

**Morgan Lewis**

**AN INTRODUCTORY  
GUIDE TO  
ARBITRATION  
IN ASIA**

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# INTRODUCTION

Commercial parties, when entering into a contractual relationship, will have to address three key issues when negotiating the dispute resolution (or jurisdiction) clause. First, whether to resolve those disputes by arbitration, a private dispute resolution procedure, or litigation, a public procedure before the national courts. Second, if arbitration is preferred, where to conduct (or “seat”) that arbitration and third, which set of procedural rules, if any, to adopt.

For many years, a significant proportion of contracting parties have chosen arbitration over litigation based on a number of factors: the arbitration may be conducted confidentially in a neutral venue rather than publicly in the state of either contracting party; the parties can select a tribunal that is familiar with their industry sector and the course of dealing within that sector; and a procedural timetable can be agreed that provides a clear way forward to the hearing and the award, enabling the parties to budget for the time and cost of resolving their dispute. Grounds for appeal are often limited and the Award itself can be enforced directly in more than 150 countries through the *New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958*.

The continued popularity of arbitration as a dispute resolution mechanism is reflected in the growth of a number of international arbitration centres throughout Asia. In turn, the arbitration centres have developed the procedural rules that the parties may adopt to govern the appointment of the tribunal and, subsequently, the procedure that the parties may follow to resolve their dispute. At the same time, national arbitration laws across jurisdictions in Asia have been reviewed and refined to support the arbitration procedure in that state and the enforcement of arbitration awards from overseas.

Collectively, these developments have produced international standards and procedures that are adopted almost universally around the world, such as the rules published by the International Bar Association. That said, it is important to remember that cultural, geographical and commercial differences still impact significantly on the conduct of arbitration globally and must be considered carefully at the contract drafting stage before deciding whether to arbitrate, where to arbitrate and which procedural rules to adopt in resolving any dispute.

This Guide assists parties seeking to make that decision in connection with the resolution of disputes with reference to arbitration in Asia. Whilst not a substitute for legal advice, this Guide intends to assist readers with issues commonly encountered in relation to arbitration in 14 countries across Asia such as questions concerning the choice of these jurisdictions as a venue or seat of arbitration and whether foreign awards may be enforced in these jurisdictions. We have also identified the main arbitration institutions in Asia and the model clauses recommended by each of these institutions that may be adopted by parties seeking to resolve their disputes by arbitration in that country.

We would like to thank the law firms that have assisted us in producing this Guide and which had contributed their time so generously. The contact details of these contributing firms can be found on page 2 and at the end of each chapter. The contact details of Morgan Lewis’s five offices in Asia can be found at the end of this Guide. Morgan Lewis has one of the strongest global arbitration practices with arbitration counsel across its 30\* offices worldwide and more than 20 arbitration lawyers in Asia. We would very much welcome the opportunity to work with you.

**Justyn Jagger and Stephen Cheong**

Singapore, 2018

We wish to express our thanks to the following firms that provided valuable input on some areas of local law and practice during the preparation of this Guide:

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## CAMBODIA

<b>Model Law</b>	Yes
<b>New York Convention</b>	Yes
<b>Arbitral institution</b>	<b>National Commercial Arbitration Centre (NCAC)</b> Building 65-67-69 St. 136, Sangkat Phsar Kandal I Khan Daun Penh Phnom Penh Kingdom of Cambodia
<b>Current rules</b>	Current edition: July 2014
<b>Model clause</b>	<i>'Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity, performance or termination, shall be referred to and finally resolved by arbitration in the Kingdom of Cambodia in accordance with the Arbitration Rules of the National Commercial Arbitration Center (NCAC) being in force at the time of commencement of arbitration and by reference in this clause the NCAC Rules are deemed to be incorporated as part of this contract.</i>  <i>The Tribunal shall consist of _____ * arbitrator(s).</i> <i>*State an odd number.</i>  <i>The language of the arbitration shall be _____.'</i>

### What legislation governs domestic and international arbitration in Cambodia?

Arbitration is governed by the Law on Commercial Arbitration, passed in March 2006 (**Law on Commercial Arbitration**). The arbitration law is based on the Model Law. The law applies to both domestic and international arbitration. In addition, *Sub-Decree No 124 on the Organisation and Functioning of the National Commercial Arbitration Centre* was passed in August 2009. The sub-decree makes provision for the creation of the **NCAC**, mechanisms for the NCAC to regulate private arbitration, and the procedure for the admission of arbitrators.

### What matters are considered arbitrable in Cambodia?

The Law on Commercial Arbitration relates to commercial disputes. The definition of 'commercial' is derived from the Model Law and is intended to cover the widest possible range of subject matter.

### In what circumstances will the court stay proceedings in favour of arbitration?

Article 8 of the Law on Commercial Arbitration provides that the court must stay court proceedings in favour of arbitration save where it finds that the arbitration agreement is null and void, inoperative or

incapable of being performed. In practice, there may be some variance in the application of this article as the courts develop a body of arbitration jurisprudence.

### **Is an arbitration clause that does not refer to a set of an administering institution's rules enforceable?**

Yes. The parties are free to choose the rules of arbitration to govern their dispute.

### **How are appointments and challenges to the appointment of arbitrators made?**

The rules dealing with appointments and challenges of the arbitrators are contained in Chapter 4 of the Law on Commercial Arbitration, as well as Rules 10, 11, and 13 of the NCAC Arbitration Rules. The parties are free to determine the number of arbitrators, so long as it is an odd number. In the absence of an agreement on the number of arbitrators, the default number of arbitrators is three. The parties are also free to determine the procedure for appointing the arbitrators. Otherwise, each party shall appoint an arbitrator and the two arbitrators so appointed shall appoint the third one.

An arbitrator may be challenged only if circumstances give rise to justifiable doubts as to his or her impartiality or independence, or if he or she does not possess the qualifications agreed to by the parties.

There are no restrictions on the qualifications or nationality of arbitrators.

### **Who appoints the arbitral tribunal if the arbitration agreement does not provide for it?**

Article 19(3) of the Law on Commercial Arbitration along with Rule 10 of the NCAC Arbitration Rules, provides a default appointment process for circumstances where the parties have not so agreed. For a tribunal with three arbitrators, each party shall appoint an arbitrator, and the third arbitrator shall be appointed by the two party-appointed arbitrators. Where a party fails to appoint an arbitrator within 30 days of a request to do so, or where the third arbitrator is not appointed by the co-arbitrators within 30 days, the appropriate court (commercial, appeal, or supreme) or NCAC shall make the appointment. For a tribunal with a sole arbitrator, the parties shall seek to agree on an arbitrator, failing which the court or NCAC will make the appointment.

### **What is the extent and nature of court supervision of arbitration?**

The supervisory jurisdiction of the courts is prescribed to certain narrow instances as follows. First, where a stay of court proceedings is sought on the basis that there exists an arbitration agreement between the parties encompassing the dispute that has arisen. The court may also intervene where the parties have failed to appoint one or more arbitrators, or where a party files a motion to challenge an arbitrator. The court may also assist in the taking of evidence where the arbitral tribunal, or a party with the approval of the arbitral tribunal, so requests.

### **Can an arbitral tribunal grant interim orders or relief?**

Yes. Article 25 of the Law on Commercial Arbitration, along with Rule 28 of the NCAC Arbitration Rules, empowers an arbitral tribunal (unless the parties have provided otherwise) to order any party to take such interim measure of protection as the tribunal may consider necessary, including the provision of security.

## **Can an arbitral tribunal award interest?**

Yes, although the Law on Commercial Arbitration does not make express provision for awards of interest.

## **Are arbitration proceedings confidential?**

The Law on Commercial Arbitration does not expressly provide for confidentiality. However, the NCAC Rules provide that, unless otherwise agreed by the parties, all the meetings and hearings shall take place in private and shall remain confidential, and all persons involved directly or indirectly in the arbitration are bound by secrecy and cannot disclose matters except in exceptional circumstances.

## **Are there any restrictions on who may represent parties in arbitration?**

Article 26 of the Law on Commercial Arbitration, along with Rule 3 of the NCAC Arbitration Rules, provides that the parties are free to choose their representatives.

## **How are domestic arbitral awards enforced in Cambodia?**

Article 353 of the Code of Civil Procedures provides that an arbitration award may be enforced by making an application to the appropriate court, together with supporting documentation, namely, a duly authenticated original or duly certified copy of the award and the original arbitration agreement or a duly certified copy thereof. Where the award or arbitration agreement which gave rise to the award was not made in Khmer, duly certified translations must be provided.

## **How and when may parties challenge arbitral awards made in Cambodia?**

A party may apply to the court to set aside an award made in Cambodia. There is no right of appeal from the substance of the dispute. The grounds for setting an award are found in Article 44 of the Law on Commercial Arbitration. They replicate the grounds for setting aside awards in Article 34 of the Model Law. Rule 38 of the NCAC Arbitration Rules also allows for correction, amplification, an interpretation, or an additional award to be granted at the request of any party.

A party has 30 days from the date of receipt of the final award to make an application to set aside an award. This is considerably shorter than the three months provided under the Model Law.

## **Can foreign arbitral awards be enforced in Cambodia?**

Yes. Cambodia is a signatory to the New York Convention.

## **When can the Cambodian courts refuse enforcement of foreign arbitral awards?**

The grounds on which the court may refuse recognition and enforcement of an award are set out in Article 46 of the Law on Commercial Arbitration. These grounds reflect those set out in Article 36 of the Model Law and are codified in Article 353 of the Code of Civil Procedures. They are as follows:

- a party to the arbitration agreement was under some incapacity;
- the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication by the parties, under the law of the Kingdom of Cambodia;



- the party making the application was not given proper notice of the appointment of an arbitrator(s) or of the arbitral proceedings, or was otherwise unable to effectively present its case;
- the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or 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, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;
- the composition of the arbitral panel 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 where the arbitration took place;
- the award has not yet become binding on the parties in the country in which, or under the law of which, that award was made, or the award has been set aside or suspended by a court in the country where the award was made;
- the subject matter of the dispute is not capable of settlement by arbitration under the law of the Kingdom of Cambodia; or
- the recognition of the award would be contrary to public policy of the Kingdom of Cambodia.

**DFDL, 2018.**

## CHINA

<b>Model Law</b>	No
<b>New York Convention</b>	Yes
<b>Arbitral institution</b>	<p><b>China International Economic and Trade Arbitration Commission (CIETAC)</b>          6/F, CCOIC Building,          No. 2 Huapichang Hutong          Xicheng District          Beijing, 100035          People's Republic of China          Tel: +86 10 8221 7788          Fax: +86 10 6464 3500 / +86 10 82217766          Email: <a href="mailto:info@cietac.org">info@cietac.org</a>          Website: <a href="http://www.cietac.org">http://www.cietac.org</a></p>
<b>Current rules</b>	CIETAC Rules 2015, which came into effect on 1 January 2015
<b>Model clause</b>	<p><u>Option 1</u></p> <p><i>'Any dispute arising from or in connection with this Contract shall be submitted to China International Economic and Trade Arbitration Commission (CIETAC) for arbitration which shall be conducted in accordance with the CIETAC's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.'</i></p> <p><u>Option 2</u></p> <p><i>'Any dispute arising from or in connection with this Contract shall be submitted to China International Economic and Trade Arbitration Commission (CIETAC)_____Sub-Commission (Arbitration Center) for arbitration which shall be conducted in accordance with the CIETAC's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.'</i></p>
<b>Arbitral institution</b>	<p><b>Shanghai International Economic and Trade Arbitration Commission/Shanghai International Arbitration Center (SHIAC)</b>          7/F, Jin Ling Mansion          28 Jin Ling Road (W)          Huangpu District          Shanghai 200021,          People's Republic of China          Tel: +86 21 6387 5588          Fax: +86 21 6387 7070          Email: <a href="mailto:info@shiac.org">info@shiac.org</a>          Website: <a href="http://www.shiac.org">www.shiac.org</a></p>

<p><b>Current rules</b></p> <p><b>Model clause</b></p>	<p>SHIAC Rules 2015, which came into effect on 1 January 2015</p> <p><i>'Any dispute arising from or in connection with this Contract shall be submitted to Shanghai International Economic and Trade Arbitration Commission/Shanghai International Arbitration Center for Arbitration.'</i></p>
<p><b>Sub-commission of SHIAC</b></p> <p><b>Current rules</b></p> <p><b>Model clause</b></p>	<p><b>China (Shanghai) Pilot Free Trade Zone Court of Arbitration (FTZ Court of Arbitration)</b></p> <p>Suite 1102-1105, Waigaoqiao Mansion 6 Jilong Road Pudong New District Shanghai 200131 People's Republic of China Tel: +86.21.68961702 Fax: +86.21.68961703 Email: <a href="mailto:infoftz@shiac.org">infoftz@shiac.org</a></p> <p>FTZ Court of Arbitration Rules 2015, which came into effect on 1 January 2015</p> <p><i>'Any dispute arising from or in connection with this Contract shall be submitted to Shanghai International Economic and Trade Arbitration Commission/Shanghai International Arbitration Center for arbitration. The arbitration shall be held in The China (Shanghai) Pilot Free Trade Zone Court of Arbitration.'</i></p>
<p><b>Arbitral institution</b></p> <p><b>Current rules</b></p> <p><b>Model clause</b></p>	<p><b>South China International Economic and Trade Arbitration Commission/Shenzhen Court of International Arbitration (SCIA)</b></p> <p>41/F , West Square of Shenzhen Stock Exchange 2012 Shennan Blvd Futian District, Shenzhen 518026 People's Republic of China Tel: +86.755.83501700 Fax: +86.755.82468591 Email: <a href="mailto:info@scia.com.cn">info@scia.com.cn</a> Website: <a href="http://www.scia.com.cn">www.scia.com.cn</a></p> <p>SCIA Rules 2016, which came into effect on 1 December 2016</p> <p><u>Option 1</u></p> <p><i>'Any dispute arising from or in connection with this contract shall be submitted to South China International Economic and Trade Arbitration Commission (SCIETAC) for arbitration.'</i></p> <p><u>Option 2</u></p> <p><i>'Any dispute arising from or in connection with this contract shall be submitted to Shenzhen Court of International Arbitration (SCIA) for arbitration.'</i></p>

<p><b>Arbitral institution</b></p>	<p><b>Beijing International Arbitration Center/Beijing Arbitration Commission</b>  16/F, China Merchants Tower  No. 118 Jianguo Road  Chaoyang District, Beijing 100022  People's Republic of China  Tel: +86.10.6566.9856  Fax: +86.10.6566.8078  Email: <a href="mailto:bjac@bjac.org.cn">bjac@bjac.org.cn</a>  Website: <a href="http://www.bjac.org.cn">http://www.bjac.org.cn</a></p>
<p><b>Current rules</b></p>	<p>Beijing Arbitration Commission Arbitration Rules, which came into effect on 1 April 2015</p>
<p><b>Model clause</b></p>	<p><i>'All disputes arising from or in connection with this contract shall be submitted to Beijing Arbitration Commission for arbitration in accordance with its rules of arbitration in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.'</i></p>

## What legislation governs domestic and international arbitration in China?

The People's Republic of China Arbitration Law revised on 1 September 2017 and effective as of 1 January 2018 (**Arbitration Law**), the People's Republic of China Civil Procedure Law revised on 27 June 2017 and effective as of 1 July 2017 (**Civil Procedure Law**) and their respective judicial interpretations apply to arbitration conducted in the mainland of the People's Republic of China (excluding the Special Administrative Regions of Hong Kong and Macau, and Taiwan). The laws and judicial interpretations apply to both domestic and international arbitration.

## What matters are considered arbitrable in China?

The Arbitration Law states that contractual disputes and other disputes over property rights and interests may be arbitrated. Certain matters are considered not to be capable of resolution by arbitration, such as marriage, adoption of children, guardianship of minors, support and succession disputes, and administrative disputes that must be determined by administrative bodies as prescribed by law.

## In what circumstances will the court stay proceedings in favour of arbitration?

Article 271 of the Civil Procedure Law provides that in respect of disputes arising from the foreign-related economics and trade, transportation and maritime, parties that have agreed on an arbitration clause in a contract or have signed an arbitration agreement waive their right to bring an action in a people's court in relation to disputes covered by the arbitration clause or agreement. Article 5 of the Arbitration Law provides that where a party to an arbitration agreement institutes an action in a people's court, jurisdiction is to be declined unless the arbitration agreement is null and void.

Article 16 of the Arbitration Law also provides that an arbitration agreement must contain an intention to arbitrate, define the scope of disputes that are to be arbitrated, and identify the arbitration commission chosen by the parties to administer the arbitration.

Validity of an arbitration agreement can be reviewed and determined by either the parties' chosen arbitration commission or the competent People's Court. Where one party submits the question of validity to the chosen arbitration commission and the other party submits the question to the People's Court, the latter has the prevailing right to make such determination.

Article 17 of the Arbitration Law provides that an arbitration agreement shall be declared null and void if any of the following tests is satisfied:

the disputes concerned are non-arbitrable under the Arbitration Law;

the arbitration agreement was signed by a party or parties suffering under an incapacity or limited capacity for civil conduct; or

a party was coerced to sign the arbitration agreement.

### **Is an arbitration clause that does not refer to a set of an administering institution's rules enforceable?**

Article 16 of the Arbitration Law provides that an arbitration agreement must contain the parties' choice of arbitration commission. As a consequence, ad hoc arbitrations conducted in China may result in an award that is unenforceable in China. Enforcement may be refused on the basis that the arbitration agreement is invalid, as prescribed by Article 58 of the Arbitration Law. It is worth noting that China is lifting the restriction on ad hoc arbitration in free-trade zones in a limited scope. On 30 December 2016, the Supreme People's Court of China released the Opinion on Providing Judicial Protection for the Development of the Pilot Free-Trade Zones, providing that '[w]here companies registered within the Pilot Free-Trade Zones agree to arbitrate relevant disputes in a specific location in mainland China, under specific arbitration rules, and by appointed arbitrators, such arbitration agreement may be recognized as valid.' Also, on 23 March 2017, Hengqin New Area of Zhuhai Guangdong Province published the ad hoc arbitration rules, providing detailed implementation rules of ad hoc arbitration between companies registered in Hengqin New Area within the framework set by the Supreme People's Court.

It is generally recognised by arbitration commissions in China that the arbitration rules of the administering arbitration commission shall be applicable unless otherwise stipulated. It is also recognised by many commissions, such as CIETAC, SHIAC and SCIA, in their rules and by the Chinese courts that an institution may administer an arbitration pursuant to the UNCITRAL Arbitration Rules, rather than their own institutional rules.

### **How are appointments and challenges to the appointment of arbitrators made?**

Articles 31 and 32 of the Arbitration Law make provision for the appointment of the arbitral tribunal. Where the parties have agreed to form a three-person tribunal, each party is to appoint one arbitrator, or to authorize the chairman of the arbitration commission administering the arbitration to appoint one arbitrator. The third arbitrator, who is to be a presiding arbitrator, is to be appointed by the parties jointly, or by the chairman of the arbitration commission. Where parties have agreed to appoint a sole arbitrator, the arbitrator shall be appointed jointly, or by the chairman of the arbitration commission.

Where parties fail to agree on the manner of constituting the tribunal or fail to appoint the tribunal within the prescribed time limit set out in the applicable arbitration rules, the chairman of the arbitration commission is to make the appointment.

Article 34 of the Arbitration Law provides that an arbitrator must withdraw from an arbitration in the circumstances set out below. The parties shall also have the right to apply for the withdrawal of any arbitrator in these circumstances:

- the arbitrator is a party or a close relative of a party or of a party's representative;
- the arbitrator has an interest in the case;
- the arbitrator is otherwise related to a party in the case, or to a party's representative, which could possibly affect the impartiality of the arbitration; or
- the arbitrator meets a party or a party's representative in private, accepts an invitation for dinner by a party or a party's representative, or accepts gifts presented by any of them.

Article 36 of the Arbitration Law provides that the chairman of the arbitration commission shall have the authority to determine the withdrawal of an arbitrator; or if the chairman of the arbitration commission is serving as an arbitrator in the case, the withdrawal shall be determined collectively by the arbitration commission.

### **Who appoints the tribunal if the arbitration agreement does not provide for it?**

Article 32 of the Arbitration Law provides that where the parties fail to decide on the composition of the arbitral tribunal, or fail to choose arbitrators within the time limit prescribed in the arbitration rules, the chairman of the relevant arbitration commission shall make the respective decision.

### **What is the extent and nature of court supervision of arbitration?**

There are three areas where the Chinese courts exercise their supervisory jurisdiction over arbitration. First, they may intervene to make a ruling on the validity of an arbitration agreement when considering whether it has jurisdiction over a dispute. Second, the Chinese courts may make orders for interim measures such as the preservation of property and evidence. Finally, they may consider whether to refuse enforcement of an award.

