealing with arbitration-related matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	<p>Unless otherwise agreed by the parties, an arbitral tribunal may at any time prior to the issuance of the award by which the dispute is finally decided, grant temporary measures ordering a party to:</p> <ol style="list-style-type: none"> a) Maintain or restore the status quo pending determination of the dispute; b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or d) Preserve evidence that may be relevant and material to the resolution of the dispute. <p>Article 43 of the Act also prescribes that, on the application of a party, the BVI Court may, in relation to any arbitral proceedings which have been or are to be commenced in or outside the BVI, grant an interim measure. For further details, please see paragraph Error! Reference source not found.</p>
Courts' attitude towards the competence-competence principle?	<p>Article 32 of the Act incorporates Article 16 of the Model Law which provides that the arbitral tribunal may rule on its own jurisdiction.</p> <p>If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may apply to the BVI Court to determine the question of jurisdiction within thirty days after having received notice of the tribunal's ruling. The BVI Court's decision on jurisdiction is final.</p>
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	There is no general right of challenge or appeal to the BVI Court on the ground of errors of fact or law on the face of the award, although the parties are entitled to reserve such a right by including an express provision within their arbitration agreement permitting a challenge on the grounds of serious irregularity or on a question of law arising out of an award made in the arbitral proceedings.

	<p>Article 79 of the Act incorporates Article 34 of the Model Law, which provides that an arbitral award may only be set aside by the BVI Court if a party provides proof that:</p> <ul style="list-style-type: none"> a) a party to the arbitration agreement was under some incapacity or the agreement is not valid under the law to which the parties have subjected it; or b) 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 c) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, 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 d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with the Act; or <p>The BVI Court finds that:</p> <ul style="list-style-type: none"> a) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of the BVI; or b) the award is in conflict with the public policy of the BVI.
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>Pursuant to section 81(1) of the Act, an award, whether made in or outside the BVI in arbitral proceedings by an arbitral tribunal is, by leave of the BVI Court, enforceable in the same manner as a judgment or order of the BVI Court that has the same effect.</p> <p>However, it is also expressly provided under section 83(1)(f)(ii) of the Act that the BVI Court may refuse to enforce an arbitral award if the award has been set aside or suspended by a competent authority of the foreign country where the award was made.</p>
<p>Other key points to note?</p>	<p>ϕ</p>

BULGARIA, BY KAMBOUROV & PARTNERS

With very few exceptions, Bulgarian arbitration law mirrors the Model Law (1985) and follows the New York convention, which makes the local arbitration climate familiar and predictable to foreign practitioners. The local courts consistently demonstrate pro-arbitration attitude and a recent reform of the arbitration law even reduced the grounds for setting aside of domestic awards.

Notably, the local law makes non-arbitrable certain categories of disputes, some of which are traditionally arbitrable in other jurisdictions, such as alimony and labour disputes.

Date of arbitration law?	The International Commercial Arbitration Act was promulgated in 1988, the latest revision being of January 2017.
UNCITRAL Model Law? If so, any key changes thereto?	<p>Bulgaria has implemented the 1985 version of the Model Law, but not the 2006 amended version.</p> <p>In 2017, Bulgaria excluded the contradiction to public policy as a ground for the setting aside of domestic awards. The Arbitration Act also restricts foreigners from sitting as arbitrators in domestic arbitrations and provides special requirements and qualifications to arbitrators.</p>
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	<p>Until January 2017, almost all arbitration related matters fell within the exclusive jurisdiction of the Sofia City Court (and upon appeal – within the jurisdiction of the Sofia Court of Appeal and the Supreme Court of Cassation). As of January 2017, some functions were decentralized. Now, the regional court at the domicile of the debtor issues the writs of execution for domestic awards; regional courts (not only in Sofia) further have jurisdiction to assist in the gathering of evidence and issuance of injunctive measures in support of arbitration.</p> <p>However, even after the 2017 reform, the Sofia City Court still has exclusive jurisdiction to act as a court of the first instance in proceedings for recognition and enforcement of foreign arbitral awards. The Supreme Court of Cassation retains its exclusive role as the only court instance that can hear motions for annulment of domestic awards. The concentration of jurisdiction in these courts leads to de facto specialization of the judges who repeatedly sit in arbitration-related matters.</p>
Availability of <i>ex parte</i> pre-arbitration interim measures?	The Arbitration Act explicitly provides that at any time before or after instituting the arbitration proceedings, a party thereto may request from the state courts interim or injunctive measures. As a matter of principle, these are heard exclusively on an <i>ex parte</i> basis. The respondent may appeal only after the measure is imposed and notified to him.
Courts' attitude towards the competence-competence principle?	The competence-competence doctrine is well established in Bulgarian arbitration law and doctrine. Apart from being

	<p>enshrined in an explicit legal provision,¹⁰ in a recent decision,¹¹ the Supreme Court of Cassation held that a claim before the state courts for establishing the nullity of an arbitration clause is inadmissible if the dispute was already submitted to arbitration and while the arbitration is pending. Thus, the Supreme Court partially adopted the doctrine that the arbitrators shall be the first to rule on the validity of the agreement. It is only partially adopted as in the same judgment the Supreme Court held that if the dispute has not been submitted to arbitration yet, the party may have legitimate interest to seize directly the state courts. It is yet to be seen to what extent this judgment will be followed.</p>
<p>Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?</p>	<p>Until January 2017, the grounds for annulment mirrored Article 34 of the Model Law (1985 version) and the New York Convention governed the recognition and enforcement of foreign awards. The 2017 reform of the arbitration law excluded the violation of public policy from the list of grounds for the setting aside of domestic awards, which by operation of Article VII(1) of the New York Convention may also apply to recognition and enforcement of foreign awards. Consequently, compared to the Model Law and the New York Convention, the local law restricts the grounds on which an award may be set aside.</p>
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>By virtue of Article V.1(d) of the New York convention in conjunction with Article 51 of the Arbitration Act, Bulgarian courts would not enforce foreign awards annulled by the courts in the country of origin.</p>
<p>Other key points to note?</p>	<p>ϕ</p>

¹⁰ Article 19 (1) of the Arbitration Act.

¹¹ [Decision No 40 of 29.06.2017 in commercial case No 2448 2015 of the Supreme Court of Cassation, First Commercial Division.](#)

CANADA, BY BORDEN LADNER GERVAIS LLP

Canada is a federal state with ten provinces and three territories. Legislative power for commercial arbitration falls primarily within provincial and territorial jurisdictions. Canada and its provinces and territories have adopted the *UNCITRAL Model Law* ("Model Law")¹² and the New York Convention,¹³ although with slight variations in the manner in which they were adopted.¹⁴

A number of provinces and territories, namely, British Columbia, Yukon Territory and Saskatchewan, have adopted the New York Convention under separate legislation specifically addressing the enforcement of foreign arbitral awards.¹⁵ Those provinces and territories have also adopted the Model Law in their *International Commercial Arbitration Acts* ("ICAA").¹⁶ Quebec, the sole civil law jurisdiction in Canada, incorporated the New York Convention and key aspects of the Model Law through amendments to the Civil Code of Quebec and the Code of Civil Procedure. The remaining provinces and territories have adopted the Model Law and the New York Convention into their *ICAAs*.¹⁷

Date of arbitration law?	International arbitration legislation was first introduced by the provinces in 1985/86. Domestic arbitration legislation goes further back in time. The dates of the current legislation across the provinces vary with British Columbia having most recently amended its international arbitration legislation in May 2018 to adopt the work of the Uniform Law Conference of Canada, which Ontario did in March 2017. Other provinces are considering similar amendments.
UNCITRAL Model Law? If so, any key changes thereto?	Yes. Canada and its provinces were among the first jurisdictions in the world to enact legislation expressly implementing the Model Law. It is incorporated into provincial legislation governing arbitration, in some cases in modified form.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes.

¹² [UNCITRAL Model Law on International Commercial Arbitration](#), UN Doc. A/40/17 (1985) Annex 1.

¹³ [Convention on the Recognition and Enforcement of Foreign Arbitral Awards](#), June 10, 1958, 330 UNTS 3, 21 UST 2517, TIA No. 6997. The Federal Government of Canada has also enacted federal legislation pertaining to arbitration, the [Commercial Arbitration Act](#), RSC 1985, c 17 (2nd Supp) [Federal CAA], but it does not deal with international commercial arbitration.

¹⁴ The Uniform Law Conference of Canada has approved its working group's final report, which included a proposed new uniform International Commercial Arbitration Act for implementation throughout Canada. The proposed Act takes into account the 2006 revisions to the Model Law and aims to clarify inconsistencies in current legislation.

¹⁵ [Foreign Arbitral Awards Act](#), RSBC 1996, c 154; [Foreign Arbitral Awards Act](#), RSY 2002, c 93; [Enforcement of Foreign Arbitral Awards Act](#), SS 1996, c E-9.12; [United Nations Foreign Arbitral Awards Convention Act](#), RSC 1985, c 16 (2nd Supp) [UNFAACA].

¹⁶ [International Commercial Arbitration Act](#), RSBC 1996, c 233; [International Commercial Arbitration Act](#), RSA 2000, c I-5; [International Commercial Arbitration Act](#), RSY 2002, c 123; [International Commercial Arbitration Act](#), SS 1988-198, c I-10.2.

¹⁷ [International Commercial Arbitration Act](#), RSA 2000, c I-5; [International Commercial Arbitration Act](#), RSNL 1990, c 1-15; [International Commercial Arbitration Act](#), RSPEI 1988, c I-5; [International Commercial Arbitration Act](#), RSNS 1989, c 234; [International Commercial Arbitration Act, 2017](#), SO 2017, c 2, Schedule 5, s 15; [International Commercial Arbitration Act](#), RSNB 2011, c 176; [International Commercial Arbitration Act](#), RSNWT (Nu) 1988, c 1-6; [International Commercial Arbitration Act](#), CCSM, c C151.

Courts' attitude towards the competence-competence principle?	Highly respected.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	None.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	Courts will approach this issue on a case-by-case basis. Courts in the past have recognised the permissive nature of this issue under the New York Convention and, in certain circumstances, may enforce an award that has been set aside at the seat. However, Canadian courts will certainly consider the status of an award at the seat, including whether a challenge to it has not yet been determined.
Other key points to note?	∅

CHINA (MAINLAND), BY HERBERT SMITH FREEHILLS

China has not adopted the UNCITRAL Model Law ("Model Law"). Although certain key elements of the Model Law have influenced Chinese domestic legislation, many aspects of arbitration seated in China diverge from the Model Law. For example, tribunals seated in mainland China are not empowered by law to order interim measures. China does not apply the doctrine of competence-competence; the power to decide a tribunal's jurisdiction lies with arbitral institutions and the competent courts, rather than the tribunal itself.

Arbitration is a commonly used dispute resolution mechanism for Sino-foreign disputes in China. It is a key characteristic of the Chinese arbitration regime that PRC law draws a distinction between purely domestic disputes (where all parties and other elements of the dispute are based in mainland China) and "foreign-related" disputes (broadly, where one or more party is domiciled or habitually resides outside mainland China, or where the subject matter of the dispute is outside mainland China). This critical distinction affects many aspects of the arbitration. Overall, the regime for foreign-related disputes is considerably more flexible and similar to international standards than that for purely domestic disputes.

Date of arbitration law?	The PRC Arbitration Law has been in force since 1995. An amendment concerning the qualifications of the arbitrators is effective from 1 January 2018.
UNCITRAL Model Law? If so, any key changes thereto?	China has not adopted the UNCITRAL Model Law. Although certain key elements from the Model Law can be seen to have influenced Chinese domestic legislation, PRC Arbitration Law and legal practice differs in a number of ways from jurisdictions that have adopted the Model Law.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	<p>There are 4 levels of courts of general jurisdiction: Basic (at local level), Intermediate (at city level or equivalent), Higher (at provincial level) and the Supreme People's Court in Beijing. There are also a number of courts of specialist jurisdiction (e.g. maritime courts and intellectual property courts).</p> <p>For arbitration involving foreign elements (e.g., where one party is not Chinese, or the subject matter of the dispute is located outside mainland China), applications related to setting aside the award, and validity of an arbitration agreement shall be subject to intermediate people's courts. For maritime or maritime trade disputes, cases concerning the validity of an arbitration agreement are subject to the jurisdiction of a maritime court. For recognition and enforcement of foreign awards under the New York Convention, the intermediate court where the award debtor is domiciled or has enforceable assets shall have jurisdiction. Generally, a special division of the court is set up to hear arbitration related matters together with other commercial cases.</p>
Availability of <i>ex parte</i> pre-arbitration interim measures?	Pre-arbitration interim measures are available in aid of domestic arbitration and foreign-related Chinese arbitrations administered by arbitration commissions established in mainland China. They are not available in support of an arbitration seated outside mainland China.

<p>Courts' attitude towards the competence-competence principle?</p>	<p>PRC Arbitration Law does not recognise the principle of competence-competence. Instead, the power to determine the tribunal's jurisdiction is vested in the relevant arbitral institution and the competent courts. In practice, a Chinese arbitral institution may delegate to arbitral tribunals to rule on their own jurisdiction. However, when one party has applied to the court to rule on the validity of the arbitration agreement (including the jurisdiction of the tribunal), and the other party requests the arbitral institution to decide the same issue, the court takes precedence over the arbitral institution. (Where the objection is first raised with the arbitral institution and a decision has been made, the court will not accept a later application to challenge the tribunal's jurisdiction).</p>
<p>Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?</p>	<p>For foreign awards, in general there is no additional ground for non-enforcement in China than those specified in New York Convention. However, the Chinese courts may refuse to recognise or enforce an award for reasons such as expiry of the limitation period for enforcement (2 years) under PRC law.</p>
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>Chinese courts will generally refuse to recognise or enforce an arbitral award that has been annulled at its seat.</p>
<p>Other key points to note?</p>	<p>∅</p>

CZECH REPUBLIC, BY BŘÍZA & TRUBAČ ATTORNEYS AT LAW

In the Czech Republic, arbitration enjoys a status equivalent to court proceedings. Arbitration has multiple advantages to the traditional court proceedings *e.g.*, single instance, prompt proceedings, informality and reasonable costs. Nowadays we witness a rapid growth in popularity of international arbitration both *ad-hoc* and institutional in the Czech Republic. Many significant domestic and international disputes are arbitrated under the various institutional rules. This has been buttressed by the recent Supreme Court case-law, under which it is possible to submit a wholly domestic dispute to international arbitration.

Date of arbitration law?	The law governing arbitration is found in the Arbitration Act ¹⁸ and the Act on Private International Law. ¹⁹
UNCITRAL Model Law? If so, any key changes thereto?	Despite the fact that the Arbitration Act is not an express incorporation of the UNCITRAL Model Law, the majority of its provisions and all its fundamental principles in fact reflect the Model Law. The main differences are in the rules pertaining to arbitrators, the power of arbitrators to order interim measures and the conduct of arbitral proceedings. The Arbitration Act also does not provide for as much detail as the Model Law, since it refers to the provisions of the Civil Procedure Code with respect to issues not regulated by the Arbitration Act.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	There is no specialized court dealing with arbitration-related matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Arbitral tribunals are not empowered to order any interim measures. They do not even have the power to apply for interim measures to the court. The Arbitration Act states that only the parties may apply to the competent court (the court that would hear the dispute if the arbitration agreement did not exist) to grant interim measures in case the enforcement of an arbitral award may be jeopardized. This applies irrespective of whether the arbitration has been submitted or whether an obligation is imposed on a third party.
Courts' attitude towards the competence-competence principle?	Pursuant to the Arbitration Act, the arbitral tribunal has the power to decide on its own jurisdiction and the courts do not have jurisdiction to make preliminary rulings on the arbitral tribunal's jurisdiction once it has been constituted. If the respondent objects to the arbitral tribunal's jurisdiction in a court after an arbitration has been initiated, the court will stay its proceedings until the arbitral tribunal decides on its jurisdiction. If, however, an objection to the arbitral tribunal's jurisdiction is filed with a court before the commencement of the arbitration, ²⁰ the court will

¹⁸ Act No. 216/1994 Coll., on arbitral proceeding and on enforcement of arbitral awards.

¹⁹ Act No. 91/2012 Coll., on Private International Law (the "PIL").

