

THE DLA PIPER GUIDE TO ARBITRATION IN ASIA



EVERYTHING MATTERS

Introduction

6. Does the NAC publish a set of procedural rules?

Yes, there is one set of rules. The rules stipulate that they apply: “except [that] where any of these Rules are in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate”.

7. Does the NAC publish a panel of recommended arbitrators?

No, not as such. ACICA maintains a panel of international arbitrators and a list of experienced arbitration practitioners. It provides information on international arbitration and is involved in education through the provision of seminars. Its website states that it can recommend arbitrators, but it does not publish any recommendations.

There are “corporate members” consisting of seven Australian law firms and each of these specifies several partners practising in the field but there are no “recommended” arbitrators as such. ACICA also has 51 “fellows” of ACICA who constitute the ACICA Panel of Arbitrators.

8. Does the NAC publish a recommended arbitration clause?

Yes, it is as follows:

“Any dispute, controversy or claim arising out of, relating to or in connection with this contract, including any question regarding its existence, validity or termination, shall be resolved by arbitration in accordance with the ACICA Arbitration Rules. The seat of arbitration shall be Sydney, Australia [or choose another city]. The language of the arbitration shall be English [or choose another language]. The number of arbitrators shall be one [or three, or delete this sentence and rely on Article 8 of the ACICA Arbitration Rules*].”

* Article 8 of the ACICA Arbitration Rules states:

“Number of Arbitrators

If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within 15 days after the receipt by the Respondent of the Notice of Arbitration the parties cannot agree, ACICA shall determine the number of arbitrators taking into account all relevant circumstances.”

9. Does the NAC administer arbitrations?

Yes.

In addition, ACICA provides the following services:

- administration of arbitrations and mediations;
- nominations of arbitrators and mediators;
- information on experienced international arbitration practitioners;
- information on arbitration agreements, rules and arbitration law and practice;
- assistance with hearing rooms, transcription and IT services and accommodation; and
- educational services, including seminars and conferences.

10. What are the NAC's costs?

ACICA's costs are as displayed in the table below:

As well as the fees shown in the table, when submitting the notice of arbitration at the beginning of the arbitration, the claimant (the party initiating arbitration) must pay to ACICA a registration fee of \$2,500. The registration fee is not refundable.

All amounts above are in Australian dollars.

Amount in dispute	Administrative fees
\$1 to \$500,000	1% of the amount in dispute
\$500,001 to \$1,000,000	\$5,000 plus 0.5% of the amount in dispute above \$500,000
\$1,000,001 to \$10,000,000	\$7,500 plus 0.25% of the amount in dispute above \$1,000,000
\$10,000,001 to \$100,000,000	\$30,000 plus 0.01% of the amount in dispute above \$10,000,000
Over \$100,000,000	\$39,000 plus 0.02% of the amount in dispute above \$100,000,000 up to a maximum of \$60,000

IV. Commencing Arbitration

11. How is arbitration commenced?

This is governed by the IAA which says that:

“Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.”

The Commercial Arbitration Acts also have provisions relating to commencement. The example below is from the Victorian Act and is reflective of the provisions in the other state acts:

- “(5) For the purposes of this section, an arbitration shall be deemed to have been commenced if-
- (a) a dispute to which the relevant arbitration agreement applies has arisen; and
 - (b) a party to the agreement-
 - (i) has served on another party to the agreement a notice requiring that other party to appoint an arbitrator or to join or concur in or approve of the appointment of an arbitrator in relation to the dispute;
 - (ii) has served on another party to the agreement a notice requiring that other party to refer, or to concur in the reference of, the dispute to arbitration; or
 - (iii) has taken any other step contemplated by the agreement, or the law in force at the time the dispute arose, with a view to referring the dispute to arbitration or appointing, or securing the appointment of, an arbitrator in relation to the dispute.”

The ACICA Arbitration Rules also provide for a process of commencement which involves issuing a notice of arbitration and payment of the registration fee.

12. Can litigation proceedings be stayed in favour of arbitration?

Yes. This is provided for by both the IAA and the Commercial Arbitration Acts and there is case law on the application of their provisions.

The IAA says:

“(2) Subject to this Part, where:

- (a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and
- (b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;

on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.”

The Commercial Arbitration Acts say (this example is again from the Victorian Commercial Arbitration Act, which is reflective of the provisions in the other state acts):

“Power to stay court proceedings

- (1) If a party to an arbitration agreement commences proceedings in a court against another party to the arbitration agreement in respect of a matter agreed to be referred to arbitration by the agreement, that other party may, subject to sub-section (2), apply to that court to stay the proceedings and that court, if satisfied
 - (a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement; and
 - (b) that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration

may make an order staying the proceedings and may further give such directions with respect to the future conduct of the arbitration as it thinks fit.

- (2) An application under sub-section (1) shall not, except with the leave of the court in which the proceedings have been commenced, be made after the applicant has delivered pleadings or taken any other step in the proceedings other than the entry of an appearance.
- (3) Notwithstanding any rule of law to the contrary, a party to an arbitration agreement shall not be entitled to recover damages in any court from another party to the agreement by reason that that other party takes proceedings in a court in respect of the matter agreed to be referred to arbitration by the arbitration agreement.”

Courts have outlined various principles in deciding when to use the power to stay proceedings in favour of arbitration. Whether the matter to be arbitrated falls within the scope of the arbitration agreement and whether it is capable of being arbitrated have been found to be relevant. The onus of proving that an arbitration agreement is null and void, inoperative or incapable of being performed for the purposes of resisting an application for proceedings to be stayed lies with the party that is resisting the stay application.

V. The Arbitral Tribunal

13. How is the tribunal appointed?

The IAA (incorporating the UNCITRAL Model Law) has specific provisions on the appointment of arbitrators which are as follows:

“Article 11. Appointment of arbitrators

- (1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
- (2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.
- (3) Failing such agreement,
 - (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;
 - (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.
- (4) Where, under an appointment procedure agreed upon by the parties,
 - (a) a party fails to act as required under such procedure, or
 - (b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or
 - (c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

- (5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.”

Similarly, Commercial Arbitration Acts contain provisions on the appointment of arbitrators.

Again, using the example of the Victorian legislation, the following principles are set out in that Act in relation to the appointment of arbitrators (contained within part II of the Act):

- There is a presumption of a single arbitrator unless the arbitration agreement provides otherwise.
- There is a presumption that an arbitrator is jointly appointed by the parties to arbitration unless otherwise agreed in writing.
- A person who defaults in the exercise of their power to appoint an arbitrator can be required to exercise that power by notice, and other consequences can ensue upon the issuance of such a notice.
- If a person has the power to appoint an arbitrator at the beginning of the arbitration and that arbitrator dies or otherwise ceases to hold office, then that person has the power to appoint a new arbitrator.
- The court has the power to fill a vacancy in the office of arbitrator where one exists and if there is no method in the arbitration agreement to govern filling the vacancy, or if the parties agree to let the court do so or if the method provided for cannot reasonably be followed.
- The court (subject to certain limitations) will have the power to appoint an arbitrator where it is the court which has removed the arbitrator.
- An umpire may be appointed in situations where an even number of arbitrators are appointed.

14. Who is eligible for appointment?

Under the IAA anyone is eligible and no person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties. Similarly, the Commercial Arbitration Acts do not set out any eligibility criteria for arbitrators.

15. How is an appointment challenged?

In an arbitration under the Commercial Arbitration Acts, provisions relating to the removal of an arbitrator under the Commercial Arbitration Acts will apply. These provisions provide for the removal of an arbitrator by application to the court and allow the court to order removal if:

- (a) there has been misconduct on the part of an arbitrator or umpire or an arbitrator or umpire has misconducted the proceedings;
- (b) undue influence has been exercised in relation to an arbitrator or umpire; or
- (c) an arbitrator or umpire is incompetent or unsuitable to deal with the particular dispute.

Under the IAA, incorporating the UNCITRAL Model Law, there is a procedure whereby the party must within 15 days give written reasons for a challenge to a member of the arbitral tribunal. If the arbitrator does not withdraw or the other party does not accept the challenge, the challenge is determined by the arbitral tribunal. If no determination is reached, the challenge may be referred to a court.

16. How is the jurisdiction of the tribunal determined?

Jurisdiction will generally be provided for by operation of the arbitration agreement. In the event of a dispute, the IAA has specific provisions for dealing with the dispute.

Under the IAA:

“The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.”

The Commercial Arbitration Acts have no general provisions dealing with jurisdiction as this is to be determined by the arbitration agreement. However, they do have provisions which allow for an arbitrator to extend the ambit of the arbitration where it appears that there is another dispute between the same parties, provided the same arbitration agreement applies to that dispute.

The Commercial Arbitration Acts do not contain specific provisions for dealing with a jurisdictional dispute. Consequently, a dispute will be a matter for the court and the court has an inherent power to make a declaration that an arbitrator is without jurisdiction to hear and determine any dispute.

17. What are the duties of the tribunal?

The arbitrator has a fundamental duty to conduct the arbitration with integrity and fairness. This means that the arbitrator must approach the determination of the dispute with a fair and unbiased mind and give each side the opportunity to present their case and to know the other side's case.

The IAA stipulates that: "parties shall be treated with equality and each party shall be given a full opportunity of presenting his case".

The arbitral tribunal is also under obligations to make its award in a certain way, as set out in the IAA:

- (1) The Tribunal shall decide questions by a majority of the votes of all its members.
- (2) The award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it.
- (3) The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.
- (4) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.
- (5) The Centre shall not publish the award without the consent of the parties."

Under the Commercial Arbitration Acts, arbitrators are under an obligation to determine questions which arise according to law and general justice and fairness and are also under an obligation to make their arbitral award in a certain way:

"Unless otherwise agreed in writing by the parties to the arbitration agreement, the arbitrator or umpire shall-

- (a) make the award in writing;
- (b) sign the award; and
- (c) include in the award a statement of the reasons for making the award."

18. What are the powers of the tribunal?

Under the IAA (incorporating the UNCITRAL Model Law) the arbitral tribunal has the power to order interim measures:

“Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.”

If the parties have not made their own agreement on the conduct of the arbitration, then the arbitrator has the power to conduct the arbitration in such manner as it considers appropriate. The powers conferred upon the arbitral tribunal include the power to determine the admissibility, relevance, materiality and weight of any evidence.

In addition, the IAA (incorporating the UNCITRAL model law) grants the following powers to an arbitral tribunal:

“Powers and Functions of the Tribunal

Article 41

- (1) The Tribunal shall be the judge of its own competence.
- (2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Article 42

- (1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.
- (2) The Tribunal may not bring in a finding of non liquet on the ground of silence or obscurity of the law.
- (3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute ex aequo et bono if the parties so agree.

Article 43

Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,

- (a) call upon the parties to produce documents or other evidence, and
- (b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate.

Article 44

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

Article 45

- (1) Failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions.
- (2) If a party fails to appear or to present his case at any stage of the proceedings the other party may request the Tribunal to deal with the questions submitted to it and to render an award. Before rendering an award, the Tribunal shall notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so.

Article 46

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counter-claims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

Article 47

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party."

The Commercial Arbitration Acts also set out the powers of arbitral tribunals, including:

- to conduct proceedings under that agreement in such manner as the arbitrator or umpire thinks fit (subject to legislation and the arbitration agreement);
- to appoint a presiding arbitrator where three or more arbitrators are appointed;
- to continue with the arbitration proceedings if a party is in default of appearance;
- to hear evidence orally and in writing or by oath, affirmation or affidavit;
- to consolidate related arbitration proceedings upon application by the parties;
- to correct an award containing an error by clerical mistake or accidental slip, a defect of form, a material miscalculation of figures or a material mistake in the description of any person, thing or matter;

- to include interest in the sum for which the arbitral award is made; and
- to set aside an arbitral award where there was misconduct by the arbitrator or the arbitral award was "improperly procured".

19. What are the liabilities of the tribunal?

The IAA provides that:

"An arbitrator is not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator, but is liable for fraud in respect of anything done or omitted to be done in that capacity."

The Commercial Arbitration Acts provide that:

"An arbitrator or umpire is not liable for negligence in respect of anything done or omitted to be done by the arbitrator or umpire in the capacity of arbitrator or umpire but is liable for fraud in respect of anything done or omitted to be done in that capacity." (Commercial Arbitration Act (Vic) 1984, section 51)

20. How are the costs of the tribunal fixed?

The IAA provides that:

"Unless the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) otherwise agreed, the costs of an arbitration (including the fees and expenses of the arbitrator or arbitrators) shall be in the discretion of the arbitral tribunal."

Under the Commercial Arbitration Acts:

"Unless a contrary intention is expressed in the arbitration agreement, the costs of the arbitration (including the fees and expenses of the arbitrator or umpire) shall be in the discretion of the arbitrator or umpire, who may -

- (a) direct to and by whom and in what manner the whole or any part of those costs shall be paid;
- (b) assess or settle the amount of costs to be so paid or any part of those costs; and
- (c) award costs to be taxed or settled as between party and party or as between solicitor and client." (Commercial Arbitration Act (Vic) 1984, section 34)

Under the Commercial Arbitration Acts if the arbitrator does not make a determination as to fees and expenses demanded by the arbitrator, the matter is referred to the court.

The ACICA Arbitration Rules also provide for a determination on costs to be made.

VI. The Arbitration Procedure

21. What procedural rules govern the arbitration?

Proceedings before an arbitral tribunal are more flexible than those before a court. An arbitrator may, subject to the Commercial Arbitration Acts and the terms of the arbitration agreement, conduct arbitration proceedings in such manner as the arbitrator thinks fit.¹ Where an agreed arbitral procedure is not followed by the arbitral tribunal, the award is void and can be set aside.

Despite the discretion conferred under the Commercial Arbitration Acts, an arbitral tribunal must conduct itself subject to the rules of natural justice, and exercise its discretion judicially. The dispute must be decided on the evidence or submissions placed before the arbitral tribunal.

The IAA, incorporating Article 19 of the UNCITRAL Model Law, similarly provides that the parties are free to agree on the procedure to be followed by the arbitral tribunal in the conduct of proceedings.

22. What evidential rules apply to the arbitration?

An arbitrator conducting proceedings under an arbitration agreement is not, unless otherwise agreed in writing, bound by the rules of evidence. An arbitrator may inform him or herself in relation to any matter he or she considers appropriate.² Unless a contrary intention appears in the arbitration agreement, the evidence before an arbitral tribunal may be given orally or in writing and shall, if the arbitral tribunal so requires, be given on oath or affirmation by affidavit.

Where the arbitrator is bound to follow the rules of evidence regard must be had to provisions in the Evidence Act 1995 (Cth) and the various state and territory Evidence Acts.³

¹ Commercial Arbitration Acts s14;

² Commercial Arbitration Acts s 19(3)

³ Evidence Act 1971 (ACT); Evidence Act 1995 (NSW); Evidence Act 1939 (NT); Evidence Act 1977 (Qld); Evidence Act 1929 (SA); Evidence Act 1910 (Tas); Evidence Act 1958 (Vic); Evidence Act 1906 (WA).

23. What is the language of the arbitration?

According to article 22 of the UNCITRAL Model Law, the parties are free to agree on the language or languages to be used in the arbitration proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. There are no provisions in the Commercial Arbitration Acts relating to language. An arbitral tribunal may, however, require submissions to be accompanied by a certified translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

24. Who can appear as Counsel?

Where an arbitration is conducted under the UNCITRAL Model Law, section 29(2) of the IAA permits legal representation as of right. Section 29(3) provides that a practitioner representing a party in an arbitration of this variety may be admitted to practice in any jurisdiction and does not have to be admitted in the jurisdiction where the arbitration proceeding will take place.

Under section 20 of the Commercial Arbitration Acts, there is no absolute unqualified right to legal representation in arbitration proceedings. A party to an arbitration agreement may be represented by a legal practitioner at arbitration proceedings only in the following cases:

- (a) where a party to the proceedings is, or is represented by, a legally qualified person;
- (b) where all the parties agree;
- (c) where the amount or value of the claim exceeds a prescribed amount (currently A\$20,000); or
- (d) where the arbitrator gives leave for such representation.

Representation by a non-legally qualified person is permitted where the party is an incorporated or unincorporated body and the representative is an officer, employee or agent of the body; where all the parties agree; or where the arbitrator gives leave for representation of that kind.

The arbitrator must grant an application for leave if he or she is satisfied that the granting of leave is likely to shorten the proceedings and reduce costs. Additionally, the arbitrator must grant an application for leave where the applicant would, if leave were denied, be unfairly disadvantaged. A practitioner does not have to be admitted in the jurisdiction where the arbitration will take place.

VII. The Arbitral Award

25. What is the form of the award?

Section 29 of the Commercial Arbitration Acts requires an arbitral award to be in writing, to be signed by the arbitrator and to include a statement of the arbitrator's reasons for making the arbitral award, unless otherwise agreed in writing between the parties to the arbitration agreement.

Where the parties have agreed to the arbitral award otherwise than in writing, the arbitrator must, upon request of a party within seven days of making the award, provide a statement in writing setting out the date of the award and the reasons for making the award.

Article 31 of the UNCITRAL Model Law, adopted into Australia by the IAA, has the same requirements for an arbitral award.

26. What are the grounds for appeal against the award?

Section 38 of the Commercial Arbitration Acts confers on the Supreme Court of each jurisdiction an appellate jurisdiction on any question of law arising out of an arbitral award, and the power to determine preliminary questions of law. A party may appeal to the court on any question of law arising out of an arbitral award. The party making the application must have obtained the consent of all the other parties to the arbitration. In the absence of consent from the parties, an appeal may proceed with the leave of the court.

The court does not have jurisdiction to set aside or remit an arbitral award for reason of error of fact or on the grounds of law on the face of the arbitral award.

The court has power to make a wide range of orders upon the determination of an appeal. In such circumstances, the court is empowered to do any of the following:

- (a) confirm the arbitral award;
- (b) vary the arbitral award;
- (c) set aside the arbitral award; or
- (d) remit the arbitral award, together with the court's opinion on the question of law which was the subject of the appeal, to the arbitrator for reconsideration.

Where an arbitral award of an arbitrator is varied on appeal, the award as varied has the same effect as if it were varied by the arbitrator, save for the fact that there is no appeal under the Commercial Arbitration Acts.

27. How is the award enforced?

Under section 33 of the Commercial Arbitration Acts an arbitral award made under an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect. Where leave is granted, the applicant may enter judgment in terms of the arbitral award. Thus, the party wishing to enforce the arbitral award may bring an action on the award or may follow the summary procedure in section 33(1) of the Commercial Arbitration Acts. The statutory method for enforcement in section 33(1) is simply a summary procedure in lieu of the conventional action on the arbitral award; it is not a statutory cause of action.

An arbitral award is enforceable by action in a court of competent jurisdiction. The action on the award may be used, for example, to seek judgment for the amount of the award; damages for failing to perform the award; an order for specific performance to enforce the award; an injunction to restrain the unsuccessful party from disobeying it; or declaratory orders as to the validity or construction of the award.

28. How are foreign awards enforced?

Foreign arbitral awards are covered by the Convention on the Recognition and Enforcement of Foreign Arbitral Award (1958) ("Convention") which is reproduced in schedule 1 to the Commonwealth International Arbitration Act 1974. While there are provisions relating to the recognition and enforcement of awards in Chapter VIII of the UNCITRAL Model Law, section 20 of the IAA provides that where both part 2 of the IAA and chapter VIII of the UNCITRAL Model Law may apply, chapter VIII does not apply.

According to section 8 of the IAA, arbitral awards made in a Convention country⁴ outside of Australia are enforceable in Australia by any court. The same position applies to arbitral awards which are otherwise not considered to be a domestic award in Australia.

The applicant must supply:

- (a) a duly authenticated original award or a duly certified copy of the original arbitral award;
- (b) the original arbitration agreement or a duly certified copy of the original arbitration agreement; and

⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) [1975] ATS 25; 330 UNTS 3 reproduced in Schedule 1 to the International Arbitration Act 1974 (Cth).