### **Can an arbitral tribunal grant interim orders or relief?**

No. The Civil Procedure Law and the Arbitration Law provide that only the Chinese courts have the power to grant interim orders, including preservation of property and evidence.

### **Can an arbitral tribunal award interest?**

Yes. The Arbitration Law does not preclude a tribunal from awarding interest, or any other remedies that the parties apply for, so long as these remedies are available under the substantive law of the dispute.

### **Are arbitration proceedings confidential?**

Yes. Article 40 of the Arbitration Law provides that arbitrations shall be conducted in private unless the parties agree otherwise. All documents referred to or produced in the course of arbitration are deemed confidential unless otherwise agreed by the parties. Chinese law further provides that representatives maintain confidentiality when relating to matters of commercial secrecy, national security, and personal privacy.

## **Are there any restrictions on who may represent parties in arbitration?**

Article 29 of the Arbitration Law provides that parties may appoint lawyers or other agents to handle matters in relation to the arbitration. Although there is no apparent restriction on the appointment of representatives, and arbitration rules of certain arbitration commissions (e.g. SCIA) have explicitly permitted the appointment of foreign lawyers as representatives in an arbitration, foreign lawyers and foreign law firms are generally prohibited from advising on Chinese law. Thus, where an arbitration concerns Chinese law, it would be prudent for Chinese counsel to be retained to work with foreign counsel to minimise the risk that an objection be taken at the enforcement of an award.

## **How are domestic arbitral awards enforced in China?**

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

The time limit to apply for enforcement of an award is two years. The application must be made in writing to the Intermediate People's Court either where the person against whom the application is made is located or where the award debtor's assets are located.

Foreign awards may be enforced in accordance with the provisions of the New York Convention and the Civil Procedure Law.

## **How and when may parties challenge arbitral awards made in China?**

The substance of an arbitration award may not be appealed to the Chinese courts. The courts may, however, consider whether to set aside an award or refuse enforcement of an award.

Chinese law recognises three types of arbitration awards: foreign, domestic, and foreign-related. The last type is a domestic arbitration that takes place in China but involves a foreign element, namely, where one of the parties is foreign; where the subject matter of the contract is partly or wholly foreign (for example, it concerns sale of property outside China); or where there exist other facts relating to civil rights and obligations that occurred outside China. Domestic and foreign-related awards may be set aside by the Chinese courts. For domestic awards, an application must be made to the Intermediate People's Court at the place where the arbitration commission is based. For foreign-related awards, the application is made to the relevant Intermediate People's Court where the arbitration commission is based.

An application to set aside an arbitral award must be filed within six months of the receipt of the award. The court will determine the application within two months of accepting the case.

Article 58 of the Arbitration Law sets out the grounds on which a domestic award may be set aside. The grounds are as follows:

- There is no arbitration agreement between the parties;
- The matters determined in the award fall outside the scope of the arbitration agreement or outside the jurisdiction of the arbitration commission;
- The composition of the arbitration tribunal or the arbitration procedure is not in accordance with the law;

- The evidence on which the award is based is found to have been falsified;
- The other party concealed evidence which is sufficient to affect the impartiality of the award;
- The arbitral tribunal demanded or accepted bribes, committed graft, or perverted the law in making the arbitral award; or
- The award is contrary to social and public interests.

For foreign-related awards, the grounds are found in Article 70 of the Arbitration Law and Article 274 of the Civil Procedure Law, including:

- There is no arbitration agreement between the parties;
- The defendant is not duly notified of the appointment of the arbitrators or the arbitration proceeding, or the defendant fails to express his defence due to reasons for which he is not held responsible;
- The composition of the arbitration tribunal or the arbitration procedure is not in accordance with the arbitration rules;
- The matters determined in the award fall outside the scope of the arbitration agreement or outside the jurisdiction of the arbitration commission; or
- The award is contrary to social and public interests.

## **Can foreign arbitral awards be enforced in China?**

Yes. China acceded to the New York Convention in 1987, permitting enforcement of awards from any other New York Convention state. If the award is rendered in a state that is not a party to the New York Convention, the competent People's Court will resort to the principle of reciprocity. In practice, this restricts the chances of enforcement of the foreign award. If the award is rendered in a country that has entered into a bilateral investment treaty with China which contains a specific enforcement mechanism, that mechanism will be followed. If the award is rendered in Hong Kong, Macau, or Taiwan, the People's Court will rely on, respectively, the rules regarding mutual recognition and enforcement of arbitral awards promulgated by the Supreme People's Court to review and decide whether to enforce an arbitral award.

## **When can the Chinese courts refuse enforcement of foreign arbitral awards?**

Only those awards rendered in another New York Convention state or in countries with which China has a bilateral treaty or reciprocity relationship can be recognised and enforced in China.

The Chinese courts may refuse an application for enforcement of arbitration awards on any of the grounds for non-enforcement contained in Article V of the New York Convention, subject to review and final approval of the Supreme People's Court.

**Morgan, Lewis & Bockius LLP (Shanghai), 2018.**



## HONG KONG

<b>Model Law</b>	Yes
<b>New York Convention</b>	Yes
<b>Arbitral institution</b>	<p><b>Hong Kong International Arbitration Centre (HKIAC)</b>  38th Floor Two Exchange Square  8 Connaught Place  Hong Kong S.A.R.  China</p> <p>Tel: +852.2525.2381  Fax: +852.2524.2171  Email: <a href="mailto:sg@hkiac.org">sg@hkiac.org</a></p>
<b>Current rules</b>	<p>HKIAC Administered Arbitration Rules (Note: the HKIAC Administered Arbitration Rules will typically be used for international arbitrations conducted at the HKIAC. There are also other rules adopted by HKIAC from time to time. For example, for domestic arbitrations conducted at the HKIAC, the HKIAC Domestic Arbitration Rules will normally apply.)</p>
<b>Model clause</b>	<p><b>Arbitration under the HKIAC Administered Arbitration Rules</b></p> <p><i>'Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.</i></p> <p><i>*The law of this arbitration clause shall be ... (Hong Kong law).</i></p> <p><i>The seat of arbitration shall be ... (Hong Kong).</i></p> <p><i>**The number of arbitrators shall be ... (one or three). The arbitration proceedings shall be conducted in ... (insert language).'</i></p> <p><u>Note:</u></p> <p>*Optional. This provision should be included particularly where the law of the substantive contract and the law of the seat are different. The law of the arbitration clause potentially governs matters including the formation, existence, scope, validity, legality, interpretation, termination, effects and enforceability of the arbitration clause and identities of the parties to the arbitration clause. It does not replace the law governing the substantive contract.</p> <p>**Optional</p>

## **What legislation governs domestic and international arbitration in Hong Kong?**

Arbitration in Hong Kong is governed by the Hong Kong Arbitration Ordinance (Cap. 609) (**Arbitration Ordinance**), which came into effect on 1 June 2011. The Arbitration Ordinance prescribes a single regime for both foreign and domestic arbitration based on the Model Law.

## **What matters are considered arbitrable in Hong Kong?**

Hong Kong law provides that any dispute or difference in respect of a defined legal relationship may be referred to arbitration, such as those arising from contracts, torts, or other forms of legal relationship. Some matters are considered non-arbitrable, such as those involving criminal offences, competition, and anti-trust cases and family law–related matters. Sections 103C and 103D of the Arbitration Ordinance, which came into effect on 1 January 2018, clarified that all disputes relating to the scope, validity, ownership, infringement, subsistence, enforceability or any other aspects of intellectual property rights are arbitrable.

## **In what circumstances will the court stay proceedings in favour of arbitration?**

Section 20 of the Arbitration Ordinance adopts Article 8 of the Model Law and provides that the court shall order a stay of court proceedings which have been commenced concerning a dispute that parties have agreed to resolve by arbitration unless the arbitration agreement is found to be null and void, inoperative, or incapable of being performed.

## **Is an arbitration clause that does not refer to a set of an administering institution's rules enforceable?**

Yes. Parties are free to arbitrate on an ad hoc basis pursuant to rules such as the UNCITRAL Arbitration Rules. Where the parties have not identified any procedural rules to govern the arbitration, the arbitral tribunal will proceed on the basis of the default procedural rules set out in the Arbitration Ordinance.

## **How are appointments and challenges to the appointment of arbitrators made?**

There are no restrictions on the parties' freedom to choose arbitrators. Parties are free to choose the number of arbitrators. Arbitrators are not required to hold any minimum qualifications, unless the parties have agreed otherwise.

An arbitrator may be challenged if there are circumstances that give rise to justifiable doubts as to the arbitrator's impartiality and independence, or if he or she does not possess the qualifications agreed upon by the parties.

Section 26(1) of the Arbitration Ordinance provides that the parties are free to agree on a procedure for challenging an arbitrator. Where the parties have not made such an agreement, the arbitral tribunal shall decide on the challenge. Where the tribunal rejects the challenge, the challenging party may apply to the Court of First Instance to rule on the challenge.

## **Who appoints the tribunal if the arbitration agreement does not provide for it?**

If the parties fail to agree on the number of arbitrators, the number of arbitrators must be either one or three as decided by the HKIAC. In an arbitration with three arbitrators, each party will appoint one

arbitrator, and the two arbitrators shall appoint the third arbitrator. In an arbitration with a sole arbitrator, in the absence of agreement by the parties, the sole arbitrator shall be appointed, upon request of a party, by the HKIAC.

## **What is the extent and nature of court supervision of arbitration?**

Hong Kong adopts a policy of minimal curial intervention. The courts will intervene to assist the arbitral process in limited circumstances, such as to stay court proceedings in favour of arbitration, to determine certain challenges of arbitrators, to terminate an arbitrator's mandate where the arbitrator is unable to perform his or her functions, to determine the jurisdiction of the tribunal, and to set aside awards.

## **Can an arbitral tribunal grant interim orders or relief?**

Yes. Section 35 of the Arbitration Ordinance empowers a tribunal to grant a wide range of interim measures. Section 61 of the Arbitration Ordinance provides that interim measures ordered by an arbitral tribunal (whether it is made in or outside Hong Kong) are, with leave of the court, enforceable in the same manner as an order or direction of the court that has the same effect.

## **Can an arbitral tribunal award interest?**

Yes. Under the Arbitration Ordinance, an arbitral tribunal can award any remedy or relief that could have been ordered in civil proceedings by the Hong Kong courts, including interest.

## **Are arbitration proceedings confidential?**

Yes. Section 18(1) of the Arbitration Ordinance provides that '*unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to the arbitral proceedings under the arbitration agreement or an award made in those arbitral proceedings*'. Exceptions to this rule are set out in section 18(2) of the Arbitration Ordinance, such as when a party is obliged by the law to disclose information.

## **Are there any restrictions on who may represent parties in arbitration?**

No. Parties are free to choose any representatives to act for them in arbitration. Section 63 of the Arbitration Ordinance expressly provides that certain provisions of the Legal Practitioners Ordinance concerning lawful practice in Hong Kong as a barrister or solicitor do not apply to arbitration proceedings and any related advice and preparation of documents.

## **How are domestic arbitral awards enforced in Hong Kong?**

Section 84 of the Arbitration Ordinance provides that domestic and foreign arbitral awards are enforceable in the same manner as a judgment of the Court of First Instance, provided that leave is granted by the court. If leave is granted, the Court of First Instance may render a judgment in terms of the award.

## **How and when may parties challenge arbitral awards made in Hong Kong?**

Section 73 of the Arbitration Ordinance provides that unless agreed by the parties, an arbitral award made by an arbitral tribunal pursuant to an arbitration agreement is final and binding both on the parties and any person claiming through or under any of the parties. A party may, however, set aside

an award on an application to court, if one of a limited and exhaustive set of grounds is made out. These grounds are stipulated in section 81 of the Arbitration Ordinance and are summarized below:

The parties to the arbitration agreement were under some incapacity;

The arbitration agreement is invalid;

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

The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration;

The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the parties' agreement or, failing such agreement, Hong Kong law;

The subject matter of the dispute is not capable of settlement by arbitration under Hong Kong law; or

The award is in conflict with Hong Kong's public policy.

Generally, there is no right to appeal an arbitral award on the grounds of errors of fact or law. Nevertheless, Schedule 2 of the Arbitration Ordinance contains opt-in provisions which (if adopted by the parties) allow parties to challenge an arbitral award on the grounds of serious irregularity or on a question of law.

### **An arbitral award may also be set aside if the court upholds the challenge to an arbitrator of the arbitral tribunal which made the award (section 26 of the Arbitration Ordinance). Can foreign arbitral awards be enforced in Hong Kong?**

Yes. Hong Kong is party to the New York Convention, permitting enforcement of awards made in other states that are also signatories to the Convention. In the case of an award made in a state that is not a signatory to the New York Convention, the courts have wider grounds to refuse enforcement.

Awards made in mainland China are enforceable pursuant to the *Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region* (21 June 1999). The grounds in this arrangement mirror those in the New York Convention save that Hong Kong may not enforce an award made in mainland China if an application for enforcement of the award has been made in mainland China.

### **When can the Hong Kong courts refuse enforcement of foreign arbitral awards?**

Recognition and enforcement of foreign awards may only be refused when one of the grounds set out in section 89 (Convention awards) and section 95 (Mainland awards) of the Arbitration Ordinance is made out. These grounds mirror Article V of the New York Convention and include the following circumstances:

- The parties to the arbitration agreement did not have the capacity to sign the agreement in accordance with the applicable law of each party;
- The arbitration agreement is invalid under the governing law, or the laws of the country in which the award was made if the arbitration agreement does not stipulate the governing law;

- The party against which enforcement is sought was not properly notified of the appointment of the arbitrator or of the arbitral proceedings, or was otherwise unable to present his case;
- The foreign arbitral award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. If it is possible to sever the arbitration award, that portion which was correctly submitted to arbitration by the parties should, however, be recognised and enforced in Hong Kong;
- The composition of the foreign arbitration tribunal, or the foreign arbitration procedure, was inconsistent with the arbitration agreement or the laws of the country in which the foreign arbitral award was made, in cases where such matters are not stipulated in the arbitration agreement;
- The foreign arbitral award is not yet enforceable or binding on the parties;
- The foreign arbitral award has been set aside or suspended by a competent body of the country in which, or under the law of which, the foreign arbitral award was made; or
- The court concludes that the relevant dispute cannot be resolved by arbitration in accordance with the laws of Hong Kong; or the recognition and enforcement of the foreign arbitral award is contrary to Hong Kong's public policy.

**Luk & Partners (In Association with Morgan, Lewis & Bockius LLP), 2018.**

## INDIA

<b>Model Law</b>	Yes
<b>New York Convention</b>	Yes
<b>Arbitral institution</b>	<p><b>Mumbai Centre for International Arbitration (MCIA)</b> 20th Floor, Express Towers, Nariman Point, Mumbai, 400021</p> <p><b>Phone</b> +91 22 6105 8888</p> <p><b>Email</b> contact@mcia.org.in</p>
<b>Current rules</b>	Arbitration Rules of the Mumbai Centre For International Arbitration (MCIA Rules 2nd Edition, 15 January 2017)
<b>Model clause</b>	<p><i>'Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in accordance with the Arbitration Rules of the Mumbai Centre for International Arbitration ("MCIA Rules"), which rules are deemed to be incorporated by reference in this clause.</i></p> <p><i>The seat of the arbitration shall be _____.</i></p> <p><i>The Tribunal shall consist of [one/three] arbitrator(s).</i></p> <p><i>The language of the arbitration shall be _____.</i></p> <p><i>The law governing this arbitration agreement shall be _____.</i></p> <p><i>The law governing the contract shall be _____.'</i></p>
<b>Arbitral institution</b>	<p><b>Singapore International Arbitration Centre, India Office (SIAC)</b> 1008, The Hub One Indiabulls Centre</p>



## **Does Indian law consider all matters to be arbitrable?**

The Act does not in specific terms exclude any category of disputes — civil or commercial — from arbitrability. However, an award will be set aside if the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the laws currently in force, or if the award conflicts with Indian public policy.

Section 2(3) of the Arbitration Act merely declares that Part I, relating to domestic arbitration and award, shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.

Since the Arbitration Act is silent on types of non-arbitrable disputes, the Supreme Court outlined judicially enumerated issues that cannot be referred to arbitration — based on analysis of the types of rights involved (rights in rem or in personam), conferment of jurisdiction on special courts or on public policy. These include matters involving crimes, matrimony, insolvency and winding up, guardianship, tenancy, testamentary matters,<sup>1</sup> trusts<sup>2</sup> and consumer protection.<sup>3</sup> However, it held that the law did not exclude issues of fraud as being non-arbitrable.

The Supreme Court in *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.*<sup>4</sup> held that allegations of fraud did not prevent the court from making reference to arbitration under Section 45 of the Arbitration Act. However, in the case of India-seated arbitrations, there was a cloud on efficacy of arbitral proceedings to resolve issues of fraud.

The Supreme Court of India in the recent judgment of *A. Ayyasamy v. A. Paramasivam & Ors.*<sup>5</sup> held that mere allegations of fraud simpliciter does not nullify the arbitration agreement, but only in cases where there are serious allegations of fraud, the disputes may be held non-arbitrable. Every allegation of fraud would need to be weighed on a scale of seriousness and complexity to identify the veracity of the allegations.

## **In what circumstances will the court stay proceedings in favour of arbitration?**

The courts will stay proceedings pending before it in favour of arbitration if the dispute falls within the scope of an arbitration agreement and if the arbitrator is competent or empowered to decide it, unless (in the case of an application made under Section 8 of the Arbitration Act, concerning a domestic commercial arbitration) they find that prima facie no valid arbitration agreement exists, or (in the case of an application made under Section 45, concerning a foreign commercial arbitration) the courts find that the arbitration agreement is null and void, inoperative or incapable of being performed.

## **Is an arbitration clause that does not refer to a set of an administering institution's rules enforceable?**

The courts will uphold an arbitration agreement, including those providing for ad hoc rather than administered proceedings, so long as it evidences an intention by the parties to resolve their dispute

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<sup>1</sup> *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. & Ors.* (2011) 5 SCC 532.

<sup>2</sup> *Shri Vimal Kishor Shah & Ors. V. Mr. Jayesh Dinesh Shah & Ors.*, Civil Appeal No. 8614 of 2016 (Supreme Court).

<sup>3</sup> *Aftab Singh and Others v. Emaar MGF Land Limited and Anr.*, Consumer Case No. 701 of 2015 (NCDRC).

<sup>4</sup> AIR 2014 SC 968.

<sup>5</sup> Civil Appeal Nos. 8245 and 8246 of 2016 (Supreme Court).



by arbitration. The Arbitration Act supplies a default procedure where the parties have not indicated what procedural rules are to apply.

## **How are appointments and challenges to the appointment of arbitrators made?**

Chapter III of Part I of the Arbitration Act relates to the composition and appointment of the arbitral tribunal. The parties to a dispute are free to determine the number of arbitrators, as long as it is not an even number. If the parties do not specify the number, the arbitration will be conducted by a sole arbitrator. The parties are free to agree on the procedure to appoint an arbitrator.

If the parties fail to appoint the arbitrator, they may approach the Supreme Court in case of international commercial arbitration and the High Court in domestic arbitrations under Section 11 of the Arbitration Act. The role of Supreme Court and High Court is confined to the examination of the existence of an arbitration agreement while appointing an arbitrator.

Before appointing an arbitrator, the Supreme Court or the High Court shall seek a disclosure in writing from the prospective arbitrator as to whether any circumstances exist that are likely to give rise to justifiable doubts as to his or her independence and impartiality. The application for appointment of the arbitrator before the Supreme Court or High Court is required to be disposed of as expeditiously as possible, and an endeavour shall be made to do so within a period of 60 days.

An arbitrator can be challenged if justifiable doubts arise as to his or her independence or impartiality or if he or she does not possess the necessary qualifications agreed to by the parties. A party can only challenge an appointment it has made (or in which it participated) if it becomes aware of these grounds after the appointment was made. The grounds stated in the Fifth Schedule of the Arbitration Act give guidance on determining whether circumstances exist that give rise to justifiable doubts as to the independence or impartiality of an arbitrator. The Seventh Schedule contains circumstances where an arbitrator is rendered ineligible for appointment.

The parties may agree on a procedure for challenging the appointment of an arbitrator. In the absence of such a procedure, a party that intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances giving rise to the challenge, send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the arbitrator challenged withdraws from his or her office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. If the challenge is not successful, the arbitration will continue and the tribunal shall pass an award. Where an award is made, the party challenging the arbitrator may make an application to set aside such an award in accordance with and in the manner provided in the Arbitration Act.