²⁰ The arbitral proceeding is deemed commenced on the day on which the request for arbitration is delivered to the permanent arbitration court or a presiding arbitrator if there is no arbitration court (such as *ad hoc* arbitration).

	decide if there is a valid arbitral agreement. An objection on the grounds of the non-existence, invalidity or termination of the arbitration agreement must be raised by way of an application with a court to rule on this issue no later than at the moment of the objecting party's first procedural act concerning the merits unless the invalidity of the agreement is based on the fact that it was not possible to conclude the agreement in the case.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	In addition to the grounds recognized by the New York Convention, the Arbitration Act allows an award to be challenged on the following grounds in the Czech Republic: (i) the arbitral award was not adopted by a majority of the arbitrators; (ii) the arbitral award requires the party to satisfy an impossible or illegal obligation under Czech law or an obligation not requested by the claimant; and (iii) the rules of the Czech Civil Procedure Code allow a case to be re-opened – such as the discovery of a new circumstance or evidence which existed at the time of the proceedings but was unknown to the given party. Under the Supreme Court's case law only arbitral awards issued in the Czech Republic (where the (legal) seat of arbitration was in the Czech Republic) may be set aside by the Czech court.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	An award annulled at the seat, is denied enforcement in the Czech Republic. Unlike the New York Convention where the non-enforcement by reason that the award has been set aside by the court of the seat of arbitration is stipulated as a possibility, the denial of enforcement for this reason is mandatory under Czech law.
Other key points to note?	∅

DENMARK, BY PLESNER

Arbitration is a well-established dispute resolution mechanism in Denmark which enacted its first piece of statutory legislation dedicated to arbitration in 1972, when Denmark also acceded to the New York Convention on the Recognition and Enforcement of Foreign Awards (New York Convention). Denmark became a UNCITRAL model law country with the 2005 revision of the Danish Arbitration Act (DAA),²¹ incorporating the 1985 version of the model law. While Denmark has not yet implemented the latest version of the model law, the jurisdiction nonetheless offers a modern and internationally recognizable legal framework for conducting arbitrations. Additionally, an imminent legal reform will, when adopted, align Denmark with the current model law and other best international practices in the field of arbitration and potentially even provide further "arbitration-friendly" benefits such as restrictions on appeal of arbitration-related court decisions and centralization of all such decisions at one specialised court.

Date of arbitration law?	The first piece of statutory legislation dedicated to arbitration was in 1972. It was revised in 2005.
UNCITRAL Model Law? If so, any key changes thereto?	Denmark is a model law country. However, the 2006 revision of the Model Law has not yet been incorporated into the DAA. As a consequence, while the DAA does set out a regime for the issuance of interim measures (albeit not to the level of detail of the 2006 model law), there is currently no applicable rules on the enforcement of interim measures ordered by arbitral tribunals. The contemplated legal reform of the DAA is expected to remedy this discrepancy between the model law and Danish legislation. The territories of Greenland and the Faeroe Islands, which enjoy Home Rule, still apply the 1972 Danish Arbitration Act and are thus not model law countries (territories).
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	At present, the DAA and the Danish Administration of Justice Act (AJA) do not draw a clear distinction between decisions taken by courts in connection with arbitral proceedings and regular litigation. As such, motions in relation to arbitral proceedings must be introduced at the competent district court (in Danish: <i>Byretten</i>) with the high court (in Danish: <i>Landsretten</i>) and, potentially, the Supreme Court acting as an appellate jurisdiction. The legal reform will, if adopted in its current form, concentrate all arbitration-related matters at the Maritime and Commercial Court of Copenhagen (in Danish: <i>Sø- og Handelsretten</i>) and significantly restrict the possibility of appeal of arbitration-related court decisions.
Availability of <i>ex parte</i> pre-arbitration interim measures?	The existence of an arbitration agreement does not preclude parties from seeking interim relief from the courts in accordance with section 40 of the AJA, but Danish courts would normally not accept granting such relief without affording all concerned parties with an opportunity to comment. Such <i>ex parte</i> measures would

²¹ The law was voted unanimously by the Danish Parliament on 14 June 2005, published on 24 June 2005 and entered into force on 1 July 2005. It is available at:

http://voldgiftsinstitutet.dk/wp-content/uploads/2015/01/danish_arbitration_act_2005.pdf.

	in all likelihood be considered at variance with the principle of equal treatment set forth at section 18 of the DAA.
Courts' attitude towards the competence-competence principle?	The arbitral tribunal is competent to rule on its own jurisdiction (DAA, section 16). The arbitral tribunal's positive finding that it has jurisdiction over a matter can be contested before the courts within 30 days, provided that a partial award is issued on jurisdiction (Section 16(3) of the DAA; negative findings by the arbitral tribunal cannot be brought before the courts). Such recourse is not suspensive of the arbitration. The competence of state courts in arbitration-related matters is narrowly defined, <i>i.e.</i> , when seized of motion against the competence of the arbitral tribunal, the court will only examine the validity of the arbitration agreement and arbitrability of the issues at hand and will otherwise desist itself in favour of the arbitral tribunal (DAA, section 8(1)).
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	DAA mirrors the grounds set forth in the New York Convention for setting aside or denying enforcement of an award. Moreover, these grounds are narrowly construed in Danish case law.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The rules set forth at section 39 of the DAA on the grounds for denying enforcement of awards are mandatory, including part 1(e) which refers to awards that have not become binding or have been set aside at the seat. Whereas the wording of the provision (" <i>can be denied</i> ") suggests some discretion for the courts, we are not aware of any examples of courts having accepted to enforce awards that were annulled at the legal seat.
Other key points to note?	∅

DOMINICAN REPUBLIC, BY JIMÉNEZ CRUZ PEÑA ABOGADOS

Law 489-08 on Commercial Arbitration governs arbitration proceedings, and the enforcement of commercial arbitration awards in the Dominican Republic. The Dominican Republic is a monistic legal system, whereby the same set of rules applies to both domestic and international arbitration proceedings seated in the Dominican Republic.

Pursuant to article 1 of Law 489-09, an arbitration is international if: (i) the parties to an arbitration agreement have their places of business in different states at the time of conclusion of that agreement; or (ii) the parties are domiciled outside the Dominican Republic; or (iii) a substantial part of the obligations of the commercial relationship is to be performed outside the state where the parties' places of business are located.

Date of arbitration law?	19 December 2008
UNCITRAL Model Law? If so, any key changes thereto?	Yes, Law 489-08 is based on the UNCITRAL Model Law with a few variations. Among these variations: <ul style="list-style-type: none"> • a specific procedure is set out for the notification of the request for arbitration when the Dominican state acts as defendant in commercial and investment arbitrations; • the number of arbitrators must be an odd number; • there is a time limit to initiate arbitration proceedings when an interim measure is granted by a local court.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No, there are no specialized courts or judges in the Dominican Republic for arbitration-related matters, except for the Civil and Commercial Chamber of the First Instance Court of the National District, which has exclusive jurisdiction to rule on requests for recognition and enforcement of foreign arbitral awards.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes, parties can request <i>ex parte</i> interim measures before or during the arbitration proceedings. Such a request is not incompatible with and cannot be construed as a waiver to the arbitration agreement.
Courts' attitude towards the competence-competence principle?	Courts tend to abide by the <i>kompetenz-kompetenz</i> principle, holding that they do not have jurisdiction when there is an arbitration agreement referring the parties to arbitration.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The Commercial Arbitration Law 489-08 follows the provisions of the UNCITRAL Model Law and of the New York Convention regarding the grounds for challenging an arbitral award. There are no additional grounds to those based on the criteria established in these texts.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The attitude of courts towards requests for recognition and enforcement of foreign arbitral awards has been positive, and they have abided by the principles and procedures stated in the law. The courts make no distinction between international arbitral awards rendered in the Dominican Republic and those rendered abroad.

Other key points to note?

Law 489-08 does not contain any provision establishing the capacity of arbitrators to issue orders or subpoenas. However, article 32 of Law 489-08 allows the arbitrators to request the assistance of a court to obtain evidence and the court will have the obligation to issue the corresponding order.

EGYPT, BY ZULFICAR & PARTNERS

The Egyptian Arbitration Act, which is principally derived from the UNCITRAL Model Law, addresses all principal aspects of the arbitral proceedings including the arbitration agreement, issues of arbitrability, the composition of the arbitral tribunal, the challenge of arbitrators, the conduct of the proceedings, the intervention and assistance by domestic courts throughout the proceedings, the applicable law(s) and the rules pertaining to the award, its annulment and enforcement. Albeit being generally arbitration friendly, the courts can intervene in matters such as deciding on the validity of an arbitration agreement, the challenge of arbitrators, the default power to order interim measures and conduct daunting procedures for enforcement and/or recognition.

Date of arbitration law?	The Arbitration Act was promulgated on 21 April 1994, entered into force as of 22 May 1994 and was slightly amended in 1997 and 2000.
UNCITRAL Model Law? If so, any key changes thereto?	The Arbitration Act is primarily based on the 1985 UNCITRAL Model Law but deviates from the Model Law in certain respects, including the following: the application of the Arbitration Act to both domestic and international arbitration as well as arbitration seated abroad where the parties agreed to its extra-territorial application, the internationalization of arbitration, the overriding mandatory requirement for an arbitration agreement to be in writing for purposes of validity, the strict rule on incorporation of arbitration agreements by express reference, the annulment of awards on the basis of exclusion of the chosen applicable law, the prohibition of annulment of a partial award or a decision on jurisdiction before the issuance of the final award, etc.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	∅
Availability of <i>ex parte</i> pre-arbitration interim measures?	Domestic courts have the power to rule on <i>ex parte</i> as well as ordinary adversarial requests for interim measures if the circumstances reflect urgency, necessity and likelihood to prevail on the merits.
Courts' attitude towards the competence-competence principle?	∅
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Egyptian courts are generally arbitration friendly and generally do not review domestic or foreign arbitral awards on the merits, i.e. whether the Arbitration Act is applicable or the New York Convention is applicable, save in cases raising public policy issues. Moreover, Egyptian courts have confirmed that foreign counsel may appear and represent parties in arbitral proceedings seated in Egypt. In case of applicability of the Arbitration Act, the annulment procedures are significantly simplified and accord little to no power with respect to review of the award on the merits by the

	<p>court, save in cases where the award contravenes principles of public policy.</p> <p>In case of foreign awards, the courts apply the New York Convention.</p>
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>In case of foreign awards, the courts apply the New York Convention. Egyptian courts have had little experience with the enforcement of awards annulled at the seat but are expected to apply the New York Convention rules.</p>
<p>Other key points to note?</p>	<p>The enforcement procedure for foreign awards may be burdensome and relatively lengthy. The application for enforcement takes the form of an exequatur, but may, on average, take one to two years to secure an enforcement order. There is also a fee recoverable by the court which is based on a percentage of the amount of the dispute reaching around 2.5% of the awarded value.</p> <p>Annulment however does not, in principle, preclude enforcement except upon reasoned request of the relevant party and the court's decision to stay enforcement pending determination of the annulment.</p> <p>The Arbitration Act and, more generally, the Egyptian arbitration practice may benefit from further input with regard to internationally developed practices which remain undeveloped in Egypt, namely: conclusion of arbitration agreements electronically, extension of arbitration agreements to third parties, anti-suit injunctions, third-party funding, simplification of enforcement procedures, etc.</p>

ENGLAND & WALES, BY EVERSHEDES SUTHERLAND

The 1996 Act was drafted to align the arbitration laws of England and Wales with international practices whilst ensuring that key principles that had emerged from the common law were preserved. The 1996 Act is broadly based on the UNCITRAL Model Law (though wider in scope) and incorporates internationally recognised principles of arbitration. Party autonomy is at the centre of the 1996 Act, and accordingly, with few exceptions, most provisions may be altered or contracted out of by the parties. The English courts enjoy wide powers to support arbitral proceedings, but in line with the principle of non-intervention contained within section 1(c) of the 1996 Act, the English courts have in practice shown deference to arbitral tribunals, and have refrained from intervening.²²

Notably, the 1996 Act allows for arbitral awards to be appealed to the English courts on a point of law, where the parties have not agreed otherwise – this is a peculiarity of the 1996 Act not reflected in the Model Law.

Date of arbitration law?	1996 (with most provisions coming into force on 31 January 1997).
UNCITRAL Model Law? If so, any key changes thereto?	The UNCITRAL Model Law was not adopted wholesale, but the 1996 Act is broadly based on it, with the scope of the 1996 Act being wider. One of the key changes in the 1996 Act is that it allows for arbitral awards to be appealed on a point of law (section 69 of the 1996 Act).
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Yes, arbitration matters are generally dealt with by suitably experienced judges in the courts which determine commercial disputes, primarily in the specialist courts of the Business and Property Court of the High Court of Justice, which includes the Commercial Court, the Admiralty Court, the Technology and Construction Court, the Circuit Commercial Court (formerly, the Mercantile Court) and the Chancery Division courts. ²³
Availability of <i>ex parte</i> pre-arbitration interim measures?	Pre-arbitration interim measures are available from the courts, and the courts will grant these <i>ex parte</i> (or without notice), where appropriate. However, these are subject to a subsequent <i>inter partes</i> (on notice) hearing to determine whether the interim measure should remain in place. Section 44 of the 1996 Act, which deals with the English courts' powers exercisable in support of arbitral proceedings, restricts the courts' powers to situations where the arbitral tribunal or institution holding those powers either " <i>has no power or is unable for the time being to act effectively</i> " (section 44(5) of the 1996 Act). It is not uncommon for a court to grant such interim measures.
Courts' attitude towards the competence-competence principle?	The principle of competence-competence is firmly stated in section 30(1) of the 1996 Act and is respected by the English courts. However, there are circumstances where, either by

²² Note that there are recent cases demonstrating that the English courts are willing to grant injunctions to stop a foreign-seated arbitration (see *e.g. Excalibur Ventures LLC v Texas Keystone Inc* [2011] EWHC 1624 (Comm); *Whitworths Ltd v Synergy Food Ingredients & Processing BV* [2014] EWHC 4239 (Comm)).

²³ Claims under the 1996 Act must be commenced in accordance with the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996. Details about the appropriate forum for bringing an arbitration claim are also contained within Rule 62 of the Civil Procedure Rules ("CPR") and in the corresponding Practice Direction to Part 62.

	<p>agreement or with the permission of the arbitral tribunal, the English courts may give a preliminary ruling on the arbitral tribunal's jurisdiction (section 32 of the 1996 Act). A tribunal's decision on its own jurisdiction may be subsequently challenged before the courts (section 30(2)) and the English courts have shown that they are willing to review a tribunal's decision on its own jurisdiction.²⁴</p>
<p>Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?</p>	<p>The 1996 Act allows the courts to vacate an award, where it has been successfully appealed on a point of law arising from the tribunal's award pursuant to section 69 of the 1996 Act.</p>
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>The English courts will generally abide by the decision of the tribunal at the seat of the award. The courts will not normally enforce an arbitral award that has been vacated (<i>i.e.</i>, annulled at the seat), but there are limited situations in which the English courts may depart from this approach, for example, where the foreign court's set-aside decision was "<i>so extreme and incorrect as not to be open to [that foreign] court acting in good faith</i>".²⁵</p>
<p>Other key points to note?</p>	<p>∅</p>

²⁴ See *e.g.*, *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

²⁵ *Maximov v Open Joint Stock Company "Novolipetsky Metallurgichesky Kombinat"* [2017] EWHC 1911 (Comm).

FINLAND, BY CASTRÉN & SNELLMAN

Arbitration in Finland is very common, especially in business-to-business disputes. Finnish courts respect arbitration agreements, and are able and willing to provide swift assistance to arbitral proceedings, *inter alia*, by providing provisional relief in support of arbitration. Finland has an active arbitration community with internationally highly regarded arbitration experts.

Date of arbitration law?	The Finnish Arbitration Act (967/1992, 'FAA') came into force in 1992.
UNCITRAL Model law? If so, any key changes thereto?	The FAA is based on the UNCITRAL Model law, but like for example Sweden, Switzerland and France, Finland is not formally a model law country.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	There are no special arbitration courts in Finland. All arbitration related matters are handled by the ordinary courts (District Courts, Courts of Appeal and the Supreme Court).
Availability of <i>ex parte</i> pre-arbitration interim measures?	Courts may and often do issue <i>ex parte</i> interim measures.
Courts' attitude towards the competence-competence principle?	The competence-competence principle is accepted and applied in Finland.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	<p>Foreign arbitral awards can be challenged on the grounds set out in the New York Convention. The only exception is that a foreign arbitral award cannot be challenged if the subject matter of the dispute is not capable of settlement by arbitration under Finnish law. The grounds for challenging a domestic arbitral award are similar to those set out in the New York convention and the UNCITRAL Model law. A notable difference is that an arbitral award under limited circumstances is considered null and void.</p> <p>One reason for an arbitral award to be declared null and void is if it is not signed by the arbitrator. An arbitrator's refusal to sign the award will not lead to it being null and void, if the award is signed by the majority of arbitrators and contains a statement by them on why the non-signing arbitrator has refused to sign the award.</p> <p>Challenge proceedings can generally be handled quite rapidly, as there seldom is a need for extensive witness testimony in challenge proceedings. There are no official statistics, but recent case law suggests that challenge proceedings last approximately 12 – 18 months in the district courts. The district court decision may be appealed if a leave of appeal is granted, and proceedings in the Court of Appeal last approximately as long as in the district courts. If leave of appeal to the Supreme Court is granted it will generally take at least 18 months before the decision is rendered.</p>

	<p>Challenge proceedings do not automatically stay the enforcement of arbitral awards. However, the court before which an action for challenging an award is pending may order that enforcement shall be stayed.</p> <p>Only final awards are enforceable in Finland. Thus, interim awards are not enforceable in Finland, whereas separate awards can be enforced.</p>
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>A foreign award, which has been set aside in the state in which, or under the law of which, that award was made, will not as a rule be recognised and enforced in Finland.</p>
<p>Other key points to note (significant idiosyncrasies not covered elsewhere)?</p>	<p>φ</p>

FRANCE, BY AUGUST DEBOUZY

France has one of the most advanced and liberal arbitration frameworks in the world. Arbitration practitioners have thus wide discretion to adapt the arbitral proceedings. The State courts widely support arbitration and systematically give priority to the arbitrators to rule upon their jurisdiction. Overall, unless the arbitration agreement is held to be manifestly void or manifestly inapplicable, which is extremely rare, the State courts systematically decide that they lack jurisdiction when they are confronted with a dispute that appears to arise from an arbitration agreement. Finally, the enforcement of foreign arbitral awards is highly effective, notably because an award set aside at the seat can still be enforced in France.