- (c) if the arbitral award or agreement is not made in the official language of the country in which the award is relied upon, a translation of these documents into such language.⁵

There are some limitations to the enforcement of such arbitral awards. Enforcement of an arbitral award may be refused if the court finds that: the award is not capable of settlement the subject matter of the difference is not capable of settlement by arbitration under the law of Australia; or the recognition or enforcement of the award would be contrary to the public policy of Australia.⁶

29. What are the grounds for objecting against enforcement?

Under the Commercial Arbitration Acts and the IAA, a party against whom an arbitral award is to be enforced may challenge the enforcement proceedings by establishing that:

- (a) the parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the arbitral award was made;
- (b) the respondent was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case;
- (c) the arbitral award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the arbitral award which contains decisions on matters submitted to arbitration may be recognised and enforced; or
- (d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (e) the arbitral award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that arbitral award was made.

⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art IV

⁶ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art V(2).

It is important to note, however, that article 4 of the UNCITRAL Model Law provides that a party who knows that any provision of the law has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance shall be deemed to have waived his right to object.

VIII. Interest And Costs

30. Is interest payable on the amount awarded?

Section 25 of the IAA permits the arbitral tribunal to order that interest be paid on any arbitral award for the payment of money for the period between the date the cause of action arose and the date the arbitral award was made.

An arbitrator has power under section 31(1) of the Commercial Arbitration Acts to order that interest be paid on any award for the payment of money for the period between the date the cause of action arose and the date the arbitral award was made.

31. How are the costs of the arbitration determined?

Under the IAA and the Commercial Arbitration Acts, unless otherwise expressed in the arbitration agreement, an arbitrator has discretion in the manner in which he or she deals with the costs of an arbitration, including the fees and expenses of the arbitrator. An arbitrator must exercise his or her discretion to award costs in accordance with established principles.

The discretion is also exercisable having regard to the matters set out in section 34 of the Commercial Arbitration Acts. Accordingly, when exercising his or her discretion to award costs an arbitrator must take into account:

- (a) where a sum of money has been paid into the court in satisfaction of a claim – both the fact that the money was paid into the court and the amount of that payment;
- (b) where an offer of compromise is made (in accordance with the rules of court) in relation to a claim – both the fact that the offer was made and the terms of the offer; and
- (c) the refusal or failure by a party to the arbitration agreement to comply with the arbitrator's direction or any wilfully performed act which results in the delay or prevention of an award being made contrary to the Commercial Arbitration Acts.

32. Who pays the costs of the arbitration?

The general rule is that “costs follow the event” and the successful party receives its costs, save for exceptional circumstances which justify some other order.

IX. Mediation

33. Is there a National Mediation Centre?

Generally, mediation is an informal process and is not undertaken at a specified national centre. There are, however, a number of national organisations in this field. These include:

- Institute of Arbitrators and Mediators (IAMA)
- National Alternative Dispute Resolution Council (NADRAC)
- The Chartered Institute of Arbitrators (Australia) Limited
- Australian Commercial Disputes Centre (ACDC)
- Australian Centre for Commercial Arbitration (ACICA)

34. Is mediation compulsory?

A party may be obliged to attend mediation:

- if they have previously entered into an agreement to mediate; or
- if they are referred to mediation by a court or other authority. Generally, the courts have a wide discretion to refer parties to mediation.

35. How is mediation conducted?

Mediation is a confidential process where an independent and neutral third party assists the disputants to negotiate and reach a decision about their dispute. Unlike arbitration or expert appraisal, the mediator cannot impose a decision upon the parties. The mediator assists the parties to explore the issues in depth and reach a mutually satisfactory outcome. Mediation is not an adversarial procedure, therefore formal legal processes relating to evidence and witnesses do not occur.

Parties have control over the mediation procedure adopted. Therefore, whether parties will be legally represented is a matter for the parties to the mediation to decide. While some mediation agreements will specifically exclude lawyers, in other cases the involvement of specialist legal representation may be necessary for a successful outcome.

36. What are the costs of mediation?

Mediation is far less costly than formal proceedings. The costs and fees of a mediator are usually shared equally, by agreement, between the parties. A mediator's fees can vary from A\$100 per hour to approximately A\$350 per hour.

X. Settlement

37. What are the opportunities for settlement?

According to section 27 of the Commercial Arbitration Acts and the provisions of the IAA, the parties to an arbitration agreement may seek resolution of a dispute through mediation, conciliation or similar means. This may occur even where an arbitration has commenced. Parties to an arbitration may authorise the arbitrator to act as a mediator, conciliator or other intermediary before or after proceeding to arbitration. If settlement occurs, there is no need to continue with the arbitration. If, however, settlement does not occur, the fact that an arbitrator acted in another capacity is not of itself sufficient to bar his or her continuing as arbitrator.

38. How is any settlement agreement enforced?

Where parties agree to settle a dispute, the settlement agreement can be enforced through the courts.

XI. The Role Of The Local Courts

39. What are the powers of the local courts?

The judicial system plays a very important role in arbitrations. Section 18 of the IAA specifies courts for the purposes of article 6 of the UNCITRAL Model Law where an arbitration is conducted in accordance with those provisions as the Commercial Arbitration Acts confer on the court extensive powers which support the administration of the arbitration process. Each jurisdiction confers powers to different courts.⁷

The court also has supervisory power to ensure that the arbitral procedure is properly exercised by the arbitrator. It will set aside an arbitral award where there has been “misconduct” on the part of the arbitrator. It may remove an arbitrator for misconduct, or where it is shown that undue influence has been exercised over the arbitrator, or where the arbitrator is incompetent or unsuitable. These supervisory powers enable the court, under section 49, to make orders upon terms and subject to conditions, including terms and conditions as to costs, as the court thinks just.

Additionally, the Commercial Arbitration Acts confer on the Supreme Court of each jurisdiction an appellate jurisdiction on any question of law arising out of an arbitral award, and the power to determine preliminary questions of law. An award on an arbitration agreement may also be enforced in the local courts in the same manner as a judgment or an order.

⁷ Australian Capital Territory - Supreme Court, Magistrates Court; Northern Territory - Supreme Court, District Court; Queensland - Supreme Court, District Court; South Australia - Supreme Court, District Court, Local Court; Tasmania - Supreme Court; Victoria - Supreme Court, Country Court; Western Australia - Supreme Court, District Court.



**AUSTRALIAN CENTRE FOR
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- support and facilitate international arbitration
- provide information and education
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China

China



I. Arbitration Legislation

1. What legislation governs arbitration?

The Arbitration Law of the People's Republic of China ("the Arbitration Law").¹

2. What is the basis of the arbitration legislation?

Mainly based on the UNCITRAL Model Law.²

3. Does the legislation distinguish between international and domestic arbitrations?

Yes. Chapter VII of the Arbitration Law includes special provisions that apply only to arbitrations involving "foreign elements". The Civil Procedure Act of 1991 also contains a section specific to "foreign-related disputes". The definition of "foreign element" is determined by the Supreme People's Court in a way that corresponds substantially to that used by the UNCITRAL Model Law.³

II. Arbitration Agreement

4. What are the requirements of an enforceable arbitration agreement?

The arbitration agreement must be in writing and it must specify the organisation governing the arbitration. Over 180 arbitration commissions exist in China, each formed in accordance with chapter II of the Arbitration Law of the People's Republic of China. The arbitration will generally employ the selected arbitration commission's procedural, evidential and other rule frameworks, however an amendment of 10 October 1998 allows parties to agree to alternative rules at the discretion of the arbitral tribunal.⁴ For more details on specific requirements of arbitration agreements, see chapter III of the Arbitration Law of the People's Republic of China.

¹ Adopted at the 8th Session of the Standing Committee of the 8th National People's Congress and Promulgated on August 31, 1994; came into effect September 1, 1995. For the full text of this law, see: <http://www.arbiter.net/chinalaw.html>.

² See APEC, Arbitration FAQ for P.R.C., <http://www.arbitration.co.nz/content.asp?section=Arbitration&country=CHN>.

³ Rashid Bahar and Julien Besse, Commercial Arbitration in the People's Republic of China Between Chinese and Foreign Entities, 7 (1999), available at http://www.sinoptic.ch/textes/rapports/1999/1999_arbitration.pdf.

⁴ Bonnie Hobbs, CIETAC Arbitration Rules and Procedures: Recent Developments and Practical Guidelines, 6-7 (1999), available at <http://www.omm.com/webcode/webdata/content/publications/CIETAC.PDF>.

III. National Arbitration Institute/Centre

5. Is there a National Arbitration Centre (“NAC”)?

China International Economic and Trade Arbitration Commission (“CIETAC”) is the most widely known arbitration commission.⁵ Maritime arbitration is mainly handled by CIETAC’s sister commission, the China Maritime Arbitration Commission (“CMAC”). CIETAC claims to be the biggest arbitration commission in the world, but many other large and small arbitration commission also engage in similar activities in China.⁶

China’s Arbitration Law requires arbitration commissions to be members of the China Arbitration Association.⁷ The China Arbitration Association is self-governed and independent, supervising its own members and arbitrators and creating the rules of arbitration subject to national laws.

6. Does the NAC publish a set of procedural rules?

In addition to a generally applicable set of arbitration rules for domestic, and foreign arbitrations (“CIETAC Rules”), CIETAC publishes a specialised set of rules for arbitrating financial disputes. Other arbitration commissions have discretion in setting up their rules around the requirements of China’s Arbitration Law.

7. Does the NAC publish a panel of recommended arbitrators?

In addition to publishing separate lists of international and domestic arbitrators, CIETAC also publishes lists of arbitrators for individual industry groups. Over 400 arbitrators are available to parties in a foreign-related CIETAC arbitration that includes foreign nationals. In accordance with China’s national Arbitration Law, other arbitration commissions have published their own panels of arbitrators. Please note that the appointment of arbitrators from the panel list is a requirement rather than merely a recommendation.

⁵ Viewable at <http://www.cietac.org.cn>.

⁶ Bahar, *supra* at 3, 3.

⁷ Arbitration Law of the People’s Republic of China, Ch. II, Art. 15 (stating that the Arbitration Association has the status of a legal person).

8. Does the NAC publish a recommended arbitration clause?

CIETAC provides such a clause:⁸

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

CIETAC also publishes a model arbitration clause tailored to financial disputes.

9. Does the NAC administer arbitrations?

CIETAC, the oldest and most well-known national arbitration commissions, has administered over 100,000 arbitrations since 1956.⁹

10. What are the NAC’s costs?

Upon acceptance, each CIETAC case incurs an RMB 10,000 administrative arbitration fee, plus the amounts specified in the table below:

Fee Schedule¹⁰ (applies to arbitration cases accepted under article 3, items 1 and 2 of the CIETAC Rules; effective 1 May 2005 - applies to all arbitration sub-commissions)

Amount of Claim (RMB)	Amount of Fee (RMB)
1,000,000 Yuan or less	3.5% of the claimed amount, minimum 10,000 Yuan
1,000,000 Yuan to 5,000,000 Yuan	35,000 Yuan plus 2.5% of the amount above 1,000,000 Yuan
5,000,000 Yuan to 10,000,000 Yuan	135,000 Yuan plus 1.5% of the amount above 5,000,000 Yuan
10,000,000 Yuan to 50,000,000 Yuan	210,000 Yuan plus 1% of the amount above 10,000,000 Yuan
50,000,000 Yuan or more	610,000 Yuan plus 0.5% of the amount above 50,000,000 Yuan

⁸ Viewable at <http://www.cietac.org.cn>.

⁹ Bahar, *supra* at 3, 3.

¹⁰ Arbitration Law of the People’s Republic of China, Ch. II, Art. 15 (stating that the Arbitration Association has the status of a legal person).

When the amount of the claim has not been determined before the application is submitted for arbitration, the secretariat of the CIETAC or its Sub-Commission determines the arbitration fee amount.

Payments are made in RMB or foreign currencies in equivalent values, based upon the exchange rate.

Please note that CIETAC reserves the right to collect reasonable charges in addition to those detailed in the Fee Schedule.

IV. Commencing Arbitration

11. How is arbitration commenced?

The claimant commences the arbitration by submitting to the arbitration commission an arbitration agreement, a written application for arbitration, and the facts and evidence in support of the claim, along with payment of any fees required by the arbitration commission.¹¹

12. Can litigation proceedings be stayed in favour of arbitration?

China's Civil Procedure Law requires that litigation proceedings should not commence if arbitration is agreed.¹² Such legal proceedings commenced in breach of the arbitration agreement may be subject to dismissal rather than a stay of the proceedings.

¹¹ Arbitration Law of the People's Republic of China, ch. IV, s1; Hobbs, *supra* at fu.4, 10.

¹² See Civil Procedure Law of the People's Republic of China, ch. XII s1, art. 111(2) (stating that two parties who have resolved contract differences through arbitral agreement may not be permitted to further litigate their case), ch. XII, §4, art. 136(5)&(6) (stating that litigation may be suspended when a case depends for its outcome upon the outcome of another case or where other circumstances permit), and ch. XXVIII, art. 257 (parties may not file a lawsuit when the contract contains a written arbitration agreement or where the parties have subsequently made such an agreement).

V. The Arbitral Tribunal

13. How is the tribunal appointed?

Chapter IV, section 2 of the Arbitration Law of the People's Republic of China governs the formation of arbitral tribunals. Article 30 specifies that the arbitral tribunal must consist of either one or three arbitrators.

According to the CIETAC Rules, summary procedure (by which a sole arbitrator is appointed) is invoked where no method is agreed upon, where the parties mutually agree in writing to use summary procedure, and where the claim amount does not exceed RMB 500,000. Typically, however, an arbitral tribunal of three arbitrators is employed. One arbitrator is selected by each of the parties and the third is selected either upon agreement by the parties or by the chairman of CIETAC.¹³ Note, however, that other Chinese arbitration commissions may have different methods of appointing arbitral tribunals and, therefore, their one-and three-member tribunals might operate somewhat differently.

Chapter II, article 13 of the Arbitration Law of the People's Republic of China sets out the basic rules of eligibility for arbitrators in China.

Under the CIETAC Rules, both Chinese and foreign individuals may become arbitrators.¹⁴ Both foreign and domestic arbitrators are required to have some proficiencies in English and Chinese, however the exact level of proficiency is not specified and exceptions are given based on factors such as reputation. Consequently, the potential pool of foreign and English-proficient arbitrators may be small. Note that Hong Kong and Macao are both deemed "foreign" under the CIETAC Rules.

15. How is an appointment challenged?

A party may make a request in writing to CIETAC for the removal of an arbitrator from his office. The Arbitration Law of the People's Republic of China provides that parties may challenge arbitrators and force their withdrawal by offering justifiable reasons to suspect that:

- (a) the arbitrator is a party in the case or a close relative of a party or of their/ its agent in the case;

¹³ CIETAC Rules, ch. II, s2.

¹⁴ CIETAC Rules, ch. II, s1, art. 21; CIETAC / CMAC Stipulations for the Appointment of Arbitrators, available at <http://www.cietac.org.cn/english/arbitrators/arbitrators.htm#> (giving requirements applying to prospective foreign and domestic arbitrators).

- (b) the arbitrator has a personal interest in the case;
- (c) the arbitrator has another relationship with a party or their/ its agent in the case which may affect impartiality; or
- (d) the arbitrator has privately met with a party or their/ its agent or accepted an invitation to entertainment or a gift from a party or their/ its agent.¹⁵

These reasons and the evidence thereof must appear in the written request when it is filed and not after the first oral hearing, unless the grounds for the challenge come out or are made known after the first oral hearing, in which case the challenge may be raised until prior to the end of the last hearing. Until a decision is made by the chairman of CIETAC, the challenged arbitrator continues to perform his arbitration duties.

16. How is the jurisdiction of the tribunal determined?

Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own jurisdiction.¹⁶

17. What are the duties of the tribunal?

The arbitral tribunal shall be impartial, prompt, protective of legitimate rights and interests of the parties, and should safeguard sound socialist economic development.¹⁷

18. What are the powers of the tribunal?

The broad powers of the arbitration commission both restrict and supersede those of the arbitral tribunal.¹⁸ The commission collects fees and develops its own rules of procedure and evidence around the national arbitration laws. Generally, the arbitral tribunal hears the case and gives the arbitral award. An arbitral tribunal may reconcile the matter on its own initiative or at the request of the parties before giving the arbitral award. It may also collect the evidence and designate certain appraisal institutions to assess specific issues arising from the arbitration.

19. What are the liabilities of the tribunal?

There is no clear provision in the Arbitration Law of the People's Republic of China in this respect. Generally, it is believed that the arbitral tribunal will only be liable if there is a serious dereliction or breach of duty.

¹⁵ Arbitration Law of the People's Republic of China, ch. IV, s2, art. 34-38.

¹⁶ See Arbitration Law of the People's Republic of China, ch. 1, art. 6; see also, Hobbs, *supra* at fn.4, 11-12 (discussing the rules regarding objection to jurisdiction).

¹⁷ Cf. Arbitration Law of the People's Republic of China, ch. 1, art. 1.

¹⁸ Hobbs, *supra* at fn.4, 17-18.

20. How are the costs of the tribunal fixed?

Parties pay fees according to applicable regulations.¹⁹ These regulations are approved by the commodity price administration. The Fee Schedule applies to all arbitrations under the Arbitration Law of the People's Republic of China.²⁰

VI. The Arbitration Procedure

21. What procedural rules govern the arbitration?

In virtually all cases, the parties arbitrate in accordance with the rules of the arbitration commission specified in the arbitration agreement because, for an arbitration agreement to be valid, the parties must specify the arbitration commission.²¹ The 1998 amendments to the Arbitration Law of the People's Republic of China state that the parties may agree to use an alternative set of rules that are not those of the forum itself; however, likely conflicts between the mandatory provisions of Chinese arbitration law and the methods and requirements of any alternative system are likely to make infeasible a choice of any other legal protocols. Moreover, the Chinese arbitration commission conducting the proceedings reserves discretion to overturn the parties' agreement to use a framework other than the one offered by that commission. Thus, the parties would be inclined to take the unlikely step of seeking prior assurances from the arbitration commission that it will not overturn the parties' agreed choice of legal framework. Otherwise, the parties face substantial uncertainty regarding whether their agreement to use an alternative legal framework will ultimately be upheld.

22. What evidential rules apply to the arbitration?

The evidential rules of the arbitration commission selected by the parties typically apply, however the 1998 amendments to the Arbitration Law of the People's Republic of China indicate that, officially, alternative rules may be used if agreed upon by the parties and affirmed by the arbitration commission.²²

¹⁹ See Annex to Arbitration Law of the People's Republic of China, ch. VIII, art. 76.

²⁰ *Supra* at fn.10.

²¹ See also Hobbs, *supra* at fn.4, 12 ("The procedure for the arbitration hearing and the level of formality are determined solely by the arbitral panel. The parties can attempt to tailor the process to their individual needs by raising certain procedural issues in advance. The tribunal rarely will disclose the final hearing procedure, however, until the parties have assembled in the hearing room ...").

²² See also, Hobbs, *supra* at fn.4, 12 ("Because the CIETAC Rules provide almost no guidance on admissibility of evidence, expert testimony, and the like, much is left to the discretion of the chief arbitrator. Procedural objections can and sometimes are confused with substantive objections").

23. What is the language of the arbitration?

Under the CIETAC Rules, Chinese is the default official language of the arbitration unless otherwise agreed to by the parties.²³ Interpreters may be brought by parties or provided by the arbitration commission. The commission, tribunal or secretariat may request Chinese language translations of documents or evidence.

24. Who can appear as Counsel?

If permitted by the particular commission, submission of an appropriate power of attorney permits foreign and domestic lawyers and non-lawyers to represent parties in an arbitration.²⁴ CIETAC makes such an allowance.²⁵

VII. The Arbitral Award

25. What is the form of the award?

An arbitral award specifies the claim, the facts of the dispute, the reasons for the decisions, the results of the arbitral award, the allocation of fees and the award date.²⁶

26. What are the grounds for appeal against the award?

Parties may file appeals to either the arbitration commission or a People's Court. Where one party applies to the commission and the other to a People's Court, the ruling by the People's Court shall prevail.²⁷

China uses a "single and final award" system for arbitration. This means that once an arbitral award is issued, neither a People's Court nor an arbitration commission may rehear the matter.²⁸

The grounds for appeal are broader for "domestic" than in "foreign-related" arbitral awards. In the latter case, objections are only permitted on procedural or policy-related grounds.²⁹

²³ CIETAC Rules, ch. V, art. 85 (2000), available at <http://www.jurisint.org/doc/html/reg/en/2003/2003jiregen15.html>.