## **Who appoints the tribunal if the arbitration agreement does not provide for it?**

In the absence of an agreement by the parties, the following procedure shall be adopted. If a sole arbitrator is to be appointed and the parties are unable to agree on the appointment, the arbitrator shall, in international commercial arbitrations, be appointed by the Supreme Court or, in domestic arbitrations, the High Court, or any person or institution designated by such court. The relevant court must make the appointment within 60 days.

If three arbitrators are to be appointed, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator. If a party fails to appoint an arbitrator within 30 days, the appointment of the arbitrator shall be made by the Supreme Court for international

commercial arbitrations and the High Court for domestic arbitrations, or any person or institution designated by such court.

## **What is the extent and nature of court supervision of arbitration?**

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

- Application for dispute to be referred to arbitration under Sections 8 and 45;
- Application for interim measures under Section 9;
- Application for court to appoint arbitrator under Section 10;
- Application challenging the appointment of an arbitrator under Section 13;
- Application to determine the termination of mandate of an arbitrator under Section 14;
- Application for assistance in taking evidence under Section 27;
- Application to extend time period for completion of arbitral proceedings beyond the 18-month time frame under Section 29A(4);
- Application to set aside an arbitral award under Section 34;
- Enforcement of an award under Section 36;
- Appeals from certain orders of a court under Section 37;
- Application to order the tribunal to deliver an award to an applicant on payment to the court under Section 39;
- Application for a determination of jurisdiction under Section 42; or
- Extension of time periods under Section 43.

## **Can an arbitral tribunal grant interim orders or relief?**

Yes. Section 17 of the Arbitration Act provides that the arbitral tribunal has the same powers as a civil court to grant and enforce interim measures of protection as it considers necessary in respect of the subject matter of the dispute. This is subject to some narrow exceptions, such as the granting of injunctive relief against encashment of a bank guarantee. The arbitral tribunal may also require a party to provide appropriate security in connection with any interim measure ordered. The interim orders passed by an Arbitral Tribunal will be deemed to be an order of the court and will be enforceable as court orders under the Code of Civil Procedure, 1908.

## **Can an arbitral tribunal award interest?**

Yes. Section 31(7) of the Arbitration Act empowers an arbitral tribunal to award interest at such rate as it deems reasonable, unless otherwise agreed by the parties. The principal sum awarded in a final award will carry interest at two per cent per annum over the prevailing rate of interest from the date of award to the date of payment.

## **Are arbitration proceedings confidential?**

Under the Arbitration Act, there is no express or implied obligation to treat an arbitration agreement, any proceedings arising from it, or the award as confidential.

## **Are there any restrictions on who may represent parties in arbitration?**

The Arbitration Act does not impose any restrictions on the representation of parties in arbitration proceedings.

## **How are domestic arbitral awards enforced in India?**

Domestic awards shall be enforced under the Code of Civil Procedure in the same manner as if the award were a decree of the court. Such enforcement can only be refused on the grounds specified in the code.

Foreign awards may be enforced in the same manner as a decree of the court. The party applying for enforcement must produce the original award or an authenticated copy, the original agreement or an authenticated copy, and evidence necessary to prove that it is a foreign award. If the award is in a foreign language, the party must produce a certified English translation.

## **How and when may parties challenge arbitral awards made in India?**

There is no appeal from arbitral awards made in India. A domestic award may only be set aside by the courts upon application by a party. Any such application must be made within three months from the date on which the party making that application had received the arbitral award. The grounds for a court to set aside an award are as follows:

- The parties were under some incapacity, or the agreement was not valid under the law of the country where the award was made or that the agreement was subject to;
- The party against whom the award is invoked was not given proper notice as required;
- The award deals with a difference not contemplated by the submission to 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, or has been set aside or suspended by a competent authority of the country under the law of which that award was made;
- The subject matter of the dispute is not capable of being settled under the laws of India;
- The enforcement of the award would be contrary to the public policy of India. The notion of public policy has been clarified by an explanation to Section 34 and is limited to fraud, corruption, contravention of fundamental policy of Indian law, or basic notions of morality or justice. The court may not review the merits of the dispute in deciding whether the award is in contravention with the fundamental policy of Indian law; or
- In the case of domestic arbitrations only, the award is vitiated by patent illegality that appears on the face of the award.

## **Can foreign arbitral awards be enforced in India?**

Yes. The procedure governing the enforcement of New York Convention awards is set out in Part II Chapter I of the Arbitration Act.

A foreign award is an (i) Arbitral Award, (ii) on differences between persons arising out of legal relationships, whether contractual or not, (iii) considered as commercial under the law in force in India, (iv) made on or after the 11th day of October 1960, (v) in pursuance of an agreement in writing for arbitration to which the convention set forth in the first schedule applies (New York Convention), and (vi) in one of such territories as the Central Government, being satisfied that reciprocal provisions made may, by notification in the Official Gazette, declare to be territories to which the said convention applies.

The enforcement of a foreign award in India is a two-stage process that is initiated by filing an execution petition. Initially, a court would determine whether the award adhered to the requirements of the Arbitration Act. The foreign award is deemed to be the decree of the Court under Part II of the Arbitration Act, once the conditions for enforcement under Section 48 are satisfied. As per recent trend, almost all challenges to enforcement of foreign awards have been rejected in Indian courts.

## **When can the Indian courts refuse enforcement of foreign arbitral awards?**

Under Section 48, the enforcement of a foreign award may be refused on the following grounds:

- The parties were under some incapacity or the agreement was not valid under the law of the country where the award was made or that the agreement was subject to;
- The party against whom the award is invoked was not given proper notice as required;
- The award deals with a difference not contemplated by the submission to 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, or has been set aside or suspended by a competent authority of the country under the law of which that award was made;
- The subject matter of the dispute is not capable of being settled under the laws of India;
- The enforcement of the award would be contrary to the public policy of India; or
- The notion of public policy has been clarified by an explanation to Section 48 and is limited to fraud, corruption, contravention of fundamental policy of Indian law, or basic notions of morality or justice. The court may not review the merits of the dispute in deciding whether the award is in contravention with the fundamental policy of Indian law.

**Nishith Desai Associates, 2018.**

## INDONESIA

<b>Model Law</b>	No
<b>New York Convention</b>	Yes, under Presidential Decree No. 34 of 1981 on Ratification of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
<b>Arbitral institution</b>	<b>Badan Arbitrase Nasional Indonesia (BANI)</b> Jakarta Office Wahana Graha Lt. 1 & 2, Jl. Mampang Prapatan No. 2, Jakarta 12760, Indonesia Email: <a href="mailto:bani-arb@indo.net.id">bani-arb@indo.net.id</a> Website: <a href="http://www.baniarbitration.org">www.baniarbitration.org</a>
<b>Model clause</b>	<i>'All disputes arising from this contract shall be binding and be finally settled under the administrative and procedural Rules of Arbitration of Badan Arbitrase Nasional Indonesia (BANI) by arbitrators appointed in accordance with said rules.'</i>
<b>Arbitral institution</b>	<b>Badan Arbitrase Pasar Modal Indonesia (BAPMI)</b> Indonesia Stock Exchange Building, Tower 1, 28th Floor, Suite 2805, Jl. Jend. Sudirman kavling 52-53 Jakarta, Indonesia Email: <a href="mailto:sekretariat@bapmi.org">sekretariat@bapmi.org</a> Website: <a href="http://www.bapmi.org">www.bapmi.org</a> Tel: +62-21 515 0480, Fax: +62-21 515 0429
<b>Model clause</b>	<i>'Any dispute arising out of and/or in connection with this Agreement and/or performance of this Agreement, regarding either a breach or tort, including termination and/or validity of this Agreement, shall be resolved and decided through BAPMI's Arbitration in Jakarta, in an Arbitral Tribunal consisting of three (3) Arbitrators, based on BAPMI's Rules, and final and binding Arbitration Award.'</i>
<b>Arbitral institution</b>	<b>Badan Arbitrase Syariah Nasional (BASYARNAS)</b> A copy of the BASYARNAS arbitration rules may be obtained by sending an email request to <a href="mailto:basyarnas-pusat@commerce.net.id">basyarnas-pusat@commerce.net.id</a> .
<b>Arbitral institution</b>	<b>Badan Arbitrase Dan Alternatif Penyelesaian Sengketa Konstruksi Indonesia (BADAPSKI)/ the Indonesian Centre of Arbitration and Alternative Dispute Resolution</b>

	<p><b>for Construction</b></p> <p>Central Park Office Tower, 18th Floor          Jl. Letjen S. Parman Kav. 28          Jakarta 11470, Indonesia          Email: <a href="mailto:info@badapski.org">info@badapski.org</a>          Website: <a href="http://www.badapski.org">www.badapski.org</a>          Tel: +62-21 2903 4283/+62-816 975 480</p>
<b>Arbitral institution</b>	<p><b>Badan Arbitrase Keolahragaan Indonesia (BAKI)/ the Indonesian Sports Arbitration Board</b></p> <p>FX Plaza Office Tower, 19th floor          Jl. Pintu I Senayan          Central Jakarta, Indonesia          Tel: +62-21 2555 4554</p>
<b>Arbitral institution</b>	<p><b>Badan Arbitrase Perdagangan Berjangka Komoditi (BAKTI)/ the Indonesian Commodities Trading Arbitration Board</b></p> <p>PT Kliring Berjangka Indonesia (Persero)          Graha Mandiri 3rd Floor          Jl. Imam Bonjol No. 61          Central Jakarta 10340, Indonesia          Email: <a href="mailto:sekretariat@bakti-arb.org">sekretariat@bakti-arb.org</a>          Website: <a href="http://www.bakti-arb.org">www.bakti-arb.org</a>          Tel: +62-21 3983 7415          Fax: +62-21 3983 3715</p>
<b>Arbitral institution</b>	<p><b>Badan Arbitrase Dan Mediasi Perusahaan Penjamin Indonesia (BAMPERPI)/ the Indonesian Underwriting Companies Mediation and Arbitration Board</b></p> <p>Gedung Jamkrindo          Jl. Angkasa Blok B-9 Kav. 8, Kota Baru Bandar, Kemayoran          Central Jakarta, Indonesia          Website: <a href="http://www.bammpi.org">www.bammpi.org</a></p>
<b>Arbitral institution</b>	<p><b>Badan Arbitrase Dan Mediasi Pembiayaan Pegadaian Indonesia (BAMPPPI)/ the Indonesian Financing and Pawnshop Mediation and Arbitration Board</b></p> <p>Kota Kasablanka Tower A          7th floor Unit D          Jl. Kasablanka Kav. 88          Jakarta, Indonesia.          Website: <a href="http://www.bmppi.com">www.bmppi.com</a></p>
<b>Arbitral institution</b>	<p><b>Badan Arbitrase Ventura Indonesia (BAVI)/ the Indonesian Venture Capital Arbitration Board</b></p>

<b>Arbitral institution</b>	<b>Badan Mediasi Dan Arbitrase Asuransi Indonesia (BMAI)/ the Indonesian Insurance Mediation and Arbitration Board</b> Gedung Menara Duta, 7th Floor Jl. Rasuna Said Kav. B-9 Jakarta 12910, Indonesia Email: <a href="mailto:info@bmai.or.id">info@bmai.or.id</a> Website: <a href="http://www.bmai.or.id">www.bmai.or.id</a> Tel: +62-21 527 4146
<b>Arbitral institution</b>	<b>Badan Mediasi Perusahaan Pembiayaan, Pegadaian, dan Modal Ventura Indonesia (BMPPVI)/ Finance Companies, Pawnbroker and Venture Capital Mediation Board of Indonesia</b> <b>Jl. Proklamasi No. 44 Pegangsaan</b> <b>Menteng Jakarta Pusat DKI</b> <b>Jakarta</b> Email: <a href="mailto:info@bmppvi.com">info@bmppvi.com</a> Website: <a href="http://www.bmppvi.com">www.bmppvi.com</a> Tel: +62 21 3929742
<b>Arbitral institution</b>	<b>Lembaga Alternatif Penyelesaian Sengketa Perbankan Indonesia/ Alternative Banking Dispute Settlement Institution of Indonesia</b> Grita Perbanas Lt. 2, Jalan Perbanas, Kel. Karet Kuningan, Kec. Setiabudi, Jakarta Selatan, DKI Jakarta 12940, Indonesia Email: <a href="mailto:sekrt@lapspi.org">sekrt@lapspi.org</a> Website: <a href="http://www.lapspi.org">www.lapspi.org</a> Tel: +62 21 5276552

## What legislation governs domestic and international arbitration in Indonesia?

Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (**Arbitration Law**) governs arbitration in Indonesia and the enforcement of international arbitration in Indonesia. Prior to the enactment of the Arbitration Law, Indonesia ratified the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**) through Presidential Decree No. 34 of 1981. In the past, the enforcement of foreign arbitral award depended solely on the New York Convention. Since the issuance of the Arbitration Law, the Law has been used as the main reference by Indonesian courts in the recognition and enforcement process of an international arbitral award.

Indonesia has not adopted the Model Law, nor is the Arbitration Law based thereupon. The Arbitration Law defines an international arbitral award as an award rendered by an arbitral institution

or an individual arbitrator outside the jurisdiction of the Republic of Indonesia, or an award that, under the provisions of the law of the Republic of Indonesia, is considered an international arbitral award. To date, there is no other provision of Indonesian law that expands on the definition of 'international arbitral award'.

Indonesia is a signatory to the New York Convention and has exercised the reciprocity and commerciality reservations.

## **What matters are considered arbitrable in Indonesia?**

Disputes of a commercial nature and those concerning rights which, under the law and regulations, fall within the full legal authority of the disputing parties may be settled through arbitration. Generally, the Arbitration Law has stipulated that disputes considered to be arbitrable are the following sectors: commerce, banking, finance, capital investment, industry, and intellectual property. Disputes that may not be resolved by arbitration are disputes where, according to regulations having the force of law, no amicable settlement is possible.

## **In what circumstances will the court stay proceedings in favour of arbitration?**

The Arbitration Law does not stipulate or specifically provide that when faced with a dispute under an agreement containing an arbitration provision/clause, the Indonesian court is required to stay any court proceedings and/or refer the disputing parties to the arbitration contrary to the states that have adopted the UNCITRAL Model Law on International Commercial Arbitration.

However, the defendant may argue before the respective Indonesian court to reject the respective suit in the civil court proceedings based on Articles 3 and 11 of the Arbitration Law, which provide that the courts have no jurisdiction and authority to determine a dispute where the parties have agreed to adjudicate the arbitrable dispute by arbitration except in particular cases determined by the Arbitration Law (e.g., a party may apply to court where it challenges or seeks the appointment of an arbitrator or enforcement awards). Most of the time, the Indonesian courts have honoured this principle indicated by the relevant Supreme Court Decisions in many cases.

Given the above, it can practically be found that a party who loses or expects to lose in an arbitration tribunal will try bringing a suit against the applicability of the arbitration agreement before the Indonesian court under the grounds of the tort claim or unlawful act, as the respective cases are not related to the breach of contract or agreement only. This may cause the Indonesian courts to keep carrying out the civil court proceedings irrespective of the arbitration.

## **Is an arbitration clause that does not refer to a set of an administering institution's rules enforceable?**

Yes. The parties may refer their dispute to ad hoc arbitration. In the absence of a procedural set of rules, the default rules set out in the Arbitration Law will apply.

Additionally, such an arbitration clause may still be enforced by fulfilling the following requirements:

- The arbitration provision must be made in writing in a document signed by the parties.
- In the event the parties are unable to sign a written agreement on the resolution of the dispute by arbitration after the dispute occurs, the written agreement must be made in form of a notarial deed and must contain the following matters:
  - a. the matter in dispute;



- b. the full name and place of residence of the parties;
- c. the full name and place of residence of the arbitrator or arbitration tribunal;
- d. the place the arbitrator or arbitration tribunal will make their decision;
- e. the full name of the secretary;
- f. the period for resolution of the dispute;
- g. a statement of assent by the arbiter; and
- h. a statement of assent from the disputing parties that they will bear all costs necessary for the resolution of the dispute through arbitration.

Any arbitration agreement after the dispute occurs that does not contain the matters as mentioned above will be void in law.

## **How are appointments and challenges to the appointment of arbitrators made?**

There are statutory limitations to the parties' autonomy to select arbitrators. Pursuant to Article 12 of the Arbitration Law, an arbitrator must fulfil the following requirements to be able to be appointed:

- a Being authorised or competent to perform legal actions;
- b Being at least 35 years of age;
- c Having no family relationship by blood or marriage, to the third degree, with either of the disputing parties;
- d Having no financial or other interest in the arbitration award; and
- e Having at least 15 years of experience and active mastery in the field.

In addition to the above, judges, prosecutors, clerks of courts, and other government or court officials may not be appointed or designated as arbitrators.

As regards to challenges of an arbitrator, Article 22 of the Arbitration Law provides that a party may challenge an arbitrator if there is sufficient cause and evidence to give rise to doubt the arbitrator's independence or that he or she will be biased in rendering an award. An arbitrator may also be challenged if it is proven that the arbitrator has any familial, financial, or employment relationship with one of the parties or their legal representatives. As a note, a challenge to an arbitrator can only be based on a party's knowledge acquired after the appointment of such arbitrator.

A party's challenge of an arbitral appointment shall be made directly to the tribunal, save where the arbitrator was appointed by the president of a district court in which the application is to be made to the district court in question. Where a challenge is rejected, the party making the application may submit its challenge to the chief judge of the district court, whose decision shall be final.

## **Who appoints the tribunal if the arbitration agreement does not provide for it?**

Article 13 of the Arbitration Law provides that in the absence of agreement for the process of appointment in the arbitration agreement or institutional rules, any party may apply to court to make the appointment.

## **What is the extent and nature of court supervision of arbitration?**

The courts have limited supervisory jurisdiction over arbitrations held in Indonesia. They may be involved at a number of stages. First, where the parties have agreed to arbitrate their arbitrable dispute, but one of them seeks to commence proceedings in court, the court must enforce the arbitration agreement and refuse jurisdiction to hear the case. Second, it remains unclear whether courts may enforce orders of a tribunal that are not final awards, such as orders for interim relief. The prevailing view is that the court will not enforce such orders. Finally, the court may enforce or annul a final award made by an arbitral tribunal.

The District Court of Jakarta Pusat (Central Jakarta) specifically supervises the recognition and enforcement of international arbitral award. In this regard, the court is reviewing whether the respective arbitral award (i) falls within the scope of commerce and (ii) is not against Indonesian public policy.

## **Can an arbitral tribunal grant interim orders or relief?**

Yes. Article 32 of the Arbitration Law provides that at the request of one of the parties, the arbitrator or arbitration tribunal may make a provisional award or other interlocutory decision to regulate the manner of running the examination of the dispute, including decreeing a security attachment or ordering the deposit of goods with third parties, or the sale of perishable goods.

Although a tribunal can grant such relief, in practice, it has no power to execute such orders. Furthermore, the courts are empowered by article 64 of the Arbitration Law only to enforce judgments and awards that are final and binding.

## **Can an arbitral tribunal award interest?**

Yes. Interest may be awarded if it is provided for in the underlying contract, or if mandated by the governing law if such law is not Indonesian law. If interest is payable but no interest rate has been agreed upon or so mandated, the statutory rate of six per cent per annum (not compounded) will be applied. If no interest has been agreed upon by the parties, the tribunal may award interest at the statutory rate for the duration between the times the award is ordered to be satisfied until actual payment.

## **Are arbitration proceedings confidential?**

Although confidentiality of arbitration is not expressly prescribed in the Arbitration Law, its elucidation provides that, since awards are not published, the confidentiality that confers is an advantage of arbitration. Further, under the Arbitration Law, all dispute examinations by the arbitral tribunal are carried out in a session closed to the public to ensure confidentiality.

The BANI arbitration rules expressly provide that all proceedings must be closed to the public and that all matters related to the arbitration, including documents, reports or notes sessions, the testimony of witnesses, and awards, are to be kept in strict confidence among the parties, the arbitrators, and BANI, except to the extent required by law or as otherwise agreed by all parties to the dispute.

## **Are there any restrictions on who may represent parties in arbitration?**

No. Any person may represent a party in arbitration so long as they are authorised by a power of attorney. Foreign counsel may therefore appear on behalf of any party.

It should be noted that the arbitration rules of BANI require that Indonesian counsel must accompany any foreign counsel if Indonesian law governs the merits of the dispute. This is not a requirement of Indonesia's arbitration law.

## **How are domestic arbitral awards enforced in Indonesia?**

Before a party can enforce an award, it must register the award with the relevant court. The arbitrators or their duly authorised representatives must register the award within 30 days of when the award is rendered. This is typically done by the tribunal providing a power of attorney to the parties to register the award on its behalf.

When seeking to execute an award, the successful party must demonstrate that the nature of the dispute and the agreement to arbitrate meet certain requirements set out in the Arbitration Law. The dispute must be of a commercial nature and fall within the authority of the parties to settle. The arbitration clause must be in writing and signed by the parties. Finally, the award itself must not be contrary to public morality and order.