Date of arbitration law?	The rules applicable to domestic and international arbitration were compiled in the second part of the 20 th century and result from a decree of 14 May 1980 on domestic arbitration and a decree of 12 May 1981 on international arbitration. A decree of 13 January 2011 reformed the current rules on both domestic and international arbitration, embodied in Articles 1442 to 1503 CCP (domestic arbitration) and 1504 to 1527 CCP (international arbitration).
UNCITRAL Model Law? If so, any key changes thereto?	The French arbitration law had existed long before the UNCITRAL Model Law was created and implemented in numerous countries. Although both systems adopt a liberal approach to international arbitration, the French system seems even more liberal than the UNCITRAL Model Law. By way of example, French arbitration law does not require the international arbitration agreement to be in writing whereas the UNCITRAL Model Law does. In addition, the enforcement of a foreign award cannot be refused on the ground that the award was set aside at the seat of arbitration.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	With regards to both domestic and international arbitration, the decree of 13 January 2011 created a dedicated judge (<i>juge d'appui</i>) who has jurisdiction over arbitration-related issues and who acts in support of arbitral proceedings. Such judge may assist the parties in the constitution of the arbitral tribunal if any problem arises. In addition, the Paris Court of Appeal has a dedicated division exclusively focused on arbitration (Section 1, Chamber 1) in order to ensure coherent case law. Similarly, the French <i>Cour de cassation</i> – the higher degree of jurisdiction in set-aside proceedings in France – systematically assigns such proceedings to its first civil division. Given the number of arbitral proceedings seated in France and the arbitration-friendly approach adopted by French lawmakers, judges dealing with arbitration-related matters are generally used to arbitration and they are familiar with the applicable rules.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Pursuant to Article 1449 CCP, which is applicable to both domestic and international arbitration, the existence of an arbitration agreement does not prevent a party from seeking pre-arbitration interim or conservatory measures before a State court as long as the arbitral tribunal has not been appointed. Such measures can be ordered to gather evidence before commencement of the

	<p>arbitral proceedings. A party who seeks other interim or provisional measures, such as freezing orders (<i>mesures conservatoires</i>) or constitution of escrow accounts reserves (<i>séquestre</i>), shall have to demonstrate urgency.</p>
<p>Courts' attitude towards the competence-competence principle?</p>	<p>The principle is widely adopted, recognized and respected by French judges as it is enshrined in the CCP. According to Article 1448 CCP, which applies to both domestic and international arbitration, State judges cannot rule on the jurisdiction of the arbitral tribunal unless (i) the arbitral tribunal is not constituted yet <u>and</u> (ii) the arbitration agreement is manifestly void or manifestly inapplicable. The judgments where State courts considered that the arbitration agreement was manifestly void or manifestly inapplicable are extremely rare as this concept is construed very narrowly.</p>
<p>Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?</p>	<p>There are no additional grounds for the annulment of international awards. In domestic arbitration, as an additional condition, the award must be signed and state the reasons for the decisions therein, its date, the name(s) of the arbitrators and it must be adopted by a majority vote.</p>
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>Contrary to the vast majority of other jurisdictions, the annulment of the arbitral award at the seat of arbitration is neither a ground nor even a significant factor to prevent such award from being recognised or enforced in France. Indeed, French arbitration law considers that the award is not attached to the seat of arbitration but rather forms part of an "arbitral legal order" distinct from state jurisdictions' legal orders, and that its annulment at the seat has no impact on its validity.</p>
<p>Other key points to note?</p>	<p>An international arbitral award can only be enforced in France if it is rendered effective by an enforcement order called "<i>exequatur</i>". This procedure is non-adversarial and only allows the French judge for a limited control. Indeed, the judge is solely requested to verify if the award that he or she is requested to enforce does exist and whether it is not manifestly contrary to the French definition of international public policy. The cases where French judges refuse to grant an <i>exequatur</i> are very rare.</p>

THE GAMBIA, BY FARAGE ANDREWS LAW PRACTICE

Date of arbitration law?	29 July 2005, with an amendment on 27 June 2006 .
UNCITRAL Model Law? If so, any key changes thereto?	<p>The Alternative Dispute Resolution Act 2005 (“ADR Act 2005”) addresses numerous forms of alternative dispute resolution, and both domestic and international arbitration, but to the extent it addresses international arbitration it is largely based on the 1985 UNCITRAL model law, with inter alia the following differences:</p> <ul style="list-style-type: none"> • Public policy as a ground for setting aside/refusing recognition or enforcement is partially defined; • The limitation period for an application for setting aside an award on the (public policy) basis that it “was induced or affected by fraud, corruption or gross irregularity” runs from when such ground was, or could reasonably have been, discovered; • There is provision for the appointment of an umpire, an individual who largely takes over the role of the tribunal in the event of a deadlock; • The substantive law governs the formalities required for the award; and • There are relatively detailed provisions on costs.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes.
Courts’ attitude towards the competence-competence principle?	The ADR Act 2005 (s. 30) enshrines the competence-competence principle, and there is no Gambian case law available in connection with this.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	No, but the ADR Act 2005 (s. 53(3)) indicates that matters in conflict with public policy include an award being “induced or affected by fraud, corruption or gross irregularity” or “a breach of the rules of natural justice” occurring during the proceedings or in connection with the making of the award.
Courts’ attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The ADR Act 2005 (s. 53(1)(a)(v)) provides that Gambian courts may refuse to recognise or enforce an award that was annulled at the seat of the arbitration. There is no Gambian case law available in this regard.
Other key points to note?	The ADR Act 2005 (s. 55) explicitly allows parties to an “ <i>an international commercial agreement</i> ” to adopt “ <i>the UNCITRAL Arbitration Rules [...] or any other international arbitration rules</i> ” to the exclusion of the provisions of the ADR Act 2005 itself.

GERMANY, BY CMS HASCHE SIGLE

The revision of the German arbitration law in 1998 has strengthened the focus on party autonomy, giving the parties considerable freedom in structuring the arbitration proceedings according to their needs. The German arbitration law is modeled closely on the 1985 UNCITRAL Model Law. It applies regardless of whether the arbitration is domestic or international. Furthermore, the dispute need not be of a commercial nature. Only very few mandatory statutory provisions limit the parties' freedom of contract. In 2016, the Ministry of Justice and Consumer Protection has installed a working group to review the German arbitration law in light of the 2006 amendments to the UNCITRAL Model Law.

All arbitration-related matters that require the assistance of state courts are handled by the German Higher Regional Courts. They do not act as a full court of appeal but limit their review potential grounds for annulment or refusal of recognition within a strictly limited scope (mainly questions of due process and public policy). The courts are considered to be efficient when they are requested to decide on arbitration matters. Germany has ratified the New York Convention ("NYC") without any reservations. Courts tend to adhere strictly to its provisions.

Date of arbitration law?	German arbitration law is found at §§ 1025 - 1066 ZPO and was last revised in 1998.
UNCITRAL Model Law? If so, any key changes thereto?	The German arbitration law is based in large parts on an adoption of the 1985 UNCITRAL Model Law with only few minor amendments.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Ordinary courts (the Higher Regional Courts as first instance) handle jurisdictional challenges and the annulment and enforcement of awards. Within these courts, all arbitration-related cases are regularly assigned to one specific division (" <i>Kammer</i> ") ensuring a certain level of knowledge and experience.
Availability of <i>ex parte</i> pre-arbitration interim measures?	The courts may grant <i>ex parte</i> interim measures.
Courts' attitude towards the competence-competence principle?	The arbitral tribunal may rule on its own jurisdiction. If the arbitral tribunal rules on jurisdiction as a preliminary question, any party may seize the state courts (as envisaged by the UNCITRAL Model Law).
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Only the grounds set out in the New York Convention.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The question of whether German courts are bound by the foreign court's set-aside decision is not finally settled. In the past, they have regularly respected the foreign court's decision without reviewing the merits <i>de novo</i> .

Other key points to note?

- Partial awards are recognized and enforced in accordance with the NYC.
- Duration of proceedings to obtain the enforcement of an award: usually between three months and one year (possibly longer when the German Supreme Court (“BGH”) is seized).
- Arbitration agreements are to be signed by all parties; there are stricter form requirements for particular groups of individuals (*e.g.*, consumers).
- German courts have a long-standing tradition of respecting arbitration agreements and exercising restraint in interfering with decisions by arbitral tribunals.

GHANA, BY N. DOWUONA & COMPANY

The ADR Act became effective on May 31, 2010, when it received presidential assent. It replaced the Arbitration Act, 1961 (Act 38) and formalised other forms of dispute resolution, other than arbitration, that hitherto, did not have legislative recognition. The ADR Act contains several provisions that are consistent with the UNCITRAL Model Law, but UNCITRAL does not consider the ADR Act to be an enactment of the UNCITRAL Model Law.

The ADR Act is indeed broader in scope than the UNCITRAL Model Law and contains provisions on certain matters on which the latter is silent. Key differences include the fact that the ADR Act extends to all matters, both domestic and international, other than those considered to be non-arbitrable under the ADR Act and includes provisions on mediation and customary arbitration. Another notable difference is the power granted under the ADR Act to the arbitral tribunal to subpoena witnesses, which is absent under the UNCITRAL Model Law. Further, the power of a court to intervene in arbitration proceedings is potentially wider under the ADR Act, than under the UNCITRAL Model Law. For instance, unlike the UNCITRAL Model Law, there is no provision in the ADR Act that expressly limits the intervention of courts in arbitration proceedings. Also, whereas under the UNCITRAL Model Law, the decision of a court, with regards to any application by a party challenging the appointment of an arbitrator or the arbitral tribunal's ruling on its jurisdiction, is not subject to appeal, the ADR Act does not contain any such limitation on decisions of the High Court with regards to such matters; except that the High Court's decision regarding the review of an arbitral tribunal's ruling on its jurisdiction may only be appealed against with leave of the High Court.

Additionally, unless otherwise agreed by parties, section 40 (1) of the ADR Act mandates the High Court to determine any question of law, arising in the course of arbitration proceedings, that is submitted by a party to the arbitration – no such authority is conferred under the UNCITRAL Model Law.

There are no specialised arbitration courts in Ghana; however, there are judges who specialise in arbitration law and are equipped to handle arbitration-related matters; hence, matters involving arbitration may be referred to them, although not exclusively. Ex-parte pre-arbitration interim reliefs may be granted in urgent cases, where the court deems it necessary for the purpose of preserving evidence or property. Unless, otherwise agreed by the parties, the arbitral tribunal must hold a case management conference within 14 days of being constituted.

In practice, the courts respect an arbitral tribunal's competence to rule on questions concerning its jurisdiction, although, the courts may review the decision of the arbitrators on an application made to it by a dissatisfied party, or in an application to set aside an arbitral award. In addition to the criteria listed in the New York Convention, an arbitral award may be annulled where the applicant satisfies the court that (a) the law applicable to the arbitration agreement is not valid; or (b) an arbitrator has an interest in the subject matter of arbitration which the arbitrator failed to disclose; or (c) the award was induced by fraud or corruption. An application to set aside an arbitral award may not be made after 3 months from the date on which the applicant received the award unless the court otherwise orders.

Leave must be sought from the High Court to enforce an arbitral award in the same manner as a judgment or order of the High Court. Ghanaian courts will not recognise or enforce a foreign arbitral award that has been annulled at the seat of arbitration or has an appeal pending against it in any court under the law applicable to the arbitration or if the court finds that the arbitration panel lacked substantive jurisdiction to make the award. A foreign arbitral award may also not be recognised or enforced if the court is not satisfied that (a) the arbitral award was made by a competent authority under the laws of the country in which the award was made; and (b) there is a reciprocal arrangement between Ghana and the country in which the award was made; or the award was made under the New York Convention or under any other international convention on arbitration ratified by the Ghanaian Parliament.

Where a party seeking to enforce a foreign arbitral award relies on a document that is not in the English Language, that party is required to produce a certified true translation of that document in English to the court. Further, the party seeking to enforce a foreign arbitral award must produce the original award and arbitration agreement or duly authenticated copies of both to the court. The copies must be authenticated in a manner prescribed by the law of the country in which it was made.

Notably, the 1996 Act allows for arbitral awards to be appealed to the English courts on a point of law, where the parties have not agreed otherwise – this is a peculiarity of the 1996 Act not reflected in the Model Law.

Date of arbitration law?	31 May 2010.
UNCITRAL Model Law? If so, any key changes thereto?	No. The ADR Act is not considered by UNCITRAL to be an enactment of the UNCITRAL Model Law. Part 1 of the Act is however, largely based on the UNCITRAL Model Law. Key differences include wider scope of application of the ADR Act, provisions on mediation and customary arbitration under the ADR Act, absence of express provisions restricting intervention of courts and empowerment of arbitral tribunals to subpoena witnesses.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No specialised courts on arbitration are available; however, there are judges capable of handling arbitration-related matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes, but only in urgent cases, where the court deems it necessary for the purpose of preserving evidence or property.
Courts' attitude towards the competence-competence principle?	The principle is recognised by the courts, but a decision on the jurisdiction of the arbitral tribunal may be reviewed by the courts on an application made to it by a dissatisfied party, or in an application to set aside an arbitral award.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Additional grounds include (i) where the law applicable to the arbitration agreement is not valid; (i) where an arbitrator fails to disclose his interest in the subject matter of arbitration; or (iii) the award was induced by fraud or corruption.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	An annulled foreign arbitral award (at the seat of the arbitration) will not be enforced by Ghanaian courts.

Other key points to note?

- Unless, otherwise agreed by the parties, an arbitral tribunal must hold a case management conference within 14 days of being constituted.
 - An application to set aside an arbitral award may not be made after 3 months from the date on which the applicant received the award unless the court otherwise orders.
 - In an application to recognise and enforce an arbitral award, documents that are not in English must be translated and certified before production in court. The original award and the arbitration agreement or validly authenticated copies of both must also be produced in court.
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GUINEA, BY THIAM & ASSOCIÉS

Date of arbitration law?	The OHADA Uniform Act on Arbitration was adopted on 11 March 1999, and last amended on 23 November 2017.
UNCITRAL Model Law? If so, any key changes thereto?	The Uniform Act on Arbitration is modelled after the UNCITRAL Model Law.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	There is no specialised court or judge for the handling of arbitration-related issues.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes.
Courts' attitude towards the competence-competence principle?	<p>Article 13 of the OHADA Edited Arbitration Act provides that Courts may declare themselves incompetent where there is an arbitration agreement, whether an arbitration tribunal has been seized or not, unless the arbitration agreement is manifestly void or manifestly inapplicable. In addition, the Court has to rule on this matter within a 15-day time limit. As a result, Guinean Courts have an obligation to apply this principle.</p> <p>Guinean Courts recognise the competence-competence principle (article 5-4 of the Guinean Arbitration Rules).</p>
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The only difference between the New York Convention and the Edited Arbitration Act, the CCJA Arbitration Rules and the Guinean Arbitration Rules is that the last three texts provide that an action for a nullity of the award is only admissible if the award has breached a rule of international public policy, while the New York Convention refers to the breach of a rule of national public policy.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	To the best of our knowledge, no decision has been rendered in relation to this subject-matter by Guinean Courts or by the Common Court of Justice and Arbitration. However, in light of the position under French law, it seems that Guinean courts, when confronted to this situation, would likely decide to recognize and enforce foreign awards annulled at the seat of the arbitration.
Other key points to note?	∅

ICELAND, BY LEX LAW

Date of arbitration law?	1 January 1990
UNCITRAL Model Law? If so, any key changes thereto?	No. The original 1985 version of the UNCITRAL Model law was one of the sources of inspiration of the IAA. However, the text of the IAA cannot be described as an UNCITRAL Model Law one. The IAA does not address the competence of the tribunal to rule on its own jurisdiction, nor interim measures. The requirements of independence and impartiality of arbitrators are included therein with reference only to the Act on Civil Procedure. The IAA only provides for setting aside procedures to challenge an award and does not specifically address grounds to refuse recognition and enforcement.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No, arbitration-related matters fall within the jurisdiction of the District Courts in the first instance and the High Court, which is the second instance appellate court.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes. A request for an interim measure is usually addressed to the District Commissioner (enforcement and administrative body) and subject to subsequent judicial review. The District Commissioner will consider <i>ex parte</i> requests taking into account the need for urgency of the requested interim measure and several other factors.
Courts' attitude towards the competence-competence principle?	The IAA does not address the competence of the Arbitral Tribunal to rule on its own jurisdiction. Yet, the domestic courts recognise the fact that the IAA was inspired by international texts and the courts generally have a positive disposition towards arbitration, including the competence-competence principle.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The IAA only provides for ground to have an award set-aside which also apply for recognition and enforcement proceedings. Article 12 of IAA exhaustively lists the grounds for having an award set-aside. Article 12(1)(6) allows <i>inter alia</i> for setting aside if the award is founded on unlawful grounds. It is not entirely clear from the drafting history of the IAA what this term "unlawful grounds" entails. The domestic courts have, however, been reluctant to set aside arbitral awards.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The IAA is silent on this issue. This issue has not been addressed by the domestic courts.
Other key points to note (significant idiosyncrasies not covered elsewhere)?	The standard of arbitrators' independence and impartiality under the IAA derives from a reference to the Act on Civil Procedure making this issue inaccessible for international users of arbitration in Iceland. The Act does not differentiate between setting aside procedures on the one hand and the recognition and enforcement

procedures on the other and there are no time limits to commence setting aside proceedings.