²⁴ Hobbs, *supra* at fn.4, 9.

²⁵ CIETAC Rules, ch. II, s1, art. 16.

²⁶ For more detail, refer to chapter IV, s3, Arts. 53-54 of the Arbitration Law of the People's Republic of China.

²⁷ See APEC, Arbitration FAQ for P.R.C., Scope of Court Intervention and Availability of Courts for Interim Relief, available at <http://www.arbitration.co.nz/content.asp?section=Arbitration&country=CHN>.

²⁸ *Id.*; see also Arbitration Law of the People's Republic of China, ch. I, art. 9.

²⁹ Hobbs, *supra* at fn.4, 9-10.

27. How is the award enforced?

The Arbitration Law of the People's Republic of China and the Civil Procedure Law of the People's Republic of China together provide for the attachment of assets and enforcement of arbitral awards.³⁰ In the event that a party defaults, a party seeking enforcement may apply to the Intermediate People's Court in the locality where the respondent resides or where the property in question lies. If the other party simultaneously asks to set aside the arbitral award, enforcement is stayed until the court resolves whether to set aside the award.³¹

28. How are foreign awards enforced?

Foreign arbitral awards are enforced based on the rules of the New York Convention of 1958.

29. What are the grounds for objecting against enforcement?

The People's Court may set aside enforcement of an arbitral award upon determining that one of the following circumstances existed at the time of arbitration³²:

- (a) there is no arbitration agreement;
- (b) the matters decided in the award exceed the scope of the arbitration agreement or are beyond the arbitral jurisdiction of the arbitration commission;
- (c) the formation of the arbitral tribunal or the arbitral procedure was not in conformity with statutory procedure;
- (d) the evidence on which the arbitral award is based was forged;
- (e) the other party has withheld evidence sufficient to affect the impartiality of the arbitration; or
- (f) while arbitrating the case, the arbitrators committed embezzlement, accepted bribes, practised graft or made an award that perverted the law.

³⁰ Hobbs, *supra* at fn.4, 8 n.27 and accompanying text.

³¹ See APEC, Arbitration FAQ for P.R.C., Recognition and Enforcement, available at <http://www.arbitration.co.nz/content.asp?section=Arbitration&country=CHN>.

³² Arbitration Law of the People's Republic of China, ch. V, art. 58; See APEC, Arbitration FAQ for P.R.C., Recourse Against an Award and Admissible Grounds, <http://www.arbitration.co.nz/content.asp?section=Arbitration&country=CHN>.

VIII. Interest And Costs

30. Is interest payable on the amount awarded?

The Arbitration Law of the People's Republic of China gives no prohibition of awards with interest.³³

31. How are the costs of the arbitration determined?

The Fee Schedule determines the costs applicable in all arbitrations under the Arbitration Law of the People's Republic of China.³⁴

32. Who pays the costs of the arbitration?

Under the CIETAC Rules, the arbitration fee, though fixed by the Fee Schedule, can be assigned to one or the other party at the discretion of the arbitral tribunal.³⁵

The arbitral tribunal may, at its discretion, assign to the parties the costs of evidence collection and travel expenses incurred by arbitrators. The arbitral tribunal may decide in the arbitral award that the losing party shall pay the winning party up to 10% of the total amount awarded to the winning party as compensation for expenses reasonably incurred in winning the case.

IX. Mediation

33. Is there a National Mediation Centre?

No. The government-endorsed People's Mediation Committees are sources of civil mediation in China.³⁶ Commercial entities do not use China's nationally provided mediation entities. Privately operated organisations, such as the US-China Business Mediation Centre or the Italy-China Business Mediation Centre, are the most likely options for parties pursuing commercial mediation with Chinese counterparts.

³³ Article 59 of section IV of the Arbitration Law of the People's Republic of China gives the arbitration tribunal discretion to require the losing party to give the winning party excess compensation up to 10% of the total amount awarded to the winning party. A component of this 10% extra allowance might consist of interest payable on the primary award.

³⁴ Supra fn.10 and fn.20.

³⁵ Fee Schedule, CIETAC, <http://www.cietac.org.cn/english/fee/fee.htm>.

³⁶ See China's Judiciary, VII. Mediation System, available at <http://www.china.org.cn/english/Judiciary/31185.htm>.

34. Is mediation compulsory?

Not in the commercial context.³⁷

35. How is mediation conducted?

Because mediation generally occurs through private means, how the mediation is conducted will depend upon the particular policies and rules of the private organisation and the agreements between the parties.

36. What are the costs of mediation?

Again, this will depend upon the policies and fees of the private parties employed to facilitate the mediation and the agreements between the parties.

X. Settlement

37. What are the opportunities for settlement?

The Arbitration Law of the People's Republic of China gives few specifics on settlement, so the details are generally resolved by the individual arbitration commissions. CIETAC allows the parties to jointly negotiate a settlement prior to the termination of the arbitration. The agreement between the parties need not involve the arbitral tribunal and may be reached independently and submitted thereafter. Conciliation is made binding by the signing and submission to the arbitral tribunal of a written agreement between the parties.³⁸

38. How is any settlement agreement enforced?

For CIETAC arbitrations, the settlement terms are customised based upon the conditions jointly agreed upon by the parties. The time limits and other rules for rendering arbitral awards that normally apply to arbitration decisions do not apply to settlements made between the parties themselves.³⁹

³⁷ Id.

³⁸ CIETAC Rules, ch. III, art. 40.

³⁹ Id.

XI. The Role Of The Local Courts

39. What are the powers of the local courts?

The local courts review appeals and enforce arbitral awards against properties within the jurisdiction.⁴⁰

⁴⁰ Supra fn.18, fn.26, fn.27 and fn.29 supra (regarding role of People's Court in arbitration process).

Hong Kong



I. Arbitration Legislation

1. What legislation governs arbitration?

The Hong Kong Arbitration Ordinance (“Ordinance”).

2. What is the basis of the arbitration legislation?

The Ordinance provides the legislative support to mediation and arbitration in Hong Kong.

3. Does the legislation distinguish between international and domestic arbitrations?

Yes. The Ordinance is divided into two distinct regimes, the international regime and the domestic or non-international regime.

International arbitrations are governed by the UNCITRAL Model Law. The domestic regime is based on the English Arbitration Acts 1950, 1975 and 1979 but includes improvements on these Acts including some provisions based on Singapore’s International Arbitration Act and the English Arbitration Act 1996.

II. Arbitration Agreement

4. What are the requirements of an enforceable arbitration agreement?

An “arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

The arbitration agreement should be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telexes, telegrams or other means of telecommunication which provide a record of the agreement. It can also take the form by way of exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

III. National Arbitration Institute/Centre

5. Is there a National Arbitration Centre (“NAC”)?

Yes. The Hong Kong International Arbitration Centre (“HKIAC”).

6. Does the NAC publish a set of procedural rules?

The HKIAC publishes:

- (a) the HKIAC Procedures for the Administration of International Arbitration; and
- (b) the HKIAC Domestic Arbitration Rules.

7. Does the NAC publish a panel of recommended arbitrators?

Yes. The HKIAC Panel of Arbitrators.

8. Does the NAC publish a recommended arbitration clause?

HKIAC recommends the following clauses:

- (a) For domestic arbitration:

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

- (b) For international arbitration:

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force and as may be amended by the rest of this clause.

The appointing authority shall be Hong Kong International Arbitration Centre.

The place of arbitration shall be in Hong Kong at Hong Kong International Arbitration Centre (HKIAC).

There shall be only one arbitrator.

Any such arbitration shall be administered by HKIAC in accordance with HKIAC Procedures for Arbitration in force at the date of this contract including such additions to the UNCITRAL Arbitration Rules as are therein contained.”

9. Does the NAC administer arbitrations?

Yes.

10. What are the NAC’s costs?

The domestic arbitration rules of HKIAC do not incorporate any specific fee scale or guidance on fees. There are three main methods for assessing fees in both domestic and international arbitrations:

- (a) time spent, by reference to an hourly or daily rate;
- (b) ad valorem, by reference to the overall amounts in dispute; and
- (c) fixed fee, where a fixed fee is assessed at the start of the arbitration, without direct reference to time spent, complexity of the dispute or amounts in dispute.

HKIAC charges HK\$4,000 to appoint an arbitrator if one cannot be agreed between the parties. It charges a further HK\$4,000 if it has to decide on the number of arbitrators to appoint.

The parties may agree to adopt the small claims procedure which is designed primarily for shipping disputes (documents alone) with the claimed amount not exceeding US\$50,000. The claimant pays a fixed fee of HK\$15,000 to the arbitrator. If there is a counterclaim which exceeds the amount of the claim, the respondent will pay an additional fee of HK\$7,500. HKIAC charges HK\$1,500 to appoint an arbitrator for the small claims procedure.

IV. Commencing Arbitration

11. How is arbitration commenced?

To commence an arbitration, the claimant would need to ensure that all parties likely to be involved are made aware of the arbitration that it is starting as soon as possible and what it concerns. The claimant may serve a notice of arbitration to all related parties but Hong Kong law does not prohibit commencement by other means, for example verbal notice.

However, it is usual that where specific arbitration rules have been chosen by the parties the manner of commencing proceedings will be specified and will need to be followed.

12. Can litigation proceedings be stayed in favour of arbitration?

Yes. Where court proceedings are brought in breach of an agreement to arbitrate, and one of the parties applies to the court, the court may intervene by staying the proceedings.

Section 6 of the Ordinance sets out the circumstances in which the court will stay the proceedings:

“If a party to an arbitration agreement that provides for the arbitration of a dispute involving a claim or other matter this is within the jurisdiction of the Labour Tribunal or a person claiming through or under such a party, commences legal proceedings in any court against any other party to the agreement or any person claiming through or under that other party, in respect of any matter agreed to be referred, and any party to those legal proceedings applies to that court after appearance and before delivering any pleadings or taking any other step in the proceedings, to stay the proceedings, the court or a judge of that court may make an order staying the proceedings, if satisfied that-

- (a) there is no sufficient reason why the matter should not be referred in accordance with the agreement; and
- (b) the applicant was ready and willing at the time the proceedings were commenced to do all things necessary for the proper conduct of the arbitration, and remains so.”

Article 8(1) of the UNCITRAL Model Law, which applies to both international and domestic arbitrations, provides that:

“A court before which an action is brought in a matter which is a subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds out that the agreement is null and void, inoperative or incapable of being performed.”

V. The Arbitral Tribunal

13. How is the tribunal appointed?

If specific arbitration rules are chosen, they will provide for how an arbitrator is chosen.

If the parties cannot agree on whom to appoint, HKIAC can make an appointment upon a party's application.

When making an appointment, the applicant and HKIAC must follow the Arbitration (Appointment of Arbitrators and Umpires) Rules. These rules require the applicant to apply on a prescribed form of HKIAC.

HKIAC will then make the appointment having considered the nature of the dispute, the availability of arbitrators, the identity of parties, the independence and impartiality of the arbitrator, any stipulation in the relevant arbitration agreement, and any suggestions made by the parties themselves.

14. Who is eligible for appointment?

There are no mandatory requirements or qualifications for persons seeking appointment as arbitrators.

15. How is an appointment challenged?

Any challenge to the arbitrator will be dealt with by the Council of HKIAC in accordance with the HKIAC Challenge Rules. In making a determination, the Council may appoint a sub-committee to oversee procedural matters, to consider the evidence and submissions made in respect of that evidence, and to make recommendations to the Council.

Any challenge will be accompanied by documents addressed to HKIAC, copied to other parties to the arbitration, and a cheque for HK\$50,000 in payment of HKIAC's fees and expenses. Additional sums may be requested by HKIAC.

After a challenge is made, the other parties to the arbitration and the challenged arbitrator will be given an opportunity to answer that challenge. The party making the challenge will then have the chance to respond.

In determining the challenge, the Council will do so based on the written evidence and written submissions alone. The determination will be given in writing and the Council may in its sole discretion decide whether to give reasons to support such determination.

16. How is the jurisdiction of the tribunal determined?

The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void will not affect the invalidity of the arbitration clause.

A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that it has/ they have appointed, or participated in the appointment of, an arbitrator.

A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitration proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

The arbitral tribunal may rule on a plea referred to above either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days after having received notice of that ruling, that the court decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitration proceedings and make an award.

The above applies to both domestic and international arbitrations.

17. What are the duties of the tribunal?

The arbitral tribunal is required:

- (a) to act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents; and
- (b) to use procedures that are appropriate to the particular case, avoiding unnecessary delay and expense, so as to provide a fair means for resolving the dispute to which the proceedings relate.

18. What are the powers of the tribunal?

When conducting arbitration proceedings, the arbitral tribunal may make orders or give directions dealing with any of the following matters:

- (a) requiring a claimant to give security for the costs of the arbitration;
- (b) requiring money in dispute to be secured;
- (c) directing the discovery of documents or the delivery of interrogatories;
- (d) directing evidence to be given by affidavit;
- (e) in relation to relevant property:
 - (i) directing the inspection, photographing, preservation, custody, detention or sale of the property by the tribunal, a party to the proceedings or an expert; or
 - (ii) directing samples to be taken from, observations to be made of, or experiments to be conducted on the property;

- (f) granting interim injunctions or directing other interim measures to be taken.

Further, the arbitral tribunal may dismiss or stay a claim if it has made an order requiring the claimant to provide security for costs and the order has not been complied with within the period allowed.

19. What are the liabilities of the tribunal?

The arbitral tribunal is liable for an act done or omitted to be done by it, or by its employees or agents, in relation to the exercise or performance, or the purported exercise or performance, of the tribunal's arbitral functions if it is proved that the act was done or omitted to be done dishonestly.

20. How are the costs of the tribunal fixed?

Arbitrators in Hong Kong usually charge on an hourly rate basis. Both parties are jointly and severally liable to the arbitrator for his fees and expenses.

VI. The Arbitration Procedure

21. What procedural rules govern the arbitration?

The parties are free to agree on the procedural rules. HKIAC has its standard international and domestic arbitration rules, as well as special rules for securities disputes and electronic transaction disputes. The parties may also agree to adopt ICC, UNCITRAL or another organisation's arbitration rules.

22. What evidential rules apply to the arbitration?

The arbitral tribunal is not bound by the rules of evidence and can receive any evidence that it considers relevant to the proceedings, but it must give such weight to the evidence adduced in the proceedings as it considers appropriate.

23. What is the language of the arbitration?

The arbitration will normally be conducted in the English language unless the parties agree otherwise. However, the evidence adduced in the proceedings may be in other languages.

24. Who can appear as Counsel?

Parties to arbitrations in Hong Kong are not required to retain qualified lawyers. Parties who wish to be represented can be represented by whomever they choose, including a solicitor or Counsel.

VII. The Arbitral Award

25. What is the form of the award?

In deciding a dispute, an arbitral tribunal may award any remedy or relief that a court could order as if the dispute had been the subject of civil proceedings.

An arbitral award should normally be in writing, dated and signed, and reasons should be given for the arbitrator's conclusion. This will help with any enforcement proceedings that become necessary. The parties, however, may dispense with any requirement to give reasons.

26. What are the grounds for appeal against the award?

An arbitral award may be set aside by the court if:

- (a) there is some defect or error patent on the face of the arbitral award;
- (b) the arbitrator has admittedly made a mistake;
- (c) material evidence has been discovered after the arbitral award was made, and that evidence could not, with reasonable diligence, have been discovered before the arbitral award was made;
- (d) the arbitrator has misconducted himself or the proceedings;
- (e) there has been corruption on the part of the arbitrator;
- (f) without misconduct, some mishap or misunderstanding has caused an aspect of the dispute that has been the subject of the reference not to be considered and adjudicated upon as fully as the parties were entitled to expect, such that it would be unfair to allow the arbitral award to take effect without further consideration by the arbitrator; and
- (g) the arbitrator has exceeded his jurisdiction or has failed to deal with all the questions submitted to him.

27. How is the award enforced?

An arbitral award, order or direction made or given in arbitration proceedings by an arbitral tribunal is enforceable in the same way as a judgment, order or direction of the Hong Kong courts, but only through an application for the leave of the Hong Kong courts. Once leave is given, the Hong Kong courts may enter judgment in terms of the arbitral award, order or direction.

A Hong Kong arbitral award will generally be recognised and can be enforced outside Hong Kong in countries which are signatories to the New York Convention.

28. How are foreign awards enforced?

Hong Kong courts recognise and enforce arbitral awards made in countries that are signatories to the New York Convention. There is also provision in the Ordinance for the Hong Kong courts to enforce domestic awards and awards made in non-Convention centres. Similarly, Hong Kong awards will generally be recognised and can be enforced outside Hong Kong through the courts of countries which are signature to the New York Convention.

Before 1 July 1997, as China is also a signatory to the New York Convention and applied the Convention to Hong Kong after 1 July 1997, arbitral awards made in the Mainland were enforceable in Hong Kong under the New York Convention as New York Convention Awards. After the change of sovereignty on 1 July 1997, the PRC assumed responsibility for the performance of Hong Kong's obligations under the New York Convention, and therefore the enforceability of arbitral awards made in the Mainland are not enforceable under the New York Convention because this Convention only applies to the enforcement of arbitral awards between two different contracting countries.

Enforcement of arbitral awards between Hong Kong and China is governed by a Memorandum of Understanding on the Arrangement between the Mainland and the HKSAR on the Mutual Enforcement of Arbitration Awards. Under this arrangement, arbitral awards made in the Mainland or Hong Kong can be enforced in the other territory by applying to the Intermediate People's Court of the Mainland or the High Court of the HKSAR.

29. What are the grounds for objecting against enforcement of foreign awards?

An arbitral award under the New York Convention and an arbitral award from China will not be enforced if the person against whom it is invoked can prove that:

- (a) a party to the arbitration agreement was under some incapacity; or
- (b) the arbitration agreement was not valid under the law; or
- (c) a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present their case; or
- (d) the 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; or
- (e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law; or
- (f) the arbitral award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made;
- (g) the arbitral award is in respect of a matter which is not capable of settlement by arbitration; or
- (h) it would be contrary to public policy to enforce the arbitral award.

Further, an arbitral award obtained in China will not be enforced if an application has already been made in China to enforce such award. However, if the arbitral award has not been fully satisfied by way of that enforcement, then to the extent that such award has not been so satisfied, the award may be enforced in Hong Kong.

VIII. Interest And Costs

30. Is interest payable on the amount awarded?

The arbitral tribunal may award simple or compound interest based on such dates and rates that it considers appropriate. In the absence of any specific provision in the arbitral award, interest is payable from the date of that award and at the same rate as for a judgment debt. Interest may be awarded on any sum outstanding after the proceedings commenced, whether or not paid before the date of the arbitral award.

31. How are the costs of the arbitration determined?

If the parties cannot agree on the costs payable, the arbitral tribunal may tax the costs recoverable. The arbitrator can have express power to order that one party bear all or part of the legal costs and expenses of the arbitration unless the parties agreed otherwise after the dispute arose. In the event that the arbitral tribunal did not reserve jurisdiction to tax costs, the parties may apply to the court for taxation.

32. Who pays the costs of the arbitration?

As in court proceedings, the costs of the arbitration will generally follow the event.

Unless the parties have come to some agreement about cost sharing after the dispute has arisen, the arbitrator must also decide the proportions in which the parties to the arbitration shall pay the costs of the award. Parties cannot enter into an agreement about cost sharing before the dispute has arisen. The arbitrator may also decide in his award that a party who has already paid money by way of deposit to the arbitrator may recover it from the other party.

IX. Mediation

33. Is there a National Mediation Centre?

Yes. The Hong Kong Mediation Council (“HKMC”). HKMC was set up within HKIAC in January 1994 to promote the development and use of mediation as a method of resolving disputes.

34. Is mediation compulsory?

No.

35. How is mediation conducted?

Mediation will be conducted by a mediator and the parties to a mediation agreement may agree what procedural rules will apply to the mediation. HKMC has its own mediation rules setting out how a mediation is conducted as well as the roles of the parties and the mediator. Often the parties will enter into an agreement to mediate, which is on HKMC’s prescribed form.