## **How and when may parties challenge arbitral awards made in Indonesia?**

There is no appeal to the courts in relation to the substance of an arbitration award. However, an award may be annulled on limited grounds, namely where a party subsequently finds that letters or documents submitted in the arbitration are false (or they are declared to be false); where it is subsequently discovered that the other party concealed decisive documents; or where the award is issued as a result of fraud by one of the parties.

Any application for annulment must be submitted within 30 days of registration of the award. The court will render its decision within 30 days of filing. The court's decision may be appealed to the Supreme Court.

## **Can foreign arbitral awards be enforced in Indonesia?**

Yes. International arbitral awards may be recognized and enforced. The award must be registered by the tribunal, or its duly authorised representative, at the Central Jakarta District Court. There is no time limit for registration of international awards. The party seeking to enforce an award must then make an application for exequatur to give the award the same status as a court judgment.

The successful party may then apply for a writ of execution in the court of the district where the losing party is domiciled. Once a writ is obtained, the losing party's assets may be sold to recover the amount owing to the successful party under the award.

## **When can the Indonesian courts refuse enforcement of foreign arbitral awards?**

The grounds for refusing enforcement are limited. International awards are enforceable in Indonesia unless (i) the award is rendered in a state that is not bound by a bilateral or multilateral convention or treaty on the recognition and enforcement of foreign arbitral awards under which Indonesia is bound; (ii) the legal relationship on which the award was based cannot be considered commercial under Indonesian law; or (iii) the recognition or enforcement of the award would be contrary to public policy.

**Ali Budiardjo, Nugroho, Reksodiputro, 2018.**

## JAPAN

<b>Model Law</b>	Yes
<b>New York Convention</b>	Yes
<b>Arbitral institution</b>	<b>Japan Commercial Arbitration Association (JCAA)</b> 3rd Floor, Hirose Building, 3-17, Kanda Nishiki-cho, Chiyoda-ku, Tokyo 101-0054 Japan Tel: +03 5280 5161 Fax: +03 5280 5160
<b>Current rules</b>	JCAA Commercial Arbitration Rules (1 February 2014)
<b>Model clause</b>	<i>'All disputes, controversies or differences which may arise between the parties hereto, out of or in relation to or in connection with this Agreement shall be finally settled by arbitration in (name of city) in accordance with the Commercial Arbitration Rules of the Japan Commercial Arbitration Association.'</i>

### What legislation governs domestic and international arbitration in Japan?

The Japanese Arbitration Act (**Arbitration Act**) applies to all arbitrations in Japan. It is based on the Model Law but departs from it in a number of instances to cater to all types of arbitration and not just commercial arbitration. Japan has not adopted the 2006 Amendments to the Model Law as they relate to interim measures.

The Arbitration Act applies to all arbitrations seated in Japan. It does not differentiate between domestic and international arbitrations.

### What matters are considered arbitrable in Japan?

Article 13(1) of the Arbitration Act provides that only civil disputes (excluding divorce and separation) may be settled through arbitration. Separate specific provisions are made for labour law and consumer law.

### In what circumstances will the court stay proceedings in favour of arbitration?

The Japanese national courts will dismiss a claim where it is covered by a valid arbitration agreement. However, Article 14(1) of the Arbitration Act provides that this rule does not apply (i) when the arbitration agreement is null and void, cancelled, or for other reasons deemed invalid; (ii) when arbitration proceedings are inoperative or incapable of being performed; or (iii) when the request for

dismissal is made by the defendant after presentation of its case or in the preparations for argument in the proceedings on the substance of the dispute.

### **Is an arbitration clause that does not refer to a set of an administering institution's rules enforceable?**

Yes. Article 26(1) of the Arbitration Act provides that there are no restrictions on the arbitral procedure that the parties may adopt, save that those procedures must not violate public policy.

### **How are appointments and challenges to the appointment of arbitrators made?**

Article 16 of the Arbitration Act concerns the appointment of the tribunal. The parties are free to determine the number of arbitrators and the procedure for their appointment. The parties may also, if they wish, specify certain qualifications that an arbitrator must possess. The default number of arbitrators is three; save that where there are more than two parties, any party may apply to court for an order specifying the number of arbitrators.

Article 18 of the Arbitration Act sets out the grounds for challenging an arbitrator, namely, where the arbitrator does not possess the qualifications agreed upon by the parties, or circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

Unless the parties have agreed otherwise, the party challenging an arbitrator must submit its application to the tribunal itself. If the tribunal rejects the application, the party may file a petition in court to remove the arbitrator. A party may also apply to court directly to challenge an arbitrator where it is alleged that the arbitrator is unable to perform his or her duties or where he or she has delayed conducting the arbitration.

### **Who appoints the tribunal if the arbitration agreement does not provide for it?**

In the absence of agreement by the parties, the provisions in Article 17 of the Arbitration Act apply. In the event of a sole arbitrator, the appointment shall be made by the court. Where the tribunal is to consist of three persons, each party shall appoint one arbitrator, and the two so appointed are to appoint the third. If one party fails to name an arbitrator within 30 days from a request by the other party, or if both arbitrators named by the parties do not agree on the third arbitrator within 30 days from their designation, the court shall appoint the third arbitrator.

Where the court appoints an arbitrator, it will have regard to any qualifications stipulated by the parties in the arbitration agreement, the impartiality and independence of the appointees and, in the case of a sole arbitrator (or where the two arbitrators appointed by the parties are to appoint the third arbitrator), whether it would be appropriate to appoint an arbitrator of a nationality other than those of the parties.

### **What is the extent and nature of court supervision of arbitration?**

Save where expressly provided in the Arbitration Act, the courts are not permitted to intervene in arbitration proceedings. The key exceptions relate to the appointment of arbitrators, challenge or removal of an arbitrator, a determination on the jurisdiction of the arbitral tribunal, the taking of evidence, and the setting aside and enforcement of awards.

## **Can an arbitral tribunal grant interim orders or relief?**

Yes. Article 24 of the Arbitration Act provides that a tribunal may order a party to take interim measures of protection and provide sufficient security, unless otherwise agreed by the parties. This power does not preclude a party's right to apply to court for interim measures, which right is preserved by Article 15 of the Arbitration Act.

## **Can an arbitral tribunal award interest?**

Yes. Interest may be awarded if it is provided for in the underlying contract or if mandated by the governing law, unless it is in violation of public policy.

## **Are arbitration proceedings confidential?**

Japanese law does not expressly provide for confidentiality of arbitration proceedings. However, many institutional rules impose duties of confidentiality upon the parties.

## **Are there any restrictions on who may represent parties in arbitration?**

No. There is no restriction on foreign lawyers acting for parties in arbitration proceedings in Japan. Further, foreign lawyers who are admitted to practice in Japan are permitted to represent parties in arbitration proceedings.

## **How are domestic arbitral awards enforced in Japan?**

If a party covered by an arbitral award fails to perform the terms of the award, another party may apply to the court for enforcement of the award. In such case, the party applying to enforce the arbitral award must provide with its application a certified copy of the award and a Japanese translation if the award is in a language other than Japanese.

## **How and when may parties challenge arbitral awards made in Japan?**

An arbitral award is final and binding upon the parties and may not be appealed. A party's only recourse against an award is to apply to set it aside or resist its enforcement. The application must be made within three months from receipt of the award.

The grounds for setting aside an award are set out in Article 44 of the Arbitration Act, as follows:

- The arbitration agreement is not valid due to limits to a party's capacity, or for some other reason under the law to which the parties have subjected it (or failing any indication thereof, under Japanese law);
- The party making the application was not given notice of the appointment of the arbitral tribunal or of the proceedings as required by Japanese law or as agreed by the parties (save where such agreement conflicts with public policy);
- The party making the application was unable to present its case in the arbitration;
- The arbitral award contains decisions on matters beyond the scope of the arbitration agreement or the claims in the arbitral proceedings;

- The composition of the arbitral tribunal or the conduct of the arbitral proceedings was not in accordance with Japanese law or as agreed by the parties (save where such agreement conflicts with public policy);
- The claims in the arbitration are not capable of settlement by arbitration under Japanese law;
- The award is in conflict with the public policy or good morals of Japan.

### **Can foreign arbitral awards be enforced in Japan?**

Yes. Japan is a signatory to the New York Convention. As such, a foreign award rendered in a New York Convention signatory state may be enforced in Japan. Application to a court in Japan for enforcement of a foreign award may be made in the same manner as for a domestic arbitral award.

### **When can the Japanese courts refuse enforcement of foreign arbitral awards?**

The party against whom enforcement is sought may resist enforcement on any of the grounds set out in Article 45 of the Arbitration Act, which basically mirror the grounds set out in Article 44 of the Arbitration Act for setting aside an award (see response to Question 13). These grounds are taken from the New York Convention.

In practice, a Japanese court may refuse to enforce a foreign arbitral award that requires payment of punitive damages or damages as sanctions that the court believes are excessive and contrary to public policy in Japan.

**Morgan, Lewis & Bockius LLP (Tokyo), 2018.**

## SOUTH KOREA

<b>Model Law</b>	Yes
<b>New York Convention</b>	Yes
<b>Arbitral institution</b>	<p><b>Korean Commercial Arbitration Board (KCAB)</b>          Samseong-dong, Trade Tower          43rd Floor, 511, Yeongdong-daero          Gangnam-gu, Seoul          06164 Republic of Korea          Tel : +8225512021          Fax : +8225512020          Email: <a href="mailto:mhlee@kcab.or.kr">mhlee@kcab.or.kr</a></p>
<b>Current rules</b>	International Arbitration Rules of the KCAB 2016
<b>Model clause</b>	<p><i>'Any disputes arising out of or in connection with this contract shall be finally settled by arbitration in Seoul in accordance with the International Arbitration Rules of the Korean Commercial Arbitration Board.</i></p> <p><i>The number of arbitrators shall be [one / three].          The seat, or legal place, of arbitral proceedings shall be [city / country].          The language to be used in the arbitral proceedings shall be [language].'</i></p>

### What legislation governs domestic and international arbitration in Korea?

The Korean Arbitration Act (**Arbitration Act**) governs domestic and international arbitration seated in Korea. It applies to both institutional and ad hoc arbitrations in Korea. The Arbitration Act has been recently amended and came into effect on 30 November 2016. While the old Arbitration Act was based on the 1985 version of the Model Law, the revised Arbitration Act adopted the 2006 Model Law amendments, which seek to modernize various aspects of the law and make Korea a more attractive venue for international arbitration. Some of the key features of the amendments include (i) adoption of Option I of Article 7 of the 2006 Model Law, alleviating the writing requirement for arbitration agreements; (ii) adoption of the 2006 Model Law regime on interim measures allowing enforcement of interim measures issued in arbitration seated in Korea; and (iii) simplification of the recognition and enforcement of arbitral awards. Korea acceded to the New York Convention in 1973.

### What matters are considered arbitrable in Korea?

Although the Arbitration Act does not expressly list any criteria for determining subject matter arbitrability, it does offer some guidance in Article 1 and Article 3 of the Arbitration Act. Under the old Arbitration Act, Articles 1 and 3(1) limited arbitration to *'any dispute under private law.'* This broad



definition is understood to include commercial disputes, but to exclude disputes relating to criminal, constitutional, or administrative matters.

The revised Arbitration Act expanded the scope of arbitrability to *'any dispute on property rights and any dispute on non-property rights that parties can resolve by settlement'*. This expansion of scope is opening up a new means of resolution of disputes in public laws through arbitration proceedings, such as intellectual property laws, antitrust competition laws, or environmental laws. The only matters which are not arbitrable are those where the prevailing interest of the state denied the parties the right to dispose of certain matters.

One Korean court has held that an infringement of copyright claim does not fall into the scope of the arbitration agreement in a license agreement because the arbitration agreement only covers disputes arising out of or in relation to *'this Agreement'* (see Seoul Central District Court Case No. 2005GaHap65093, dated 17 January 2007).

## **In what circumstances will the court stay proceedings in favour of arbitration?**

Pursuant to Article 9 of the Arbitration Act, the courts must dismiss a case if a party pleads the existence of an arbitration agreement, provided that the agreement is not null and void, inoperative, or incapable of being performed. The courts do not have the authority to dismiss a case ex officio in favour of arbitration.

## **Is an arbitration clause that does not refer to a set of administering institution's rules enforceable?**

There is no requirement in the Arbitration Act for parties to designate a particular arbitral institution or any particular institutional rules. Both institutional and ad hoc arbitrations are recognized in Korea.

## **How are appointments and challenges to the appointment of arbitrators made?**

Article 12(2) of the Arbitration Act provides that parties may agree on a procedure for appointing arbitrators. In the absence of any agreement, Article 12(3) provides a default procedure for appointment of arbitrators as detailed in Section 6 below. Article 13 of the International Arbitration Rules of the KCAB (**KCAB International Rules**) provides that the nomination of any arbitrator by the parties or of the third arbitrator by the other arbitrators shall be deemed appointed upon confirmation by the Secretariat.

Both the Arbitration Act and the KCAB International Rules provide that an arbitrator's appointment may only be challenged where there are circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence (Article 13(2) of the Arbitration Act and Article 14.1 of the KCAB International Rules). In addition, an arbitrator may also be challenged if he or she does not have qualifications that are required by party agreement (Article 13(2) of the Arbitration Act). Also, Article 15.2 of the KCAB International Rules provides that the Secretariat may remove any arbitrator who fails to perform his or her duties or unduly delays the performance of his or her duties, or is legally or actually unable to perform his or her duties.

## **Who appoints the tribunal if the arbitration agreement does not provide for it?**

Article 12 of the Arbitration Act provides that in an arbitration with a sole arbitrator, the competent court (a specific local court designated under Article 7 of the Arbitration Act) or an arbitral institution

designated by the court shall appoint the arbitrator upon request of any party. For an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators so appointed will appoint the third arbitrator to act as the chairman of the tribunal. If the two party-appointed arbitrators fail to agree upon the appointment of the third arbitrator within 30 days after they are appointed, the competent court or the designated arbitral institution will appoint the third arbitrator upon request of any party.

Pursuant to Article 12 of the KCAB International Rules, in a case with a sole arbitrator, the Secretariat will appoint the arbitrator. For a case with three arbitrators, one arbitrator is nominated in each of the request for arbitration and the answer. Where the Secretariat decides to refer the case to three arbitrators absent the parties' agreement, each party has an opportunity to nominate an arbitrator. In either event, if the two arbitrators fail to agree on the third arbitrator within 30 days after the appointment of the second arbitrator, the Secretariat shall appoint the chairman.

## **What is the extent and nature of court supervision of arbitration?**

Pursuant to the Arbitration Act, the courts have a limited supervisory role in arbitral proceedings (Article 6). The main areas where the courts will intervene are in considering an application for dismissal of litigation where an arbitration agreement covers the dispute (Article 9), interim measures (Article 10), the appointment and any challenge of arbitrators (Articles 12 and 14), determining the jurisdiction of the tribunal (Article 17), challenging experts appointed by the tribunal (Article 27(3)), assistance in taking evidence (Article 28), and setting-aside and enforcement proceedings (Articles 36(2) and 37).

## **Can an arbitral tribunal grant interim orders or relief?**

Yes, tribunals have the power to grant interim orders and relief under Article 18 of the Arbitration Act and Article 32 of the KCAB International Rules. Notably, Article 18(2) of the revised Arbitration Act specifies the types of interim orders that the arbitral tribunal can issue: (i) maintaining or restoring the status quo; (ii) preventing or refraining from taking action that is likely to cause harm or prejudice to the arbitral process; (iii) preserving assets out of which a subsequent arbitral award may be satisfied; and (iv) preserving evidence that may be relevant and material to the resolution of the dispute.

The party requesting interim measures must show that (i) harm not likely to be reparable by the award could occur if the measure is not ordered; (ii) this harm substantially outweighs the harm suffered by the other party; and (iii) there is a reasonable possibility that the requesting party will succeed on the merits (Article 18-2 of the Arbitration Act). In addition, the tribunal may order the requesting party to provide a security for the granting of the measure (Article 18-4 of the Arbitration Act).

## **Can an arbitral tribunal award interest?**

Both the old Arbitration Act and the KCAB International Rules were silent on the matter of interest. However, the revised Arbitration Act provides for the tribunal's authority to award interest as it deems appropriate, unless the parties agree otherwise (Article 34-3 of the Arbitration Act). In practice, KCAB tribunals usually award interest upon the party's request. When the governing law of the underlying contract is Korean law, parties are often entitled to claim interest as a matter of substantive law. The Korean Supreme Court has ruled that the substantive law of the underlying contract should apply to determine the rate of interest (*see* Supreme Court Case No. 89DaKa20252 dated 10 April 1990).

## **Are arbitration proceedings confidential?**

The Arbitration Act does not address confidentiality of arbitral proceedings. However, since the Arbitration Act does not bar confidentiality agreements, parties may ensure that their dispute and the arbitration proceedings will be kept confidential by entering into a separate confidentiality agreement or stipulating confidentiality of the arbitration in the arbitration clause.

By contrast, Article 57 of the KCAB International Rules stipulates that the arbitral tribunal, the Secretariat, the parties, and their representatives and assistants shall not disclose facts related to arbitration cases or facts disclosed in the arbitration without consent of the parties or as otherwise required by law.

## **Are there any restrictions on who may represent parties in arbitration?**

Article 7 of the KCAB International Rules provides that a party can be represented by any person of its choice in proceedings, subject to such proof of authority as the arbitral tribunal may require. Also, there is no restriction in the Arbitration Act on a party's selection of its party-appointed representatives.

Having said that, there are restrictions on who may render legal services in Korea. Acting as counsel in an arbitration in Korea is considered to be rendering legal services, so only Korean law firms or foreign legal consultants may act as counsel in arbitration proceedings in Korea. An exception exists under the Foreign Legal Consultants Act where the arbitration contains at least one issue involving foreign law or customary international law (Article 24-2 of the Foreign Legal Consultants Act). In practice, it is therefore common for foreign lawyers to appear in arbitrations, although usually Korean counsel are also instructed where there are issues of Korean law to be considered.

## **How are domestic arbitral awards enforced in Korea?**

Upon application by a party to a court, domestic arbitral awards (awards rendered in arbitration seated in Korea, even where one of the parties is a non-Korean entity) may be enforced in Korea by a court decision under Article 38 of the Arbitration Act. The revision to the old Arbitration Act changed the enforcement requirement from a judgment of a court to a court decision allowing enforcement proceedings to be carried out in a more expeditious and simple manner.

## **How and when may parties challenge arbitral awards made in Korea?**

An arbitral award may only be challenged by applying to a court to set aside the award on the limited grounds set out in Article 36(2) of the Arbitration Act. Those grounds are the same as those found in Article 34 of the Model Law and Article V of the New York Convention. There is no right of appeal against the substantive findings of the arbitral tribunal.

Under Article 36(3) of the Arbitration Act, an application to set aside an arbitral award shall be raised within three months from the date of receipt of the award, and under Article 36(4) of the Arbitration Act, the application is not allowed to be made after the decision for recognition or enforcement of the award rendered by a Korean court becomes final and conclusive. Contrary to the revised enforcement proceedings, setting-aside application still requires a full hearing and a judgment of a court.

## **Can foreign arbitral awards be enforced in Korea?**

Yes. Korea is a signatory to the New York Convention, subject to two reservations; Korea only enforces foreign awards rendered in another signatory country and only those awards for commercial

disputes. Foreign arbitral awards rendered in a non-signatory country would be enforced in accordance with the enforcement procedure of foreign judgments under Article 39(2) of the Arbitration Act.

## **When can the Korean courts refuse enforcement of foreign arbitral awards?**

Under Article 39(1) of the Arbitration Act, Korean courts will only refuse enforcement of foreign arbitral awards on the narrow grounds listed in Article V of the New York Convention, namely as follows:

- The parties to the arbitration agreement did not have the capacity to sign the agreement in accordance with the applicable law of each party;
- The arbitration agreement is unenforceable or invalid in accordance with the governing law, or the laws of the country in which the award was made if the arbitration agreement does not stipulate the governing law;
- The individual, body or organisation against which enforcement is sought was not properly notified of the appointment of the arbitrator or the procedures for resolving the dispute by foreign arbitration, or had reasonable cause for failing to exercise his, her, or its right to participate in the proceedings;
- The foreign arbitral award was issued in respect of a dispute which was not referred to arbitration by the parties, or exceeded the scope of the request of the parties. If it is possible to sever the arbitration award, that portion which was correctly referred to arbitration by the parties should, however, be recognized and enforced in Korea;
- The composition of the foreign arbitration tribunal, or the foreign arbitration procedure, was inconsistent with the arbitration agreement or the laws of the country in which the foreign arbitral award was made, in cases where such matters are not stipulated in the arbitration agreement;
- The foreign arbitral award is not yet enforceable or binding on the parties;
- The foreign arbitral award has been set aside or suspended by a competent body of the country in which the foreign arbitral award was made, or of the country whose law governs the arbitration agreement; or
- The court of Korea concludes that the relevant dispute cannot be resolved by arbitration in accordance with the laws of Korea; or the recognition and enforcement of the foreign arbitral award is contrary to the fundamental principles of the laws of Korea.