INDONESIA, BY KARIMSYAH

Date of arbitration law?	Arbitration in Indonesia is governed by Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution ("The Arbitration Law"), which came into force on 12 August, 1999.
UNCITRAL Model Law? If so, any key changes thereto?	The Indonesian Arbitration Law is not based upon the UNCITRAL Model Law, but has many similarities with it.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	∅
Availability of <i>ex parte</i> pre-arbitration interim measures?	Although the Arbitration Law gives arbitral tribunals the power to issue interlocutory or interim relief, such relief will not be enforced by the courts. Nor will the courts issue any interim orders in aid of an arbitration.
Courts' attitude towards the competence-competence principle?	<p>There is no explicit provision providing for <i>kompetenz-kompetenz</i>, but it should be implicit from Articles 3 and 11 of the Arbitration Law that only the arbitral tribunal has the jurisdiction to determine its own jurisdiction, as well as whether a matter is capable of being arbitrated or not.</p> <p>There is no specific reference to severability. However, Article 10 of the Arbitration Law states that the agreement to arbitrate shall survive even if the main contract expires or is declared void. This will not apply, however, if the contract is determined to be void <i>ab initio</i>, as in that case the arbitration clause will be deemed not to have been agreed upon at all.</p>
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	An arbitral award may be challenged through an application to the court for annulment of the award. Article 70 of the Indonesian Arbitration Law provides limited grounds for annulment. The three grounds for annulment are: false or forged letters submitted in the hearings, discovery after the award of decisive documents intentionally concealed by a party, and where an award was rendered as a result of fraud committed by one of the parties to the dispute. Likewise, a court may refuse to enforce an award if the dispute is not of a commercial nature or if it can be established that the Parties did not agree to arbitrate such dispute.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The Arbitration Law does not refer to awards annulled in the place of arbitration and, to the knowledge of the writers, the issue as to whether such awards may still be enforced in Indonesia has not arisen.

Other key points to note?

The Arbitration Law provides that only disputes of a commercial nature and those that are within the authority of the parties themselves to resolve may be arbitrated. [Articles 3 and 11](#) make it clear that where the parties have agreed to arbitrate their disputes, the courts do not have and may not take jurisdiction over such matters. The only role of the court is that of annulment and/or enforcement of final and binding arbitral awards (or the appointment of arbitrators if a party does not do so and the parties have not chosen any specific rules or otherwise designated a different appointing authority).

Although agreements in general are not required to be in writing to be valid and binding under Indonesian law, [Article 1\(3\)](#) of the Arbitration Law requires arbitration agreements to be in writing. Such agreement may be made either before or after a dispute has arisen. In the latter case, the contents of such written agreement must be more comprehensive, and even the arbitrators need to be named.

The enforcement process for domestic and international awards differs slightly. Awards are defined as domestic, regardless of the nationality of the parties or other factors, where the arbitration is held in Indonesia. Awards are defined as international if they are rendered outside Indonesia. Regardless of whether the award is domestic or international, the award must first be registered with the court by the arbitrators or their duly authorised representatives. Note, therefore, that as a practical matter arbitrators issuing awards likely to be enforced in Indonesia should include in, or separately from, the award a power of attorney to the parties, or either of them, to effect registration of the award. Domestic awards must be registered, within 30 days of rendering, with the District Court having jurisdiction over the respondent. Foreign-rendered, or international, awards must be registered with the District Court of Central Jakarta. There is no time limit for registration of international awards. Registration of an international award will require submission of a certificate from the Indonesian diplomatic representative in the country in which the award is rendered to the effect that that country and Indonesia are both signatories to the New York Convention. (Indonesia has been a signatory since 1981.)

IRAN, BY GHEIDI & ASSOCIATES

The primary regulations on arbitration can be found in Articles 454-501 of the Iranian Civil Procedure Law (“CPL”), which is in force and applicable to purely domestic arbitrations. On 17 September 1997, the Iranian Law on International Commercial Arbitration (“LICA”) was adopted, based on the UNCITRAL Model Law on International Commercial Arbitration (1985). However, certain provisions of the law do not exactly reflect the Model Law and instead are tailored to satisfy local requirements. Arbitration laws have not allocated specific tribunals to arbitration proceedings and have not set restrictions or specific qualifications on arbitrators to be appointed by the parties to arbitration, except that persons who lack legal capacity or have been deprived of social rights (by court) cannot be appointed as arbitrators.

The law has granted some specific powers to arbitrators, that are similar to judges’ powers, including the ability to issue an injunction upon request by a party in matters related to a dispute which require immediate action. However, the ability to issue pre-arbitration interim measures is not provided for in the law.

The principle of *Kompetenz-Kompetenz* is included in the LICA, and an arbitrator may rule on his/her jurisdiction as well as on the question of the existence or validity of an arbitration agreement, even if the CPL is silent on this principle, as well as on many other principles and rules that are adopted under the LICA. The LICA also includes provisions on, amongst others, (i) party autonomy to agree on the procedure of arbitration proceedings, (ii) recognition of institutional arbitration, (iii) independence and impartiality of arbitrators, and (iv) arbitrator jurisdiction to identify the applicable law in the event that the parties have failed to do so.

Recognition and enforcement of arbitral awards are recognized under the LICA, unless an award is either set aside or is null and void *ab initio*.

It is worth noting that the LICA does not include any provision on the enforcement and recognition of foreign awards that have been annulled at the seat of arbitration by a competent authority. Therefore, it seems that the Courts will refuse to enforce such awards.

Date of arbitration law?	17 September 1997.
UNCITRAL Model Law? If so, any key changes thereto?	Yes, although certain provisions of the law do not exactly reflect the Model Law and are specifically tailored to local requirements.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No.
Availability of <i>ex parte</i> pre-arbitration interim measures?	No, although <i>ex parte</i> pre-arbitration interim measures are not available within Iranian jurisdiction, arbitrators have the ability to issue injunctions upon a request by a party in matters related to the dispute which require immediate action.
Courts’ attitude towards the competence-competence principle?	Based on Article 16 of the LICA, the arbitral tribunal is empowered to make a determination as to its own jurisdiction to adjudicate the substantive claims in dispute.
Grounds for annulment of awards additional to those based on the criteria for the recognition and	Grounds of annulment of an international award in Iran are the same as those stated in Article 5 of the New York Convention. However, the LICA further provides that the award is null and void <i>ab initio</i> when the award with respect to immovable property located in Iran is incompatible with the mandatory

<p>enforcement of awards under the New York Convention?</p>	<p>provisions of the laws of Iran, or with respect to official deeds, unless the arbitrator has been given the authority to reach a compromise.</p>
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>Courts refuse to enforce foreign arbitral awards that have been annulled at the seat of arbitration by a competent authority. It is argued that enforcing an annulled award results in unacceptable and inconsistent consequences. Bearing in mind the analytical framework below, other key points to note, in particular any significant idiosyncrasies of the jurisdiction not covered elsewhere in the summaries (e.g. atypical formality requirements for an award to be deemed valid, such as its signature at the seat of arbitration; whether it is sufficient for the institution to notify an award to trigger the time-limit for seeking the annulment of the award; issues with the enforcement of partial and interim awards).</p>
<p>Other key points to note?</p>	<p><u>Typical formality requirements for an award to be deemed valid:</u></p> <p>The award shall be in writing and signed by the arbitrator(s). In cases where there is more than one arbitrator, the signature of the majority of the arbitrators shall be sufficient, provided that the reason(s) for non-signature by the other member is indicated.</p> <p>The reasoning of the decision shall be stated in the text of the award, unless the parties agree that the reasoning not be provided, or unless the award has been issued on the basis of a mutual agreement by the parties.</p> <p>The award shall contain the date and venue of the arbitration.</p> <p><u>The enforcement of partial awards:</u></p> <p>The LICA is silent on the enforcement of partial awards, hence it seems that there are no legal obstacles to the enforcement of partial awards</p>

ITALY, BY CASTALDIPARTNERS

Date of arbitration law?	<p>The main source for arbitration law in Italy is the Code of Civil Procedure, which entered into force in 1942.</p> <p>The Legislative Decree n° 40/2006 revamped the arbitration law in 2006.</p>
UNCITRAL Model Law? If so, any key changes thereto?	<p>Italian arbitration law embodies most of the principles of the UNCITRAL Model law.</p> <p>The only notable differences with the UNCITRAL Model Law are that (i) Italian law does not allow arbitrators to grant interim measures and (ii) there is no exclusion of liability for arbitrators.</p>
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No. Arbitration-related matters usually fall within the jurisdiction of the Civil Court of the district of the seat of the arbitration.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Arbitrators are deprived of any power to issue interim measures. However, parties can have recourse to national courts to obtain interim measures with the view of commencing arbitral proceedings.
Courts' attitude towards the competence-competence principle?	<p>The law explicitly empowers the arbitrators with the ability to decide on their own jurisdiction. State courts abide by this rule.</p> <p>However, if a party starts court proceedings despite a valid arbitration agreement, the defendant must raise the jurisdictional objection in the first statement of defence.</p>
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Yes. The award can also be set aside if it (i) does not decide the merits of the dispute (and it is not an interim or partial award), (ii) does not provide sufficient reasoning, (iii) is missing the signature of the arbitrators (iv) is missing the operative part (v) is in contradiction with a previous award or judgement having the force of <i>res judicata</i> and such decision was raised by one of the parties during the arbitral proceedings.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	There is no case-law on the matter
Other key points to note?	One of the most prominent characteristics of Italian arbitration law is the distinction between <i>arbitrato rituale</i> and <i>arbitrato irrituale</i> . The difference between the two types of arbitration lays in the effects of the award: while the decision issued at the end of an <i>arbitrato rituale</i> is a binding award, the <i>arbitrato irrituale</i> results in an award having the effect of a binding contract.

JAPAN, BY MORI, HAMADA & MATSUMOTO

Date of arbitration law?	The Japanese Arbitration Act (Act No. 138 of 2003) (the “ Act ”) was enacted on August 1, 2003 and implemented from March 1, 2004.
UNCITRAL Model Law? If so, any key changes thereto?	The Act is based on the UNCITRAL Model Law (the “ Model Law ”) and closely follows the Model Law. There are no significant differences, though the Act provides for original provisions related to the court proceedings for arbitration assistance and supervision as suggested in Article 6 of the Model Law, including Article 5 of the Act (Jurisdiction of the Court), as well as Article 7 (Appeal Against Judicial Decision), Article 8 (Participation of the Court in the Case if the Place of Arbitration Has Yet to Be Determined), Article 9 (Inspection of Record of the Case Pertaining to the Proceeding Carried Out by the Court), Article 10 (Application Mutatis Mutandis of the Code of Civil Procedure to the Proceeding Carried Out by the Court), Article 11 (Rules of the Supreme Court) and Articles 35.3-6 (Examination of Evidence by the Court), arbitration cost and expenses (Articles 47-49), and criminal penalty with regard to bribery (Articles 51-55).
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	There is no specialized court or judge in Japan for handling arbitration-related matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	The court may issue an order for a pre-arbitration interim measure and an order for provisional seizure or an order for provisional disposition with regard to a disputed subject matter (such as an order of provisional disposition issued to preserve the right to claim the delivery or surrender of the disputed subject matter) can be <i>ex parte</i> .
Courts’ attitude towards the competence-competence principle?	The court has the right to make the final decision on the authority of arbitrators (Article 44.1(1)(2) of the Act) and shall make such a decision on the basis of its own discretion.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The grounds for the annulment of awards under the Act are substantially the same as those under the New York Convention.
Courts’ attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The court cannot recognise or enforce foreign awards, which are annulled at the seat of the arbitration (Article 45.2(7) of the Act).
Other key points to note (significant idiosyncrasies not covered elsewhere)?	φ

LATVIA, BY LAW OFFICE OF INGA KAČEVSKA

Date of arbitration law?	The Arbitration Law became effective as of 1 January 2015. It was revised on 6 October 2016, and this revision became effective since 3 November 2016.
UNCITRAL Model Law? If so, any key changes thereto?	Latvia has not adopted the UNCITRAL Model Law.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No.
Availability of <i>ex parte</i> pre-arbitration interim measures?	<p>The court can grant interim measures but only before the commencement of the arbitration proceedings and, according to case law, the interim measures would not include the freezing/attachment of bank accounts. Given that there are many non-residents' bank accounts in Latvia, this is a real disadvantage, in international cases, in which it is often needed to attach those accounts before commencing the arbitration.</p> <p>If the respondent owns property (not money) in Latvia, or if the respondent is domiciled in Latvia, interim measures can be granted <i>ex parte</i> before the initiation of the arbitration proceedings. However, it is rather expensive: the court fee for securing the claim is 0,5% of the total amount claimed, and the fee is not refunded in the event the claim is not secured. The denial of the request for interim measures cannot be appealed. Therefore, claimant is rarely advised to request for interim measures.</p>
Courts' attitude towards the competence-competence principle?	For a long time, courts have misinterpreted the provision of the law stating: "an arbitration court determines jurisdiction regarding a dispute, even in cases where one of the parties contests the existence or the validity of an agreement". The courts referring to this provision considered that only and exclusively an arbitral tribunal shall decide on its competence and the courts shall not accept claims covered by an arbitration clause at all. One of the courts' arguments was that if the parties have decided to settle their disputes outside the court of general jurisdiction, they should not overload the courts with such applications. This provision of the law was challenged in the Constitutional Court. The applicant to the constitutional claim submitted that in his arbitration case, the arbitration agreement was forged. Despite this fact, the arbitral tribunal considered that it was valid and proceeded with the review of the case. The Constitutional Court decided that this rule shall be interpreted in

	<p>a way that the court also has competence to decide on the validity of the arbitration clause.²⁶</p> <p>In practice, the judgment of the Constitutional Court did not solve the problem, as illustrated by the following example. If a party submits an application to the court asking to acknowledge that the arbitration agreement is void and to hear the dispute on the merits; while the other party submits the statement of claim to the arbitral tribunal; despite the first party's challenge, the arbitral tribunal may find that it has jurisdiction and render an award regardless. In this case, even if the court finds that the arbitration agreement is not valid, the award cannot be set aside.</p>
<p>Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?</p>	<p>Pursuant to Article 536 of the Civil Procedure Law, a judge may refuse to issue a writ of execution (for a domestic award issued in Latvia) if:</p> <ol style="list-style-type: none"> 1) the dispute could only be resolved in court; 2) the arbitration agreement has been entered into by a natural person who had restricted capacity to act, or by a minor; 3) the arbitration agreement, in accordance with the applicable law, has been revoked or declared null and void; 4) the party was not notified of the arbitration proceedings in an appropriate manner, or due to other reasons was unable to submit his or her observations, and this has or could have significantly affected the proceedings; 5) the party was not notified of the appointing of an arbitrator in an appropriate manner, and this has or could have significantly affected the arbitration proceedings; 6) the arbitrator does not comply with the requirements of the Arbitration Law, the arbitral tribunal was not appointed, or the arbitration proceedings did not take place in accordance with the provisions of the arbitration agreement or of the Arbitration Law; 7) the dispute that gave rise to the award was not provided for in the arbitration agreement or did not conform to the provisions of the arbitration agreement, or the issues decided by the arbitral tribunal were not within the scope of the arbitration agreement. <p>There is no public policy ground for refusing to issue a writ for compulsory execution of the domestic arbitral awards.</p> <p>If a writ is denied, the party can form an appeal within 10 days. However, the decision to issue a writ may not be appealed. Moreover, the law is silent as to the validity of the arbitral award if the court has denied issuing the writ. Theoretically, the award does not automatically become invalid, and thus could still be recognised abroad.</p>

²⁶ The Constitutional Court of the Republic of Latvia judgment in the case No. 2014-09-01 dated 28 November 2014 (in English): http://www.satv.tiesa.gov.lv/wp-content/uploads/2014/03/2014-09-01_Spriedums_ENG.pdf.

Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	φ
Other key points to note?	<p>Courts issue writs of execution on application of the winning party to entail forced execution of the arbitral award. A writ of execution can be obtained only for awards rendered by the permanent arbitral institution, not for awards rendered by <i>ad hoc</i> arbitral tribunals. This is a strong disincentive to the use of <i>ad hoc</i> arbitrations where enforcement in Latvia is sought.</p> <p>The procedure to seek the issuance of the writ of execution of the award rendered by the permanent arbitral institution is written. Application is made by the winning party and the losing party may subsequently object. There is thus no hearing of the parties. The court verifies whether there are procedural grounds to deny the application for the writ. The decision can only be based upon the application and the reply of the parties.</p>

LEBANON, BY OBEID LAW FIRM

Date of arbitration law?	The Lebanese Code of Civil Procedure (" LCCP "), which was enacted by Law 90/83 dated 16 September 1983, with amendments resulting from Law No. 440 dated 29 July 2002, devotes an entire chapter (Chapter 2) to arbitration, with a distinction being made between domestic arbitration (Articles 762 to 808 LCCP) and international arbitration (Articles 809 to 821 LCCP).
UNCITRAL Model Law? If so, any key changes thereto?	The provisions on arbitration in the LCCP are based on the old French arbitration law (French decrees No. 80-354 of 14 May 1980 and No. 81-500 of 12 May 1981) and not on the UNCITRAL Model Law.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	There is no specialist court in Lebanon dealing with arbitration matters. The judiciary in the Court of First Instance is however considered as the " <i>juge d'appui</i> " (i.e. the judge acting in support of the arbitration). As such, the Court of First Instance may, for example, hear requests for the appointment of arbitrators and summon recalcitrant witnesses within its jurisdiction.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Lebanese courts can grant provisional relief in support of arbitration when the Arbitral Tribunal is not yet constituted. In this case, an application for interim measures should be filed before the competent judge of summary proceedings.
Courts' attitude towards the competence-competence principle?	Article 785 of the LCCP expressly recognises the principle of competence-competence.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Lebanese law provides no additional grounds to those based on the criteria for the recognition of awards under the New York Convention. The Lebanese arbitration law is, in fact, more favourable than the New York Convention in referring to a violation of 'international public policy' rather than 'public policy' as a ground for annulment of international arbitral awards (see section 5.2 below for further details regarding the grounds for annulment under Lebanese law and the position in domestic arbitrations).
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	An award rendered outside Lebanon and set aside at the seat of arbitration may still be recognised and enforced in Lebanon since local courts have the discretion to independently assess the grounds for annulment when a request for recognition and <i>exequatur</i> of a foreign award is sought.

Other key points to note?

Under Lebanese legislation, the following types of disputes are subject to the exclusive jurisdiction of the state courts *i.e.* are not arbitrable:²⁷ questions of personal and social status, capacity, fundamental rights, rights of succession, questions of public policy, insolvency, employment contracts and social security.

Furthermore, Lebanese courts have traditionally held that commercial representation disputes are subject to the exclusive jurisdiction of local courts. Recent jurisprudence, however, suggests a more supportive approach towards arbitration in specific cases.

Finally, in administrative contracts, a state and public entity can validly conclude an arbitration agreement subject to prior authorisation by the Council of Ministers upon a recommendation of either the relevant minister or the relevant regulatory authority (*autorité de tutelle*). In international administrative contracts, while the law is silent on the necessity of obtaining a prior approval from the Council of Ministers, it is recommended to systematically obtain such authorisation.

²⁷ There are exceptions with respect to most of these exclusions; see below (III, 2, d)).

LITHUANIA, BY ELLEX VALIUNAS

Lithuania became a member of the New York Convention in 1995 and adopted the Arbitration Law in 1996. While the Arbitration Law is based on the UNCITRAL Model Law, the Arbitration Law makes no distinction between international and national arbitration. Changes to the UNCITRAL Model Law in 2006 and best international practices were incorporated into the Arbitration Law in 2012. In addition to modern legislation which allows, for instance, *ex parte* pre-arbitration interim measures and recognition of interim measure rulings, Lithuanian courts follow a strong pro-arbitration tradition and accept all universal arbitration doctrines, including the competence-competence principle, the separability doctrine, and the local courts' prohibition to review an award on its merits in set-aside or recognition proceedings. Lithuanian practitioners are keen to follow the highest international legal standards and the arbitration-related rules and guidelines issued by International Bar Association are being followed by the agreement of the parties and arbitrators as a result.

Date of arbitration law?	1996.
UNCITRAL Model Law? If so, any key changes thereto?	Yes. No distinction between international and national arbitration.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	While there are no specialised courts, if available, judges with relevant or specialised experience are appointed to arbitration-related matters in the Lithuanian Court of Appeal, which has jurisdiction to adjudicate set-aside and recognition applications.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes.
Courts' attitude towards the competence-competence principle?	Accepted.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	No.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	Very pro-arbitration.
Other key points to note?	ϕ

LUXEMBOURG, BY LUTGEN + ASSOCIÉS

Luxembourg is a first-class European business centre and home to the worlds' leading financial and banking institutions. This feature has a twofold impact to the arbitration practice in Luxembourg, rendering Luxembourg practitioners and judges highly attuned to the practice of arbitration:

- i. Where the Luxembourg corporate law is applicable to shareholder agreements and international financial contracts containing arbitration clauses, parties to arbitration proceedings need to seek Luxembourg corporate and private international law specialists.
- ii. Luxembourg is, de facto, an unavoidable venue for enforcing foreign arbitral awards.

Moreover, preeminent arbitration specialists are associated in the Think Tank for the Development of Arbitration in Luxembourg. The Think Tank has been working for the past years on a draft bill aiming at a complete overhaul of the Luxembourg rules on arbitration, which are currently codified in the New Code of Civil Procedure ("**NCPC**"), under Part II, Book III, Title I "On Arbitration", Articles 1224 to 1251. The draft has been influenced by the recent French arbitration reform and the UNCITRAL Model Law as applied and interpreted in Belgium. It is hoped that the bill will be passed in the next 2 to 3 years.

Date of arbitration law?	Luxembourg rules on arbitration date back to the enactment of the NCPC in 1806, with reforms made in 1939 and 1981.
UNCITRAL Model Law? If so, any key changes thereto?	Arbitration rules do not follow the UNCITRAL Model Law. However, the Model Law is one of the influencing instruments in the upcoming reform bill prepared by the Think Tank for the Development of Arbitration in Luxembourg.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	There are no specialised judges. However, the judges are highly familiar with the principles of arbitration law for the reasons explained above.
Availability of <i>ex parte</i> pre-arbitration interim measures?	<i>Ex parte</i> interim measures are available for the constitution of the arbitral tribunal. Otherwise, the admissibility of <i>ex parte</i> applications for interim measures is subject to the applicant demonstrating the existence of exceptional circumstances.
Courts' attitude towards the competence-competence principle?	Subject to either of the parties raising the issue, the principle is analysed and upheld by the courts, unless the arbitration agreement is null and void.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The Luxembourg rules on arbitration follow closely the New York Convention grounds for annulment, while also providing additional grounds. Annulment proceedings may last from 6 to 11 months subject to appeals and the complexity of the case. One unusual feature of Luxembourg law is that, to seek annulment of a Luxembourg award, one must first request its exequatur before the District Court via an <i>ex parte</i> application to the President of the competent District Court which is usually expedited under one to two weeks.

<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>Following in the footsteps of French judges, Luxembourg courts have enforced arbitral awards annulled in the seat of arbitration. However, in 2015, Luxembourg departed from this position by deciding to stay exequatur proceedings in Luxembourg to await the result of annulment proceedings at the seat of the arbitral award.</p>
<p>Other key points to note?</p>	<p>∅</p>

MALTA, BY CAMILLERI PREZIOSI

Arbitration in Malta is regulated by the Arbitration Act, Chapter 387 of the Laws of Malta (“the Act”).²⁸ The Act lays down a separate regime for domestic and international arbitration. Domestic arbitrations must be conducted with and under the rules of the Malta Arbitration Centre (“MAC”), under pains of nullity. As for international arbitration, the Act is largely based on the UNCITRAL Model Law.

Date of arbitration law?	It came into force on 23 February 1998 and was last amended in 2015.
UNCITRAL Model Law? If so, any key changes thereto?	The legal regime for international arbitration is largely based on the Model Law, with the following main changes: <ul style="list-style-type: none"> • the procedure for obtaining the recognition and enforcement of foreign awards; and • parties can choose to exclude the application of the Model Law, in which case the provisions applicable to domestic arbitration shall apply unless the parties have chosen different rules.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No, save inasmuch as the Chairman of the Board of Governors of the MAC is the competent authority designated for the purposes of Article 6 of the Model Law.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes, before the First Hall, Civil Court. Where interim measures are granted prior to the commencement of arbitration proceedings, the party requesting such a measure must proceed to file the arbitration proceedings within twenty days from such request.
Courts’ attitude towards the competence-competence principle?	Respected, unless for domestic arbitration if the court considers that any party will suffer irreparable harm if the court does not itself determine the issue (see Article 32 of the Act).
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	No. For domestic arbitral awards, it is possible to appeal them on a point of law (and on points of fact as well in the case of mandatory domestic arbitrations).
Courts’ attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	Maltese courts have not so far expressed any views on this issue, but under the Act the courts could refuse to recognise such awards.

²⁸ Available at <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8854>.

Other key points to note?

The power of arbitral tribunals to grant interim measures does not extend to those such measures known under Maltese law as precautionary acts, namely the warrant of description, warrant of seizure, warrant of seizure of commercial going concern, garnishee order, warrant of impediment of departure, warrant of arrest of sea vessels, warrants of arrest of aircraft and the warrant of prohibitory injunction. If a court issues a precautionary act, it shall remain in force until the final determination of the dispute between the parties by the arbitral tribunal, or until the same court issues a counter-warrant.

MAURITIUS, BY PEEROO CHAMBERS

The Mauritian legal system comprises a combination of common law and civil law principles. Its international arbitration law is modern and efficient. Intervention by the local courts has been drastically reduced, and the autonomy of arbitration proceedings has been considerably enhanced. For instance, the International Arbitration Act 2008, which is based on the UNCITRAL Model Law, additionally includes the negative effect of the principle of competence-competence. In relation to interim measures, only in cases of urgency, or where all parties agree or the arbitral tribunal so permits, will applications for such measures be entertained by the courts, and so only to the extent that the arbitrator(s) cannot act effectively. Further, key judicial functions, such as the appointment of arbitrators or resolving difficulties encountered in the setting up of the arbitral tribunal, and challenge to arbitrators, are carried out by the Permanent Court of Arbitration in the Hague, rather than by domestic courts. Arbitration-related cases before the courts are submitted to a three-judge panel of specialised judges, with a sole and final possibility of appeal to the Judicial Committee of the Privy Council (UK).

Mauritius has distinct legal regimes for domestic and international arbitrations, but parties may choose to apply the international arbitration law to arbitrations which would otherwise be considered as domestic. Therefore, in order to ensure that parties benefit from the highly efficient and more up-to-date regime, arbitration clauses should specify that the arbitration will be governed by the International Arbitration Act 2008.

Date of arbitration law?	The International Arbitration law is dated 2008 and was revised in 2013.
UNCITRAL Model Law? If so, any key changes thereto?	It is based on the UNCITRAL Model Law, with enhancements such as: <ul style="list-style-type: none"> • the negative effect of the principle of competence-competence; and • the priority of the arbitral tribunal to order interim measures.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Arbitration-related cases are heard by a panel of three specialised judges. In the light of their recent judgments, the panel of specialised arbitration judges can be said to be arbitration-friendly.
Availability of <i>ex parte</i> pre-arbitration interim measures?	<i>Ex parte</i> interim measures are available in case of urgency.
Courts' attitude towards the competence-competence principle?	The competence-competence principle is applied.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Two additional grounds for annulment of an award can be relied on, namely: <ul style="list-style-type: none"> • where its making was induced or affected by fraud or corruption; and • where there has been a breach of natural justice during the arbitral proceedings or in connection with the making of the award, by which the rights of any party have been or will be substantially prejudiced.

<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>It is arguable that awards annulled at the seat may be enforced in Mauritius in exceptional cases.</p>
<p>Other key points to note?</p>	<ul style="list-style-type: none"> • There is a time-limit of three months to seek annulment, triggered by receipt of the award by the party seeking annulment. • Awards in French and English do not have to be translated to be enforced. • Arbitration-related proceedings before the courts are fast and efficient.

THE NETHERLANDS, BY KENNEDY VAN DER LAAN

In addition to dealing with disputes relating to international trade, The Netherlands have also become a hub for financial services. This has led to a thriving cross-border industry (with English as a working language) that, given its nature, requires suitable means of resolving disputes. Accordingly, arbitration has become widely accepted and is commonly used to settle disputes in the Netherlands, both where it concerns international as well as complex domestic disputes. To facilitate arbitration even further, the Dutch Arbitration Act (“DAA”) has been updated and modernized in 2015.

Date of arbitration law?	The DAA entered into force in 1986. A substantial revision aimed at modernizing and improving the DAA entered into force on 1 January 2015.
UNCITRAL Model Law? If so, any key changes thereto?	The UNCITRAL model law has served as an inspiration for the original DAA and has also been drawn upon as part of the 2015 revision of the DAA.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	The competent courts in the key seats within the Netherlands are the District Court of, respectively, Amsterdam, The Hague and Rotterdam that are experienced in dealing with arbitration-related matters. There are no specialized courts that have special jurisdiction over arbitration matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Dutch courts can grant <i>ex parte</i> conservatory measures, such as pre-judgement attachment of assets. Other interim measures are generally granted only after the other party has been heard.
Courts’ attitude towards the competence-competence principle?	The competence-competence principle is applied in the Netherlands. Accordingly, arbitrators decide on their own jurisdiction. Control is exercised through annulment proceedings after the award has been rendered.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Annulment is only possible in case of (i) absence of a valid arbitration agreement, (ii) irregular constitution of the arbitral tribunal, or if (iii) the arbitration tribunal has exceeded its mandate, (iv) the award has not been signed or motivated, (v) the award or the manner in which it has been established violates public order (art. 1065 DCCP).
Courts’ attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	In the absence of a treaty, the annulment of foreign awards in the jurisdiction where the seat of arbitration is located will mean that the award can no longer be enforced in The Netherlands (art. 1076 (1)(A)(e) DCCP). With respect to foreign awards to which a treaty is applicable, the rules of the latter will apply. In the context of the New York Convention, the Dutch Supreme Court recently ruled that the national courts must be considered to have some discretion with respect to the recognition and enforcement of arbitral awards, also if the grounds for refusal

	under article V(1) apply. ²⁹ This discretion should, however, be applied restrictively.
Other key points to note?	<u>Assistance of the Dutch courts</u> : The Dutch courts can assist in matter such as (i) constitution of the arbitral tribunal, (ii) challenge of arbitrators, (iii) granting provisional or conservatory measures, and (iv) taking evidence in cross-border settings.

²⁹ Supreme Court 24 November 2017, ECLI:LN:HR:2017:2992 (*X / OJSC Novolipetsky Metallurgichesky Kombinat*).

NIGERIA, BY BRODERIK BOZIMO

The Arbitration and Conciliation Act 1988 (the 'ACA') governs arbitration in the Federal Republic of Nigeria. The ACA came into force on 14th March 1988 and applies to all arbitration proceedings commenced on or after that date.

The ACA incorporates the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the 'New York Convention') and is modelled on the 1985 version of the UNCITRAL Model Law with minor additions as it concerns domestic arbitration.