The mediator may meet the parties on their own and conduct private discussions. During mediation, the parties would participate in a secure yet comfortable negotiating environment where the intention is for them to negotiate freely without fear, threat or harassment. Confidentiality and evidential privilege are essential in a mediation.

During the mediation process, the mediator will help to identify and clarify issues, and expand the parties' options in order to achieve a mutually acceptable agreement.

The mediator does not have the authority to make a determination or findings; the resolution of the dispute must be consensual.

At the conclusion of the mediation, a written agreement will usually be prepared stating all decisions and agreements reached by the parties.

36. What are the costs of mediation?

There is no prescribed fee structure but as in arbitration the mediator will normally charge on an hourly rate basis. The parties to the mediation are free to agree on who bears the costs. Both parties are jointly and severally liable for all costs and expenses such as the mediator's fee.

HKMC will charge an administration fee of HK\$2,000 and will ask for deposits from each party if it is asked to administer the mediation. The deposit (from each party) ranges from HK\$10,000 to HK\$50,000 depending on the quantum in dispute.

X. Settlement

37. What are the opportunities for settlement?

Parties can settle at any stage of the arbitration proceedings.

38. How is any settlement agreement enforced?

If parties to an arbitration reach agreement in settlement of their dispute and enter into an agreement in writing, the settlement agreement shall be treated as an award on an arbitration agreement for the purposes of its enforcement, and may, with the leave of the court, be enforced as a judgment.

XI. The Role Of The Local Courts

39. What are the powers of the local courts?

Any settlement agreement can be enforced by the High Court in the same manner and to the same effect as a judgment or order by granting leave.

Should there be an application of extension of time to commence arbitration proceedings, the court will have the discretion to grant such extension.

Upon appeal to the court on any question of law arising out of an arbitral award, the court may confirm, vary or set aside the arbitral award or remit the arbitral award to the reconsideration of the arbitrator together with the court's opinion on the question of law.

With the consent of an arbitrator or with the consent of all other parties, the court may determine any question of law arising in the course of the reference.

Where an arbitrator or umpire has misconducted himself or the proceedings, the court may remove him on application by the parties.

Where an arbitrator has misconducted himself or the proceedings, or an arbitration or arbitral award has been improperly procured, the court may set the award aside.

Where an application is made to set aside an arbitral award, the court may order that any money made payable by that award shall be brought into court or otherwise secured pending the determination of the application.



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Hong Kong International Arbitration Centre (“HKIAC”) is an independent non-profit making company limited by guarantee. It was founded in 1985 to provide advisory and support services for the resolution of local and international disputes by arbitration, adjudication and mediation. On 1 July 1997 Hong Kong became a Special Administrative Region of the People’s Republic of China. Despite this change the Hong Kong legal system remains essentially the same as before. The Hong Kong Arbitration Ordinance (Chapter 341 of the Laws of Hong Kong) is widely recognised as being one of the most advanced arbitration statutes in the world. It provides a maximum of support to the arbitration process with a minimum of interference. The Ordinance incorporates the UNCITRAL Model Law on International Commercial Arbitration.

The HKIAC is the default appointing authority for arbitrators in Hong Kong, a function that was previously exercised by the Hong Kong courts. The Arbitration Ordinance also gives the HKIAC the power to decide whether an arbitral tribunal should consist of one or three arbitrators in international arbitrations if the parties cannot agree on such numbers.

**Functions / Activities / Services:-
The Hong Kong Mediation Council**

The Hong Kong Mediation Council (“HKMC”) was set up within the HKIAC in January 1994 to promote the development and use of mediation as a method of resolving disputes. The HKMC is a division of the HKIAC and was previously known as the HKIAC Mediation Group. Membership is invited from people in Hong Kong who have an interest in learning more about mediation and in assisting in its development in Hong Kong. The HKMC organises regular evening talks and training courses for those interested in conducting mediations in Hong Kong.

The Hong Kong Maritime Arbitration Group

The Hong Kong Maritime Arbitration Group (“HKMAG”) was set up within the HKIAC to promote maritime arbitration in Hong Kong and to encourage those involved in the shipping industry to become arbitrators. Through the initiative of the HKMAG, the HKIAC has adopted Documents Only Procedures and Small Claims Procedures based on similar procedures adopted by the London Maritime Arbitrators Association. Under the Small Claims Procedures, arbitrators’ fees are limited to HK\$15,000, the HKIAC’s fee for appointment is HK\$1,500 and recoverable costs are limited to HK\$30,000. The Small Claims Procedures are suitable for arbitration where neither the claim nor any counterclaim exceeds US\$50,000 but may be suitable for handling larger claims when there is a simple issue at stake and it is unlikely that a long hearing is needed.

Procedures for Arbitration, Adjudication and Mediation

The Centre assists parties in formulating procedures suitable to their particular needs for the resolution of their dispute by arbitration, adjudication or mediation. The HKIAC has its own Domestic Arbitration Rules and recommends the UNCITRAL Arbitration Rules for international arbitration. It is happy to assist with the selection of arbitrators, adjudicators and mediators and to be named in contracts as appointing authority to appoint arbitrators, adjudicators or mediators where the parties are unable to agree. The Centre maintains panels of international arbitrators of experience and distinction and, where the parties so wish, will act as arbitration administrator.

Panels of Arbitrators, Adjudicators and Mediators

The HKIAC maintains panels of distinguished and experienced arbitrators, adjudicators and mediators from around the world. At present there are arbitrators from 25 countries on our panels. These include arbitrators from the Mainland of China and of course Hong Kong.

Electronic Transaction Arbitration Rules

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

Domain Name Disputes

In June 2001 the HKIAC was appointed as the sole domain name dispute resolution provider for the .hk ccTLD (www.hkiac.org) and in December 2001 the Asian Domain Name Dispute Resolution Centre (“ADNDRC”) www.adndrc.org, a joint undertaking between the China International Economic and Trade Arbitration Commission (“CIETAC”) and the Hong Kong International Arbitration Centre was formed to provide dispute resolution services in regard to disputed generic top level domain names (gTLD’s), which are the top level domains approved by the Internet Corporation for Assigned Names and Numbers (“ICANN”). The ADNDRC is one of only four domain name dispute providers in the world, and the first and only one in Asia. In September 2002 the HKIAC was named as the second domain name dispute resolution provider for .cn domain names, the ccTLD for Mainland of China, while in August 2004 the HKIAC was also named as a dispute resolution provider for .pw domain name disputes, the ccTLD for Palau.

India

India

4



I. Arbitration Legislation

1. What legislation governs arbitration?

The Arbitration and Conciliation Act 1996 (“Act”).

2. What is the basis of the arbitration legislation?

The Act is based on the UNCITRAL Model Law and Rules.

3. Does the legislation distinguish between international and domestic arbitration?

The Act applies where the place of arbitration is India. In an international commercial arbitration at least one party must not be Indian. Therefore, the Act governs international commercial arbitration and domestic arbitration (domestic arbitration is not defined under the Act).

II. Arbitration Agreement

4. What are the requirements of an enforceable arbitration agreement?

An “arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or a separate agreement.

An arbitration agreement must be in writing. An agreement is in writing if it is contained in a document signed by the parties; or in an exchange of letters, telexes, telegrams or other means of telecommunication which provide a record of the agreement; or in an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

III. National Arbitration Institute/Centre

5. Is there a National Arbitration Centre (“NAC”)?

There is no National Arbitration Centre as such in India. However, there is a non-profit institution known as the Indian Council of Arbitration (“ICA”). ICA was established in 1965 with the support of the Ministry of Commerce, the Government of India and the Federation of Indian Chambers of Commerce and Industry (“FICCI”).

6. Does the NAC publish a set of procedural rules?

ICA has its own rules which are consistent and in conjunction with the Act. There are certain independent bodies that provide the facility for resolution of disputes through arbitration. Such arbitrations would be subject to the governing law of the contract and the procedural rules would be provided for by such bodies.

7. Does the NAC publish a panel of recommended arbitrators?

The Bombay High Court has a panel of arbitrators. ICA also has a panel of recommended arbitrators.

8. Does the NAC publish a recommended arbitration clause?

No.

9. Does the NAC administer arbitrations?

ICA does administer arbitration. The key functions of ICA are:

- appointment of arbitrators when they cannot agree on an appointment;
- management of the financial and other practical aspects of arbitration;
- facilitation of the smooth progress of arbitration.

10. What are the NAC's costs?

The fees of an arbitrator appointed from the panel of the Bombay High Court cannot exceed Rs. 75,000/- according to a circular issued by the state government of Maharashtra.

Charges of ICA are based principally on the amount of the claim. For example, an approximate total arbitration fee for a case of about INR 10 million with a sole arbitrator comes to INR 122,000 and an approximate total arbitration fee for a case of about INR 50 million consisting of three arbitrators comes to INR 365,000/-.

Independent bodies would have their own fee structure.

IV. Commencing Arbitration

11. How is arbitration commenced?

Unless otherwise agreed by the parties, arbitration proceedings commence on the date on which a request for the dispute to be referred to arbitration is received by the other party.

12. Can litigation proceedings be stayed in favour of arbitration?

The Act provides that no judicial authority shall intervene except as provided for by the provisions of the Act. If a dispute is covered by the arbitration agreement and any judicial proceedings are adopted by any party to resolve the dispute which is not in consonance with and as provided for in the Act, then such judicial proceedings will be stayed.

V. The Arbitral Tribunal

13. How is the tribunal appointed?

The parties are free to determine the number of arbitrators, provided that such number shall not be an even number. The parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Failing such agreement, in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator. If a party fails to appoint

an arbitrator within 30 days from the receipt of a request to do so from the other party or the two appointed arbitrators fail to agree on the third arbitrator within 30 days from the date of their appointment, then the appointment of the arbitrator is made, upon request of a party, by the Chief Justice or any person or institution designated by him.

Failing agreement, the arbitral tribunal shall consist of a sole arbitrator.

14. Who is eligible for appointment?

A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

15. How is an appointment challenged?

When a person is approached to be an arbitrator he should disclose in writing the circumstances likely to give rise to justifiable doubts as to his independence or impartiality. Subject to complying with these statutory grounds, parties are free to agree on a procedure for challenging an arbitrator.

Failing such agreement, a party who 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 which concern the impartiality, independence and qualification of the arbitrator, send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

If a challenge under any procedure agreed upon by the parties or under the procedure outlined above is not successful, the arbitral tribunal shall continue the arbitration proceedings and make an arbitral award.

16. How is the jurisdiction of the tribunal determined?

The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because he has appointed, or participated in the appointment of, an arbitrator.

17. What are the duties of the tribunal?

The arbitral tribunal is under a duty to treat the parties equally and give each party a full opportunity to present their case.

18. What are the powers of the tribunal?

The powers of the arbitral tribunal include the power to determine the admissibility, relevance and materiality of the evidence. The arbitral tribunal is not bound by the Code of Civil Procedure or the provisions of the Indian Evidence Act. However, the directions given by the arbitrators would be in consonance with laws governing procedure and evidence. The arbitral tribunal also has the power to pass interim orders as a measure of protection as it may consider necessary keeping in mind the subject matter of the dispute.

19. What are the liabilities of the tribunal?

The question of the liabilities of the arbitral tribunal is not specifically provided for by the Act, however if the arbitral tribunal misconducts itself, the general law, depending upon the nature of the misconduct, would apply with respect to the action that can be taken and the defences to the same.

20. How are the costs of the tribunal fixed?

The costs of the arbitrators, if appointed from the panel of the Bombay High Court, are fixed. The fees of arbitrators appointed from the panel of ICA are also fixed. Other arbitrators usually agree their daily rates with the parties before accepting the appointments. Parties usually agree to bear the costs of the arbitral tribunal in equal shares. However, depending upon the nature of the case, costs may be awarded against a party in the arbitral award.

VI. The Arbitration Procedure

21. What procedural rules govern the arbitration?

The Act lays down certain procedural rules. For procedures not provided for in the Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, for example by adopting the procedural rules of the Code of Civil Procedure.

Failing such agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate and determine the admissibility, relevance, materiality and weight of any evidence submitted in the arbitration.

22. What evidential rules apply to the arbitration?

Although the arbitral tribunal is not strictly bound by the laws of evidence, it would be influenced by the laws governing admissibility of evidence.

23. What is the language of the arbitration?

The parties are free to agree on the language of the arbitration proceedings. Failing such agreement, the arbitral tribunal shall determine the language to be used. This agreement or determination shall apply to any written statement, hearing, award, decision or other communication by the arbitral tribunal.

24. Who can appear as Counsel?

There are no restrictions on who can appear as Counsel.

VII. The Arbitral Award

25. What is the form of the award?

An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal. In arbitration proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

The arbitral award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the arbitral award is an award on agreed terms.

The arbitral award shall state its date and the place of arbitration and shall be deemed to have been made at that place. After the arbitral award is made, a copy signed by the arbitrators shall be delivered to each party.

26. What are the grounds for appeal against the award?

An arbitral award may be set aside by the court only if:

- (a) the party making the application furnishes proof that:
 - (i) a party was under some incapacity; or
 - (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under Indian law being in force; or
 - (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present its/ their case; or
 - (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or determines matters beyond the scope of the submission to arbitration, in which instance decisions on matters not submitted to arbitration may be set aside; or
 - (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement between the parties, unless such agreement was in conflict with a provision of the Act from which the parties cannot derogate, or, failing such agreements, was not in accordance with the Act, or
- (b) the court finds that:
 - (i) the subject matter of the dispute is not capable of settlement by arbitration under Indian law; or
 - (ii) the arbitral award is in conflict with the public policy of India.

27. How is the award enforced?

Where the time for making an application to set aside the arbitral award (ie three months from the date on which the party making that application had received the arbitral award) has expired or where such application, having been made, has been refused, the arbitral award shall be enforced under the Code of Civil Procedure 1908 (5 of 1908) in the same manner as if it were a decree of the court.

28. How are foreign awards enforced?

The Act provides for the enforcement of New York Convention Awards and Geneva Convention Awards.

New York Convention Awards: Enforcement

The party applying for the enforcement of a foreign arbitral award shall, at the time of the application, produce before the court:

- (a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
- (b) the original agreement for arbitration or a duly certified copy thereof; and
- (c) such evidence as may be necessary to prove that the award is a foreign award.

Geneva Convention Awards: Enforcement

The party applying for the enforcement of a foreign arbitral award shall, at the time of the application, produce before the court:

- (a) the original arbitral award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
- (b) evidence proving that the arbitral award has become final; and
- (c) such evidence as may be necessary to prove that the conditions mentioned below are satisfied:
 - (i) the arbitral award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;
 - (ii) the subject matter of the arbitral award is capable of settlement by arbitration under the law of India; and
 - (iii) the arbitral award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure.

29. What are the grounds for objecting against enforcement?

Enforcement of New York Convention Awards may be refused, at the request of the party against whom it is invoked, only if the party furnishes to the court proof that:

- (a) the parties to the agreement, under the law applicable to them, are under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the arbitral award was made; or
- (b) the party against whom the arbitral award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its or their case; or
- (c) the arbitral award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

Enforcement of an arbitral award may also be refused if the court finds that:

- (a) the subject matter of the difference is not capable of settlement by arbitration under the law of India; or
- (b) the enforcement of the arbitral award would be contrary to the public policy of India.

Even if the conditions above are fulfilled, enforcement of the arbitral award shall be refused if the court is satisfied that:

- (a) the arbitral award has been annulled in the country in which it was made;
- (b) the party against whom it is sought to use the arbitral award was not given notice of the arbitration proceedings in sufficient time to enable it/ them to present their case, or that, being under a legal incapacity, they were not properly represented;
- (c) the arbitral award does not deal with the differences contemplated by or falling within the terms of the submissions to arbitration or that it contains decisions on matters beyond the scope of the submissions to arbitration; or
- (d) the enforcement of the arbitral award is contrary to the public policy or the law of India.

VIII. Interest And Costs

30. Is interest payable on the amount awarded?

Yes. Provided that the arbitral award provides for it.

31. How are the costs of the arbitration determined?

Costs are determined on the basis of expenses incurred.

32. Who pays the costs of the arbitration?

Costs usually follow the event, such that the unsuccessful party pays. The parties can agree at the outset that each party bears its own costs and that the costs of the arbitration (mainly the arbitral tribunal) are shared equally.

IX. Mediation

33. Is there a National Mediation Centre?

No. There is no National Mediation Centre in India.

34. Is mediation compulsory?

No.

35. How is mediation conducted?

Mediation is an informal and non-adversarial problem-solving process.

A mediator, who may be a respected and senior member of the legal or another profession, facilitates this process by helping the parties to identify issues, to negotiate constructively and to explore settlement alternatives.

The parties make their own decisions usually with the help of their lawyers. Therefore, they retain complete control over the outcome and do not run the risk of having an adverse decision imposed upon them by a judge or arbitrator.

36. What are the costs of mediation?

The costs of mediation are determined by the parties in consultation with the mediator.

X. Settlement

37. What are the opportunities for settlement?

Parties may settle at any stage of the arbitration proceedings.

38. How is any settlement agreement enforced?

The arbitral award passed will be in terms of the settlement agreement entered into by the parties.

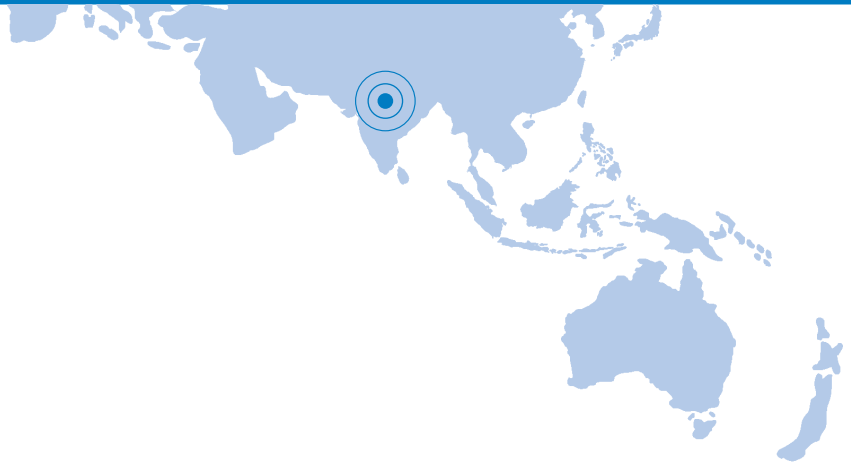
XI. The Role Of The Local Courts

39. What are the powers of the local courts?

The Courts have, subject to the provisions of the Act, the powers to:

- (a) pass interim orders for protection pending the commencement of the arbitration proceedings;
- (b) hear appeals from certain orders passed by the arbitral tribunal;
- (c) assist the arbitral tribunal in taking evidence if required; and
- (d) enforce or set aside arbitral awards.

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Little & Co., established in the year 1856, is more than hundred and fifty years old. It is one of the leading firms of advocates and solicitors in India. This firm is proud of having been the legal advisor for the East India Company, the Government of India and the successive Governments of the Presidency of Bombay.

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funds), insurance, commercial disputes, property law and conveyancing, corporate and commercial law, energy (including coal, oil and gas), mining, telecommunications, intellectual property, partnership, testamentary, air law (including aircraft leasing), shipping, taxation, direct and indirect, and dispute resolution by litigation and arbitration before international and domestic tribunals.

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Indonesia

5.

I. Arbitration Legislation

1. What legislation governs arbitration?

Law No. 30 of 1999 (“Law No. 30”) Concerning Arbitration and Alternative Dispute Resolution.

2. What is the basis of the arbitration legislation?

Indonesia did not adopt the UNCITRAL Model Law or an arbitration law following the new Dutch Arbitration Law. Law No. 30 contains 82 articles as opposed to 36 in the UNCITRAL Model Law.

3. Does the legislation distinguish between international and domestic arbitrations?

Law No. 30 does not draw a distinction between domestic and international arbitrations, save that there is a difference in the procedure for enforcing domestic and international (foreign) awards.

II. Arbitration Agreement

4. What are the requirements of an enforceable arbitration agreement?

Article 1(3) of Law No. 30 defines an “arbitration agreement” as a written agreement in the form of an arbitration clause entered into by the parties before a dispute arises or a separate written arbitration agreement made by the parties after a dispute arises.