**Lee & Ko, 2018.**

## MALAYSIA

<b>Model Law</b>	Yes
<b>New York Convention</b>	Yes
<b>Arbitral institution</b>	<p><b>Kuala Lumpur Regional Centre for Arbitration (KLRCA)</b>            Bangunan Sulaiman            Jalan Sultan Hishamuddin            50000 Kuala Lumpur            Malaysia            Tel: +603 2271 1000            Fax: +603 2271 1010            Email: <a href="mailto:enquiry@klrca.org">enquiry@klrca.org</a>            Website: <a href="http://www.klrca.org">www.klrca.org</a></p>
<b>Current rules</b>	KLRCA Arbitration Rules (Revised 2017)
<b>Model clause</b>	<i>'Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the KLRCA Arbitration Rules.'</i>

### What legislation governs domestic and international arbitration in Malaysia?

The Malaysian Arbitration Act 2005 (**Arbitration Act**) governs domestic and international arbitration in Malaysia. It is based on the Model Law.

### What matters are considered arbitrable in Malaysia?

Section 4(1) of the Arbitration Act provides that any dispute that the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration, unless the arbitration agreement is contrary to public policy.

### In what circumstances will the court stay proceedings in favour of arbitration?

Section 10(1) of the Arbitration Act provides that a court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

The Malaysian Federal Court in *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417 held, *inter alia*, that "[88] The court should lean more towards granting a stay pending arbitration under s 10(1) of the 2005 Act, even in cases where the court is in some doubt about the validity of the arbitration clause or where it is arguable whether the subject matter of the claim falls within or

outside the ambit of the arbitration clause.”The general principles set out in the *Press Metal* case were followed by the Federal Court in the case of *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang & Other Appeals* [2018] 1 CLJ 693.

## **Is an arbitration clause that does not refer to a set of administering institution’s rules enforceable?**

Yes. Section 21(2) of the Arbitration Act provides that where the parties fail to agree on the procedure to be followed by the tribunal in conducting the proceedings, the tribunal may, subject to the provisions of the Act, conduct the arbitration in such manner as it considers appropriate.

## **How are appointments and challenges to the appointment of arbitrators made?**

Section 13(2) of the Arbitration Act provides that the parties are free to agree on a procedure for appointing an arbitrator.

Section 14(3) of the Arbitration Act provides for the challenge of an arbitrator’s appointment when the circumstances give rise to justifiable doubts as to the arbitrator’s impartiality or independence, or when the arbitrator does not possess qualifications agreed to by the parties.

Section 15 of the Arbitration Act outlines the procedure for challenging an arbitrator’s appointment. A challenge may be initiated within 15 days after becoming aware of the constitution of the tribunal, or of any reasons referred to in Section 14(3), by sending a written statement of the reasons for the challenge to the tribunal.

If the challenge is unsuccessful, the challenging party may, within 30 days after having received notice of the decision rejecting the challenge, apply to the court to make a decision on the challenge.

## **Who appoints the tribunal if the arbitration agreement does not provide for it?**

Where the arbitration agreement is silent on the appointment of the tribunal, Section 13 of the Arbitration Act provides a default appointment procedure.

For arbitrations with a sole arbitrator, in the event the parties fail to agree on an arbitrator, either party may apply to the Director of the KLRCA for the appointment of an arbitrator.

In an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two party-appointed arbitrators will then appoint the third arbitrator as the presiding arbitrator. If the two party-appointed arbitrators fail to agree upon the appointment of the third arbitrator within 30 days of their appointment, or within such extended period as the parties may agree, either party may apply to the Director of the KLRCA for the appointment of the third arbitrator.

## **What is the extent and nature of court supervision of arbitration?**

The courts adopt a policy of minimal curial intervention in arbitration. Section 8 of the Arbitration Act provides that no court shall intervene in matters governed by the Arbitration Act except where provided for in the Act. The areas where the court maintains supervision are as follows:

- Section 10 of the Arbitration Act provides for the stay of court proceedings where there is an arbitration agreement.
- Section 11 of the Arbitration Act provides for the power to grant interim measures.
- Section 13 of the Arbitration Act provides for the power to appoint an arbitrator in certain situations.
- Section 15 of the Arbitration Act provides for the power to decide on a challenge to the appointment of an arbitrator.
- Section 16 of the Arbitration Act provides for the power to decide on the termination of the mandate of an arbitrator.
- Section 18 of the Arbitration Act provides for the power to hear an appeal on the jurisdiction of the tribunal.
- Section 29 of the Arbitration Act provides for the power to assist in the taking of evidence.
- Section 37 of the Arbitration Act provides for the setting aside of an award.
- Section 38 of the Arbitration Act provides for the power to recognise and enforce an arbitration award as a judgment.
- Section 41 of the Arbitration Act provides for the power to determine a preliminary point of law arising in the course of an arbitration.
- Section 42 of the Arbitration Act provides for parties to refer any question of law arising out of an award to the court.
- Section 44(1) of the Arbitration Act provides for the power of the court to tax costs and expenses of an arbitration in certain situations.
- Section 44(4) of the Arbitration Act provides for the power to order a tribunal to deliver an award in certain circumstances.
- Section 45 of the Arbitration Act provides for the power to extend time for commencing arbitral proceedings.
- Section 46 of the Arbitration Act provides for the power to extend time for the making of an award.
- Section 49 of the Arbitration Act provides for the power to direct any matter in connection with or for the purpose of bankruptcy proceedings to be referred to arbitration.

### **Can an arbitral tribunal grant interim orders or relief?**

Yes. Section 19(1) of the Arbitration Act provides that unless agreed by the parties, a party may apply to the tribunal for orders for security for costs, discovery of documents and interrogatories, giving of evidence by affidavit, and the preservation, interim custody, or sale of any property that is the subject matter of the dispute.

## **Can an arbitral tribunal award interest?**

Yes. Section 33(6) of the Arbitration Act provides that, unless otherwise provided in the arbitration agreement, the tribunal may award interest on any sum of money awarded, calculated from the date of the award to the date of realisation, and may also determine the rate of interest.

## **Are arbitration proceedings confidential?**

The Arbitration Act does not make express reference to confidentiality. Parties typically address the issue of confidentiality either through the arbitration agreement or by the adoption of institutional rules.

Rule 16 of the KLRCA Arbitration Rules provides that all matters relating to the arbitral proceedings shall remain confidential except where disclosure is necessary for purposes of implementation and enforcement, or to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to challenge an award in bona fide legal proceedings before a state court or other judicial authority.

## **Are there any restrictions on who may represent parties in arbitration?**

Generally, there are no restrictions on the choice of party-appointed representatives. However, please note that in *Samsuri Baharuddin & Ors v Mohamed Azahari Matiasin & Another* [2017] 3 CLJ 287, the Malaysian Federal Court held that lawyers who are not considered advocates under the Sabah Advocates Ordinance 1953 are prohibited from representing parties in arbitral proceedings in Sabah.

## **How are domestic arbitral awards enforced in Malaysia?**

Upon the application of an enforcing party under Section 38(1) of the Arbitration Act, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State shall, subject to section 38 and section 39, be recognized and be enforced by entry as a judgment in terms of the award or by action. In this respect, Section 39 of the Arbitration Act provides for the grounds for refusing recognition or enforcement of an award.

## **How and when may parties challenge arbitral awards made in Malaysia?**

Section 37(1) of the Arbitration Act provides for an application to set aside an award on the following limited and exhaustive grounds:

- A party to the arbitration agreement was under any incapacity.
- The arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia.
- The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case.
- The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration.
- The award contains decisions on matters beyond the scope of the submission to arbitration.
- The composition of the tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the



Arbitration Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with the Act.

- The court finds that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia.
- The court finds that the award is in conflict with the public policy of Malaysia.

### **Can foreign arbitral awards be enforced in Malaysia?**

Yes. Malaysia is a signatory to the New York Convention. As such, a foreign award rendered in a New York Convention signatory state may be enforced in Malaysia.

### **When can the Malaysian courts refuse enforcement of foreign arbitral awards?**

Section 39(1) of the Arbitration Act provides that recognition or enforcement of an award may be refused at the request of the party against whom it is invoked, on the following limited and exhaustive grounds:

- A party to the arbitration agreement was under any incapacity.
- The arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of the State where the award was made.
- 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 that party's case.
- The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration.
- The award contains decisions on matters beyond the scope of the submission to arbitration.
- The composition of the tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the Arbitration Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with the Arbitration Act.
- 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.
- The court finds that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia.
- The court finds that the award is in conflict with the public policy of Malaysia.

**Ariff Rozhan & Co., 2018.**

## MYANMAR

<b>Model Law</b>	Arbitration Law 2016
<b>New York Convention</b>	Yes
<b>Arbitral institution</b>	An international arbitration centre has yet to be established.

### What legislation governs domestic and international arbitration in Myanmar?

The Myanmar Arbitration Act of 1944 (**Arbitration Act**) governs domestic arbitration in Myanmar. Myanmar acceded to the New York Convention on 15 July 2013, but local enacting legislation has yet to be passed.

A new arbitration bill is currently under discussion in the Parliament of Myanmar with the aim of adopting the principles of the Model Law into local law and to incorporate the New York Convention enforcement regime.

The Arbitration Law of Myanmar was enacted on 5 January 2016 and governs both domestic and international arbitration.

International Arbitration means:

At the time of making an arbitration agreement, the business and commercial transactions of a party to such agreement are situated in a country other than Myanmar; or

The place of arbitration or the place where the arbitration proceedings are to be carried out according to the arbitration agreement is situated outside of the country in which the business of the parties to the agreement is situated; or

For commercial transactions, the place where the material obligation is carried out or the place to which the matter of dispute relates is outside of the country where the business of the parties to the agreement is situated; or

Parties to the arbitration agreement agreed that the subject matter of the arbitration agreement relates to more than one country.

Domestic Arbitration is an arbitration which is not an International Arbitration.

### What matters are considered arbitrable in Myanmar?

The Arbitration Act does not define subject matter arbitrability. It is generally accepted that all civil matters, subject to a few exceptions, can be resolved in arbitration. The exceptions are matters which fall within the sole jurisdiction of the courts, such as a winding-up petition or the appointment of a guardian for a minor.

According to Chapter -2 (objective), Section 4 of the Arbitration Law, the law focuses on the settlement of corporate and commercial transaction locally and internationally.

## **In what circumstances will the court stay proceedings in favour of arbitration?**

The courts will stay court proceedings in favour of arbitration where the subject matter of a dispute that commenced in court is the same as that covered by the arbitration agreement between the parties.

According to Section 10, an application for a stay of legal proceedings can be made not later than the time of submitting any written statement in relation to the subject matter. Unless the court finds that the agreement for arbitration is void, not effective, or unable to proceed, the dispute shall be referred to arbitration.

## **Is an arbitration clause that does not refer to a set of administering institution's rules enforceable?**

The Arbitration Act is silent on the subject of arbitration in the absence of express procedural rules. This is due to the age of the Arbitration Act itself, which came into force in 1944 before the dramatic rise of arbitration in the last 20 years or so. The conditions implied in arbitration agreements set out in the First Schedule to the Arbitration Act support the view that in the absence of express procedural rules, an arbitration may nevertheless proceed.

According to the agreement of the disputing parties, an arbitration tribunal can arrange to seek assistance from a reasonable organization or person for administration.

## **How are appointments and challenges to the appointments of arbitrators made?**

The procedure for the appointment of arbitrators is found at the First Schedule of the Arbitration Act, which applies to all arbitrations by default unless otherwise specified by the parties. The default number of arbitrators is one, unless agreed otherwise.

Where reference is to an even number of arbitrators, each party will appoint an even number of arbitrators, and the arbitrators shall appoint an umpire. If the reference is to three arbitrators, each party will appoint one arbitrator and the appointed arbitrators shall appoint a third arbitrator.

- An arbitrator may be challenged on the following grounds:
- The arbitrator has a personal interest in the subject matter of the dispute.
- The arbitrator has mishandled the arbitral proceedings.
- The arbitrator is incapable of acting as an arbitrator.
- The arbitrator is guilty of misconduct.

### Appointment of Arbitrators

Unless otherwise agreed between the disputing parties, a person of any nationality can act as an arbitrator.

Disputing parties can freely agree to the means of appointment of arbitrators. In the event that either disputing party fails to follow the agreement on appointment of an arbitrator and no other alternative means to appoint an arbitrator is mentioned in the arbitration agreement, any disputing party may request that the Chief Justice, or his appointed person or organization, appoint the arbitrator.

Where the disputing parties do not reach an agreement on an arbitrator:

In arbitration proceedings with three arbitrators, each disputing party shall appoint one arbitrator, and such arbitrators shall appoint the umpire within 30 days after their appointment; failing which, any disputing party may request the Chief Justice, or his appointed person or organization, to appoint the umpire.

In arbitration proceedings with 1 arbitrator, if the parties fail to reach an agreement for appointing one arbitrator within 30 days from the date of receipt of the request from either disputing party for appointment of an arbitrator, any disputing party may request the Chief Justice, or his appointed person or organization, to appoint the arbitrator.

When selecting the arbitrator, the Chief Justice, or his appointed person or organization, shall primarily consider whether the arbitrator is eligible in accordance with the arbitration agreement between the disputing parties and whether the arbitrator is impartial.

When the disputing parties are foreigners from different countries, the Chief Justice, or his appointed person or organization, shall appoint an arbitrator (in the case of a single arbitrator) or umpire whose citizenship shall be different from that of the disputing parties.

The term "Chief Justice" refers to, in the case of domestic arbitration, a Chief Justice of the State or Region of the competent jurisdiction and in the case of international arbitration, a Chief Justice of the Union.

#### Objection to Arbitrator

An arbitrator being contacted to be appointed as arbitrator shall disclose in writing whether there is any conflict of interest in relation to him or her being able to make an impartial decision; failing which, any disputing party may reveal any such conflict without delay during the arbitration proceeding.

It is possible to object to the appointment of an arbitrator:-

- If the arbitrator does not meet the qualification agreed between the disputing parties; or
- If the arbitrator is reasonably suspected in relation to his independence and impartiality.

Provided, however, that the disputing party may object to the arbitrator appointed by him only for matters discovered after such arbitrator's appointment.

#### Means for Objection

Objection to the arbitrator shall be made within 15 days from the date of establishment of the arbitral tribunal, and the written objection that states the reason for the objection shall be submitted to the arbitral tribunal.

The arbitral tribunal shall decide whether the arbitrator should resign upon objection if the other disputing party disagrees with such objection. If the decision of arbitral tribunal is not favourable to the party making the objection, that party may submit an application to the competent court of jurisdiction within 30 days after the decision. Regardless of whether the court proceeding on objection is ongoing, the arbitration proceeding may proceed.

## **Who appoints the tribunal if the arbitration agreement does not provide for it?**

A court will appoint the tribunal where the arbitration agreement is silent.

For a domestic arbitration, should there be no reference to a set of arbitrators, disputing parties can agree on the process for appointment of arbitrators; failing which, upon application of any party, the Chief Justice or his appointed person or organization, may administer the arbitration as it thinks fit.

## **What is the extent and nature of court supervision of arbitration?**

A court exercises a higher degree of supervision over arbitrations in Myanmar than in many other jurisdictions. A court may intervene in the following situations:

- To allow parties to revoke the authority of an arbitrator.
- To appoint an arbitrator or umpire, or to fill a vacancy in certain circumstances.
- To set aside the appointment of a sole arbitrator by a party.
- To remove an arbitrator who fails to perform his or her duties diligently, or who is guilty of misconduct.
- To terminate the effectiveness of an arbitration agreement.
- To give its opinion when an arbitrator submits a special case.
- To direct an award to be filed.
- To modify or correct an award.
- To remit an award for reconsideration.
- To extend the time for the submission of an award.
- To render judgment in the terms of an award and pass a decree to its effect.
- To grant interim orders after an award is filed so as to prevent the rights of the person in whose favour a decree might be passed from being defeated or delayed.
- To supersede a reference.
- To summon the parties and witnesses whom the arbitral tribunal wishes to examine.
- To punish the parties or witnesses if they fail to give evidence or are guilty of contempt.
- Unless there is a provision allowing a court to intervene, no court shall intervene.

## **Can an arbitral tribunal grant interim orders or relief?**

Under Section 19, an arbitral tribunal has the power to make interim orders. However, parties must apply to court for enforcement of these orders.

## **Can an arbitral tribunal award interest?**

The Arbitration Act does not expressly confer power on a tribunal to award interest. However, Section 29 of the Arbitration Act provides that a court may order payment of interest on an award at a rate deemed by the court to be reasonable.

There is no specific provision regarding the determination of interest by an arbitral tribunal. However, under Section 51, where the award stated is for the payment of money but there is no other description, the interest shall be calculated as if stipulated for the money award decided by the court, from the date of the arbitral award.

## **Are arbitration proceedings confidential?**

The Arbitration Act does not make provision for the confidentiality of arbitration proceedings. Parties may separately agree on terms of confidentiality, either in their arbitration agreement or by the adoption of rules which make provision for it.

Unless the disputing parties agree otherwise, it is confidential.

## **Are there any restrictions on who may represent parties in arbitration?**

There is no such restriction.

## **How are domestic arbitral awards enforced in Myanmar?**

A party may apply to have a domestic arbitral award enforced by filing it with a court, after which the court will render a judgment on the award. Thereafter, it may be enforced in the same manner as a court judgment.

Domestic arbitral awards will be enforced by the competent court of jurisdiction in accordance with the Civil Procedure Code of Myanmar.

## **How and when may parties challenge arbitral awards made in Myanmar?**

After an award has been converted into a local court judgment, no right of appeal exists against the award unless the decree issued by the court is in excess of the award or is not otherwise compliant with the award.

An award may be set aside on the following grounds:

- The arbitrator or umpire was guilty of misconduct;
- The arbitrator or umpire improperly conducted the proceedings;
- The award was made after the award was superseded;
- The award was made after the arbitration proceedings became invalid under Section 35 of the Arbitration Act (where arbitral proceedings are stayed once all parties to the proceedings are engaged in court proceedings over the same subject matter);
- The award was improperly procured; or
- The award is otherwise invalid.

Where the defendant can prove that the arbitral tribunal making a domestic arbitral award does not have the authority to do so, the court shall not enforce the domestic arbitral award.

## **Can foreign arbitral awards be enforced in Myanmar?**

Foreign arbitral awards can be enforced in Myanmar.

Only foreign awards of countries that are signatories to the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 are enforceable as domestic awards in Myanmar. There is currently no procedure for the enforcement of foreign awards other than those made in Geneva Convention countries. However, Myanmar has ratified the New York Convention and local enacting legislation is due to be passed. Once enacted, awards from any New York Convention country will be enforceable in Myanmar.

Whilst it is possible in theory to invoke the Arbitration Act of 1937 to enforce foreign arbitral awards, this has not occurred in practice. That act provides that, in order to be enforceable, a foreign award must have been:

- made pursuant to an agreement to arbitrate, which is valid under the law under which it was governed;
- made by the tribunal provided for in the agreement, or agreed upon by the parties;
- made in conformity with the laws of the country governing the arbitration procedure;
- considered final in the country in which it was made; and
- made in connection with a matter which may lawfully be referred to arbitration under the laws of Myanmar.

Finally, the enforcement of the award must not be contrary to the public policy or the laws of Myanmar.

## **When can the Myanmar courts refuse enforcement of foreign arbitral awards?**

See the answer to **Question 14** above.

Myanmar Courts may refuse the enforcement of foreign arbitral awards if either of the following circumstances arise:-

- Where the dispute is not arbitrable under the law of the state of Myanmar;
- Where the enforcement of an arbitral award is against the national benefit of the state of Myanmar.