Date of arbitration law?	The ACA entered into force in 1988.
UNCITRAL Model Law? If so, any key changes thereto?	The ACA is modelled after the 1985 UNCITRAL Model Law with minor additions with respect to domestic arbitration.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	The ACA designates the High Courts of the respective States and the Federal High Court to handle arbitration-related matters. The Lagos State High Court has a commercial division to which arbitration matters are generally assigned. The High Court of the Federal Capital Territory, Abuja also proposes to introduce a commercial division. It currently designates an 'ADR Judge', to whom arbitration matters are generally assigned.
Availability of <i>ex parte</i> pre-arbitration interim measures?	In appropriate cases (such as cases of genuine urgency), <i>ex parte</i> pre-arbitral interim measures are available from the courts.
Courts' attitude towards the competence-competence principle?	Recent judicial policy recognises and gives deference to the competence-competence principle.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The grounds for annulment mirror the criteria for refusal of recognition and enforcement of foreign awards set out in the New York Convention.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The annulment of a foreign award at its seat constitutes a ground for refusal of recognition or enforcement of that award in Nigeria. Under the current judicial policy, these awards will not be recognised or enforced in Nigeria.
Other key points to note?	Partial and Interim Awards are enforceable under the ACA. A comprehensive Bill to repeal and re-enact the ACA is awaiting third reading at the Senate of the Federal Republic of Nigeria. The Bill is modelled on the 2006 version of the UNCITRAL Model Law with some notation additions. These include the introduction of emergency arbitrator provisions and the introduction of an appellate review tribunal if parties elect to circumvent the national courts for annulment proceedings. The Bill also introduces time limits in arbitration related matters before the Courts.

NORWAY, BY WIKBORG REIN

In Norway, ad hoc arbitral tribunals are, by far, the most commonly used. In cases of institutional arbitration, the parties often opt for the SCC or ICC rules. The Oslo Chamber of Commerce has an institute for arbitration and alternative dispute resolution, which recently gained some attraction. The status of international arbitration in Norway has remained mostly unchanged in recent years. With the international trend of an increasing number of cross-border contractual relationships and the increased costs associated with the large arbitration institutions, the number of international arbitrations in Norway may increase in the years ahead.

Date of arbitration law?	The Arbitration Act 2004 was enacted on 14 May 2004 and governs arbitration seated in Norway.
UNCITRAL Model Law? If so, any key changes thereto?	The Arbitration Act is based on the UNCITRAL Model Law with some adjustments. The Arbitration Act governs both international and domestic arbitration.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	There are no specialised courts in Norway handling arbitration-related matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Norwegian courts may decide on interim measures even though the dispute is governed by an arbitration clause.
Courts' attitude towards the competence-competence principle?	The tribunal has competence to decide on its own jurisdiction and any objections to the existence or validity of the arbitration agreement. In case the tribunal renders a decision on jurisdiction before the final award, that decision may be brought before the ordinary courts
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The Arbitration Act upholds the pro-enforcement bias, as set out in the New York Convention. Enforcement of the award may be refused on the same grounds as set out in the New York Convention which essentially are the same grounds that would render an award invalid. In addition, enforcement may be refused if the award is not yet binding on the parties or the award has been overturned by a court in the state where the award was rendered.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	In case legal action is taken before the ordinary courts regarding the validity of an arbitral award, Norwegian courts have a discretionary power to stay enforcement of the award. In practice, the courts will evaluate the allegations and submissions regarding the invalidity of the award when assessing whether staying enforcement is appropriate.
Other key points to note?	The main rule in Norway is that the parties jointly nominate all three arbitrators. If the parties cannot agree on a panel, the parties will choose one arbitrator each, and the two chosen arbitrators then appoint the third arbitrator who acts as the chairperson of the arbitration

PAKISTAN, BY RAJA MOHAMMED AKRAM & CO. (RMA&CO)

Date of arbitration law?	The Arbitration Act was introduced in 11 March 1940. The New York Convention Act was promulgated on 15 July 2011 (and applies to foreign arbitral awards issued after 14 July 2005).
UNCITRAL Model Law? If so, any key changes thereto?	No.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Jurisdiction under the Arbitration Act rests with the ordinary civil courts. Jurisdiction under the New York Convention Act is with the High Courts, which are constitutional courts one tier below the Supreme Court (which is the highest court).
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes.
Courts' attitude towards the competence-competence principle?	The courts generally accept that the arbitral tribunal may decide on its own jurisdiction, but there is no specific legislation to this effect.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	No. The grounds for annulment of awards under the Arbitration Act are wide and include questions relating to the misconduct of the arbitral proceedings and the legality of the award apparent on the face of the award.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The courts in Pakistan have not addressed this issue.
Other key points to note?	φ

PARAGUAY, BY GROSS BROWN ESTUDIO JURÍDICO

With the enactment of the Arbitration Act in 2002, Paraguay adopted almost entirely the UNCITRAL Model Law of 1985. This allowed a significant increase in the practice of commercial arbitration.

Date of arbitration law?	The Arbitration Act was enacted on 24 April 2002.
UNCITRAL Model Law? If so, any key changes thereto?	<p>The Arbitration Act has adopted almost entirely the UNCITRAL Model Law. The few key deviations are briefly set out below:</p> <ul style="list-style-type: none"> • First, Article 11 of the Arbitration Act deviates from Article 8(2) of the Model Law. Article 11 of the Arbitration Act adds the phrase identified in red at the end of the text of Article 8(2) of the Model Law: <p style="margin-left: 40px;"><i>Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court, provided that the parties, before an award is rendered, desist from the instance.</i></p> <p>Accordingly, arbitrators cannot render an award while a dispute which may fall within the scope of the arbitration agreement is still pending before Paraguayan domestic courts.</p> • Article 19 of the Arbitration Act deviates from Article 16 of the Model Law, by adding that the arbitral tribunals may not render its award while a matter pertaining to the arbitral tribunal's jurisdiction is pending before Paraguayan domestic courts. • Article 40 subsection b) of the Arbitration Act deviates from Article 36 of the Model Law regarding the grounds for refusal of enforcement, by providing that a violation of "international public policy" (as opposed to the reference to the State's public policy in Article 36 of the Model Law) shall give rise to a denial of enforcement. <p>These differences are further developed below.</p>
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Pursuant to Article 9 of the Arbitration Act, the authority responsible for handling arbitration-related matters is the First Instance Court for Civil and Commercial matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	<p>Pursuant to Article 20 of the Arbitration Act, prior to the constitution of the Arbitral Tribunal, interim measures can only be requested from the First Instance Court for Civil and Commercial matters.</p> <p>Interim measures granted by such courts will expire seven days after the constitution of the Arbitral Tribunal.</p>

	Both courts and arbitrators can grant interim measures <i>ex parte</i> .
Courts' attitude towards the competence-competence principle?	<p>Pursuant to Article 19 of the Arbitration Act, the arbitral tribunal has the power to rule upon its own jurisdiction, including in cases where a party has objected to its jurisdiction, based on the existence or validity of the arbitration agreement. For this purpose, arbitration clauses are considered independent from the rest of the contract. The nullity of the contract will not entail ipso jure the nullity of the arbitration clause.</p> <p>However, even though the competence-competence principle is enshrined in Article 19 of the Arbitration Act, arbitral tribunals cannot render an award while an issue of jurisdiction is pending before domestic courts. Although there are not many cases dealing with the competence-competence principle, the general trend shows that domestic courts respect this principle, and decline to exercise jurisdiction in the presence of arbitration clauses.</p>
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Grounds for annulment under the Arbitration Act are substantially the same as those set forth in the New York Convention.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	Pursuant to Article 46 of the Arbitration Act, the annulment of an award at the place of arbitration constitutes a ground for denying enforcement in Paraguay. However, there is no relevant case law where this exception has been applied.
Other key points to note?	Besides Article 248 of the National Constitution of the Republic of Paraguay (the " National Constitution ") -which grants a jurisdictional nature to arbitration- (developed below), all the most salient characteristics of the Paraguayan jurisdiction are detailed in the analytical framework.

PERU, BY MIRANDA & AMADO, ABOGADOS

The Peruvian Arbitration Law ("**PAL**") is based on the 2006 UNCITRAL Model Law and applies to both international and domestic arbitration. The PAL has a modern approach on arbitration. The rules applicable protect the arbitration agreement limit the intervention of the courts during the course of the arbitration and the grounds for annulment are restrictive following the approach of the 2006 UNCITRAL Model Law. As all Peruvian state procurement contracts are referred to arbitration, there is a large volume of arbitration cases in Peru, thus a specialized arbitration culture has developed which is constantly evolving and improving.

Date of arbitration law?	The PAL entered into force on 1 September 2008.
UNCITRAL Model Law? If so, any key changes thereto?	Yes. No material changes have been introduced.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Yes, the Superior Court of Lima has two chambers specialized in commercial matters, which are competent for set-aside applications and award recognition actions. Please note that these chambers are not exclusively dedicated to arbitration-related matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes.
Courts' attitude towards the competence-competence principle?	Courts are favorable to the competence-competence principle. It has been recognized as a principle by the Peruvian Constitutional Tribunal.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	No.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	There is no case-law on this issue.
Other key points to note?	Under Peruvian law, all procurement contracts executed by the Peruvian State must be submitted to arbitration.

THE PHILIPPINES, BY SYCIP SALAZAR HERNANDEZ & GATMAITAN

Arbitration in the Philippines is primarily governed by Republic Act No. 9285 (“RA 9285”). It is also known as the Alternative Dispute Resolution Act of 2004. RA 9285 primarily adopted (1) Republic Act No. 876 (otherwise known as the Arbitration Law), which was enacted on June 19, 1953 to govern domestic arbitration, and (2) the UNCITRAL Model Law to govern international commercial arbitration.

Parties are free to agree on, among other things: (a) the seat of arbitration, (b) the law governing the arbitration agreement, (c) the place where arbitration hearings shall be held, (d) the language of the arbitration, and (e) the procedure for the appointment of arbitrators and the proceedings.

Philippine courts also provide support to parties to an arbitration agreement and arbitration proceedings. For example, Philippine courts have the power to (1) suspend court proceedings and refer the parties to arbitration once it is notified of the existence of an arbitration agreement between the parties, (2) issue interim measures of protection when necessary, and (3) provide assistance in the taking of evidence. An arbitral award may not be appealed, and may only be set aside or refused enforcement in accordance with the grounds set out in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which the Philippines is a party to.

Date of arbitration law?	RA 9285 was enacted on February 4, 2004, and it has not yet been amended.
UNCITRAL Model Law? If so, any key changes thereto?	The Philippines adopted the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on June 21, 1985. It has not yet adopted the 2006 Model Law.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	ϕ
Availability of <i>ex parte</i> pre-arbitration interim measures?	Arbitrators may issue interim measures of protection. Philippine courts have the power to issue interim measures of protection, including temporary orders of protection that they can issue <i>ex parte</i> .
Courts’ attitude towards the competence-competence principle?	The principle of competence-competence is recognized by Philippine law. Philippine courts will generally stay court proceedings if there is a valid arbitration agreement covering the dispute.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The Philippines has adopted the grounds to refuse the recognition and enforcement of an arbitral award set out in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
Courts’ attitude towards the recognition and enforcement of	ϕ

foreign awards annulled at the seat of the arbitration?	
Other key points to note?	<p>The law does not regulate the arbitrator's right to admit or exclude evidence.</p> <p>A domestic arbitral award or international commercial arbitral award may not be appealed.</p> <p>The petition to recognize and enforce an arbitral award may be filed anytime from receipt of the award, but it must be filed within 10 years from receipt of the award. However, if a timely petition to set aside an arbitral award is filed (which must be filed within three months from the receipt of the award), the opposing party must file therein and in opposition thereto the petition for recognition and enforcement of the same award within fifteen (15) days from receipt of the petition to set aside.</p> <p>A foreign arbitral award is presumed to have been made and released in due course of arbitration and is subject to enforcement by the court.</p> <p>It is a crime for an arbitrator to have any interest in the property disputed in the arbitration proceedings wherein he acted as an arbitrator. However, there does not appear to be any arbitrator who has been convicted of this crime.</p>

POLAND, BY CLIFFORD CHANCE

Date of arbitration law?	The Polish arbitration law was enacted in 2005 and the last revision was made in 2015.
UNCITRAL Model Law? If so, any key changes thereto?	The Polish arbitration law is mainly based on the UNCITRAL Model Law. The key modifications are: the arbitration agreement must be in writing and cannot confer a unilateral right to arbitrate only on one of the parties. Arbitration agreements in respect of disputes with consumers or concerning labour law are valid only if they are concluded after the dispute arises.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Polish courts can issue <i>ex parte</i> pre-arbitration interim measures.
Courts' attitude towards the competence-competence principle?	
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The grounds for annulment of an arbitral award are similar to those provided for in the New York Convention.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	Under Polish law, the courts cannot recognize and enforce an award annulled at the seat of the arbitration. Set aside and recognition/enforcement proceedings are single-staged and are held before the Court of Appeal. The decision of the Court of Appeal (concerning the enforcement of a foreign arbitral award or setting aside of local/foreign awards) can be appealed to the Supreme Court, but on very narrow grounds.
Other key points to note?	ϕ

PORTUGAL, BY MORAIS LEITÃO, GALVÃO TELES, SOARES DA SILVA & ASSOCIADOS

The current Portuguese Voluntary Arbitration Law (“PAL”) is the result of an extensive debate and peer-review process and it materializes the efforts of the Portuguese government to equip Portugal with a more competitive, effective and modern arbitration law, thereby rendering the country truly arbitration-friendly.

Date of arbitration law?	The PAL entered into force on 14 March 2012 and is heavily influenced by the 2006 UNCITRAL Model Law, with certain improvements mostly based on the experience of other leading jurisdictions and/or on demands by users.
UNCITRAL Model Law? If so, any key changes thereto?	Yes, with main changes discussed below.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Portuguese Courts are renowned for their independence and impartiality and are generally supportive of arbitration. Notwithstanding, there is no specific judicial body devoted to handling arbitration-related matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes, in the appropriate circumstances.
Courts’ attitude towards the competence-competence principle?	Article 5, both the positive and negative effects of the competence-competence principle are recognized.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Parties may request annulment of awards by means of a set aside motion under Article 46 of the PAL. In this regard, the Portuguese law significantly reflects, but does not absolutely mirror, the New York Convention, as it sets narrow grounds to set aside the award and does not allow for a review of the merits of the arbitral decision.
Courts’ attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The PAL has a pro-arbitration stance in respect of the enforcement of arbitration agreements. To the best of our knowledge, Portuguese courts have not yet had the opportunity to address the question of whether an award that has been annulled at the seat may be recognized and enforced in Portugal.
Other key points to note?	<ul style="list-style-type: none"> – The PAL provides for specific rules governing multi-party and multi-contract arbitrations and expressly allows for interim measures and preliminary orders. – The PAL provides a general principle of confidentiality of the arbitration proceedings.

ROMANIA, BY IORDACHE PARTNERS

Date of arbitration law?	2013. The main body of law applicable to arbitration in Romania is set out in Book IV "On Arbitration" and in Book VII, "On International Arbitration and the Effects of Foreign Arbitral Awards", of the new Civil Procedure Code.
UNCITRAL Model Law? If so, any key changes thereto?	Although the International arbitration provisions are not based on the UNCITRAL Model Law, it is in line with its principles.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	The arbitration related matters are handled by the municipal civil courts (<i>Tribunal</i>) or by courts of appeal (<i>Curte de Apel</i>).
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes.
Courts' attitude towards the competence-competence principle?	Arbitral tribunal's right to rule on its own competence is upheld. Furthermore, the court, when seized with a dispute in relation to which there is a valid arbitral agreement will decline competence.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Awards can notably be annulled in the following circumstances: <ul style="list-style-type: none"> - the decision was rendered after the expiry of the agreed time limit although termination had been invoked by one of the parties and there was no party agreement for the continuation of the arbitration; - the decision did not include the reasons, did not state the date and place where it was rendered, or was not signed by the arbitrators; - after the award was rendered, the Constitutional Court renders a decision on an unconstitutionality objection raised in the course of the arbitral proceedings, declaring unconstitutional the law or piece of legislation or provision which formed the subject of the objection.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	Under the new provisions, both recognition and enforcement may be suspended or rejected if the foreign award had been subject to annulment at the seat.
Other key points to note?	<u>Access to the Constitutional Control for arbitral tribunals:</u> The access of arbitral tribunals to the Constitutional Court takes place by means of objection as to the unconstitutionality of a law or a provision of the law.