Article 4 of Law No. 30 provides that the arbitration agreement must be in writing and signed by both parties. Article 4(3) permits an arbitration agreement to be made by an exchange of correspondence, including letters, telexes, telegrams, faxes, e-mails, or any other form of communication provided there is a record of receipt of the correspondence by the parties.

Article 10 h. of Law No. 30 provides that an arbitration agreement shall not become null and void if the main contract is held to be invalid.

III. National Arbitration Institute/Centre

5. Is there a National Arbitration Centre (“NAC”)?

Yes. It is Badan Arbitrase Nasional Indonesia, the Indonesian National Arbitration Body (“BANI”).

6. Does the NAC publish a set of procedural rules?

Yes. The Rules of Arbitration of BANI (“BANI Rules”).

7. Does the NAC publish a panel of recommended arbitrators?

Yes. There is a list of Indonesian arbitrators and a list of foreign arbitrators.

8. Does the NAC publish a recommended arbitration clause?

Yes. It is as follows:

“All disputes arising out of or in connection with this contract shall 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.”

To this may be added the following:

“The place of arbitration shall be Jakarta. The arbitration shall be held in the English language. Each party shall designate one arbitrator and the two so chosen shall, subject to approval of the Chairman, appoint the third arbitrator who shall act as Chairman of the tribunal, unless the arbitrators decide otherwise.”

9. Does the NAC administer arbitrations?

Yes. The Secretariat of BANI will register the arbitration upon receipt of the required documentation and decide the costs of and administer the payment of the administration and registration fees. The Secretariat deals with the fees of the arbitrators and the service of all documents, and provides hearing rooms and secretarial services. The Chairman of BANI is empowered to appoint an arbitrator where there has been a failure to appoint within the stipulated time or within 14 days from receipt of a request to appoint if no time is specified.

10. What are the NAC's costs?

- (a) Registration fee: Rp. 2,000,000, which is payable on the date of submission of the arbitration application.
- (b) The administration fee, hearings fee and arbitrator's fee for convention and reconvention are as set out in the table below:

	Claims (Rp)	Tariff		Claims (Rp)	Tariff
	Less than 500,000,000	10.0%	14	35,000,000,000	1.9%
	500,000,000	9.0%	15	40,000,000,000	1.8%
1	1,000,000,000	8.0%	16	45,000,000,000	1.7%
2	2,500,000,000	7.0%	17	50,000,000,000	1.6%
3	5,000,000,000	6.0%	18	60,000,000,000	1.5%
4	7,500,000,000	5.0%	19	70,000,000,000	1.4%
5	10,000,000,000	4.0%	20	80,000,000,000	1.3%
6	12,500,000,000	3.5%	21	90,000,000,000	1.2%
7	15,000,000,000	3.2%	22	100,000,000,000	1.1%
8	17,500,000,000	3.0%	23	200,000,000,000	1.0%
9	20,000,000,000	2.8%	24	300,000,000,000	0.9%
10	22,500,000,000	2.6%	25	400,000,000,000	0.8%
11	25,000,000,000	2.4%	26	500,000,000,000	0.6%
12	27,500,000,000	2.2%	Over	500,000,000,000	0.5%
13	30,000,000,000				

IV. Commencing Arbitration

11. How is arbitration commenced?

Article 8(1) of Law No. 30 requires the claimant to inform the respondent by registered letter, telegram, telex, fax, e-mail or by courier that a dispute has arisen. There is no time stipulated in Law No. 30 as to when arbitration commences.

12. Can litigation proceedings be stayed in favour of arbitration?

A stay of court proceedings is not contemplated by Law No. 30. By a combination of article 3 which provides that the district courts shall have no jurisdiction to try disputes between parties bound by an arbitration agreement and article 11 which provides that the existence of an arbitration agreement extinguishes the right of the parties to seek resolution of the dispute through a district court, it would be contradictory to include a provision for a stay in Law No. 30. Notwithstanding this, if court proceedings are commenced in violation of Law No. 30, an application can be made to stay those proceedings.

V. The Arbitral Tribunal

13. How is the tribunal appointed?

The parties are free to choose the number of arbitrators, provided that it is an odd number. The BANI Rules fix the number of arbitrators as either one or three.

The arbitration agreement should set out the mechanism for appointing the arbitral tribunal. If the parties cannot agree on the choice of arbitrators, or no terms have been set out in the arbitration agreement for the appointment of arbitrators, the Chief Judge of the district court having jurisdiction over the respondent shall appoint the arbitrator(s). In the case of BANI arbitration, the default appointments are made by the Chairman of BANI. Article 15(1) of Law No. 30 provides that the appointment of two arbitrators by the parties gives those two arbitrators the power to appoint a third arbitrator. Again by article 15(4) the Chief Judge of the district court acts as the default appointing authority.

14. Who is eligible for appointment?

There are no restrictions on whom may be appointed as an arbitrator save that judges, prosecutors, clerks of court and other government or court officials may not be appointed. However, article 12 of Law No. 30 sets out five conditions that a potential arbitrator is required to satisfy. The arbitrator must:

- (a) have legal capacity;
- (b) be at least 35 years old;
- (c) have no family relationship by blood or marriage, to the third degree, with either of the disputing parties;
- (d) have no financial or other interest in the arbitral award; and
- (e) have at least 15 years' experience and active mastery in the field.

15. How is an appointment challenged?

An application to challenge a party appointed arbitrator must be submitted to the sole arbitrator or to the arbitral tribunal within 14 days of either the appointment of the arbitrator or the grounds for recusal set out in article 22 of Law No. 30 becoming known. A challenge to an arbitrator appointed by the Chief Judge of a district court must be submitted to the district court concerned. If the other party does not consent to the request for recusal and the arbitrator concerned does not resign voluntarily, the request for recusal is submitted to the Chief Judge of the district court, whose decision is final.

16. How is the jurisdiction of the tribunal determined?

The jurisdiction of the arbitral tribunal is determined by the scope of the arbitration agreement. Law No. 30 does not contain a provision that the arbitral tribunal may rule on its own jurisdiction (Kompetenz-Kompetenz). Such a provision is, however, to be found in the BANI Rules.

17. What are the duties of the tribunal?

The arbitral tribunal is required to render an award fairly, justly and in accordance with the prevailing stipulations of law and contract. This would include complying with the stipulation in article 29(1) of Law No. 30 that equal opportunity shall be given to each party to present their case.

18. What are the powers of the tribunal?

The arbitral tribunal has the power to grant interim relief. Article 32(1) of Law No. 30 empowers the arbitral tribunal to make a provisional award or other interlocutory decision to regulate the conduct of the dispute, including a security attachment ordering the deposit of goods with third parties or the sale of perishable goods.

19. What are the liabilities of the tribunal?

If the arbitral tribunal fails, without valid reason, to render its award within the specified period of time, the arbitrator(s) may be ordered to pay compensation to the parties for the costs and losses caused by the delay. The arbitral tribunal is not liable for actions carried out in the conduct of the reference, unless it is proved that there was bad faith.

20. How are the costs of the tribunal fixed?

Article 76 of Law No. 30 allows the arbitrators to determine the costs of the arbitration. In ad hoc arbitrations the arbitrator(s)' fees are usually agreed with the parties. In a BANI arbitration the arbitrator(s)' fees are determined on an ad valorem basis.

VI. The Arbitration Procedure

21. What procedural rules govern the arbitration?

Article 31(1) of Law No. 30 states that the parties can, by an express written agreement, determine the procedures to be used in the arbitration as long as they do not conflict with the provisions of Law No. 30. If the parties cannot agree on the procedures, the arbitration will be conducted in accordance with the provisions of Law No. 30. The parties could agree to use the BANI Rules.

22. What evidential rules apply to the arbitration?

Article 37(3) of Law No. 30 provides that the examination of witnesses and expert witnesses before the arbitral tribunal shall be conducted in accordance with the provisions of the Indonesian Civil Procedural Law.

23. What is the language of the arbitration?

Indonesian is the language to be used in all arbitration proceedings unless the parties agree otherwise and the arbitral tribunal consents to the use of another language.

24. Who can appear as Counsel?

The parties may represent themselves or be represented by their attorney-at-law through a power of attorney. Law No. 30 neither confirms nor restricts the use of foreign legal Counsel.

VII. The Arbitral Award

25. What is the form of the award?

The arbitral award is required to contain the following:

- (a) a heading to the arbitral award with the words “DEMI KEADILAN BERDASARKAN KETUHANAN YANG MAHAESA” (for the sake of justice based on the blessing of almighty God);
- (b) the full names and addresses of the parties;
- (c) a summary of the dispute;
- (d) the respective positions of the parties;

- (e) the full names and addresses of the arbitrators;
- (f) the reasons and the conclusions of the arbitrators on all matters in dispute;
- (g) the opinion of each arbitrator in the event that there is any difference of opinion within the arbitral tribunal;
- (h) the order or direction made;
- (i) the place and the date of the arbitral award; and
- (j) the signature(s) of the arbitrator(s).

26. What are the grounds for appeal against the award?

If the subject matter of the dispute is arbitrable under Indonesian law and the arbitral award rendered is not contrary to Indonesian public policy, an application to set aside an arbitral award can be made on the basis that:

- (a) after the arbitral award has been rendered, letters or documents submitted to the hearings are acknowledged to have been falsified or forged or are declared to have been falsified or to be forgeries;
- (b) after the arbitral award has been rendered, decisive documents are discovered which were concealed by the opposing party; or
- (c) the arbitral award was rendered as a result of fraud committed by one of the parties in the course of the arbitration proceedings.

27. How is the award enforced?

Domestic arbitral awards are required to be registered with the Clerk of the district court within 30 days of being rendered. If the arbitral award is not complied with voluntarily, such award is enforced on the basis of an order for execution made by the Chief Judge of the district court. The arbitral award is then enforced like a judgment in a civil case.

28. How are foreign awards enforced?

The Central Jakarta District Court is the court authorised under Law No. 30 to handle matters regarding the recognition and enforcement of foreign arbitral awards. The foreign arbitral award is registered with the Clerk of the Central Jakarta District Court. The decision whether or not to recognise or to enforce a foreign arbitral award is made by the Chief Judge of the Central Jakarta District Court. A decision to enforce the foreign arbitral award is unappealable whereas a decision not to enforce such award may, by a leapfrog provision, be appealed to the Supreme Court. An order for execution is made by the Chief Judge of the Central Jakarta District Court. Enforcement of this order is delegated to the Chief Judge of the District Court having jurisdiction to enforce it. The foreign arbitral award is then enforced like a judgment in a civil case.

29. What are the grounds for objecting to enforcement?

Law No. 30 provides that a foreign arbitral award will only be recognised and enforced if the award is made in a country that is party to a bilateral or multilateral treaty with Indonesia regarding recognition and enforcement and the dispute is within the scope of commercial law according to Indonesian law. A foreign arbitral award will not be recognised or enforced if it violates Indonesian public order.

VIII. Interest And Costs

30. Is interest payable on the amount awarded?

There is no provision in either Law No. 30 or the BANI Rules relating to an award of interest. It is usual however for an award of interest to run from the date of the notice of arbitration. The basis for this is derived from the interest provisions contained in the Indonesian Civil Code.

31. How are the costs of the arbitration determined?

Law No. 30 provides that the arbitrators determine the arbitration fee. The arbitration fee includes:

- (a) the honoraria of the arbitrators;
- (b) travel expenses and other costs incurred by the arbitrators;
- (c) the costs of witnesses and expert witnesses required in the hearings on the dispute;
and
- (d) administrative expenses.

32. Who pays the costs of the arbitration?

The losing party pays the arbitration fee. If the claim is only partially successful, the arbitration fee should be allotted proportionally between the parties.

IX. Mediation

33. Is there a National Mediation Centre?

Yes. Pusat Mediasi Nasional [National Mediation Centre] (“PMN”).

34. Is mediation compulsory?

No.

35. How is mediation conducted?

Mediation procedures are published by PMN. The proceedings are informal, confidential and remain firmly in the control of the parties.

36. What are the costs of mediation?

Each mediator sets his or her own fees, which will vary depending on the experience and reputation of the mediator. Payment of these fees is the responsibility of both parties, though alternative agreements are possible. Payment is made through PMN. There is a non-refundable registration fee with PMN of Rp. 500,000.

X. Settlement

37. What are the opportunities for settlement?

Article 45(1) of Law No. 30 requires the arbitral tribunal to endeavour to get the parties to reach an amicable settlement at the first meeting after receipt of the respondent’s response to the statement of case. Settlement between the parties can be achieved at any time during the pendency of the arbitration proceedings.

38. How is any settlement agreement enforced?

If a settlement is reached pursuant to article 45(1) of Law No. 30, article 45(2) requires that the arbitrators draft a binding deed setting out the terms of settlement and order the parties to comply with the terms of the settlement. The parties can themselves enter into a settlement agreement as provided in the Indonesian Civil Code or request the arbitrators to make a consent award embodying the terms of their agreement.

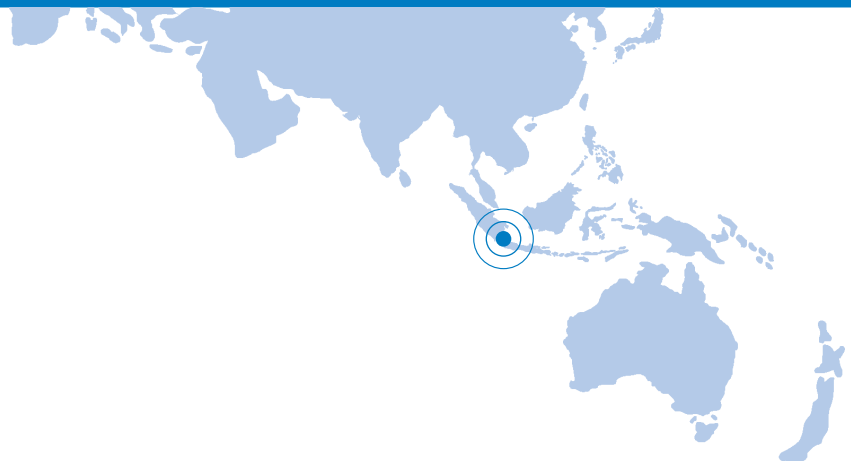
XI. The Role Of The Local Courts

39. What are the powers of the local courts?

Law No. 30 envisages that the courts will act as the default authority for the appointment of arbitrators, decide the question of the recusal of an arbitrator, determine applications to annul arbitral awards, deal with the enforcement of a domestic arbitral award, and deal with the recognition and enforcement of a foreign arbitral award.

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He is a Fellow of the Chartered Institute of Arbitrators and a member of the Indonesian chapter of the East Asia Branch of the Chartered Institute. He is a panel member of the HKIAC, SIAC and BANI.

Japan

6.

I. Arbitration Legislation

1. What legislation governs arbitration?

The Japanese Arbitration Law (Law No. 138 of 2003, in effect since 1 March 2004) (“JAL”) replaced Japan’s old arbitration law (Law Concerning Procedure for General Pressing Notice and Arbitration Procedure, Law No. 29 of 1890) which was based on 19th century German practice.

2. What is the basis of the arbitration legislation?

The legislators’ intent was to make the JAL as compatible as possible with the UNCITRAL Model Law. In addition, Japan is a contracting state to the New York Convention and has declared that it will apply the Convention to recognising and enforcing awards made in the territory of another contracting state. The JAL has adopted almost verbatim the Convention’s provisions on recognising, enforcing and setting aside awards.

3. Does the legislation distinguish between international and domestic arbitrations?

Yes, but only in a geographic sense; not all of the provisions of the JAL apply if the arbitration takes place outside of Japan. The JAL itself does not discuss “international” and “domestic” arbitrations as separate concepts. As a practical matter, however, when an arbitration involves a foreign party, there may be issues as to the representation of that party by foreign Counsel or the selection of foreign arbitrators. These are discussed in more detail in our responses to questions 14 and 24.

II. Arbitration Agreement

4. What are the requirements of an enforceable arbitration agreement?

According to article 13 of the JAL, an arbitration agreement is valid only when its subject matter is a civil dispute that may be resolved by settlement between the parties. The arbitration agreement must be in the form of a document signed by all the parties. Letters, telegrams, e-mails or faxes exchanged between the parties or other written instruments are acceptable.

It should be noted that certain subject matters are not arbitrable. For example, article 13 of the JAL provides that divorce and adoption dissolution disputes are not arbitrable. As a general principle of Japanese law, disputes on administrative/government agency, bankruptcy and taxation matters are not subject to resolution by arbitration.

If the underlying contract containing the arbitration agreement is declared null and void, the arbitration agreement itself is not necessarily affected.

III. National Arbitration Institute/Centre

5. Is there a National Arbitration Centre (“NAC”)?

Yes. The Japan Commercial Arbitration Association (“JCAA”). It is the only permanent commercial non-maritime arbitral institution in Japan. The JCAA contributes to the resolution of disputes arising from both international and domestic business transactions. The ICC maintains a national committee in Japan (“ICC Japan”), but does not provide secretarial or administrative services to ICC arbitrations in Japan. Nineteen local Japanese Bar Associations have also opened up arbitration centres.

6. Does the NAC publish a set of procedural rules?

Yes. The Japan Commercial Arbitration Association Commercial Arbitration Rules (“JCAA Rules”). There are also JCAA Administrative and Procedural Rules for Arbitration under the UNCITRAL Arbitration Rules.

7. Does the NAC publish a panel of recommended arbitrators?

Yes. Rule 9 of the JCAA Rules requires the JCAA to prepare and maintain a panel of arbitrators to facilitate the appointment of arbitrators.

8. Does the NAC publish a recommended arbitration clause?

Yes, it reads:

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

9. Does the NAC administer arbitrations?

Yes. The JCAA provides overall administration of JCAA arbitration proceedings and its Secretariat at the request of the arbitral tribunal or any party may make tape recordings and arrange for interpreting, make stenographic transcripts and provide a hearing room or other services as necessary for conducting the arbitration proceedings.

10. What are the NAC's costs?

Below is the fee schedule from the JCAA Arbitration Fee Regulations, as amended and effective on 1 March 2004:

Request Fee: ¥52,500	
Administrative Fee:	
Amount of economic value of claim	Amount of Fee
Not more than ¥5,000,000	¥210,000
More than ¥5,000,000 but not more than ¥10,000,000	¥210,000 plus 3.15% of excess over ¥5,000,000
More than ¥10,000,000 but not more than ¥20,000,000	¥367,500 plus 1.575% of excess over ¥10,000,000
More than ¥20,000,000 but not more than ¥100,000,000	¥525,000 plus 1.05% of excess over ¥20,000,000
More than ¥100,000,000 but not more than ¥1,000,000,000	¥1,365,000 plus 0.315% of excess over ¥100,000,000
More than ¥1,000,000,000 but not more than ¥ 5,000,000,000	¥4,200,000 plus 0.2625% of excess over ¥1,000,000,000
More than ¥5,000,000,000	¥14,700,000
Claim whose economic value cannot be calculated or is extremely difficult to calculate	¥1,050,000 per claim

It should be noted that charges for hearing room rentals and other incidentals are not covered in the fees set forth above.

IV. Commencing Arbitration

11. How is arbitration commenced?

According to article 29 of the JAL, arbitration proceedings commence on the date that one party gives the other party/parties notice that the dispute will be referred to arbitration, unless the parties agree otherwise.

12. Can litigation proceedings be stayed in favour of arbitration?

Yes, by way of dismissal upon the request of the defendant; however, there are cases when litigation proceedings cannot be stayed. These are set forth in article 14 of the JAL:

- (i) when the arbitration agreement is null and void, cancelled, or for other reasons invalid;
- (ii) when arbitration proceedings are inoperative or incapable of being performed based on the arbitration agreement; or
- (iii) when the request is made by the defendant subsequent to the presentation of its statement in the oral hearing or in the preparations for argument proceedings on the substance of the dispute.

Also, it should be noted that Japanese courts do not actually issue orders to stay the litigation proceedings; in such a case, they simply dismiss without prejudice the claims that have been brought before the court. (See also our response to question 39).

V. The Arbitral Tribunal

13. How is the tribunal appointed?

The JAL provides that the parties are generally free to agree on a procedure for appointing arbitrators. If no such procedure exists, articles 17 and 19 set forth an appointment procedure. The JCAA Rules also contain specific provisions for the appointment of arbitrators for JCAA arbitration proceedings as set out below. In the JCAA rules, reference to the "Association" means the JCAA.