**U Tin Yu & Associates, 2018.**

## PHILIPPINES

<b>Model Law</b>	Yes
<b>New York Convention</b>	Yes
<b>Arbitral institution</b>	<b>Philippine Dispute Resolution Center (PDRCI)</b> 3F, Commerce and Industry Plaza 1030 Campus Avenue cor. Park Avenue McKinley Town Center Fort Bonifacio 1634 Taguig City Philippines Tel: +63 555-0798 Fax: +63 822-4102 Email: <a href="mailto:secretariat@pdrci.org">secretariat@pdrci.org</a>
<b>Current rules</b>	Arbitration Rules of the PDRCI (1 January 2015)
<b>Model clause</b>	<i>'Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the PDRCI Arbitration Rules in force at the time of the commencement of the arbitration.'</i>  <i>Parties may consider adding:</i> <i>'The number of arbitrators shall be . . . (one or three);</i> <i>The place of arbitration shall be . . . (city or country);</i> <i>The language(s) to be used in the arbitral proceedings shall be . . . (language).'</i>

### What legislation governs domestic and international arbitration in the Philippines?

International arbitration is governed by Republic Act No. 9285, which by Section 19 adopts the 1985 Model Law into Philippines law. Domestic arbitration is governed by Republic Act No. 876. Certain provisions of the 1985 Model Law also apply to domestic arbitration.

The application and implementation of these laws are governed by their Implementing Rules and by Supreme Court Administrative Matter No. 07-11-08-SC–Special Rules of Court on Alternative Dispute Resolution (**Special ADR Rules**).

The Philippines ratified the New York Convention on 6 July 1967.

It should be noted that regarding construction disputes, the Philippines' Construction Industry Arbitration Commission (**CIAC**) is deemed to automatically have jurisdiction to resolve such a dispute, even if the parties selected a different arbitral institution.



## **What matters are considered arbitrable in the Philippines?**

Philippines law provides that certain disputes are not capable of resolution by arbitration, as follows:

- Labour disputes covered by the Labour Code of the Philippines;
- The jurisdiction of the courts;
- The civil status of persons;
- Matrimonial matters such as the validity of marriage and any ground for legal separation of married persons;
- Certain matters concerning the inheritance of property;
- Criminal matters; and
- Disputes that by law cannot be compromised.

## **In what circumstances will the court stay proceedings in favour of arbitration?**

The courts will stay court proceedings in respect of both domestic and international arbitration where the parties have agreed to resolve that dispute by arbitration.

## **Is an arbitration clause that does not refer to a set of an administering institution's rules enforceable?**

Yes. The provisions of the Model Law supply a set of default procedural rules where the parties have not agreed to one.

## **How are appointments and challenges to the appointment of arbitrators made?**

The parties are free to agree on the number of arbitrators. Failing agreement on the number of arbitrators, the default is three arbitrators.

Following the Model Law, parties may challenge the appointment of an arbitrator only if circumstances give rise to justifiable doubts as to his or her impartiality or independence, or if he or she does not possess qualifications agreed to by the parties.

Challenges to the appointment of an arbitrator may be made before the arbitral tribunal. If the challenge fails, the party may request the Appointing Authority to rule on the challenge. If the Appointing Authority fails or refuses to act, the party may renew the challenge in court.

## **Who appoints the tribunal if the arbitration agreement does not provide for it?**

Where the arbitration agreement is silent, the appointing authority shall be the appointing authority designated in the arbitral rules chosen by the parties.

In ad hoc arbitration, the default appointment of an arbitrator shall be made by the National President of the Integrated Bar of the Philippines (**IBP**) or his or her duly authorised representative.

When the parties agree that their dispute shall be resolved by three arbitrators, each party shall appoint one arbitrator and the two arbitrators thus appointed shall appoint a third arbitrator.

In the event that the appointing authority designated in the scenarios above fails or refuses to make the appointment, the parties may apply to court to make the appointment.

## **What is the extent and nature of court supervision of arbitration?**

Philippine law and jurisprudence have adopted a policy in favour of arbitration and generally restrict the courts' supervision of arbitration. In both international and domestic arbitration, courts can intervene in the following circumstances:

- To grant protective orders to preserve confidentiality;
- To appoint an arbitrator where an appointing authority fails or refuses to act, or resolve a challenge to the appointment of an arbitrator;
- To terminate the mandate of an arbitrator where an appointing authority fails to act;
- To rule on a jurisdictional issue as a preliminary question;
- To issue and enforce interim measures of protection;
- To assist in the taking of evidence;
- To set aside, enforce, and recognise arbitral awards;
- To make a preliminary determination of any question concerning the existence, validity, and enforceability of an arbitration agreement prior to the commencement of arbitration; and
- To grant relief from the ruling of an arbitral tribunal on a preliminary question upholding or declining its jurisdiction.

In domestic arbitration, courts may, in addition to the above, confirm, correct/modify, or vacate an award.

## **Can an arbitral tribunal grant interim orders or relief?**

Yes. Arbitral tribunals are granted this power under Sections 28 and 29 of Republic Act No. 9285. To enforce such interim measures, a party may file an application with the courts for assistance in implementing or enforcing the interim relief granted by the arbitral tribunal.

When the arbitral tribunal is unable to act effectively, a petition for interim measures of protection may also be made with the courts even after the arbitral tribunal is constituted.

## **Can an arbitral tribunal award interest?**

The arbitration laws do not expressly empower an arbitral tribunal to award interest, but do not prohibit awards of interest based on the substantive law of the dispute.

## **Are arbitration proceedings confidential?**

Yes. Section 23 of Republic Act No. 9285 provides that international arbitral proceedings and matters relating to the proceedings shall remain confidential. Section 33 of the same law also applies this rule of confidentiality to domestic arbitration. The Supreme Court has applied these laws to express a general rule that information disclosed by a party or witness in an arbitration proceeding is considered privileged and confidential.

## **Are there any restrictions on who may represent parties in arbitration?**

Section 22 of Republic Act No. 9285 allows a party to appoint any representative in international arbitrations conducted in the Philippines. However, in relation to domestic arbitration, legal representation is limited to Filipinos.

## **How are domestic arbitral awards enforced in the Philippines?**

For domestic awards, parties may apply to a court to confirm the award at any time after the lapse of 30 days from receipt by the parties of the arbitral award. The court must grant the order unless the award is vacated, modified, or corrected. Once confirmed, an award may be enforced in the same way as any court judgment.

## **How and when may parties challenge arbitral awards made in the Philippines?**

A party may challenge an international arbitration award by filing a petition to set it aside on any of the grounds set out in Article 34 of the Model Law within three months from the time the petitioner receives a copy thereof. There is no right of appeal on the substance of the award.

A party may challenge a domestic arbitration award by filing a petition to vacate that award not later than 30 days from receipt of the arbitral award on one of the following grounds:

- The award was procured by corruption, fraud, or other undue means.
- The arbitrator was partial or corrupt.
- The arbitrator was guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the dispute.
- One or more of the arbitrators were disqualified to act as such under Section 9 of the Republic Act No. 876 and wilfully refrained from disclosing such disqualifications, or were guilty of any other misbehaviour by which the rights of any party have been materially prejudiced.
- The arbitrators exceeded their powers, or so imperfectly executed them, such that a mutual, final, and definite award upon the issues submitted to them was not made.
- The arbitration agreement did not exist, or is invalid for any ground for the revocation of a contract or is otherwise unenforceable.
- A party to arbitration is a minor or a person judicially declared to be incompetent, if (a) the other party to arbitration knowingly entered into a submission or agreement with such minor or incompetent; or (b) the submission to arbitration was made by a guardian or guardian ad litem who was not authorized to do so by a competent court.

## **Can foreign arbitral awards be enforced in the Philippines?**

Article 35 of the Model Law and the New York Convention govern the enforcement of foreign arbitral awards made in other New York Convention countries. A petition for recognition and enforcement of foreign arbitral awards must be filed with the Regional Trial Court in accordance with the rules of procedure of the Supreme Court.

For arbitral awards issued in non–New York Convention countries, the court may, on grounds of comity and reciprocity, recognise and enforce a non–New York Convention award as a New York Convention award.

Arbitral awards issued in non–New York Convention countries which do not extend comity and reciprocity to awards issued in the Philippines may be enforced as a foreign judgment.

### **When can the Philippines' courts refuse enforcement of foreign arbitral awards?**

The courts will only refuse enforcement on the limited grounds found in Article V of the New York Convention.

**V&A Law Villaraza & Angangco, 2018.**

## SINGAPORE

<b>Model Law</b>	Yes
<b>New York Convention</b>	Yes
<b>Arbitral institution</b>	<p><b>Singapore International Arbitration Centre</b>  32 Maxwell Road  #02-01, Maxwell Chambers  Singapore 069115</p> <p>Tel: +65 6221 8833  Fax: +65 6224 1882  Email: <a href="mailto:corpcomms@siac.org.sg">corpcomms@siac.org.sg</a></p>
<b>Current rules</b>	Arbitration Rules of the Singapore International Arbitration Centre (Sixth Edition, 1 August 2016)
<b>Model clause</b>	<p><i>'Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre ('SIAC') in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ('SIAC Rules') for the time being in force, which rules are deemed to be incorporated by reference in this clause.</i></p> <p><i>The seat of the arbitration shall be [Singapore].*</i></p> <p><i>The Tribunal shall consist of _____ ** arbitrator(s).</i></p> <p><i>The language of the arbitration shall be _____.</i></p> <p><i>* Parties should specify the seat of arbitration of their choice. If the parties wish to select an alternative seat to Singapore, please replace "[Singapore]" with the city and country of choice (e.g., "[City, Country]").</i></p> <p><i>** State an odd number. Either state one or state three.'</i></p>

## **What legislation governs domestic and international arbitration in Singapore?**

There are three main pieces of legislation:

The International Arbitration Act (IAA);

The Arbitration Act (AA); and

The Arbitration (International Investment Disputes) Act.

The IAA incorporates and gives effect to the Model Law, which aims to harmonise arbitration laws in different states. The IAA applies to arbitrations that are international (defined as any arbitration proceeding that contains a cross-border element), but parties may agree for the IAA to apply to an arbitration that would not be considered international if it is clearly stated in the arbitration agreement.

The AA applies to arbitrations that are not considered international, and generally provides for greater supervision by the Singapore courts than the IAA.

The Arbitration (International Investment Disputes) Act gives effect to the United Nations Convention on the Settlement of Disputes Between States and Nationals of Other States.

## **What matters are considered arbitrable in Singapore?**

Section 11(1) of the IAA provides that any dispute may be determined by arbitration unless it is contrary to public policy to do so. For example, matters directly related to a statutory insolvency regime are non-arbitrable. It is generally accepted that matters involving matrimonial and criminal issues are also not arbitrable.

## **In what circumstances will the court stay proceedings in favour of arbitration?**

A stay of court proceedings in favour of arbitration is mandatory in the case of international arbitrations governed by the IAA unless the court is satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

For domestic arbitration proceedings governed by the AA, the court has discretion regarding whether to stay court proceedings in favour of arbitration.

## **Is an arbitration clause that does not refer to a set of administering institution's rules enforceable?**

An arbitration agreement is not rendered unenforceable where the parties do not provide for a set of procedural rules. The court will uphold an arbitration agreement so long as it evidences an intention by the parties to resolve their dispute by arbitration. In the absence of procedural rules, the parties will generally be deemed to have agreed to an ad hoc arbitration. The procedural rules set out in the Model Law will apply unless the parties or the tribunal adopts an alternative process.

## **How are appointments and challenges to the appointment of arbitrators made?**

The nomination and appointment of arbitrators are typically subject to the procedure to which the parties agreed. There are no restrictions as to who may be appointed as arbitrators unless the parties have agreed otherwise.

Institutional arbitration rules have similar provisions for the nomination and appointment of arbitral tribunals in the event that the parties have not expressly provided for it. For example, under the SIAC Rules, if the parties are unable to agree on the nomination of a sole arbitrator within 21 days of receipt of a Notice of Arbitration, the President of the SIAC Court of Arbitration will appoint an arbitrator as soon as possible. Similarly, where the tribunal is to consist of three arbitrators and a party fails to make a nomination within 14 days, the President of the SIAC Court of Arbitration will make the appointment instead.

A party may challenge the appointment of an arbitrator. Again, the institutional rules provide a timeline for this process. Where a challenge is made, the other party may agree to the challenge, or the challenged arbitrator may choose to withdraw from the proceedings.

If the other party does not agree to the challenge or the challenged arbitrator does not withdraw, the challenge will be ruled upon by the institution administering the arbitration. Such decision is final and cannot be the subject of appeal to the Singapore courts.

Parties can also bring a challenge against the appointment of an arbitrator in court. This is governed by a different procedure under the Rules of Court.

## **Who appoints the tribunal if the arbitration agreement does not provide for it?**

If the parties fail to designate a procedure or authority for the appointment of arbitrators, the parties may apply to the President of the SIAC Court of Arbitration to make the appointment.

## **What is the extent and nature of court supervision of arbitration?**

A Singapore court adopts a policy of minimal supervision of arbitration proceedings in Singapore. It will intervene to assist in the process, for example, where the mechanism for appointing an arbitrator has failed.

The court can also grant interim relief in support of arbitration under Section 12A of the IAA. However, the court will only intervene to the extent that the tribunal has no power or is unable to act effectively. If the matter is not urgent, an application for court-ordered interim relief can only be brought with the permission of the tribunal or the other parties' agreement in writing.

Any dispute as to the jurisdiction of the tribunal may be finally determined by the court.

## **Can an arbitral tribunal grant interim orders or relief?**

Arbitrators have extensive powers to grant interim relief under the IAA and AA. Under Section 12 of the IAA, a tribunal may make orders, such as for parties to provide security for costs and discovery of documents. Arbitral rules such as the SIAC Rules also provide that, prior to the constitution of the full tribunal, an emergency arbitrator can be appointed to grant emergency interim relief.

These orders are enforceable through the Singapore courts as if they were orders made by a court. The procedure for this is governed by Order 69A Rule 5 of the Rules of Court.

### **Can an arbitral tribunal award interest?**

A tribunal may award interest on the whole or any part of any sum which is awarded to any party, or which is in issue in the proceedings but paid prior to an award, for any period up to the date of payment.

A tribunal is empowered to award interest on a simple or compound basis and at such rate as it considers appropriate. An award will carry interest from the date of the award and at the same rate as the interest rate for court judgments in Singapore (currently 5.33% per annum), unless the award provides otherwise.

### **Are arbitration proceedings confidential?**

Yes. Case law in Singapore has confirmed that arbitration proceedings are confidential. However, such confidentiality has not been placed on a statutory footing.

Where a party seeks to challenge an arbitral award or seeks to enforce an award in court, confidentiality might fall away as court proceedings are a matter of public record. Section 22 of the IAA therefore allows parties to apply for proceedings to remain private, and Section 23 allows parties to apply for directions from the court that information be sealed or redacted.

### **Are there any restrictions on who may represent parties in arbitration?**

There are no restrictions on who may represent a party in arbitration. It need not be a lawyer. The Singapore Legal Profession Act expressly permits foreign lawyers to represent a party in Singapore arbitration proceedings, including those where the governing law of the contract in question is Singapore law.

### **How are domestic arbitral awards enforced in Singapore?**

Arbitral awards are enforced as if they were judgments or orders of the Singapore High Court. Under Order 69A Rule 6 of the Rules of Court, a party may apply to enforce an award. The application must be accompanied by an affidavit exhibiting the arbitration agreement and the award. It should also state the usual or last known place of abode or business of the enforcing party and the party against whom the award is to be enforced. The affidavit must confirm that the award has not been complied with, or the extent to which it has not been complied with, at the date of the application.

The party against whom the award is being enforced will have 14 days to challenge enforcement. If no challenge is made, or if the challenge fails, the enforcing party may proceed to enforce the award as if it were a judgment of the Singapore High Court, and the full remedies for enforcement will be available to it.

### **How and when may parties challenge arbitral awards made in Singapore?**

A party may seek to set aside an arbitral award made in Singapore on any of the grounds set forth in Article 34 of the Model Law or Section 24 of the IAA. These grounds relate to jurisdiction, procedural irregularity, public policy, fraud, or breach of natural justice.



If a party wishes to challenge a tribunal's decision in a Singapore-seated arbitration that it has or does not have jurisdiction to hear a dispute, the party may apply to a court under Section 10 of the IAA for a decision.

## **Can foreign arbitral awards be enforced in Singapore?**

The Singapore courts will enforce arbitral awards that were obtained in countries that are contracting states to the New York Convention. This means that arbitral awards from at least 150 states are enforceable in Singapore.

## **When can the Singapore courts refuse enforcement of foreign arbitral awards?**

The Singapore courts may refuse enforcement of foreign arbitral awards under Section 31 of the IAA. The grounds for refusal set out in that section are exhaustive:

- A party could not validly enter into the arbitration agreement at the time the agreement was made.
- The arbitration agreement is not valid under its chosen law or under the law of the country where the award was made.
- A party was not given sufficient notice of the appointment of the arbitrator or of the arbitration proceedings, or was unable to present its case at those proceedings.
- Generally, where the award dealt with matters that parties did not intend to submit to arbitration.
- The tribunal or the arbitral procedure was not in accordance with the agreement of the parties or in accordance with the law of the country where the arbitration took place.
- The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the laws of which, the award was made.
- The subject matter is non-arbitrable under the laws of Singapore.
- The enforcement of the award would be contrary to the public policy of Singapore.

**Morgan Lewis Stamford LLC, 2018.**

## TAIWAN

<b>Model Law</b>	Yes
<b>New York Convention</b>	No
<b>Arbitral institution</b>	<b>Chinese Arbitration Association, Taipei (CAA)</b> Floor 14, 376 Renai Road Section 4 Taipei Taiwan 106 Tel: +886 2 2707 8672 Fax: +886 2 2707 8462 Email: <a href="mailto:service@arbitration.org.tw">service@arbitration.org.tw</a>
<b>Current rules</b>	CAA Arbitration Rules (effective in 2001, most recently amended in April 2017)
<b>Model clause</b>	<i>'Any dispute, controversy, difference or claim arising out of relating to or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration referred to the Chinese Arbitration Association, Taipei, in accordance with the Association's arbitration rules. The place of arbitration shall be in Taipei, Taiwan. The language of arbitration shall be _____. The arbitral award shall be final and binding upon both parties.'</i>

### What legislation governs domestic and international arbitration in Taiwan?

The main legislation governing arbitration in Taiwan is the Arbitration Law (**Arbitration Law**), which came into force on December 24, 1998 and was last amended on December 2, 2015. The Arbitration Law is supplemented by the Rules on Arbitration Institutions, Mediation Procedures and Fees ("Rules"), which was promulgated on March 3, 1999 and was last amended on January 22, 2003. The Rules provide for the establishment of arbitral institutions and prescribe matters such as the fees and procedural rules for arbitration.

In addition to the Chinese Arbitration Association, Taipei (CAA), which is the more prominent arbitral institution in Taiwan, there are also several other arbitral institutions that are legally approved and established, such as the Chinese Construction Industry Arbitration Association, Taiwan Construction Arbitration Association, Chinese Real Estate Arbitration Association and the Arbitration Association for Labour Disputes.

Apart from the arbitrations conducted by any of the aforementioned arbitral institutions in Taiwan, it is also possible for arbitrations to be conducted in Taiwan in accordance with the procedural rules of international arbitration institutions such as the International Chamber of Commerce (ICC) and International Centre for Settlement of Investment Disputes (ICSID), if parties of the arbitration agreement have so agreed.

## **What matters are considered arbitrable in Taiwan?**

Pursuant to Paragraph 1 of Article 1 of the Arbitration Law, parties may enter into an arbitration agreement for any present dispute that has arisen or future dispute that may arise, as long as such dispute may be settled in accordance with the law.

As such, civil or commercial disputes in general may be resolved by arbitration, including but not limited to disputes related to construction, real estate transactions, intellectual property, maritime matters, consumer protection, employment and medical practice.

Disputes arising out of securities transactions under Taiwan's Securities and Exchange Act ("SEA") may also be resolved by arbitration should the parties so agree. However, disputes between securities firms and securities exchange or between two or more securities firms must be settled by arbitration pursuant to Article 166 of the SEA, regardless of whether the parties have agreed to arbitration.

Matters that are not arbitrable are criminal law and family law matters, as well as disputes related to the validity of intellectual property rights and antitrust and competition law matters Taiwan's Fair Trade Act.

## **In what circumstances will the court stay proceedings in favour of arbitration?**

In the event that a party commences court proceedings against another party despite an arbitration agreement between the parties, Article 4 of the Arbitration Law provides that the court shall stay proceedings upon application of the other party (the defendant) and order the plaintiff to submit to arbitration within a specified time period, unless the defendant has responded to the proceedings commenced by the plaintiff.

The court proceedings will remain stayed for the duration of the arbitration and will be deemed to have been withdrawn when an arbitral award is made. In the event that the plaintiff fails to submit to arbitration within the time period specified by the court, the proceedings shall be dismissed.

## **Is an arbitration clause that does not refer to a set of an administering institution's rules enforceable?**

Article 19 of the Arbitration Law provides that in the absence of an agreement between the parties on the procedural rules governing the arbitration, the arbitral tribunal shall apply the Arbitration Law. For matters not stipulated by the Arbitration Law, the arbitral tribunal may refer to rules of the Code of Civil Procedure or other rules of procedure as it deems proper.