RUSSIA, BY FRESHFIELDS BRUCKHAUS DERINGER

<p>Date of arbitration law?</p>	<p>Russia has separate statutes for international and domestic arbitration. International arbitration is governed by Law ‘On International Commercial Arbitration’ dated 7 July 1993 (the ICA Law) which was significantly modified by arbitration reform legislation adopted in December 2015. The reform legislation also included a new Federal Law ‘On Arbitration’ dated 31 December 2015 (the Domestic Arbitration Law) which replaced Russia’s pre-existing federal statute on domestic arbitration. The Domestic Arbitration Law and the reformed ICA Law entered into force on 1 September 2016. The ICA Law generally applies to Russia-seated arbitrations with significant cross-border elements and to the recognition and enforcement of foreign awards in Russia, while the Domestic Arbitration Law regulates the arbitration of “intra-Russian” disputes. In respect of Russia-seated international arbitrations, some provisions of the Domestic Arbitration Law (e.g., in respect of eligibility criteria for arbitrators) apply by reference. Qualification of a dispute as ‘domestic’ or ‘international’ not only determines which statute and arbitral rules will apply, but may have wider consequences. For example, it is arguable that purely domestic disputes are not capable of being referred to arbitration outside Russia, and those arguments have been supported in some Russian court decisions. It is also important to bear in mind that new Russian arbitration legislation expressly allows arbitration clauses in respect of Russian corporate disputes from 1 February 2017 and suggests that earlier arbitration clauses relating to such disputes are non-enforceable.</p>
<p>UNCITRAL Model Law? If so, any key changes thereto?</p>	<p>Russia’s two arbitration laws are largely harmonized, and based to a significant extent on the UNCITRAL Model Law. There are some differences, for example the criteria of ‘international’ disputes under the ICA Law are not identical to those under the Model Law, arbitrators may not decide cases <i>ex aequo et bono</i>, etc.</p>
<p>Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?</p>	<p>There are no specialised courts or judges dealing exclusively with arbitration-related matters. The key seat of arbitration in Russia and the location of the most important arbitral institutions in the country is Moscow. The judicial corps in Moscow is well-trained, and Moscow courts of different levels often have to deal with arbitration-related cases such as recognition of foreign arbitral awards and annulment of awards issued in Moscow-seated arbitrations. Regional courts have also had exposure to arbitration matters, e.g. in the cases of recognition and enforcement of foreign arbitral awards against companies in the Russian regions.</p>
<p>Availability of <i>ex parte</i> pre-arbitration interim measures?</p>	<p>Pre-arbitration interim relief is available from courts. Applications for interim relief are considered <i>ex parte</i>. As a practical matter, Russian courts are usually reluctant to grant interim relief, unless</p>

	very strong evidence of immediate risk of asset dissipation can be demonstrated.
Courts' attitude towards the competence-competence principle?	Both the ICA Law and the Domestic Arbitration Law recognise the principle of competence-competence. Russian courts can be expected to recognise and support this rule.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The grounds for the annulment of an award under Russia's arbitration legislation are based on the criteria for the recognition and enforcement of awards under the New York Convention. However, as a practical matter, the application of these grounds may differ from that applied by courts in other countries. For example, Russian courts have traditionally taken a broad view of the public policy exception to the recognition and enforcement of arbitral awards (although the approach has recently evolved towards a narrower interpretation). The New York Convention-based non-arbitrability exception to enforcement will also apply differently in Russia compared to some other jurisdictions. This is because Russia, unlike many foreign jurisdictions, has specific and complex rules defining the arbitrability of various types of disputes, including corporate disputes.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	Russian courts will generally refuse enforcement of annulled arbitral awards.
Other key points to note?	∅

SERBIA, BY MORAVČEVIĆ VOJNOVIĆ AND PARTNERS IN COOPERATION WITH SCHOENHERR

Date of arbitration law?	10 June 2006
UNCITRAL Model Law? If so, any key changes thereto?	Yes, the Serbian Arbitration Act was modelled after the 1985 UNCITRAL Model Law. Changes include that: <ul style="list-style-type: none"> – the number of arbitrators must be odd; – the parties must appoint arbitrators within a certain timeframe; and – an award may be set aside if it was based on a false witness or expert testimony, counterfeit documents or criminal acts by arbitrators or parties (as established in a final and binding criminal court judgment).
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No, arbitration-related matters fall within the jurisdiction of the Higher Courts and Commercial Courts in the first instance.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes. Although the courts typically request input from the opponent on applications for interim measures, if applicant can indeed justify urgency or in case of service of process abroad, the courts were willing to issue <i>ex parte</i> interim measures.
Courts' attitude towards the competence-competence principle?	The courts accept that the arbitral tribunal may decide on its own competence, as a rule expressly provided by the Serbian Arbitration Act. However, if an arbitral tribunal decided on its competence as a preliminary matter, a party may still request the courts to decide this matter.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Yes. An award may be set aside if it is based on a false witness or expert testimony, counterfeit documents or criminal acts by arbitrators or parties (as established in a final and binding criminal court judgment).
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The court may refuse to recognise and enforce foreign awards set aside at the seat of arbitration. This is an express ground for refusal of recognition and enforcement.
Other key points to note?	The setting aside procedure is a standard litigation; the decision on the setting aside application is appealable, and may also be subject to revision before the Supreme Court of Cassation.

SINGAPORE, BY RAJAH & TANN SINGAPORE LLP

Arbitration law in Singapore is consistent with the Model Law regime – it is generally pro-arbitration focused, premised on minimal curial intervention. Arbitration awards – both domestic (i.e. arbitrations seated in Singapore) and foreign (i.e. awards from arbitrations seated in NY Convention countries) are readily enforceable before the Singapore courts.

Courts are also an avenue for support during, and before, the arbitration process. For instance, parties may apply to the Singapore court for interim measures in support of the arbitration (for instance the seeking of injunctions). Where possible, however, these applications should first be made to the tribunal.

The most recent development in Singapore is the relative liberalisation of third-party funding in the realm of arbitration. Parties involved in arbitration (as well as mediation and arbitration related court proceedings) may now avail to third party funding, subject to certain restrictions as provided for in the regulation: the Civil Law (Third-Party Funding) Regulations 2017 (S 68/2017).

Date of arbitration law?	The arbitration law (i.e. the two relevant statutes: the Arbitration Act and the International Arbitration Act) was last amended in 2016; it continues to be updated by case law.
UNCITRAL Model Law? If so, any key changes thereto?	Yes. Chapter VIII of the Model Law, which deals with Recognition and Enforcement of Awards, is excluded. But this is largely technical; Enforcement may be resisted in Singapore on the bases set out in Article 36.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Yes, there is an arbitration docket at the High Court such that judges experienced in arbitration-related matters are typically rostered to hear such matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes.
Courts' attitude towards the competence-competence principle?	Wholly supportive.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	No. However, in setting aside cases, section 24 of the International Arbitration Act provides that: "24. Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if — (a) the making of the award was induced or affected by fraud or corruption; or (b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced." However, the courts have interpreted these as being consistent with and not different from the due process and public policy rights already provided for under the Model Law.
Courts' attitude towards the recognition and enforcement of	Uncertain, although likely dismissive.

foreign awards annulled at the seat of the arbitration?	
Other key points to note?	φ

SLOVAKIA, BY ALLEN & OVERY

Date of arbitration law?	The Arbitration Act was enacted in 2012 and was substantially amended with effect from 1 January 2015.
UNCITRAL Model Law? If so, any key changes thereto?	The Arbitration Act is fully based on the 2006 version of the UNCITRAL Model Law. There are no key modifications.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Three general courts exercise jurisdiction over arbitral proceedings: the District Court Bratislava V, the District Court Banska Bystrica and the District Court Kosice I.
Availability of <i>ex parte</i> pre-arbitration interim measures?	<i>Ex parte</i> pre-arbitration interim relief may be granted by a court.
Courts' attitude towards the competence-competence principle?	Slovak law recognizes the negative effect of the competence-competence principle.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	There are no additional grounds for the annulment of awards rendered in Slovakia on top of those laid out in the New York Convention.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	A court may, but is not obliged to, refuse the enforcement of an award that has been set aside at the seat of the arbitration. There is no case law confirming whether the courts of the Slovak Republic would be willing to enforce awards that have been set aside.
Other key points to note?	<ul style="list-style-type: none"> • There are no issues with the enforcement of partial awards. However, interim awards are not per se considered as arbitral awards and are not immediately enforceable by the courts of the Slovak Republic. • The commencement of annulment proceedings does not automatically suspend the enforcement of an award. However, upon request of a party, the enforceability of an award may be suspended. • Arbitrators and experts can face civil as well as criminal liability.

SPAIN, BY GARRIGUES

The SAA, amended in 2011, was drafted following the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law), adopted on 21 June 1985, and only a few modifications were introduced thereto. It applies to both domestic and international arbitration when Spain is the place of arbitration, and certain provisions apply even when the place is abroad.

Date of arbitration law?	23 December 2003, last amended by Law 11/2011, of 20 May 2011.
UNCITRAL Model Law? If so, any key changes thereto?	<p>The SAA is based on the UNCITRAL Model Law. Nevertheless, the SAA presents some differences:</p> <ul style="list-style-type: none"> - any dispute over matters that can be freely and legally disposed of by the parties are arbitrable (Article 2(1) SAA); - in international arbitration, States or State-controlled entities cannot invoke prerogatives provided by their national law to circumvent obligations deriving from the arbitral agreement (Article 2(2) SAA); - arbitral proceedings are considered international also if the legal relationship from which the dispute stems has an impact on international trade (Article 3(1c) SAA); - in international arbitration, the arbitration agreement is valid if they fulfil the requirements set forth in any of the following rules are met: the legal rules chosen by the parties, the rules applicable to the merits of the dispute or the SAA (Article 9(6) SAA); - capital companies may subject their internal disputes, including the challenge of corporate resolutions, to arbitration (Article 11 bis SAA); - awards setting aside a registrable agreement must be entered in the Mercantile Registry (Article 11 ter SAA); - the default rule requires a single arbitrator to be appointed (rather than three) (Article 12 SAA); - a specific procedure for the appointment of arbitrators in multi-party arbitrations is foreseen (Article 15(2b) SAA); - if arbitrators do not notify the acceptance of their appointment within the agreed period (default rule of 15 days from the nomination) the appointment shall be deemed to have been declined (Article 16 SAA); - arbitrators may incur liability in the event of bad faith, gross recklessness or wilful act (Article 21 SAA); and - arbitral proceedings are presumed confidential (Article 24(2) SAA).
Availability of specialised courts or judges at the key seat(s) in the	Since 25 November 2010, the Court of First Instance, No. 101 of Madrid (<i>Juzgado de Primera Instancia No. 101 de Madrid</i>) was assigned exclusive jurisdiction over arbitration matters. This is

<p>jurisdiction for handling arbitration-related matters?</p>	<p>the first, and so far only, specialized court in Spain for arbitration-related matters.</p> <p>The success of this specialized court, especially in terms of length of the proceedings, has led to several requests for more of these courts from different legal practitioners. Therefore, it is not unlikely that more courts specialized in arbitration are to be created in Madrid; as well as in other key seats in Spain, such as Barcelona.</p> <p>In fact, there is already an initiative to centralize the enforcement of arbitral awards requested all over Catalonia in a specialized court located in Barcelona, which is pending for approval from the Spanish General Council of the Judiciary.</p>
<p>Availability of <i>ex parte</i> pre-arbitration interim measures?</p>	<p>Article 11(3) SAA provides that the arbitration agreement will not prevent any of the parties, prior to or during the arbitral proceedings, from requesting for interim measures to a court, or the court from granting such measures.</p>
<p>Courts' attitude towards the competence-competence principle?</p>	<p>The <i>Kompetenz-Kompetenz</i> principle is enshrined in Article 22 SAA (as expressly admitted in its recitals), pursuant to which arbitrators can decide on their own jurisdiction, either through a partial or final award.</p> <p>Such principle is generally respected by Spanish courts, even when the validity or the existence of the arbitration agreement itself is challenged (see decisions of the Supreme Court n° 409/2017, of 27 June 2017 (RJ 2017\3021)³⁰; and n° 776/2007, of 9 July 2007 (RJ 2007\4960)).</p> <p>Spanish courts may only review the decision of an arbitral tribunal on its own jurisdiction within the context of a request for set aside or a request for recognition and enforcement of an award deciding on the jurisdiction of the tribunal.</p>
<p>Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?</p>	<p>In accordance with the criteria for the recognition and enforcement of awards under Article V of the New York Convention, Article 41(1) SAA states the grounds for the annulment of awards, establishing that an award may be set aside only if the party against whom it is requested evidences that:</p> <ul style="list-style-type: none"> a) The arbitration agreement does not exist or is not valid; b) The party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; c) The award contains decisions on matters not submitted to arbitration; d) The appointment of the arbitrators or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with an

³⁰ In this decision, the Supreme Court admitted that, in case the jurisdiction of a court is challenged due to the existence of an arbitration agreement, such court may fully examine the validity and effectiveness of the arbitration agreement.

	<p>imperative provision of the SAA, or, failing such agreement, was not in accordance with such act;</p> <p>e) The subject-matter of the dispute cannot be submitted to arbitration;</p> <p>f) That the award is contrary to Spanish public policy.</p> <p>In conclusion, all the grounds for annulment of awards provided for by the SAA are based on the standard set-out for the recognition and enforcement of awards under the New York Convention.</p>
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>There is no express legal provision regarding the enforcement of annulled foreign awards in Spanish Law.</p> <p>However, the granting of <i>exequatur</i> for foreign awards is governed by the New York Convention. Pursuant to Article V(1e) of the Convention, recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, if that party demonstrates that the award has been set aside by a competent authority in the country where the award was rendered.</p> <p>In that line of reasoning, Spanish courts have generally adopted the view that an annulled award cannot be recognized.</p> <p>Notwithstanding with the above, it is important to note that the European Convention on International Commercial Arbitration concluded in Geneva on 21 April 1961 ("the Geneva Convention"), ratified by Spain in 1975 provides, to a certain extent, a more favourable regime regarding the recognition and enforcement of arbitral awards than the one established in the New York Convention.</p> <p>Concretely, with regard to the recognition and enforcement of foreign awards that have been annulled at the seat of arbitration, the Geneva Convention provides that their recognition and enforcement may only be refused when their annulment was based on any of the grounds set out in its Article IX (incapacity of the parties or invalidity of the arbitral convention, lack of due process, abuse of powers by arbitrators, and when the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the Convention). Therefore, if the award was annulled on a different ground, the Convention does not prohibit its recognition or enforcement.</p> <p>However, the scope of application of the Geneva Convention is more limited than the New York Convention, since it is only applicable to commercial matters, and only if the parties are located in different contracting States.</p>
<p>Other key points to note?</p>	<p>∅</p>

SWEDEN, BY MANNHEIMER SWARTLING

The Swedish Arbitration Act is fundamentally based on party autonomy. As a consequence, the structure of the arbitral proceedings under the Arbitration Act is primarily decided by the parties and, absent their agreement, by the arbitral tribunal. The Arbitration Act imposes very few mandatory rules, so the parties are free to contract out of the majority of provisions. Swedish courts are considered very arbitration-friendly, which is evident in that they will typically not intervene in arbitrations but will readily enforce both Swedish and foreign arbitral awards.

Date of arbitration law?	The Swedish Arbitration Act of 1 April 1999 (the " Arbitration Act ").
UNCITRAL Model Law? If so, any key changes thereto?	Sweden is <u>not</u> a Model Law country, but the Arbitration Act conforms to the Model Law's basic principles.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No special courts for handling arbitration-related matters. In practice, the Svea Court of Appeal located in Stockholm is very specialised in arbitration as it has jurisdiction over e.g. challenge procedures regarding arbitrations seated in Stockholm and enforcement procedures of foreign awards.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Swedish courts have power to order pre-arbitration interim measures for arbitrations seated in Sweden and abroad. The courts will also consider requests <i>ex parte</i> , <i>i.e.</i> , without hearing the other party, if delay would place the applicant's claim at risk. If interim measures are sought prior to commencing the arbitration, the applicant must submit a request for arbitration within one month from the issuance of the interim measure.
Courts' attitude towards the competence-competence principle?	Courts respect the competence-competence principle that is enshrined in the Arbitration Act. However, the Arbitration Act also entitles a party to seek a declaratory judgment from a competent Swedish court on whether or not the arbitral tribunal has jurisdiction.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The Arbitration Act makes a distinction between an action to declare an award invalid and an action to set aside an award. An award made in Sweden is invalid if the dispute was non-arbitrable, if the award is clearly incompatible with public policy or if it does not meet the formal requirements of an award (written form and signature). An award made in Sweden can be wholly or partially set aside if the arbitration agreement is invalid, the award was not rendered within a time limit agreed by the parties, arbitrators exceeded their mandate, the arbitral proceedings should not have taken place in Sweden, there were irregularities in the appointment of arbitrators, an arbitrator lacked capacity or impartiality, or there are other procedural irregularities that influenced the outcome of the case.