"Rule 23. Appointment of Arbitrators

1. The arbitrator(s) shall be appointed pursuant to the agreement of the parties.
2. If no agreement exists between the parties concerning the appointment of arbitrators, the arbitrator(s) shall be appointed pursuant to the following Rule 24 through Rule 26.

Rule 24. Number of Arbitrators

1. If the parties fail to notify the Association within three (3) weeks from the Basic Date of their agreement with respect to the number of arbitrators, such number shall be one (1).
2. Either party may, within three (3) weeks from the Basic Date, notify the Association of the request that such number shall be three (3). If the party notifies the Association of such request, the number of arbitrators shall be three (3) if the Association, taking into consideration the amount in dispute, the complexity of the case and other circumstances, considers it appropriate and notifies the parties to that effect.

Rule 25. Appointment of Arbitrator - Single Arbitrator

1. If the number of arbitrators is one (1) under the provisions of the preceding Rule, the parties shall agree upon and appoint a single arbitrator within two (2) weeks from the time limit provided for in Rule 24, Paragraph 1.
2. If the parties fail to submit to the Association a notice of the appointment of an arbitrator pursuant to Rule 27 within the period of time provided for in the preceding paragraph, the Association shall appoint such arbitrator.
3. If the Association is to appoint an arbitrator pursuant to the provisions of the preceding paragraph, the Association shall give consideration to a request submitted by either party that the Association shall appoint as such arbitrator a person of a different nationality from those of the parties.

Rule 26. Appointment of Arbitrators - Three Arbitrators

1. If the number of arbitrators is fixed at three (3) pursuant to Rule 24, Paragraph 2, each party shall appoint one (1) arbitrator within three (3) weeks from the date on which the Association notifies the parties in accordance with Rule 24, Paragraph 2.
2. If either party fails to submit to the Association a notice of the appointment of an arbitrator pursuant to Rule 27 within the period of time provided for in the preceding paragraph, the Association shall appoint such arbitrator.
3. The arbitrators appointed by the parties, or pursuant to the provisions of the preceding paragraph, shall agree upon and appoint the third arbitrator within three (3) weeks from the date on which the Association notifies the arbitrators to the effect that the two arbitrators have been appointed.

4. If the arbitrators fail to submit to the Association the notice of the appointment of the third arbitrator pursuant to Rule 27 within the period of time provided for in the preceding paragraph, the Association shall appoint such arbitrator.
5. If the Association is to make the appointment under the provisions of the preceding paragraph, the provisions of Paragraph 3 of the preceding Rule shall apply *mutatis mutandis*.”

14. Who is eligible for appointment?

Both the JAL and the JCAA Rules stipulate that the parties to the arbitration agreement are free to set qualification requirements for arbitrators. Neither the JAL nor the JCAA Rules contain restrictions on arbitrator eligibility *per se* (ie, based on citizenship, residency, professional background or similar criteria) in such a case. However, when a court selects the arbitrators, the JAL contains certain considerations to which the court must give regard. These are set forth in article 17.(6):

- (a) the qualifications required of the arbitrators by the agreement of the parties;
- (b) the impartiality and independence of the appointees; and
- (c) in the case of a sole arbitrator, or in the case where the two arbitrators appointed by the parties are to appoint the third arbitrator, whether or not it would be appropriate to appoint an arbitrator of a nationality other than those of the parties.

The JCAA Rules impose certain requirements on arbitrators to maintain (as opposed to obtain) their eligibility. These are set forth in Rule 28:

- “1. Arbitrators shall be, and remain at all times, impartial and independent.
2. When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall fully disclose to that person any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.
3. An arbitrator shall, without delay, disclose any and all such circumstances to the parties and the Association unless they have already been informed of the circumstances by the arbitrator.”

Similarly, article 18 of the JAL imposes a continuing obligation on arbitrators to disclose any circumstances that that may give rise to doubts about their impartiality or independence.

In the response to question 24 below, we cite Article 72 of the Japanese Practising Attorney Law which states that only a *bengoshi* (lawyer) can engage in “legal business”. “Legal business” includes participating for fees in international arbitration. However, Japanese law has a doctrine - *seitoo gyomu kooi* (proper business activity), which provides *inter alia*

that non-bengoshi arbitrators participating in an arbitration in Japan do not violate article 72 since it is generally accepted as proper for foreign lawyers and jurists, professors, industry experts and other professionals to take part in international arbitrations in their business activities.

15. How is an appointment challenged?

Again, the parties are free to choose a procedure for challenging appointments. In the absence of such a procedure, article 18 of the JAL (Grounds for Challenge) sets forth the rules for challenging an arbitrator appointment:

- "(1) A party may challenge an arbitrator:
- (i) If it does not possess the qualifications agreed to by the parties; or
 - (ii) If circumstances exist that give rise to justifiable doubts as to its impartiality or independence.
- (2) A party who appointed an arbitrator, or made recommendations with respect to the appointment of an arbitrator, or participated in any similar acts, may challenge that arbitrator only for reasons of which it becomes aware after the appointment has been made.
- (3) When a person is approached in connection with its possible appointment as an arbitrator, it shall fully disclose any circumstances likely to give rise to justifiable doubts as to its impartiality or independence.
- (4) An arbitrator, during the course of arbitral proceedings, shall without delay disclose any circumstances likely to give rise to justifiable doubts as to its impartiality or independence (unless the parties have already been informed of them by the arbitrator)."

The actual challenge procedure is set forth in Article 19 of the JAL:

- "(1) The parties are free to agree on a procedure for challenging an arbitrator. Provided, this shall not apply to the provisions of paragraph (4).
- (2) Failing an agreement as provided for in the preceding paragraph, upon request of a party, the arbitral tribunal shall decide on the challenge.
- (3) A party who intends to make a request as provided for in the preceding paragraph shall, within fifteen days of the later of either the day on which it became aware of the constitution of the arbitral tribunal or the day on which it became aware of any circumstance referred to in any item of paragraph (1) of the preceding article, send a written request describing the reasons for the challenge to the arbitral tribunal. In such case, the arbitral tribunal shall decide that grounds for challenge exist when it finds that grounds for challenge exist with respect to the arbitrator.

- (4) If a challenge of the arbitrator under the procedure for challenge prescribed in the preceding three paragraphs is not successful, the challenging party may request within thirty days after having received notice of the decision rejecting the challenge, the court to decide on the challenge. In such case, the court shall decide that grounds for challenge exist when it finds that grounds for challenge exist with respect to the arbitrator.
- (5) While a case relating to a challenge as prescribed in paragraph (4) is pending before the court, the arbitral tribunal may commence or continue the arbitral proceedings and make an arbitral award.”

16. How is the jurisdiction of the tribunal determined?

Article 23 of the JAL reflects the “competence-competence” principle of the UNCITRAL Model Law and provides that an arbitral tribunal may rule on the issue of its own jurisdiction.

Rule 33 of the JCAA Rules likewise embodies this principle in its provision for determining the jurisdiction of a JCAA tribunal:

- “1. The arbitral tribunal may decide challenges made regarding the existence or validity of an arbitration agreement or its own jurisdiction.
- 2. The arbitral tribunal shall decide to terminate arbitral proceedings if it considers it has no arbitral jurisdiction.”

17. What are the duties of the tribunal?

Rule 32 of the JCAA Rules sets forth the duties and powers of a JCAA Tribunal:

- “1. The examination proceedings, including hearings, shall be conducted under the supervision of the arbitral tribunal.
- 2. The arbitral tribunal shall treat the parties equally and give each party sufficient opportunity to state and prove its case and present a defense against the other party’s case.
- 3. The arbitral tribunal may proceed with the arbitral proceedings even if either party fails to submit its arguments or to apply to present its evidence.
- 4. The arbitral tribunal shall make efforts towards the expedited resolution of the dispute.
- 5. The arbitral tribunal shall, by consultation with the parties, make a schedule of arbitral proceedings as soon as the arbitral tribunal is established.
- 6. A party shall send any documents to be submitted in the arbitral proceedings to the arbitrators, the other party and the Association and the arbitral tribunal shall send the Association a copy of any communication which is sent to the parties.

7. The submission of the documents by the party provided for in the preceding paragraph may be made by way of electromagnetic record or facsimile if the arbitral tribunal considers it appropriate.”

18. What are the powers of the tribunal?

Please see response to question 17.

19. What are the liabilities of the tribunal?

There are no specific Japanese legislative acts dealing with arbitrator liability. Some jurists maintain that article 644 of the Japanese Civil Code, which imposes a duty of care of a good manager on those who handle matters for other people under “inin” (fiduciary) agreements, extends to arbitrators as well. In any event, Japanese courts would most likely hold that arbitrators have wide discretion in performing their functions. Rule 13 of the JCAA Rules sets forth a limitation of liability for the arbitral tribunal as well as the JCAA itself and its officers:

“Neither the arbitrators, nor the Association, nor the officers and staff of the Association shall be liable to any person for any act or omission in connection with the arbitration unless such act or omission is shown to constitute willful or gross negligence.”

20. How are the costs of the tribunal fixed?

Rule 69 of the JCAA Rules stipulates how the arbitral tribunal’s fees and expenses are fixed and allocated:

“The parties shall bear, in the manner provided below, the fees provided for in the Arbitration Fee Regulations [see the response to question 10 above] and the necessary expenses incurred during the proceedings:

- (1) the request fee shall be borne by the party requesting the initiation of arbitral proceedings; and
- (2) the administrative fee and the necessary expenses incurred during the proceedings shall be borne subject to the allocation determined by the arbitral tribunal and set forth in the arbitral award.”

Rule 70 of the JCAA Rules provides that the arbitrators’ fees are fixed by the JCAA and are equally borne by the parties. However, the arbitral tribunal may allocate such costs in any other manner “in view of the circumstances”.

VI. The Arbitration Procedure

21. What procedural rules govern the arbitration?

For JCAA arbitrations there are the JCAA Administrative and Procedural Rules for Arbitration under the UNCITRAL Arbitration Rules. The JAL allows the parties to fix the procedural rules to be followed by the arbitral tribunal as it sees fit, provided ie the rules do not violate Japanese public policy.

22. What evidential rules apply to the arbitration?

As mentioned in the response to question 21, the JAL allows the parties freedom to establish procedural rules. If the parties cannot agree, the JAL grants the arbitral tribunal the authority to conduct the proceedings as it feels appropriate, including determining the admissibility, relevance, materiality and weight of any evidence (article 26). For JCAA arbitrations, the evidentiary rules are set forth in Rule 37:

- “1. Each party shall have the burden of proving the facts relied on to support such party’s claims or defenses.
2. The arbitral tribunal may, when it deems it necessary, examine evidence that a party has not applied to present.
3. Such examination of evidence may be made other than at a hearing. If the arbitral tribunal decides to examine evidence other than at a hearing, the parties shall be given the opportunity to be present.
4. A party may request the arbitral tribunal to order the other party to produce documents which it possesses.
5. If the request under the preceding paragraph is made, the arbitral tribunal may, after hearing the other party’s opinion, order the production provided for in the preceding paragraph if it considers it necessary to the examination proceedings, unless it determines there are legally justified reasons for the party to refuse the production.”

It should be noted that more and more arbitration tribunals in Japan are adopting the International Bar Association’s Rules on the Taking of Evidence in International Commercial Arbitration.

23. What is the language of the arbitration?

Article 30 of the JAL gives the parties complete freedom to choose the language of the arbitration proceedings. When the parties have made no choice, the arbitral tribunal determines the language (or languages).

For JCAA arbitrations, Rule 11 of the JCAA Rules states:

“The language or languages to be used in arbitral proceedings shall be Japanese or English or both. The arbitral tribunal shall, except where the parties have agreed on one or both of such languages, determine, without delay, the language or languages to be used. The arbitral tribunal shall, in so determining, take into consideration whether interpreting or translating will be required and how the cost thereof should be allocated.”

24. Who can appear as Counsel?

Article 72 of the Practising Attorney Law generally prohibits the practice of “legal business” by anyone other than a bengoshi (lawyer) licensed to practice in Japan. “Legal business” (horitsu jimu) includes litigation and arbitration. However, foreign lawyers can register for the status of gaikokuho-jimu-bengoshi (foreign law-office lawyer) and obtain the right to perform limited legal practice in Japan, including representation in an international arbitration. In addition, the Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers (Law No. 66 of 1986) contains an exception provision allowing foreign lawyers who are not gaikokuho-jimu-bengoshi to represent clients in an international arbitration case in Japan:

“A person who is a foreign lawyer (excluding a person who is a gaikokuho-jimu-bengoshi) and is engaged in legal business, on the basis of the qualification to become such foreign lawyer, in a foreign country (excluding a person who is employed and is providing services in Japan, based on his or her knowledge of foreign law) may, notwithstanding the provision of Article 72 of the Bengoshi Law, perform representation in regard to the procedures for an international arbitration case which he or she was requested to undertake or undertook in such foreign country.”

VII. The Arbitral Award

25. What is the form of the award?

According to article 39 of the JAL, an arbitral award must be in writing and signed by the arbitrators; it must be dated and indicate the place of arbitration. The arbitral award is deemed to have been made in the place of arbitration. If the parties agree otherwise, the arbitral award must state the reasons why and a copy thereof must be sent to each party.

The requirements for the form as well as the contents of a JCAA arbitral award are set forth in Rule 54. The basic form is composed of the following elements:

- “(1) the full personal or corporate names of the parties and their addresses;
- (2) if a party is represented by an agent, the name and address of such agent;
- (3) the text of the award;
- (4) the reason for the award;
- (5) the date of the award; and
- (6) the place of arbitration.”

26. What are the grounds for appeal against the award?

Although the JCAA award is final and binding upon the parties, the JCAA Rules contain procedures allowing the arbitral award to be corrected in case of error or to be interpreted by the arbitral tribunal. Also, the Rules provide for additional awards to be made as to claims made during the arbitration but omitted in the original award.

Although an arbitral award cannot be specifically appealed to a Japanese court, judicial grounds for overturning an award are contained in article 44 of the JAL. A party may apply to a court to overturn an arbitral award if any of the following grounds is present:

- (a) the arbitration agreement is not valid due to limits to a party's capacity;
- (b) the arbitration agreement is not valid for a reason other than limits to a party's capacity under the law to which the parties have agreed to subject it (or, failing any indication thereon, under the law of Japan);
- (c) the party making the application was not given notice as required by the provisions of the law of Japan (or, where the parties have otherwise reached an agreement on matters concerning the provisions of the law that do not relate to the public policy, such agreement) in the proceedings to appoint arbitrators or in the arbitration proceedings;
- (d) the party making the application was unable to present its case in the arbitration proceedings;
- (e) the arbitral award contains decisions on matters beyond the scope of the arbitration agreement or the claims in the arbitral proceedings;
- (f) the composition of the arbitral tribunal or the arbitration proceedings were not in accordance with the provisions of the law of Japan (or, where the parties have otherwise reached an agreement on matters concerning the provisions of the law that do not relate to the public policy, such agreement);
- (g) the claims in the arbitration proceedings relate to a dispute that cannot constitute the subject of an arbitration agreement under the law of Japan; or
- (h) the content of the arbitral award is in conflict with the public policy or good morals of Japan.

27. How is the award enforced?

As mentioned in the response to question 2 above, Japan is a contracting state to the New York Convention and will enforce arbitral awards made on the territory of other contracting states. Article 46 of the JAL contains the basic mechanism for enforcement of arbitral awards:

- "(1) A party seeking enforcement based on the arbitral award may apply to a court for an enforcement decision (which hereinafter means a decision authorizing enforcement based on an arbitral award) against the debtor as counterparty.
- (2) The party making the application described in the preceding paragraph shall supply a copy of the arbitral award, a document certifying that the content of said copy is identical to the arbitral award, and a Japanese translation of the arbitral award (except where made in Japanese)."

However, this process is subject to numerous exceptions and varying procedures depending on the nature of the property to be used to satisfy the arbitral award and its location.

28. How are foreign awards enforced?

The mechanism of article 46 of the JAL for enforcing foreign arbitral awards is the same, save the requirement to translate the award into Japanese.

29. What are the grounds for objecting against enforcement?

These are contained in article 45 (2) of the JAL and are similar to those for setting aside an award given in article 44. An arbitral award shall be "subject to an enforcement decision" unless one of the parties proves any one of the following grounds:

- (a) the arbitration agreement is not valid due to limits to a party's capacity;
- (b) the arbitration agreement is not valid for a reason other than limits to a party's capacity under the law to which the parties have agreed to subject it (or, failing any indication thereon, the law of the country under which the place of arbitration falls);
- (c) a party was not given notice as required by the provisions of the law of the country under which the place of arbitration falls (or, where the parties have otherwise reached an agreement on matters concerning the provisions of the law that do not relate to public policy, such agreement) in the proceedings to appoint arbitrators or in the arbitration proceedings;

- (d) a party was unable to present its case in the arbitration proceedings;
- (e) the arbitral award contains decisions on matters beyond the scope of the arbitration agreement or the claims in the arbitration proceedings;
- (f) the composition of an arbitral tribunal or the arbitration proceedings were not in accordance with the provisions of the law of the country under which the place of arbitration falls (or, where the parties have otherwise reached an agreement on matters concerning the provisions of the law that do not relate to public policy, such agreement);
- (g) according to the law of the country under which the place of arbitration falls (or where the law of a country other than the country under which the place of arbitration falls was applied to the arbitration proceedings, such country), the arbitral award has not yet become binding, or the arbitral award has been set aside or suspended by a court of such country;
- (h) the claims in the arbitration proceedings relate to a dispute that cannot constitute the subject of an arbitration agreement under the law of Japan; or
- (i) the content of the arbitral award would be contrary to the public policy or good morals of Japan.

VIII. Interest And Costs

30. Is interest payable on the amount awarded?

Yes, the percentage of interest payable depends on the governing law of the arbitration agreement. In the event that the governing law is Japanese law, the admissible interest rate is six per cent.

It is worth mentioning here that arbitrators may not award punitive damages since they are in violation of Japanese public policy. This rule has been upheld by the Supreme Court of Japan in a ruling dated 11 July 1997, in which the punitive-damages portion of a judgment of a California state court was denied enforcement.

31. How are the costs of the arbitration determined?

In a JCAA arbitration, the remuneration of the arbitrators and the arbitration fees are set by the JCAA. The JCAA also determines an amount of estimated necessary expenses for the arbitration to be prepaid. However, if the arbitral tribunal determines a lesser amount of necessary expenses, the JCAA will refund the excess.

32. Who pays the costs of the arbitration?

The arbitral tribunal can allocate the costs of the arbitration among the parties in any manner it chooses, including all or part of the legal representation expenses incurred.

IX. Mediation

33. Is there a National Mediation Centre?

Mediation or chootei has very deep roots in Japanese legal culture. It has been said to represent a Japanese element embedded in a westernised judicial system (Japan's judicial system was thoroughly reorganised in the 19th century along German lines). There is no national mediation centre, but judicial courts, many local bar associations and the JCAA provide mediation services.

34. Is mediation compulsory?

No, the essence of mediation philosophy in Japan precludes the notion of compulsion when resolving disputes by compromise as opposed to litigation. However, when parties are in litigation, a judge can compel them to settle. This is discussed below in our response to question 37.

35. How is mediation conducted?

The chootei procedure is set forth in the Civil Mediation Law of 1951. This Law is "to devise, by mutual concessions of the parties, solutions for disputes concerning civil matters, which are consistent with reason and benefiting actual circumstances". A party may apply to a court, a local bar association or the JCAA for mediation. When a court is chosen, jurisdiction will be vested in the summary court which has jurisdiction over the defendant's residence or place of work, unless the parties otherwise agree. The chootei sessions are conducted by a mediation committee consisting of a chairman and at least two members. The chairman is a district court judge. The chairman selects the committee members from among persons nominated each year by the district court and from persons designated by mutual agreement of the parties. Agreement reached by way of chootei has the same effect as a final judgment. The mediation is terminated, however, should the parties fail to reach agreement. At this point, the court may step in and render a judgment to resolve the dispute. The parties have two weeks in which to protest the decision, otherwise it takes effect as a final judgment.