## **How are appointments and challenges to the appointment of arbitrators made?**

Parties are free to agree on the method of appointment of arbitrators and the number of arbitrators, so long as an odd number of arbitrators is designated. An arbitrator must be a natural person (Paragraph 1 of Article 5 of the Arbitration Law).

An arbitral institution may also be appointed as arbitrator in accordance with an arbitration agreement.

Article 9 of the Arbitration Law provides that in the event that arbitrators have not been appointed in an arbitration agreement or the method of appointment of arbitrators have not been stipulated in the arbitration agreement, the parties shall each appoint an arbitrator, and the two appointed arbitrators shall jointly designate a third arbitrator to be the chair of the arbitral tribunal.

In the event the arbitration agreement provides for a sole arbitrator, and the parties cannot agree on the sole arbitrator, either party may apply to have the court make the appointment. If the arbitration agreement provides that the arbitration shall be administered by an arbitral institution, the arbitrator shall be appointed by the arbitral institution.

Article 16 of the Arbitration Law provides that should the arbitrator have any one of the following circumstances, a party may challenge the appointment of such arbitrator by applying to have the arbitrator withdrawn:

1. where the arbitrator does not meet the qualifications agreed by the parties;
2. the existence of any of the causes requiring a judge to withdraw from a judicial proceeding in accordance with Article 32 of the Code of Civil Procedure;
3. the existence or history of an employment or agency relationship between the arbitrator and a party;
4. the existence or history of an employment or agency relationship between the arbitrator and an agent of a party or between the arbitrator and a key witness; or
5. the existence of any other circumstances which raises any justifiable doubts as to the impartiality or independence of the arbitrator.

Pursuant to Article 17 of the Arbitration Law, the application for withdrawal of an arbitrator shall be made in writing to the arbitral tribunal within 14 days of the applicant party becoming aware of any one of the circumstances listed above, and the arbitral tribunal shall make a decision within ten days upon receipt of that application, unless the parties have agreed otherwise. In the event a party wishes to challenge the decision made by the arbitral tribunal on the application for withdrawal, such party may apply for a court ruling within 14 days of the decision of the arbitral tribunal. The court ruling shall then be final and cannot be further challenged by either party. In the case of a sole arbitrator, the application for withdrawal of arbitrator shall be submitted directly to the court and does not need to be submitted to the arbitral tribunal first.

## **Who appoints the tribunal if the arbitration agreement does not provide for it?**

As noted in Question 5 above, Article 9 of the Arbitration Law provides that in the event that arbitrators have not been appointed in an arbitration agreement, the parties shall each appoint an arbitrator, and the two appointed arbitrators shall jointly designate a third arbitrator to be the chair of the tribunal. In the event the two arbitrators fail to designate the third arbitrator within 30 days of their appointment, any of the parties may apply for the court to make the final appointment. The same applies in the case of a sole arbitrator. If the arbitration agreement provides for the arbitration to be administered by an arbitral institution, the arbitral institution shall appoint the arbitrator(s).

## **What is the extent and nature of court supervision of arbitration?**

In principle, the courts do not have the authority to interfere or intervene before or during the arbitration proceedings, except in the appointment and withdrawal of arbitrator(s), the granting of enforcement or setting aside of the arbitral award and recognition and enforcement of foreign arbitral award. Upon the request of the arbitral tribunal, the courts may provide assistance during the course of the arbitration proceedings, such as in relation to the investigation of evidence, as provided by Article 28 of the Arbitration Law.

## **Can an arbitral tribunal grant interim orders or relief?**

The Arbitration Law does not expressly grant an arbitral tribunal the right to order interim measures or relief. Such power rests with the court. Article 39 of the Arbitration Law provides that any party to the arbitration agreement may apply to the court for provisional attachment or injunction.

In the case of a CAA arbitration, Article 36 of the CAA Arbitration Rules allows the arbitral tribunal, at the request of either party and upon the consent of the parties, to take 'any interim measures as agreed by the parties in respect to the subject-matter of the dispute for purposes of preserving perishable goods, such as ordering their sales or other interim measures the tribunal considers appropriate'.

## **Can an arbitral tribunal award interest?**

The Arbitration Law does not prohibit an arbitral tribunal from awarding interest. Under Taiwanese law, an award creditor may also seek interest on a principal sum awarded from the date when the payment is due until the date of payment.

## **Are arbitration proceedings confidential?**

There are several provisions in the Arbitration Law that ensure the confidentiality of arbitration proceedings. Article 23 of the Arbitration Law provides that the arbitral proceedings are not to be made public unless the parties agree otherwise. Furthermore, Article 32 also stipulates that deliberations on the arbitral award shall not be made public. The arbitrators are also under a duty of confidentiality pursuant to Article 15 of the Arbitration Law.

## **Are there any restrictions on who may represent parties in arbitration?**

The Arbitration Law does not stipulate any requirements or restrictions as to who may represent parties in arbitration. Article 24 of the Arbitration Law provides that a party may appoint its representative(s) to appear before the arbitral tribunal to make statements for and on its behalf. Such appointment shall be made in writing.

## **How are domestic arbitral awards enforced in Taiwan?**

As provided by Article 37 of the Arbitration Law, an arbitral award has the same force as a final judgment of the court. Nevertheless, before an arbitral award can be enforced, an application for an enforcement order must be filed with a competent court, and the arbitral award will only be enforceable upon granting of the enforcement order by the court. According to Article 38 of the Arbitration Law, the court shall reject an application for an enforcement order in the event of any one of the following circumstances:

1. The arbitral award concerns a dispute not contemplated by the terms of the arbitration agreement, or exceeds the scope of the arbitration agreement, unless the offending portion of the award may be severed and the severance will not affect the remainder of the award;
2. The reasons for the arbitral award were not stated, as required, unless the omission was corrected by the arbitral tribunal;
3. The arbitral award directs a party to act contrary to the law.

It is also possible for the arbitral award to be enforced without an enforcement order if the parties have so agreed in writing and if the arbitral award relates to payment of a specified amount of money or certain amount of fungible things or valuable securities, or delivery of a specified movable property (Paragraph 2 of Article 37 of the Arbitration Law).

## **How and when may parties challenge arbitral awards made in Taiwan?**

In addition to the circumstances under which the court shall reject an application for an enforcement order for the arbitral award as provided by Article 38 of the Arbitration Law mentioned in Question 12, a party may apply for an arbitral award to be set aside based on any one of the following grounds in accordance with Article 40 of the Arbitration Law:

1. The arbitration agreement is nullified, invalid, has yet to come into effect, or has become invalid prior to the conclusion of the arbitral proceedings;
2. The arbitral tribunal failed to give any party an opportunity to present its case prior to the conclusion of the arbitral proceedings, or if any party was not lawfully represented in the arbitral proceedings;
3. The composition of the arbitral tribunal or the arbitral proceedings was contrary to the arbitration agreement or the law;
4. An arbitrator failed to fulfil the duty of disclosure prescribed in Paragraph 2 of Article 15 of the Arbitration Law and appears to have been partial, or was requested to withdraw but continued to participate (provided that the request for withdrawal was not dismissed by the court);
5. An arbitrator violated any duty entrusted in the arbitration and such violation carries criminal liability;
6. A party or any representative committed a criminal offence in relation to the arbitration
7. Evidence or the content of any translation upon which the arbitration award relies, has been forged or fraudulently altered or contains any other misrepresentations; or
8. Judgment of a criminal or civil matter, or an administrative ruling upon which the arbitration award relies, has been reversed or materially altered by a subsequent judgment or administrative ruling.

For items 5 to 7 as listed above, such grounds shall be limited to instances where a final conviction has been rendered or where criminal proceedings may not commence or continue for reasons other than insufficient evidence. As for item 3 in the case of contravention of the arbitration agreement, as well as items 4 to 8 as listed above, such grounds shall not be sufficient to set aside the arbitral award unless it is established that the violation materially affects the result of the arbitral award.

The application for setting aside an arbitral award must be made within 30 days of delivery of the award, as provided by Paragraph 2 of Article 41 of the Arbitration Law, although certain exceptions apply for some of the grounds for setting aside the arbitral award.

## **Can foreign arbitral awards be enforced in Taiwan?**

Pursuant to Article 47 of the Arbitration Law, an arbitral award is considered a foreign arbitral award if it is issued outside the territory of Taiwan, or issued within the territory of Taiwan but based on foreign laws. Foreign arbitral awards can be enforced in Taiwan after an application for recognition has been granted by the court.

## **When can the Taiwanese courts refuse enforcement of foreign arbitral awards?**

Pursuant to Article 49 of the Arbitration Law, an application for recognition of a foreign arbitral award shall be dismissed by the court if the recognition or enforcement of the foreign arbitral award is contrary to Taiwan's public order or good morals, or where the dispute involved is not arbitrable under Taiwanese laws. The court may also dismiss the application for recognition of a foreign arbitral award if the country where the arbitral award is made or whose laws govern the arbitral award does not recognize arbitral awards from Taiwan.

Article 50 of the Arbitration Law further provides that if a party applies for recognition of a foreign arbitral award, the other party may apply for the court to dismiss such application for recognition within 20 days from the date of receipt of the notice of the application for recognition based on any one of the following grounds:

1. The arbitration agreement is invalid as a result of the incapacity of a party according to the law chosen by the parties to govern the arbitration agreement;
2. The arbitration agreement is null and void according to the law chosen to govern the arbitration agreement or, in the absence of choice of law, the law of the country where the arbitral award was made;
3. A party was not given proper notice of the appointment of an arbitrator or of any other matter required in the arbitral proceedings, or any other situation arose which gives rise to lack of due process;
4. The award does not relate to the subject matter of the dispute covered by the arbitral agreement, or exceeds the scope of the arbitration agreement, unless the offending portion can be severed from and will not affect the remainder of the arbitral award;
5. The composition of the arbitral tribunal or the arbitration procedure was not in conformity with the arbitration agreement or, failing specific agreement thereon, with the law of the place of the arbitration;
6. The award is not yet binding upon the parties or has been suspended or annulled by a court of competent jurisdiction.

**Chien Yeh Law Offices, 2018.**

## THAILAND

<b>Model Law</b>	Yes
<b>New York Convention</b>	Yes
<b>Arbitral institution</b>	<b>Thai Arbitration Institute (TAI)</b> 5 <sup>th</sup> Floor, Criminal Court Building Ratchadapisek Road Chatuchak, Bangkok 10900 Tel: +66 0.2541.2298.9 Fax: +66 0.2512.8434 Email: <a href="mailto:tai.arbitration@coj.go.th">tai.arbitration@coj.go.th</a>
<b>Current rules</b>	Arbitration Rules of the Thai Arbitration Institute, Office of the Judiciary (published on 30 December 2016)
<b>Model clause</b>	<i>'Any dispute, controversy or claim arising out of or relating to this contract or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Arbitration Rules of the Thai Arbitration Institute, Office of the Judiciary applicable at the time of submission of the dispute to arbitration and the conduct of the arbitration thereof shall be under the auspices of the Thai Arbitration Institute.'</i>
<b>Arbitral institution</b>	<b>Thailand Arbitration Center (THAC)</b> 26 <sup>th</sup> Floor, 689 Bhiraj Tower Sukhumvit Road Klong Tan Nuea, Vadhana Bangkok 10110 Tel: +66 0.2018.1615 Fax: +66 0.2018.1632 Email: <a href="mailto:info@thac.or.th">info@thac.or.th</a>
<b>Current rules</b>	Arbitration Rules of the Thai Arbitration Center B.E. 2558 (AD 2015) (published on 11 June 2015)
<b>Model clause</b>	<i>'Any dispute, controversy or claim arising out of or relating to this contract or the breach, termination or invalidity thereof, shall be referred to and finally resolved by arbitration in accordance with the Arbitration Rules of The Thailand Arbitration Center for the time being in force and the conduct of the arbitration thereof shall be under the administration of the Thailand Arbitration Center.'</i>



## **What legislation governs domestic and international arbitration in Thailand?**

Arbitration is governed by Arbitration Act B.E. 2545 (2002), which came into force on 30 April 2002 (**Arbitration Act**). It applies to both national and international arbitrations, so long as the parties conclude an arbitration agreement, made in writing and signed by the parties, specifying the application of the Thai arbitration law, either in the form of an arbitration clause or a separate arbitration agreement. The Arbitration Act generally follows the Model Law.

Thailand is a party to the New York Convention by accession on 21 December 1959.

## **What matters are considered arbitrable in Thailand?**

Article 11 of the Arbitration Act recognises that parties may arbitrate disputes arising out of a defined legal relationship, whether contractual or not. This includes any disputes arising out of a contract made between a government agency and a private enterprise, regardless of whether it is an administrative contract. Therefore, contractual or tortious disputes are generally considered to be arbitrable. Criminal matters, family matters, bankruptcy, business rehabilitation, or any matters relating to public order are not generally capable of being referred to arbitration.

## **In what circumstances will the court stay proceedings in favour of arbitration?**

Pursuant to Section 14 of the Arbitration Act, where a case is brought to the court by a party to a valid and enforceable arbitration agreement and the other party thereto requests that the court strike the case, the court shall issue an order striking the case so that the parties may proceed with an arbitration proceeding. However, the court may find otherwise if there are grounds for the court to believe that the arbitration agreement is void, unenforceable or impossible to perform. In any case, the request for the court to strike the case must be made no later than the date for filing a statement of defence. After filing of such request, pending the decision of the court, a party may commence the arbitral proceedings, or the arbitral tribunal may continue the proceedings and render an award on the dispute.

## **Is an arbitration clause that does not refer to a set of an administering institution's rules enforceable?**

Yes. Parties to an arbitration agreement may agree to adopt their own arbitral procedure or they may select institutional rule to govern procedural aspect of the arbitration. Where the parties do not agree on a rule of procedure, the provisions of the Arbitration Act (which generally follow the Model Law) will apply.

## **How are appointments and challenges to the appointment of arbitrators made?**

Under Thai law, parties to an arbitration agreement may specify, among other things, the qualifications and procedure for the appointment of arbitrators, either by expressly specifying in the agreement or by referring to an applicable institutional rule. However, if the agreement is silent on these matters, under Thai law, the parties shall comply with the rules governing appointments and challenges to the appointment of arbitrators as detailed in Chapter II of the Puissant to the Arbitration Act.

Pursuant to the Arbitration Act, parties are free to agree on the required number of arbitrators. If the arbitration agreement is silent on such matter, a sole arbitrator shall be appointed.

The Arbitration Act requires that arbitrators be impartial and independent. A prospective arbitrator must disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence, and an arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, must without delay make appropriate disclosure to the parties if any such circumstances arise.

Appointed arbitrators must also have the qualifications specified by the parties in their arbitration agreement, or by any applicable institutional rules.

Section 19 of the Arbitration Act provides that a party may challenge an arbitrator if there are circumstances giving rise to justifiable doubts as to his or her impartiality or independence, or if he or she lacks agreed qualifications. A party may not challenge his or her own appointed arbitrator, or any arbitrator in whose appointment he or she has participated, unless he or she had no knowledge of or should not have known the grounds for challenge at the time of appointment.

Unless the parties agreed otherwise in the arbitration agreement, the challenge must be made in writing within 15 days from the date on which the party became aware of the appointment or the grounds for challenge. The tribunal will decide on the challenge. If the challenge is rejected, or where a sole arbitrator is challenged, the challenging party may request that the court decide the matter. That request must be filed within 30 days of receipt of the tribunal's decision, of becoming aware of the appointment of the sole arbitrator, or of the grounds for the challenge.

## **Who appoints the tribunal if the arbitration agreement does not provide for it?**

As mentioned in the answer to question 5 above, parties to an arbitration agreement are free to agree on the appointment of arbitrators. However, where the parties fail to agree, or where the appointment process fails for any reason, the Thai court acts as the default appointing authority.

Where the tribunal consists of a sole arbitrator, and the parties are unable to agree on that arbitrator, either party can apply to the court to request it to appoint the arbitrator.

Where the tribunal consists of more than one arbitrator, each party must appoint an equal number of arbitrators, and those arbitrators jointly appoint an additional arbitrator (the chairman). If any party fails to appoint its arbitrator within 30 days after notification from the other party, or if the party-appointed arbitrators are unable to agree on a chairman within 30 days from the date of their own appointment, either party can apply to the court to request it to appoint the arbitrator or the chairman, as the case may be.

## **What is the extent and nature of court supervision of arbitration?**

The Arbitration Act confers broad powers on the arbitral tribunal and restricts the intervention of the courts into the arbitral process. The key areas where the courts may be involved in the process are to determine whether to strike court cases in favour of arbitral proceedings, to determine applications by the parties for provisional measures, and to determine whether to enforce an arbitral award.

## **Can an arbitral tribunal grant interim orders or relief?**

No. Under Section 16 of the Arbitration Act, a party to an arbitration agreement may only request the courts, and not the arbitral tribunal, to issue an order imposing provisional measures in order to protect parties' interests before or during the arbitration proceedings. The following orders can be granted:

injunctive relief (restraining the party against whom the arbitration is initiated from performing certain acts); and

security for costs (demanding the party that initiates the arbitration to deposit money as security for payment of costs and expenses).

### **Can an arbitral tribunal award interest?**

The Arbitration Act does not prohibit an award on interest. It is generally accepted that arbitrators have the power to award interest if this is provided for in the contract at issue.

### **Are arbitration proceedings confidential?**

In practice, arbitration proceedings in Thailand are generally treated as confidential and not disclosed to the general public. The parties are free to agree to duties of confidentiality, and they often do so by the adoption of arbitration rules that make express provisions for it, such as arbitration rules of TAI and THAC.

### **Are there any restrictions on who may represent parties in arbitration?**

Yes. Pursuant to the new Royal Ordinance on Managing the Work of Aliens B.E. 2560 (2017) (**Royal Ordinance**) and the list attached to the royal decree prescribing works relating to occupation and profession in which aliens are prohibited to engage B.E. 2522 (1979) (as amended) (which is still effective by means of the transitory provisions of the Royal Ordinance), foreign nationals may only represent clients in arbitration if the law governing the dispute is not Thai law or if the award will not be enforced in Thailand.

### **How are domestic arbitral awards enforced in Thailand?**

Awards are enforced by means of an application to the competent court for a judgment recognising and enforcing the award. Once an enforcement judgment has been obtained, it may be enforced in the same way as any other Thai judgment, through the processes as prescribed by the Thai Civil Procedure Code.

### **How and when may parties challenge arbitral awards made in Thailand?**

Under Thai law, if a party wishes to challenge a final arbitral award, the parties' only recourse is to apply to set aside the arbitral award, within 90 days after receipt of a copy of the arbitral award or after the correction or interpretation or the making of an additional award (as the case may be) on one of the following grounds:

- A party to the arbitration agreement was under some incapacity according to the law applicable to that party;
- The arbitration agreement is not binding under the law agreed to by the parties or, in the absence of such agreement, under Thai law;
- The applicant was not given proper advance notice of the appointment of the arbitral tribunal or of the arbitral proceedings, or was otherwise unable to present its case;
- The award deals with a dispute which is not within the scope of the arbitration agreement or contains a decision on a matter outside the scope of the agreement (however, if the award in

the matter which is outside the scope thereof can be separated from the part that is within such scope, the court may set aside only the part that is outside the scope thereof);

- The composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the parties' agreement or the Arbitration Act (as the case may be);
- The award deals with a dispute that is not capable of being settled by arbitration under the law; or
- The recognition or enforcement of the award would be contrary to public order or good morals.

### **Can foreign arbitral awards be enforced in Thailand?**

Yes. Thailand is a party to the New York Convention, permitting enforcement of awards made in any other state that is also a party to the convention.

### **When can the Thailand courts refuse enforcement of foreign arbitral awards?**

The Thai courts may refuse enforcement of any domestic or foreign award if the opposing party proves one of the grounds set out in Sections 43 and 44 of the Arbitration Act, which generally correspond to those grounds contained in Article V of the New York Convention. A court may also refuse to enforce an award where it finds that the dispute was not capable of settlement by arbitration under Thai law or that the enforcement would be contrary to public policy or the good morals of the people.