<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>The grounds for refusing the recognition and enforcement of a foreign arbitral award are those set out in the New York Convention.</p> <p>Upon the objection of a party, an award that has been set aside at the seat is not enforceable in Sweden.</p> <p>An interim measure by an arbitral tribunal is generally not considered as a decision on the merits and is thus not recognised as an enforceable award in Sweden.</p>
<p>Other key points to note?</p>	<p>φ</p>

SWITZERLAND, BY LEVY KAUFMANN-KOHLER

Chapter 12 of the Swiss Private International Law Act (“PILA”) governs international arbitrations with a seat in Switzerland. Salient features of Chapter 12 PILA include its clarity and conciseness, party autonomy and arbitration-friendliness, namely through comparatively more favourable standards regarding (i) the validity of arbitration agreements (Article 178 PILA); (ii) the arbitrability of any matter involving an economic interest (Article 177(1) PILA); (iii) the assistance of experienced state courts in support of arbitration (Articles 179(2) and (3), 180(3) and 183-185 PILA); (iv) an exhaustive and narrowly defined list of grounds of annulment of arbitral awards (Article 190(2) PILA), including a possibility for parties without any territorial connection with Switzerland to waive their right to seek annulment (Article 192 PILA); and (v) an arbitration-friendly approach by Swiss courts towards the recognition and enforcement of foreign awards under the New York Convention (Article 194 PILA).

Date of arbitration law?	18 December 1987, in force as from 1 January 1989.
UNCITRAL Model Law? If so, any key changes thereto?	While Chapter 12 PILA is not based on the UNCITRAL Model Law, there are no major differences or inconsistencies between these texts.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	<p><u>Geneva:</u> <i>Tribunal de première instance</i> (Article 356(2) of the Swiss Code of Civil Procedure (“CCP”); Article 86(2)(d) of the Geneva Law on Judicial Organisation (“<i>Loi sur l’organisation judiciaire</i>” or “LOJ/GE”)); <i>Chambre civile de la Cour de Justice</i> (Article 120(1)(a) LOJ/GE).</p> <p><u>Zurich:</u> <i>Obergericht</i> (Articles 356(1) and 356(2)(a) and (b) CCP; § 46 of the Zurich Law on Judicial Organisation (“<i>Gesetz über die Gerichts- und Behördenorganisation im Zivil- und Strafprozess</i>” or “GOG/ZH”)); <i>Bezirksgericht</i> (specifically, <i>Einzelgericht</i>) (Article 356(2)(c) CCP; §32 GOG/ZH).</p> <p>Assistance in matters of (i) constitution of the arbitral tribunal; (ii) challenge of arbitrators; (iii) any procedural matters, including provisional measures and the taking of evidence (Articles 179(2) and (3), 180(3) and 183-185 PILA).</p>
Availability of <i>ex parte</i> pre-arbitration interim measures?	Swiss courts (Article 265(1) CCP) and arbitral tribunals (unless the parties have otherwise agreed; Article 183 PILA) can grant <i>ex parte</i> provisional measures. However, as long as the arbitral tribunal is not yet constituted and no other private body, such as an emergency arbitrator, is available, the parties have no other option than to submit their request for (<i>ex parte</i>) interim relief to a state court. ³¹
Courts’ attitude towards the competence-competence principle?	Articles 186(1) and (1bis) PILA establish and recognize the competence-competence principle.
Grounds for annulment of awards additional to those based on the criteria for the recognition and	Exhaustive and narrowly defined list of annulment grounds (Article 190(2) PILA): irregular constitution of the arbitral tribunal (a); incorrect decision on jurisdiction (b); <i>ultra</i> or <i>infra petita</i> decisions (c); violations of fundamental principles of procedure

³¹ Bernhard BERGER/Franz KELLERHALS, *International and Domestic Arbitration in Switzerland*, 3rd ed., Berne 2015, para. 1275.

enforcement of awards under the New York Convention?	(d); and violations of public policy (e). These grounds are generally in line with Article V of the New York Convention, although the list in Article 190(2) PILA is more restrictive as it does not include the violation of the procedural rules agreed by the parties.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	While the Swiss courts have not yet decided this issue, Swiss commentators suggest that the recognition of awards annulled at the seat could be envisaged where the ground for annulment departs from those stated in Article V of the New York Convention, ³² or the annulment amounts to a manifest violation of the law of the country in which the award was made. ³³
Other key points to note?	∅

³² Gabrielle KAUFMANN-KOHLER/Antonio RIGOZZI, *International Arbitration – Law and Practice in Switzerland*, Oxford 2015, para. 8.269.

³³ Bernhard BERGER/Franz KELLERHALS, *International and Domestic Arbitration in Switzerland*, 3rd ed., Berne 2015, para. 2083; Sébastien BESSON/Luc PITTET, *La reconnaissance à l'étranger d'une sentence annulée dans son Etat d'origine - Réflexions à la Suite de l'Affaire Hilmarton*, 16 ASA Bulletin (1998), p. 525.

TOGO, BY MARTIAL AKAKPO & ASSOCIÉS

Date of arbitration law?	The OHADA Uniform Arbitration Act was revised on 23 November 2017.
UNCITRAL Model Law? If so, any key changes thereto?	The Togolese arbitration law is not based on UNCITRAL Model Law strictly speaking, but most of the core principles underlying the Model Law are applied under the Uniform Arbitration Act.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No. Ordinary courts handle jurisdictional challenges and the annulment and enforcement of awards.
Availability of <i>ex parte</i> pre-arbitration interim measures?	The courts may grant <i>ex parte</i> interim measures.
Courts' attitude towards the competence-competence principle?	The arbitral tribunal may rule on its own jurisdiction and national courts seized with a matter potentially falling within the ambit of an arbitration agreement must refer such matter to the arbitral tribunal save if the arbitration agreement is manifestly void or inapplicable.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Only limited grounds set out in the Uniform Arbitration Act, which are similar to those provided for in the New York Convention.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The question of whether Togolese courts are bound by the foreign court's set-aside decision has not been settled yet, although we believe that such setting aside would not be a ground for non-enforcement in Togo.
Other key points to note?	Arbitration agreements are to be signed by all parties in principle, although the Uniform Arbitration Act leaves room for a binding effect of the arbitration agreement on non-signatories. Based on the decision rendered by Togolese courts, we would assess the arbitration friendliness of Togo at about 40%.

UKRAINE, BY REDCLIFFE PARTNERS

Ukraine is an arbitration-friendly jurisdiction with detailed regulation of courts' control over and support to international commercial arbitration. International and domestic arbitration are regulated in separate statutes: international commercial arbitration is regulated in the Law of Ukraine On International Commercial Arbitration (the "**ICA Law**") while domestic arbitration is subject to the Law on Domestic Arbitration Courts. In practice, the only international commercial arbitration institution in Ukraine that administers international commercial arbitration disputes is the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (the "**ICAC**"), however there is no legal restriction to set up an institution for administering international commercial arbitrations.

The Ukrainian parliament has recently adopted a major law restating a number of the procedural codes and amending statutes of Ukraine governing the court procedure and arbitration (the "**Court Procedures Reform Law**"). It entered into force on 15 December 2017.

Date of arbitration law?	The ICA Law was adopted on 24 February 1994 and entered into force on 20 April 1994. The latest amendments were introduced on 15 December 2017.
UNCITRAL Model Law? If so, any key changes thereto?	<p>The ICA Law is based on the UNCITRAL Model Law dated 1985 without the 2006 amendments and with certain deviations regarding:</p> <ul style="list-style-type: none"> • the "international" nature of the disputes (Art. 1); • the "commercial" nature of disputes (Art. 1); and • the indication that the President of the Ukrainian Chamber of Commerce and Industry shall perform the functions of the appointing authority referred to in articles 11(3), 11(4), 13(3). <p>The Court Procedures Reform Law also provides for:</p> <ul style="list-style-type: none"> • negative inferences based on a party's failure to provide evidence; and • additional regulation of interim measures.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No. The cases for annulment of arbitral awards rendered in international arbitration seated in Ukraine will be considered by the appeal court of the region where such arbitration was seated, while the Kyiv City Court of Appeal is in charge of the applications for recognition and enforcement of arbitral awards. However, given the fact that ICAC seated in Kyiv is the only arbitral institution that administers international commercial disputes in Ukraine, the Kyiv City Court of Appeal alone will hear the annulment and recognition cases in Ukraine.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes.
Courts' attitude towards the competence-competence principle?	Ukrainian courts generally recognize the competence-competence principle.
Grounds for annulment of awards additional to those based on the	No.

<p>criteria for the recognition and enforcement of awards under the New York Convention?</p>	
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>Under the ICA Law, a court may refuse to recognise and enforce a foreign award if the foreign award has been annulled at its seat. There have been no precedents of attempts to enforce annulled awards in Ukraine. However, in our view, the annulment of the award at the jurisdiction of its seat would likely be regarded by Ukrainian courts as a bar to recognition and enforcement.</p>
<p>Other key points to note?</p>	<p>The arbitration agreement should expressly indicate the full name of an arbitral institution and the types of disputes that the parties have agreed to refer to the arbitration. Ukrainian courts tend to invalidate the arbitration agreement or deny enforcement of the arbitral award in case of misspelling of the name of an arbitral institution. While the amendments to the ICA Law introduced by the Court Procedures Reform Law provide that any inaccuracies in the text of the arbitration agreement or doubts regarding its validity, effect and enforceability shall be interpreted by the court in favour of its validity, effect and enforceability, it remains to be seen whether the overly strict and formalistic approach of Ukrainian courts will change as a result of these changes.</p>

UNITED ARAB EMIRATES, BY AL TAMIMI & COMPANY

UAE Federal Arbitration Law No. 6 of 2018 on Arbitration has been recently issued and gazetted. It repeals the Arbitration Chapter of the UAE Civil Procedures Law No. 11 of 1992. The new law came into effect on 16 June 2018 and will apply to all ongoing and future arbitral proceedings. The new law is expected to significantly revamp arbitration in the UAE.

This GAP chapter on UAE is currently being updated to incorporate the provisions of the new UAE Federal Arbitration Law.

Arbitration has been a widely-used method for resolving commercial disputes arising out of domestic and international commercial transactions in the UAE. The UAE’s ascension to the New York Convention in 2006 and the drafting of a proposed UAE Federal Arbitration Law (to replace the existing Federal Code of Civil Procedure) highlights the UAE’s commitment to utilising arbitration as a popular commercial dispute resolution regime in the region. The UAE courts are generally supportive of and respect an agreement to arbitrate between parties (although they have tended to adapt a restrictive approach to confirming arbitration agreements as an exception to their general jurisdiction). The UAE courts also respect domestic, international and foreign arbitral awards and recognise and enforce them, subject to the provisions of the law, without examining the merits of the case.

Date of arbitration law?	At present, the CPC governs all arbitrations conducted in the UAE (excluding those that take place in the context of the DIFC and the ADGM). The CPC arbitration provisions were drafted in 1992 and have remained largely unchanged since then. Article 203 (arbitration agreement) and Article 241 (conduct of the execution bailiff) were amended in 2005 pursuant to Federal Law No. 30 of 2005.
UNCITRAL Model Law? If so, any key changes thereto?	The CPC is not based on the UNCITRAL Model Law. The new federal arbitration law is based on the UNCITRAL Model Law and replaces Articles 203 to 218 of the CPC.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	There are no specialised arbitration courts or judges in the UAE.
Availability of <i>ex parte</i> pre-arbitration interim measures?	The parties can apply for precautionary attachment orders on an <i>ex parte</i> basis as a pre-arbitration interim measure.
Courts’ attitude towards the competence-competence principle?	The CPC does not expressly provide for the competence-competence doctrine. However, this principle is recognised by the UAE courts. There are no statutory provisions, which prohibit the arbitrator(s) from determining their jurisdiction.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Under the CPC, awards may be challenged for the following reasons: (1) the award was rendered without an arbitration deed or was based on an invalid arbitration agreement or deed, (2) the arbitrator was invalidly appointed, (3) the award was issued by one arbitrator in the absence of other members of the tribunal without their permission, (4) the award was issued out of time, (5)

	a material procedural flaw in the arbitral proceedings (6) the award relates to a matter that is not capable of being arbitrated, or (7) the award is contrary to the public policy of the UAE. This reflects the criteria under Article V of the New York Convention.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	This issue has not been addressed by the courts to date.
Other key points to note?	∅

UNITED STATES, BY ARENT FOX LLP, DEBEVOISE & PLIMPTON LLP, AND HUGHES HUBBARD & REED LLP

While the Federal Arbitration Act (“FAA”) is the primary arbitration statute in the United States, each state typically has its own arbitration statute as well. The FAA generally applies broadly—reaching any arbitration agreement or award which touches on interstate commerce (*i.e.*, commerce between one of the U.S. states) or international commerce. Typically, the FAA, when applicable, will pre-empt any contrary state law provisions. However, if the FAA is silent with respect to a particular issue, the applicable state law will control. The state arbitration law will also apply to the extent an arbitration agreement or award does not implicate interstate or international commerce—for instance, a purely local dispute that does not involve federal law. Moreover, the FAA itself is subject to interpretation by the courts, which may reach differing interpretations in areas in which the U.S. Supreme Court has not ruled.

In this context, the following are key questions for legal practitioners to consider when engaged in arbitrations in the United States. As these questions are answered, the parameters of the arbitration will take shape, and practitioners will know what to expect as the arbitral proceedings move forward.

Date of arbitration law?	The FAA was enacted in 1925. Typically, each U.S. state also has its own arbitration law, and the enactment dates vary from state to state.
UNCITRAL Model Law? If so, any key changes thereto?	The FAA bears some similarity to the UNCITRAL Model Law on International Commercial Arbitration. However, there are important differences. Unlike the Model Law, the FAA provides different grounds for vacating an award and few default rules of procedure where the parties fail to agree to a governing set of rules.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	The availability of specialised courts or judges varies across the U.S. For example, New York has implemented specific procedures to help its courts develop arbitration expertise, including by designating a specialized judge to handle all of the New York County Commercial Division’s international arbitration cases.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Most U.S. Federal and state courts permit some form of pre-arbitration interim measures. Whether the procedure is purely <i>ex parte</i> or requires some notice to the parties varies.
Courts’ attitude towards the competence-competence principle?	U.S. courts typically have a favourable view of the competence-competence principle.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The typical grounds for annulment of awards in the U.S. are: (i) the award was procured through corruption, fraud, or undue means; (ii) the arbitrators exhibited bias or acted corruptly; (iii) the arbitrators engaged in misconduct in the course of proceedings, prejudicing the parties or otherwise raising due process concerns; and (iv) the arbitrators exceeded their power or imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.

<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>Foreign awards are readily confirmed and enforced in the U.S., consistent with the policy of the New York Convention. Depending on the circumstances, U.S. courts typically would not enforce an award that was annulled at the seat of the arbitration.</p>
<p>Other key points to note?</p>	<ol style="list-style-type: none"> 1. <u>What type of court intervention, if any, can be expected during the arbitral proceedings?</u> U.S. federal and state courts may intervene in select circumstances to facilitate arbitration of claims. 2. <u>In what format should the award be?</u> Typically, awards under the FAA and state arbitration laws are written, but the FAA does not require that they be signed, dated, or reasoned. 3. <u>What are the requirements for a valid and enforceable award?</u> Typically, under the FAA and state arbitration laws, an award is valid and enforceable so long as it is written and the arbitral process is conducted in accordance with due process.

ZAMBIA, BY ERIC SILWAMBA, JALASI & LINYAMA LEGAL PRACTITIONERS

Date of arbitration law?	29 December 2000.
UNCITRAL Model Law? If so, any key changes thereto?	Yes, the Zambian Arbitration Act (the “ Act ”) is based on the 1985 UNCITRAL Model Law. Key deviations concern: <ul style="list-style-type: none"> • Broader provisions in case of default of the claimant • Broader grounds for the setting aside of awards • Broader grounds for refusing recognition of awards
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Yes
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes
Courts’ attitude towards the competence-competence principle?	Arbitrators may rule on their own jurisdiction, including on any objection with respect to the existence or validity of the arbitration agreement.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	In addition to the grounds set out in the New York Convention, the Act also provides that recognition and enforcement may be refused if the court finds that the making of the award was induced by fraud, corruption or misrepresentation.
Courts’ attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	Courts may refuse the recognition and enforcement of awards annulled at the seat of the arbitration upon request of the party against which enforcement is sought.
Other key points to note?	∅

An aerial photograph of a coastline, showing a mix of light-colored sandy or rocky terrain and darker, possibly vegetated or rocky areas. A large, semi-transparent blue rectangle is overlaid on the upper portion of the image, serving as a background for the text.

DELOS DISPUTE RESOLUTION

PALAIS BRONGNIART, 16 PLACE DE LA BOURSE, 75002 PARIS, FRANCE
WWW.DELOSDR.ORG . SAFESEATS@DELOSDR.ORG

#ACTIVATINGARBITRATION