36. What are the costs of mediation?

In the case of court mediation, committee members are paid expenses and a daily fee. In the case of JCAA mediation, the parties and the JCAA negotiate the terms and fees as well as the procedures of the mediation.

X. Settlement

37. What are the opportunities for settlement?

Article 38 of the JAL provides that an arbitral tribunal may attempt an amicable settlement if the parties consent. Similarly, Rule 47 of the JCAA Rules states an arbitral tribunal may attempt to settle the dispute in the arbitration proceedings if all of the parties consent, orally or in writing, thereto.

Japanese jurisprudence has an unusual feature in that article 89 of the Civil Procedure Code allows the courts at any time and without consent of the parties to attempt an amicable settlement. This is known as wakai kanshi.

38. How is any settlement agreement enforced?

Article 38 of the JAL sets forth the rules for enforcement of a settlement reached during arbitration:

- “(1) If, during arbitral proceedings, the parties settle the civil dispute subject to the arbitral proceedings and the parties so request, the arbitral tribunal may make a ruling on agreed terms.
- (2) The ruling as provided for in the preceding paragraph shall have the same effect as an arbitral award.
- (3) The ruling as provided for in paragraph (1) shall be made in writing in accordance with paragraphs (1) and (3) of the following article and shall state that it is an arbitral award.”

XI. The Role Of The Local Courts

39. What are the powers of the local courts?

The JAL has several provisions dealing with the powers of local courts in arbitration matters. Article 5 is a general grant of jurisdiction to district courts (provided they have jurisdiction over the place of arbitration or the counterparty's forum) over cases concerning court proceedings involving provisions of the JAL. Article 8 allows for court intervention if a place of arbitration has not been designated, provided there is a possibility that the place of arbitration will be in the territory of Japan. Article 14 stipulates that a court before which a civil dispute that is the subject of an arbitration agreement shall dismiss the action if the defendant so requests (however, Japanese courts do not issue orders to compel arbitration - this in effect is a deviation from the UNCITRAL Model Law which provides that a court shall refer the parties to arbitration). Article 15 allows courts to grant interim measures in respect of civil disputes that are the subject of an arbitration agreement. Article 35 allows for courts to assist in taking evidence when requested by a party or the arbitral tribunal. And, of course, courts can enforce or set aside arbitration awards in accordance with the provisions of articles 44 through 46.

Malaysia



I. Arbitration Legislation

1. What legislation governs arbitration?

Up until 15 March 2006, arbitration proceedings in Malaysia were regulated by the Arbitration Act 1952 (Act 93). With the passing of the new Arbitration Act 2005 (Act 646) (which came into force on 15 March 2006), Malaysia's arbitration legislation has now seen a wholesale revamp.

The Arbitration Act 2005 ("Act") applies to all arbitration agreements, whether they were entered into before or after the Act, provided that arbitration proceedings or court proceedings relating to arbitrations have not commenced before the Act came into force. Section 23 of the Act defines "commence" as "the date on which a request in writing for that dispute to be referred to arbitration is received by the respondent." This means that arbitration proceedings commenced before 15 March 2006 will continue to be governed by the Arbitration Act 1952.

2. What is the basis of the arbitration legislation?

The Act is modelled upon the UNCITRAL Model Law on International Commercial Arbitrations, which was adopted by the United Nations Commission on International Trade Law on 21 June 1995, with relevant modifications to suit the local situations and requirements.

3. Does the legislation distinguish between international and domestic arbitrations?

Yes. The Act expressly distinguishes between international and domestic arbitrations. Section 2 of the Act defines "international arbitration" as being an arbitration where:

- (a) one of the parties to the arbitration agreement has its place of business outside Malaysia;
- (b) the seat of arbitration expressed in the arbitration agreement is outside Malaysia;
- (c) the place where a substantial part of the obligations is to be performed is outside Malaysia;
- (d) the place with which the subject matter of the dispute is most closely connected is outside Malaysia; or
- (e) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one state.

An arbitration, which is not an international arbitration, is a “domestic arbitration”.

Other provisions of the Act differentiating an international arbitration from a domestic arbitration include:

- (i) the “opting in” and “opting out” of certain provisions of the Act;
- (ii) the number of arbitrators where the arbitration agreement is silent; and
- (iii) the substantive law to be applied to the arbitration.

II. Arbitration Agreement

4. What are the requirements of an enforceable arbitration agreement?

The requirements of an enforceable arbitration agreement are:

- (a) the arbitration agreement must be in writing;
- (b) the arbitration agreement must be valid under the laws to which the parties have subjected it, or, failing any indication thereon, the laws of Malaysia;
- (c) the subject matter of the dispute must be capable of settlement by arbitration under the laws of Malaysia;
- (d) the arbitral award sought is not in conflict with the public policy of Malaysia;
- (e) the agreement is not null and void or inoperative or incapable of being performed;
- (f) there is in fact a dispute between the parties with regard to the matters to be referred; and
- (g) in the event that a party to the arbitration has instituted court proceedings, the party seeking to enforce the arbitration agreement has not taken any further step in the court proceedings.

III. National Arbitration Institute/Centre

5. Is there a National Arbitration Centre (“NAC”)?

There is no National Arbitration Centre in Malaysia. Instead, the Kuala Lumpur Regional Centre for Arbitration (“KLRCA”) was established in 1978 (under the auspices of the inter-governmental international law body, the Asian-African Legal Consultative Organisation (“AALCO”)) to provide a forum for the settlement of disputes by arbitration in trade, commerce and investment within the Asia-Pacific region. While it has the support of the Malaysian government, KLRCA is a non-profit organisation and is not a branch or agency of the government.

KLRCA aside, other institutional bodies such as the Institution of Engineers Malaysia (“IEM”), the Pertubuhan Arkitek Malaysia (Malaysian Institute of Architects) (“PAM”), the Palm Oil Refiners Association of Malaysia (“PORAM”) and the Chartered Institute of Arbitrators, Malaysia also conduct arbitration proceedings under their respective arbitration rules, with emphasis being placed on the resolution of disputes in matters relating to a particular subject matter requiring special technical expertise.

6. Does the NAC publish a set of procedural rules?

Yes. KLRCA adopts the UNCITRAL Arbitration Rules of 1976 (“UNCITRAL Rules”) with certain modifications and adaptations to fit into its institutional framework, as set forth in the Rules for Arbitration of KLRCA. The UNCITRAL Rules have been recommended by the United Nations General Assembly by its Resolution No. XXXI 98 and have been widely accepted by the international community. The rules for arbitration under any other arbitral regime are similarly published.

7. Does the NAC publish a panel of recommended arbitrators?

In general, the parties are free to choose their own preferred arbitrators in the manner indicated in the UNCITRAL Rules but they may also request that the Director of the KLRCA recommend or appoint the arbitrators. The KLRCA maintains an international panel of experienced arbitrators for this purpose.

8. Does the NAC publish a recommended arbitration clause?

Yes. The KLRCA does publish a model arbitration clause as a guidance to be incorporated in a contract between the parties.

9. Does the NAC administer arbitrations?

Yes. KLRCA does administer international and domestic arbitrations under the UNCITRAL Rules with modifications as mentioned above.

10. What are the NAC's costs?

The fees and charges of KLRCA are fixed, based on the actual expenses incurred and keeping in mind the non-profit-making character of KLRCA. They will be borne by the parties in such proportion as may be determined in the arbitral award.

IV. Commencing Arbitration

11. How is arbitration commenced?

Given the number of arbitration centres in Malaysia, arbitration proceedings are commenced pursuant to and in accordance with their respective arbitration rules. Under section 23 of the Act, an arbitration is “commenced” on the date on which a request in writing for a dispute to be referred to arbitration is received by the respondent to the intended arbitration. The request in writing should require the other party to appoint an arbitrator or agree to the appointment of a proposed arbitrator or to submit the dispute to any person named or designated in the arbitration agreement. The request notice should make it clear that arbitration proceedings are commenced and not, for instance, indicate merely the intention of subsequently initiating arbitration proceedings.

12. Can litigation proceedings be stayed in favour of arbitration?

The Act makes it mandatory for the court to stay proceedings unless:

- (a) the applicant has taken any other step in the proceedings before applying for a stay; or
- (b) the agreement is null and void, inoperative or incapable of being performed; or
- (c) there is in fact no dispute between the parties.

V. The Arbitral Tribunal

13. How is the tribunal appointed?

Under the Act, unless the parties otherwise agree, the arbitral tribunal of an international arbitration is to consist of three arbitrators, whereas the arbitral tribunal of a domestic arbitration is to consist of one arbitrator.

Where the arbitral tribunal is to consist of three arbitrators, each party is to appoint one arbitrator, and the two appointed arbitrators are to appoint the third arbitrator as the presiding arbitrator.

In the event that the parties are unable to agree on the arbitrators or the procedure for the appointment of the arbitral tribunal, the Director of KLRCA is given the role as the appointing authority. A written request can be submitted by either party for such appointment. In the event that the Director of KLRCA fails to appoint an arbitrator within 30 days of a request being made to him to do so, any of the parties may apply to the court for the appointment of an arbitrator.

14. Who is eligible for appointment?

Unless the parties otherwise agree, no person is to be precluded by reason of nationality from acting as an arbitrator. Other considerations are qualifications, independence and impartiality.

15. How is an appointment challenged?

Under the Act, the sole grounds for challenging the appointment of an arbitrator are:

- (a) any circumstances that give rise to justifiable doubts as to the arbitrator's independence or impartiality; or
- (b) the arbitrator does not possess the qualifications agreed to by the parties.

Any party who intends to challenge the appointment of an arbitrator is required to issue a written statement to the arbitral tribunal setting out the reasons for the challenge. The time period for doing so is within 15 days after becoming aware of the constitution of the arbitral tribunal. The arbitral tribunal will be moved to make a decision on the challenge if the arbitrator challenged does not withdraw from the appointment or if the other party disagrees with the challenge.

In the event the arbitral tribunal rejects the challenge, the party challenging may, within 30 days of the arbitral tribunal's decision on the challenge, apply to the High Court to make a decision on the challenge. Reference to the High Court does not stay the arbitration proceedings and, pending the High Court's decision on the challenge, the arbitral tribunal may continue with the arbitration and make an award. The decision of the High Court is final and unappealable.

16. How is the jurisdiction of the tribunal determined?

The arbitral tribunal is empowered to rule on its own jurisdiction, including dealing with objections with regard to the existence or validity of the arbitration agreement. A plea of lack of jurisdiction must be raised not later than the submission of the statement of defence. On the other hand, a plea that the arbitral tribunal acted in excess of the scope of its authority must be raised as soon as the matter complained of becomes an issue.

The arbitral tribunal may rule on the plea and the ruling is subject to the right of appeal to the High Court, the decision of which is final and is not appealable.

With regard to the law, in respect of domestic arbitration, the governing law is the substantive law of Malaysia. In respect of international arbitration, the dispute shall be decided in accordance with the law as agreed upon by the parties as applicable to the substance of the dispute.

17. What are the duties of the tribunal?

The duties of the arbitral tribunal are to treat the parties with equality and to give each party a fair and reasonable opportunity of presenting that party's case. The arbitral tribunal is also under a duty to comply with the procedure agreed to by the parties.

18. What are the powers of the tribunal?

Under the Act, the arbitral tribunal is expressly given the power to:

- (a) determine the admissibility, relevance, materiality and weight of any evidence;
- (b) draw on its own knowledge and expertise;
- (c) order the provision of further particulars in a statement of claim or statement of defence;
- (d) order the giving of security for costs;
- (e) fix and amend the time limits within which various steps in the arbitration proceedings must be completed;

- (f) order the discovery and production of documents or materials within the possession or power of a party;
- (g) order the interrogatories to be answered;
- (h) order that any evidence be given on oath or by affirmations; and
- (i) make such other orders as the arbitral tribunal considers appropriate.

In respect of interim measures, unless the parties otherwise agree, the arbitral tribunal may order:

- (i) security for costs;
- (ii) discovery of documents and interrogatories;
- (iii) the giving of evidence by affidavit;
- (iv) the preservation, interim custody or sale of any property which is the subject matter of the dispute; and
- (v) appropriate security in connection with any of these measures.

Any interim measure awarded will be enforceable as an arbitral award.

19. What are the liabilities of the tribunal?

The arbitral tribunal and an arbitrator assumes no liabilities for any act or omission in the discharge of their functions, the exception being where it can be shown such act or omission has been made in bad faith.

20. How are the costs of the tribunal fixed?

The costs of the arbitral tribunal can be fixed by agreement between the parties. In the absence of agreement, the costs and expenses of the arbitration will be at the discretion of the arbitral tribunal. The costs and expenses will be dependent upon several factors, such as the complexity of the case, the nature of the dispute, the amount of the claim (and counterclaim), the length of the hearings, and the eminence and standing of the arbitrators. The fees will be fixed in each case in accordance with the schedule of fees provided for by the particular arbitral institution and after consultation with the arbitrators and the parties.

VI. The Arbitration Procedure

21. What procedural rules govern the arbitration?

The parties are free to agree on the procedure to be adopted for the purpose of the arbitration proceedings. If the parties fail to agree, the arbitral tribunal may, subject to the provisions of the Act, conduct the arbitration in such manner as it considers appropriate.

22. What evidential rules apply to the arbitration?

In Malaysia, the rules of evidence as prescribed by the Evidence Act 1950 would apply. The arbitral tribunal is expressly given the power under the Act to determine the admissibility, relevance, materiality and weight of any evidence adduced in the proceedings.

23. What is the language of the arbitration?

Under the Act, the parties are free to agree on the language to be used in the arbitration proceedings, failing which the arbitral tribunal shall determine it. It is common for arbitration proceedings in Malaysia to be conducted in English, with the services of interpreters engaged in the event any of the witnesses is not so conversant.

24. Who can appear as Counsel?

The Act does not contain any provisions as to Counsel entitled to appear in arbitration proceedings. It is thought that parties are free to engage Counsel of their choice irrespective of nationality.

VII. The Arbitral Award

25. What is the form of the award?

The requirements of an arbitral award are that it be in writing and be signed by the arbitrator(s). In arbitration proceedings with more than one arbitrator, the signature of the majority of all members of the arbitral tribunal shall be sufficient provided that reason for the omission of any signatures is stated. The arbitral award is also to state the reasons upon which it is based, unless the parties have agreed no reasons are to be stated or that the arbitral award is an award on agreed terms. The arbitral award is also to state the date of the award and the seat of arbitration.

26. What are the grounds for appeal against the award?

The Act sets out express grounds for the setting aside of an arbitral award.

An arbitral award may be set aside if it can be proven by the applicant that:

- (a) any party to the arbitration agreement was under any incapacity;
- (b) the arbitration agreement is invalid under the law to which the parties have subjected it or, failing any indication thereon, under the laws of Malaysia;
- (a) the applicant was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present its case;
- (b) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
- (c) the arbitral award contains matters outside the terms of submission to arbitration. However, where the decision on matters properly submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award containing decisions on matters not submitted may be set aside;
- (d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with any of the provisions of the Act from which the parties could not derogate.

An arbitral award may also be set aside where the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia or that the arbitral award is in conflict with the public policy of Malaysia. The Act provides that an arbitral award would be in conflict with public policy where the making of the arbitral award was induced or affected by fraud or corruption, or where a breach of the rules of natural justice occurred during the arbitration proceedings or in the making of the arbitral award.

An application to set aside an arbitral award is to be made within 90 days from the date of receipt of that award.

27. How is the award enforced?

An arbitral award may be enforced by filing an application in the High Court to have it entered as a judgment in terms of the arbitral award or by action. The application must be attached with the duly authenticated original award and the original arbitration agreement or duly certified copies thereof.

28. How are foreign awards enforced?

There is no distinction in terms of enforcement with regard to arbitral awards made in respect of a domestic arbitration or arbitral awards from foreign states; the same procedure as aforesaid applies. Despite the foregoing, only foreign arbitral awards made from the foreign states which are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in 1958 are recognised and enforceable in Malaysia.

29. What are the grounds for objecting against enforcement?

The grounds for refusing recognition and enforcement are the same as the grounds for setting aside an arbitral award described above.

VIII. Interest And Costs

30. Is interest payable on the amount awarded?

Under the Act, unless otherwise provided in the arbitration agreement, the arbitral tribunal may determine the rate of interest and award interest on any sum of money ordered to be paid from the date of the arbitral award to the date of realisation. The Act is, however, silent on the giving of pre-award interest. It is submitted that the arbitral tribunal has the power to award the same under the Act following a recent decision of the Malaysian Court of Appeal that held that an arbitrator not only has a power to award pre-award interest but should in normal circumstances do so in line with established court practice. This is of course subject to the successful party claiming pre-award interest.

31. How are the costs of the arbitration determined?

As stated above, the costs of the arbitral tribunal can be fixed by agreement between the parties. In the absence of agreement, the costs and expenses of the arbitration will be in the discretion of the arbitral tribunal.

32. Who pays the costs of the arbitration?

Normally, the losing party will be ordered to pay the costs of the arbitration.

IX. Mediation

33. Is there a National Mediation Centre?

There is no national mediation centre. However, a Malaysian Mediation Centre (“MMC”) has been set up under the auspices of the Malaysian Bar Council. Other mediation centres in Malaysia (including industry-related mediation centres) include the KLRCA, the Finance Mediation Bureau, the insurance industry centre and a mediation centre for the National Sports Council for sports-related disputes.

34. Is mediation compulsory?

No, at present mediation is not compulsory.

35. How is mediation conducted?

By its very nature, mediation is a voluntary process. If parties agree to submit their dispute to mediation, they (or their solicitors) can write to the Malaysian Bar Council of their intention to mediate their dispute. A mediation request form is to be completed and submitted with a non-refundable registration fee of RM100. The Bar Council will then forward to the applicant a mediation kit together with a list of mediators. The mediation kit contains information on mediation, a copy of the standard mediation agreement and even a specimen settlement agreement. Parties are required to choose mediators from the list of mediators.

The parties will then meet up with the mediator, whose role will be to try to broker and facilitate a settlement of the dispute. A settlement agreement will be drawn up if the mediation is successful. The settlement agreement will constitute a binding contract between the parties and will be enforceable as between them.

36. What are the costs of mediation?

The MMC fixes a scale of fees of the mediator. In addition, the parties are also to bear other miscellaneous charges such as MMC administrative charges, room rental, refreshments and secretarial service charges (if needed).

X. Settlement

37. What are the opportunities for settlement?

Under the Act, the parties are given the opportunity to settle the dispute even during the course of the arbitration proceedings. In the event of a settlement, the arbitral tribunal will suspend the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an award. Such an award will have the same status and effect as an award on the merits of the case and would therefore be enforceable as an award.

38. How is any settlement agreement enforced?

If the settlement agreement is made into an award, then it would be enforceable as an award. Conversely, if the settlement is not made into an award, then it would be enforceable as per the terms of the settlement.

XI. The Role Of The Local Courts

39. What are the powers of the local courts?

The Act contains express provisions that limit the power of the court to interfere in the arbitration proceedings, save for the matters specifically provided for therein.

Nevertheless, the local courts do have the power to order the following:

- (a) stay of court proceedings;
- (b) security for costs;
- (c) discovery of documents and interrogatories;
- (d) giving of evidence by affidavit;
- (e) appointment of a receiver;
- (f) securing the amount in dispute;
- (g) preservation, interim custody or sale of any property which is the subject matter of the dispute;

- (h) ensuring that any award which may be made in the arbitration proceedings is not rendered ineffectual by the dissipation of assets by a party;
- (i) interim injunctions or any other interim measure;
- (j) challenges to the appointment of an arbitrator (where the arbitral tribunal has first rejected the challenge);
- (k) the setting aside of an arbitral award;
- (l) the enforcement of an arbitral award.

Other than as aforementioned, the local courts have no jurisdiction to interfere. This is strengthened with the words “unless otherwise provided”, which have the effect of assuring the independence of the arbitration.

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Azmi & Associates is a full service law firm of 38 professionals and is actively involved in undertaking full range of legal services including contentious and litigation matters. Our range of service includes the following areas: Litigation & Arbitration; Insolvency & Restructuring; Projects; Mergers & Acquisitions; Capital & Debt Market; Corporate & Commercial; Financial Services.