**Weerawong, Chinnavat & Partners Limited, 2018.**

## VIETNAM

<b>Model Law</b>	Yes
<b>New York Convention</b>	Yes
<b>Arbitral institution<sup>6</sup></b>	<p><b>Vietnam International Arbitration Centre (VIAC)</b>          No. 9 Dao Duy Anh Street, Dong Da District, Hanoi          Vietnam          Tel: +84.24.3574.4001 or +84.24.3574.6916          Fax: +84 24 3574 3001          Email: <a href="mailto:info@viac.org.vn">info@viac.org.vn</a></p>
<b>Current rules</b>	Rules of Arbitration of the Vietnam International Arbitration Centre (in force as from 1 March 2017)
<b>Model clause</b>	<p><i>'Any dispute arising out of or in relation with this contract shall be resolved by arbitration at the Vietnam International Arbitration Centre (VIAC) in accordance with its Rules of Arbitration.'</i></p> <p>or</p> <p><i>'Any dispute arising out of or in relation with this contract shall be resolved by arbitration at the Vietnam International Arbitration Centre at the Vietnam Chamber of Commerce and Industry (VIAC) in accordance with its Rules of Arbitration.'</i></p> <p>Parties may wish to consider adding:</p> <ul style="list-style-type: none"> <li>(a) the number of arbitrators shall be [one or three].</li> <li>(b) the place of arbitration shall be [city and/or country].</li> <li>(c) the governing law of the contract [is/shall be] the substantive law of [ ].*</li> <li>(d) the language to be used in the arbitral proceedings shall be [ ].**</li> </ul> <p>Note:</p> <p>* For disputes that involve a foreign element.</p> <p>** For disputes that involve a foreign element or disputes in which at least one party is an enterprise with foreign investment capital.</p>

<sup>6</sup> There are other arbitral institutions in Vietnam but the VIAC is the most active one.

## What legislation governs domestic and international arbitration in Vietnam?

In Vietnam, domestic and international arbitration are mainly governed by the Law on Commercial Arbitration No. 54/2010/QH12 dated 17 June 2010, which came into force on 1 January 2011 (the **2010 Arbitration Law**). The 2010 Arbitration Law is supplemented by (i) Decree No. 63/2011/ND-CP of the Government dated 28 July 2011, which includes implementing regulations on the 2010 Arbitration Law and became effective on 20 September 2011, and (ii) Resolution No. 01/2014/NQ-HDTP of the Council of Judges of the Supreme People's Court dated 20 March 2014, which guides the implementation of certain provisions of the 2010 Arbitration Law and became effective on 2 July 2014 (the **Resolution**). Notably, the Resolution clarifies the provisions on the validity of arbitration agreements, the grounds for setting aside arbitral awards, and the supervisory and supporting role of domestic courts and their power over foreign arbitrations seated in Vietnam.

In addition, the enforcement of domestic and recognised foreign arbitral awards is governed by (i) the Law on Enforcement of Civil Judgements No. 26/2008/QH12 dated 14 November 2008, which came into force on 1 July 2009 and was amended by Law No. 64/2014/QH13 dated 25 November 2014 and became effective on 1 July 2015 (the **2014 Law on Enforcement of Civil Judgements**), and (ii) the Civil Procedure Code No. 92/2015/QH13 dated 25 November 2015, which became effective on 1 January 2017 (the **2015 Civil Procedure Code**).

## What matters are considered arbitrable in Vietnam?

Article 2 of the 2010 Arbitration Law limits the categories of disputes that may be resolved through arbitration to the following:

- (i) disputes arising from 'commercial activities';
- (ii) disputes where at least one party is engaged in commercial activities; and
- (iii) other disputes where the law stipulates that arbitration is a permissible means of resolution.

'Commercial activity' is not defined under the 2010 Arbitration Law. However, Article 3.1 of the Commercial Law No. 36/2005/QH11 dated 31 December 2005 defines 'commercial activity' as any 'activity for profit-making purposes, comprising purchase and sale of goods, provision of services, investment, commercial enhancement, and other activities for profit-making purposes.'

In addition, Article 470.1 of the 2015 Civil Procedure Code specifies that the following disputes are subject to the exclusive jurisdiction of the Vietnamese courts and are therefore not arbitrable in Vietnam:

- (i) civil cases related to rights over immovable property located within the Vietnamese territory;
- (ii) divorce proceedings between a Vietnamese citizen and a foreigner or a stateless person if both spouses are long-term residents of Vietnam; and
- (iii) civil cases where the parties have the right, under Vietnamese law or an international treaty of Vietnam, to select the jurisdiction of Vietnamese courts, and have decided to make such selection.

## **In what circumstances will the court stay proceedings in favour of arbitration?**

Article 6 of the 2010 Arbitration Law provides that where there is an arbitration agreement between the parties in dispute but one party nonetheless initiates court proceedings, the court must refuse to accept jurisdiction, unless the arbitration agreement is invalid or incapable of being performed.

## **Is an arbitration clause that does not refer to a set of administering institution's rules enforceable?**

Yes, the validity, and therefore enforceability, of an arbitration clause is not subject to the reference to a set of administering institution's rules in Vietnam. Rather, Articles 16 and 18 of the 2010 Arbitration Law provide the following requirements for an arbitration agreement to be valid:

- (i) be in writing; which can be satisfied in many forms:
  - a. an exchange of telegram, fax, telex, email or other form prescribed by law between the parties;
  - b. an exchange of correspondence between the parties;
  - c. an agreement prepared in writing by a lawyer, notary public or competent organization at the request of the parties;
  - d. a reference by the parties during the course of a transaction to a document such as a contract, source document, company charter or other similar documents that contain an arbitration agreement; or
  - e. an exchange of a statement of claim and defence expressing the existence of an agreement proposed by a party and not denied by the other;
- (ii) cover a commercial dispute and be arbitrable;
- (iii) be validly executed by a person having legal authority and civil capacity;
- (iv) not having been obtained through deceit or coercion or declared void on the basis of such deceit or coercion; and
- (v) not being in violation of Vietnamese law.

## **How are appointments and challenges to the appointment of arbitrators made?**

The procedure for the appointment of the arbitral tribunal is provided under Articles 39 to 41 of the 2010 Arbitration Law. If the parties have not agreed upon the number of arbitrators, the arbitral tribunal shall consist of three arbitrators, as provided by Article 39.2 of the 2010 Arbitration Law.

Article 20 of the 2010 Arbitration Law imposes the following minimum qualifications for an arbitrator:

- (i) full civil legal capacity as prescribed in the Vietnamese Civil Code;
- (ii) a university qualification and at least five years of work experience in the discipline which he/she studied; and
- (iii) in special cases, an expert with highly specialised qualifications and considerable practical experience may still be selected as an arbitrator notwithstanding that he/she fails to satisfy the requirements above.

However, if a person has all the qualifications above but falls within one of the following categories, he/she may not act as arbitrator:

- (i) a judge, prosecutor, investigator, enforcement officer or official of a people's court, of a people's procuracy, of an investigative agency, or of a judgment enforcement agency; or
- (ii) a person who is currently prosecuted, or a person who is serving a criminal sentence or who has fully served his or her sentence but his or her criminal record has not yet been cleared.

It is noted that an arbitral institution may require higher qualifications than the above.

Article 42.1 of the 2010 Arbitration Law provides for four specific circumstances under which an arbitrator must refuse to hear a dispute, and accordingly, the parties have the right to request the replacement of such arbitrator:

- (i) the arbitrator is a relative or the representative of a party;
- (ii) the arbitrator has an interest related to the dispute;
- (iii) there are clear grounds for believing that the arbitrator is not impartial or objective; and
- (iv) the arbitrator was a mediator, representative or lawyer for either of the parties prior to the dispute being brought to arbitration for resolution, and the parties did not provide written consent to let the arbitrator be part of the tribunal.

Articles 42.3 and 42.4 of the 2010 Arbitration Law further provide for the procedure to replace an arbitrator in an institutional arbitration and ad hoc arbitration, respectively.

In an institutional arbitration, such as a VIAC arbitration:

- (i) prior to the constitution of the arbitral tribunal: the chairman of the arbitral institution (for example, the President of the VIAC) shall decide on the replacement of the arbitrator;
- (ii) after the constitution of the arbitral tribunal: the remaining members of such tribunal shall make the decision. If these members are unable to decide, the chairman of the arbitral institution shall decide on the replacement of the arbitrator; or
- (iii) after the constitution of the arbitral tribunal: if all the arbitrators or the sole arbitrator refuses to decide on the replacement, the chairman of the arbitral institution shall decide.

In case of an ad hoc arbitration, the procedure to replace an arbitrator is as follows:

- (i) prior to the constitution of the arbitral tribunal: the 2010 Arbitration Law is silent on the procedure to replace an arbitrator;
- (ii) after the constitution of the arbitral tribunal: the remaining members of such tribunal shall make the decision. If these members are unable to decide, the competent court shall decide on the replacement of the arbitrator; or
- (iii) after the constitution of the arbitral tribunal: if all the arbitrators or the sole arbitrator refuses to decide on the replacement, the competent court shall decide.

Finally, Article 42.5 of the 2010 Arbitration Law provides that the decision taken by the chairman of the arbitral institution or the competent court on the replacement of an arbitrator is final.

## **Who appoints the tribunal if the arbitration agreement does not provide for it?**

Articles 40 and 41 of the 2010 Arbitration Law set forth the procedure for the establishment of the arbitral tribunal if the arbitration agreement is silent in this regard. Article 40 governs the



establishment of an arbitral tribunal in case of an institutional arbitration, and Article 41 governs such establishment in an ad hoc arbitration. These provisions are mostly similar and are as follows:

- (i) within 30 days of the receipt of the statement of claim and request to select an arbitrator, the respondent has to (i) select an arbitrator and notify the arbitral institution or (ii) request that the chairman of the arbitral institution appoint an arbitrator on its behalf. If the respondent fails to do either, then within a further seven days after the expiration of the above 30-day period, the chairman of the arbitral institution shall appoint the respondent's arbitrator;
- (ii) within 15 days of the selection by the parties or appointment by the chairman of the arbitral institution of the parties' arbitrators, the arbitrators so elected or appointed shall elect the third arbitrator, who will be the chairman of the arbitral tribunal. If they fail to do so within seven days of the expiration of the above 15-day period, the chairman of the arbitral institution shall appoint the chairman of the arbitral tribunal.
- (iii) If the parties have agreed to a sole arbitrator but fail to select him/her within 30 days from the date on which the respondent receives the statement of claim, then, at the request of a party or all the parties, the chairman of the arbitral institution shall appoint the sole arbitrator within 15 days from the date of receipt of such request.

It is noted that in case of an ad hoc arbitration, the competent court acts in lieu of the chairman of the arbitral institution.

## **What is the extent and nature of court supervision of arbitration?**

The courts generally refrain from intervening in the arbitral process. However, the courts may intervene in the following circumstances:

- (i) refusing jurisdiction if the parties have an arbitration agreement, unless the arbitration agreement is invalid or incapable of being performed (Article 6 of the 2010 Arbitration Law);
- (ii) appointing arbitrators in certain circumstances (see Question 6 in case of ad hoc arbitrations);
- (iii) determining challenges to appointments of arbitrators (see Question 5 in case of ad hoc arbitrations);
- (iv) assisting with the collection of evidence from individuals or organisations in case the arbitral tribunal or the parties cannot obtain such evidence (Article 46 of the 2010 Arbitration Law);
- (v) issuing summonses to witnesses to give oral evidence (Article 47 of the 2010 Arbitration Law);
- (vi) granting interim or conservatory relief. The courts have broader power than an arbitral tribunal with respect to the types of interim relief they may grant (Article 114 of the 2015 Civil Procedure Code); and
- (vii) hearing application for setting aside arbitral awards (Article 68 of the 2010 Arbitration Law).

## **Can an arbitral tribunal grant interim orders or relief?**

Yes, Article 48.1 of the 2010 Arbitration Law provides for the power of an arbitral tribunal to grant interim relief. Article 49.2 of the 2010 Arbitration Law sets forth the types of interim relief available:

- (i) prohibiting any change in the status quo of the assets in dispute;

- (ii) prohibiting acts, or ordering one or more specific acts to be taken by a party, to prevent conduct adverse to the process of the arbitration proceedings;
- (iii) attaching assets in dispute;
- (iv) requiring the preservation, storage, sale or disposal of any of the assets of a party or all parties;
- (v) requiring the provisional payment of money between the parties; and
- (vi) prohibiting the transfer of rights in the assets in dispute.

## **Can an arbitral tribunal award interest?**

The 2010 Arbitration Law is silent on whether an arbitral tribunal can award interest on the principal claim or costs. However, in Vietnamese litigation proceedings, the Ministry of Finance, the Ministry of Justice, the Supreme People's Prosecutor, and the Supreme People's Court have enacted a joint circular stating that interest will be included on the principal claim and costs in a judgment to prevent any delay in the enforcement of the judgment by the losing party. An arbitral tribunal may apply this rule in its award.

Pursuant to Articles 357 and 468 of Civil Code No. 91/2015/QH13 dated 24 November 2015, which became effective on 1 July 2017, the applicable rate for interest due to delay in performing payment obligations is 20% per annum.

## **Are arbitration proceedings confidential?**

Article 4.4 of the 2010 Arbitration Law provides that arbitration is confidential, unless the parties have agreed otherwise. Article 55 of the 2010 Arbitration Law further specifies that the hearings shall be conducted in private, unless the parties have agreed otherwise. Furthermore, the arbitral tribunal can only allow other persons to participate in the hearings subject to the parties' agreement.

## **Are there any restrictions on who may represent parties in arbitration?**

A party must be represented by a representative at the arbitration. If the party is an individual, the party can represent himself/herself or be represented by a duly-authorized person. If the party is a legal entity, the party can be represented by either a legal representative or an authorized representative.

A legal representative of an entity is a person whose name is recorded in that entity's business registration certificate in that capacity. An authorized representative is a person who has been granted a written power of attorney to act in such capacity.

In Vietnamese arbitration proceedings, only the representative can 'act on behalf' of the party, e.g. sign legal submissions, argue in hearings. The parties may retain counsel, including foreign counsel, to help protect their legal rights and interests in arbitration proceedings (i.e. acting as the parties' lawyer). However, for an attorney to act as the representative of a party, the attorney must have a written power of attorney from the party specifying the scope of representation.

## **How are domestic arbitral awards enforced in Vietnam?**

The enforcement of domestic arbitral awards is governed by (i) Articles 65 to 67 of the 2010 Arbitration Law and (ii) the 2014 Law on Enforcement of Civil Judgements.

As a general rule, the parties are encouraged to voluntarily carry out arbitral awards (Article 65 of the 2010 Arbitration Law) within 10 days of the receipt of the arbitral awards (Article 45 of the 2014 Law

on Enforcement of Civil Judgements). If at the expiration of the 10-day period the losing party has not voluntarily executed nor applied for the setting aside of the award, the prevailing party shall have the right to request that the competent civil judgment enforcement agency enforce the award as provided by Article 66 of the 2010 Arbitration Law.

In practice, the enforcement agency will request that the prevailing party seek a confirmation from the competent court that the award has not been set aside.

## **How and when may parties challenge arbitral awards made in Vietnam?**

Article 69 of the 2010 Arbitration Law provides that a party may apply to the competent court to set aside an arbitral award within 30 days from the date of receipt of such award. The application must be accompanied by materials and evidence proving that such application has sufficient grounds and is lawful.

Article 68 of the 2010 Arbitration Law provides that an arbitral award shall be set aside on the following grounds:

- (i) there is no arbitration agreement or the arbitration agreement is invalid;
- (ii) the composition of the arbitral tribunal or the arbitration proceedings is not in compliance with the agreement of the parties or the 2010 Arbitration Law;
- (iii) the dispute does not fall within the jurisdiction of the arbitral tribunal; if any part or aspect of the dispute falls outside the scope of the jurisdiction of the arbitral tribunal, such part or aspect shall be set aside;
- (iv) the evidence supplied by the parties on which the arbitral tribunal relied to issue the award was forged, or an arbitrator received money, assets or some other material benefit from one of the parties in dispute which affected the objectivity and impartiality of the arbitral award; or
- (v) the arbitral award is contrary to the fundamental principles of Vietnamese law.

There is, however, no explicit provision on what the 'fundamental principles of Vietnamese law' (i.e. public policy) are. Those principles are broad and undefined, and have historically been the main basis by which a losing party was able to convince a Vietnamese court to set aside or refuse to enforce an arbitral award.

Article 68 of the 2010 Arbitration Law further requires that, with respect to grounds (i) to (iv), the parties bear the burden of bringing the evidence supporting these grounds, and with respect to ground (v), the court is responsible for verifying and collecting such evidence in deciding whether to set aside the award.

## **Can foreign arbitral awards be enforced in Vietnam?**

If the foreign arbitral award is issued in a country not party to the 1958 New York Convention, the prospect of getting such award recognised and enforced in Vietnam is extremely low. The only basis for such award to be recognised and enforced in Vietnam is the reciprocal principle, which, in practice, is rarely if ever applied.

If the foreign arbitral award is issued in a country party to the 1958 New York Convention, there is an application procedure under the 2015 Civil Procedure Code for its recognition and enforcement in Vietnam. With respect to the likelihood of the recognition and enforcement, historically the prospect is low. However, in recent years more recognition and enforcement have been granted. Whether a foreign arbitral award can be recognised and enforced is to be considered on a case-by-case basis.

## When can the Vietnamese courts refuse enforcements of foreign arbitral awards?

Article 459 of the 2015 Civil Procedure Code provides that a foreign arbitral award shall not be recognised or enforced in Vietnam if one (or more) of the following grounds exists (exist):

- (i) the parties to the arbitration agreement did not have the capacity to sign such agreement according to the law applicable to each party;
- (ii) the arbitration agreement is unenforceable or invalid according to the governing law, or the laws of the country where the award was made where the arbitration agreement does not provide for the governing law;
- (iii) the individual against whom, or body or organisation against which, enforcement is sought (i) had not been properly and in a timely manner notified of the appointment of the arbitrator or the procedures for resolving the dispute through foreign arbitration, or (ii) had reasonable cause for failing to exercise its, or his or her, procedural rights;
- (iv) the foreign arbitral award was made with respect to a dispute which was not referred to arbitration by the concerned parties, or which goes beyond the request of the parties to the arbitration agreement. Where it is possible to sever the arbitral award, that part which was referred to arbitration by the parties shall be recognised and enforced in Vietnam;
- (v) the composition of the arbitral tribunal or the arbitration proceedings was inconsistent with the arbitration agreement or the laws of the country in which the foreign arbitral award was made, in cases where such matters are not stipulated in the arbitration agreement;
- (vi) the foreign arbitral award is not yet binding on the parties; or
- (vii) the foreign arbitral award has been revoked or suspended by a competent body of the country in which the foreign arbitral award was made or by a competent body of the country, the law of which is the governing law.

In addition, Article 459 of the 2015 Civil Procedure Code specifies that a foreign arbitral award shall not be recognized or enforced in Vietnam, if the Vietnamese court concludes that:

- (i) the relevant dispute cannot be resolved by arbitration in accordance with the laws of Vietnam; or
- (ii) the recognition and enforcement of the award in Vietnam is contrary to the 'fundamental principles of Vietnamese law.'

These 'fundamental principles of Vietnamese law' (i.e., public policy) are broad and undefined, and have historically been the main basis by which a losing party was able to convince a Vietnamese court to set aside or refuse to enforce a foreign arbitral award.

## Additional topics

### Evidence Rule

#### *What is the relevant law and prevailing practice relating to document production in international arbitration in your jurisdiction?*

Article 46 of the 2010 Arbitration Law requires the parties to produce documentary evidence in support of their claims and defences. The 2010 Arbitration Law allows the arbitral tribunal to request documentary evidence from witnesses, as well as opinions from professional experts, appraiser, or valuers.

However, Vietnamese law is silent on whether the parties to an arbitration have the right to request documents from each other. We have been involved in a substantial arbitration case before the VIAC where the arbitral tribunal allowed the parties to request documents from each other during discovery.

## **Seat or place of arbitration**

*If your jurisdiction is selected as the seat of arbitration, may hearings and procedural meetings be conducted elsewhere?*

Yes, Article 54.1 of the 2010 Arbitration Law allows the arbitral tribunal to decide on the place of the hearings or procedural meetings if the parties do not agree otherwise or the arbitration rules of an arbitral institution do not provide otherwise. There is no express restriction on where such hearings or meetings can take place. In practice, we have experienced a VIAC arbitration where the arbitral tribunal decided to hold a meeting outside of Vietnam.

## **Formalities for a valid and enforceable award**

*What, if any, are the legal and formal requirements for a valid and enforceable award?*

Article 61 of the 2010 Arbitration Law requires that an award must be made in writing and should include the following elements:

- (i) date and place of issuance of the award;
- (ii) names and addresses of the claimant and the respondent;
- (iii) name(s) and address(es) of the arbitrator(s);
- (iv) summary of the notice of arbitration and the disputing issues;
- (v) grounds for the award, unless otherwise agreed by the parties;
- (vi) resolution of the dispute;
- (vii) period for implementing the award;
- (viii) allocation of arbitration fees and other fees; and
- (ix) signature(s) of the arbitrator(s).

**YKVN, 2018.**

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