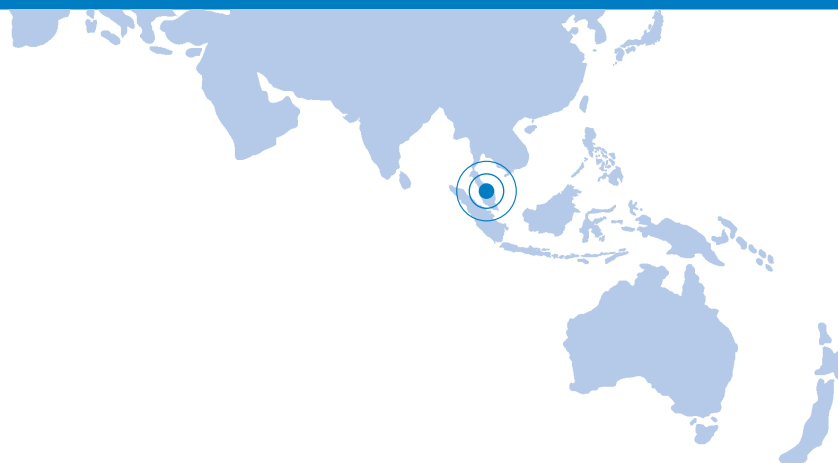
The Litigation and Arbitration Practice Group of Azmi & Associates comprises 10 professionals and has gained from strength to strength and has served various foreign clients as well as local clients including blue-chip corporations, in various domestic and cross border litigation and arbitration matters.

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New Zealand



I. Arbitration Legislation

1. What legislation governs arbitration?

The Arbitration Act 1996 (“AA96”).

2. What is the basis of the arbitration legislation?

Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law (“UNCITRAL Model Law”).

3. Does the legislation distinguish between international and domestic arbitration?

Yes. Although the provisions of the AA96 will generally apply to all domestic arbitrations (although certain provisions can be contracted out of), certain provisions in the AA96, such as those relating to interim relief and enforcement, will apply to international arbitrations also. Other provisions only apply to parties to an international arbitration if the parties so agree.

To assist the legislation’s purpose of creating consistency between international and domestic arbitral regimes in New Zealand, the provisions applying to international arbitrations under the AA96 will also apply to domestic arbitrations unless the parties agree otherwise.

II. Arbitration Agreement

4. What are the requirements of an enforceable arbitration agreement?

The AA96 defines an “arbitration agreement” as:

“an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.”

“Consumer” arbitration agreements aside, unlike the UNCITRAL Model Law, under the AA96 arbitration agreements can be either oral or in writing. They may be in the form of a separate agreement or an arbitration clause in a contract. A reference in a contract to a document containing an arbitration clause will also constitute an arbitration agreement, as long as the reference to the clause is sufficient to make it part of the contract.

However, consumer arbitration agreements will only be enforceable against the consumer if the agreement is in writing. A party enters into an arbitration agreement as a consumer if that party enters into it while in New Zealand, while not in trade, and while the other party to the agreement is in trade.

III. National Arbitration Institute/Centre

5. Is there a National Arbitration Centre (“NAC”)?

Yes. The Arbitrators’ and Mediators’ Institute of New Zealand Incorporated (“AMINZ”).

6. Does the NAC publish a set of procedural rules?

Yes. AMINZ publishes for its members draft procedural directions for domestic commercial arbitrations in New Zealand.

AMINZ also publishes a Code of Ethics that binds its arbitrators and mediators.

7. Does the NAC publish a panel of recommended arbitrators?

Yes. AMINZ publishes and makes available through its website a register of suitably qualified and experienced arbitrators.

8. Does the NAC publish a recommended arbitration clause?

No.

9. Does the NAC administer arbitrations?

AMINZ will only administer arbitrations to the extent that it may be chosen by the parties or the High Court as the nominating authority. The AA96 also makes provision, where the parties cannot agree on an arbitrator, for the appointment of an arbitrator upon application to the High Court.

10. What are the NAC's costs?

Where AMINZ is chosen as the nominating authority, the President of the Institute will select a suitable arbitrator for a fee of NZ\$250 plus Goods and Services Tax. The costs of the arbitration itself will be negotiated with the relevant arbitrator before their appointment and be paid directly to that arbitrator.

IV. Commencing Arbitration

11. How is arbitration commenced?

Arbitration is commenced by an applicant requesting of the respondent that the relevant dispute be referred to arbitration.

12. Can litigation proceedings be stayed in favour of arbitration?

Yes. Under the AA96, where the parties have agreed to submit their dispute to arbitration but one of them brings court proceedings, another party may apply to the court for a stay in the proceedings so that the matter can be referred to arbitration. In this situation, the relevant court shall make an order staying the proceedings and referring the parties to arbitration, provided that the request is not later than when that party submits their first statement on the substance of the dispute. The court may however refuse to stay the proceedings where it finds that the agreement is: "null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred".

Even where an issue agreed between the parties as subject to arbitration is pending before the court, arbitration proceedings may nevertheless be commenced or continued and an arbitral award may be made.

Rule 383A of the High Court Rules and Rule 385A of the District Courts Rules also allow the parties to court proceedings to agree to refer their dispute, or any part of their dispute, to arbitration under the AA96 at any time during the course of the court proceedings. Where this occurs, the court is bound to stay the whole or part of the proceedings as appropriate.

V. The Arbitral Tribunal

13. How is the tribunal appointed?

Parties are able to agree to a procedure appointing their own arbitral tribunal. However, if the parties or arbitrators come to dispute the agreed procedure, or a party or third party fails to act in accordance with the agreed procedure, then the other party may ask the High Court to take any necessary steps, provided that the agreement between the parties does not make available other means of appointment. Any such steps taken by the High Court cannot be appealed.

Where the parties have not agreed to the number of arbitrators for the arbitration, the default rules of the AA96 apply. Here, there will be three arbitrators appointed if the arbitration is international and for all other arbitrations only one arbitrator will be appointed.

Where the parties have not agreed on a procedure for appointing the arbitral tribunal, either party may apply to the High Court asking it to make the necessary appointments in the following situations:

- (a) where the parties have agreed on a sole arbitrator although they have not agreed on a procedure for appointment;
- (b) if the parties have agreed to appointing two, four or more arbitrators, or there are three arbitrators involved and more than two parties;
- (c) where the parties have agreed on three arbitrators and there are two parties. Here, each party will appoint one arbitrator, and these two appointed arbitrators will appoint the third arbitrator. If, within the required 30-day period, either a party fails to appoint an arbitrator after being requested to do so by the other party or the two appointed arbitrators fail to agree on the appointment of a third arbitrator, then either party can apply to the High Court for it to make the necessary appointments.

In making any appointment for the parties, the court is to have regard to any specifications within the arbitration agreement as to the nature of the arbitrator.

14. Who is eligible for appointment?

Anyone can be appointed. No person will be prevented from acting as an arbitrator on the basis of their nationality, unless the parties agree otherwise.

However, due to the AA96's amendment of the Judicature Act 1908, it appears that Associate Judges cannot act as arbitrators.

15. How is an appointment challenged?

An appointment of an arbitrator by a party (or in which that party participated) may be challenged by another party where there are justifiable grounds for doubts as to the relevant arbitrator's impartiality, independence or qualifications (if they are qualifications that the parties had agreed to). However, the challenging party may only challenge appointments on the basis of information that came to that party's knowledge after the appointment.

An arbitrator's appointment may be challenged by a procedure agreed to between the parties. If the parties have not agreed to such a procedure, then the AA96 states that the challenging party must, within 15 days of gaining knowledge of the arbitral tribunal's constitution, or after becoming aware of any of the grounds for challenge, send to the arbitral tribunal a statement in writing stating the reasons for the challenge. If the challenged arbitrator does not withdraw or the parties do not agree, then the arbitral tribunal must decide the validity of the challenge.

If such a challenge is unsuccessful, the challenging party has 30 days from receiving notice of the unsuccessful challenge to ask that the High Court decide upon the issue. Any such decision by the High Court cannot be appealed. Even where a party takes the challenge to the High Court, the arbitral tribunal (including the arbitrator called into question) can nevertheless continue the arbitration and make an award.

16. How is the jurisdiction of the tribunal determined?

The arbitral tribunal can determine its own jurisdiction and any objections raised over the existence or validity of the arbitration agreement. Here, an arbitration clause within a contract will be treated as an independent agreement in itself. However, where an arbitral tribunal decides that the contract is null and void, this will not necessarily invalidate the arbitration clause.

Any plea that the arbitral tribunal does not have jurisdiction should be raised (even where that party has appointed, or been involved in the appointment of, an arbitrator) no later than the time that the statement of defence is submitted. A claim that the arbitral tribunal is exceeding its jurisdiction should also be made as soon as the reason for the plea occurs during the arbitration, or later at the discretion of the arbitral tribunal.

The arbitral tribunal may rule on such a claim as a preliminary issue or as part of an award on the merits. If the arbitral tribunal rules on the plea as a preliminary issue, any party within 30 days can ask the High Court to decide the plea. Once again, any such decision of the High Court cannot be appealed and pending its decision the arbitral tribunal can continue the arbitration and make an award.

17. What are the duties of the tribunal?

The arbitral tribunal must treat all parties equally and give them a full opportunity to present their case. The arbitral tribunal must also recognise that every witness giving evidence, as well as every Counsel, expert or other person appearing before it, has the same privileges and immunities as witnesses and Counsel would have if they were before a court.

The arbitral tribunal also has a duty to make sure that any arbitral award is in writing and signed by it. Unless the parties have agreed otherwise, the arbitral tribunal must also provide reasons for any award made.

The arbitral tribunal also has a duty to issue an order terminating the arbitration if the claimant withdraws their claim (and the respondent does not object), if the parties agree on the termination of the proceedings or if the arbitral tribunal finds that the continuation of the arbitration has become impossible or unnecessary.

18. What are the powers of the tribunal?

Unless the parties agree otherwise, the AA96 states that they will be deemed to have agreed that the arbitral tribunal has the power to do the following:

- (a) adopt inquisitorial processes;
- (b) draw on its own knowledge and expertise;
- (c) order the provision of further particulars in a statement of claim or statement of defence;
- (d) order the giving of security for costs;
- (e) fix and amend time limits within which various steps in the arbitration proceedings must be completed;
- (f) order the discovery and production of documents or materials within the possession or power of a party;
- (g) order the answering of interrogatories;
- (h) order that any evidence be given orally or by affidavit or otherwise;
- (i) order that any evidence be given on oath or by affirmation;
- (j) order any party to do all such other things during the arbitration proceedings as may reasonably be needed to enable an arbitral award to be made properly and efficiently; or
- (k) make an interim, interlocutory or partial arbitral award.

The arbitral tribunal, or a party with the approval of the arbitral tribunal, also has the power to request a court's assistance in the exercise of any of the above powers conferred on it.

Section 12 of the AA96 also states that unless otherwise agreed by the parties, an arbitration agreement is deemed to give the arbitral tribunal the following powers:

- (a) it may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court.
- (b) it may award interest on the whole or any part of any sum which:
 - i) is awarded to any party, for the whole or any part of the period up to the date of the award; or
 - ii) is in issue in the arbitration proceedings but is paid before the date of the award, for the whole or any part of the period up to the date of payment.

However, section 12 is subject to the following qualifications:

- (a) that a dispute will not be able to be resolved by arbitration where the arbitration agreement is contrary to public policy or, under any other law, such a dispute is not capable of determination by arbitration.
- (b) the High Court may set aside an award of the arbitral tribunal if it finds that the subject matter of the dispute is incapable of settlement by arbitration under the laws of New Zealand, or if the arbitral award is in conflict with New Zealand's public policy.
- (c) a court may refuse to recognise or enforce an award of the arbitral tribunal if it finds that the subject matter of the dispute is incapable of settlement by arbitration under the laws of New Zealand, or if recognising or enforcing the award is in conflict with New Zealand's public policy.

Wherever legislation confers jurisdiction in respect of any matter on the High Court or a district court and does not refer to the determination of that matter by arbitration, an arbitral tribunal may nevertheless decide the dispute if the parties agree.

Unless the parties have agreed otherwise, the arbitral tribunal also has the power, upon the request of a party, to order any party to undertake interim measures for the protection of the subject matter of the dispute. The arbitral tribunal may also require a party to provide sufficient security for the purposes of any interim measure ordered. Nevertheless, unlike the powers of the courts, the arbitral tribunal's power to order interim measures does not extend to measures that affect third parties.

The arbitral tribunal also has various other powers to decide such things as the place, procedure or language to be used in the arbitration provided that it complies with the requirements of the AA96. Likewise, unless the parties have agreed otherwise, the arbitral tribunal has the power to appoint an expert to help decide issues and require the parties to provide that expert with certain evidence. Furthermore, the arbitral tribunal can request the assistance of a court in taking evidence.

19. What are the liabilities of the tribunal?

An arbitrator is not liable for negligence in respect of any act or omission done in the capacity of an arbitrator.

20. How are the costs of the tribunal fixed?

Where the parties have not already agreed as to how to pay the arbitral tribunal's costs, the legal and other expenses of the parties and the arbitral tribunal, as well as any other expenses related to the arbitration, shall be allocated by the arbitral tribunal in any award made by it.

Failing any such award by the arbitral tribunal allocating the costs and expenses of the arbitration, each party will be responsible for their own legal and other expenses, as well as an equal share of the arbitral tribunal's expenses and any other expenses arising from the arbitration.

Unless the parties agree otherwise, the parties also agree that if party A makes an offer to party B to settle the dispute (or part of the dispute), and the offer is not accepted by party B, and the award of the arbitral tribunal is no more favourable to party B than was the offer, the arbitral tribunal may take the fact of the offer into account. Here, the arbitral tribunal may award costs and expenses against party B in respect of the period between the making of the offer and the making of the award. However, the parties are not to inform the arbitral tribunal that an offer to settle has been made until it has made a final determination on all aspects of the dispute (other than the fixing and allocation of costs and expenses).

A party may appeal to the High Court if that party is unhappy with the arbitral tribunal's award of the arbitration's costs and expenses. However, a party cannot appeal the arbitral tribunal's award after three months have elapsed from the date on which the party making the application received any award or additional award fixing and allocating the costs and expenses of the arbitration.

Provided that a party is able to appeal to the High Court, the High Court may make an order varying the arbitral tribunal's allocation of costs and expenses if it is satisfied that the arbitral tribunal's allocation was unreasonable in all of the circumstances. Although the arbitral tribunal has a right to appear and be heard where a party has appealed to the High Court in this way, no appeal is available from any decision of the High Court.

VI. The Arbitration Procedure

21. What procedural rules govern the arbitration?

The parties are generally free to agree to their own arbitral procedure (subject to the provisions of schedule 1 to the AA96). Failing this, the arbitral tribunal can (again subject to the provisions of schedule 1 to the AA96) carry out the arbitration in any way that it considers appropriate.

22. What evidential rules apply to the arbitration?

The parties are free to agree to their own evidential rules for the arbitration; however, where they do not, the tribunal has the power (subject to the provisions of schedule 1 to the AA96) to determine the relevance, admissibility, materiality and weight of any evidence.

23. What is the language of the arbitration?

The parties are free to agree to the language(s) to be used in the arbitration. Failing this, the arbitral tribunal will determine the appropriate language(s) to be used. Unless otherwise specified, any written statements, hearings, awards, decisions and other communications by the arbitral tribunal will be in this/these language(s) once decided or determined. The arbitral tribunal may also order that any documentary evidence be accompanied by a translation into the selected language(s).

24. Who can appear as Counsel?

There are no restrictions as to who can appear as Counsel.

VII. The Arbitral Award

25. What is the form of the award?

Any award of the arbitral tribunal must be in writing and signed by the arbitrator. Where there is more than one arbitrator, only the signatures of the majority of the arbitrators on the arbitral tribunal are required, provided that an explanation is given for any omitted signatures. After the arbitral award is made, the arbitrators must also deliver a signed copy of the award to each of the parties.

An arbitral award must also state the reasons on which it is based unless the parties have agreed not to require such reasons or the arbitral award is an award on agreed terms between the parties.

The arbitral award must further state the date and the place of the arbitration and will be deemed to be made at the nominated place of the arbitration, even if it was actually made elsewhere.

26. What are the grounds for appeal against the award?

A party may only appeal against an award of the tribunal through an application to the High Court to set the award aside. The High Court may only set the award aside if the applicant party can prove that:

- (a) a party to the arbitration agreement was under some incapacity, or the agreement is not valid under the law to which the parties have subjected it, or, failing any indication on that question, under the law of New Zealand;
- (b) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present that party's case;
- (c) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or
- (d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of schedule 1 to the AA96 from which the parties cannot derogate, or, failing such agreement, was not in accordance with schedule 1 to the AA96.

Alternatively, a party may appeal if the High Court finds that:

- (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of New Zealand; or
- (ii) the arbitral award is in conflict with the public policy of New Zealand. Without limiting the generality of matters in conflict with the public policy of New Zealand, an arbitral award will be in conflict with the public policy of New Zealand where the making of that award was induced or affected by fraud or corruption, or a breach of natural justice occurred either during the arbitration proceedings or in connection with the making of that award.

In addition, any party may appeal to the High Court on any question of law arising out of an arbitral award if the parties have so agreed before the making of that award, or with the consent of every other party given after the making of that award, or with the leave of the High Court.

27. How is the award enforced?

An arbitral award will be recognised as binding. Upon written application to the High Court, such an award can also be entered and enforced as a judgment on its terms or by action unless there are grounds for refusing its recognition or enforcement.

However, the party seeking to rely on an arbitral award or seeking its enforcement must supply the authenticated original award and the original arbitration agreement if in writing (or certified copies of either). If the arbitral award or agreement is not in English, the party must also supply a certified translation into English.

28. How are foreign awards enforced?

Irrespective of the country in which they are made, foreign awards are enforced in the same way that New Zealand arbitral awards are.

29. What are the grounds for objecting against enforcement?

A party against whom an arbitral award is sought can only successfully object against enforcement of an arbitral award where that party can prove to the court in which enforcement is sought that:

- (a) a party to the arbitration agreement was under some incapacity; or the agreement is not valid under the law to which the parties have subjected it or, failing any indication on that question, under the law of the country where the award was made;
- (b) the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present that party's case;
- (c) The arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;
- (d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (e) the arbitral 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.

Alternatively, enforcement of an arbitral award may be refused if the court finds that either the subject matter of the dispute is not capable of settlement by arbitration under the law of New Zealand or that enforcement of the arbitral award would be contrary to the public policy of New Zealand.

Without limiting the generality of matters contrary to New Zealand public policy, an award will be contrary to the public policy of New Zealand if the making of that award was induced or affected by fraud or corruption; or a breach of the rules of natural justice occurred either during the arbitration proceedings, or in connection with the making of that award.

Furthermore, any party may appeal to the High Court on any question of law arising out of an arbitral award if the parties have so agreed before the making of that award, or with the consent of every other party given after the making of that award, or with the leave of the High Court.

VIII. Interest And Costs

30. Is interest payable on the amount awarded?

Yes. Unless the arbitration agreement or the arbitral award provides otherwise, sums directed to be paid by an award shall carry interest from the date of the award at the same rate as a judgment debt. The rate of interest applicable to judgment debts in New Zealand is currently set at 7.5% per annum or such lower rate as fixed by the Court.

31. How are the costs of the arbitration determined?

The arbitral tribunal will determine by award the costs of the arbitration, being the legal and other expenses of the parties and the arbitral tribunal as well as any other expenses related to the arbitration.

Where the arbitral tribunal does not determine the costs of the arbitration in any award, the cost of the arbitration for each party will be the cost of their own expenses as well as an equal share of the arbitral tribunal's expenses and any other expenses arising from the arbitration.

32. Who pays the costs of the arbitration?

Unless the parties themselves reach agreement as to how the costs of the arbitration are to be paid, the arbitral tribunal will determine by award the party or parties that are to pay the costs of the arbitration. In the absence of any award by the arbitral tribunal determining

who is to pay the costs of the arbitration, each party will bear their own costs and an equal share of the tribunal's expenses, together with any other expenses arising from the arbitration.

A party may appeal to the High Court if that party is unsatisfied with any award of the arbitral tribunal that fixes and/or allocates the costs of the arbitration. In this situation, if the High Court considers that the amount and/or allocation of the costs was unreasonable in all of the circumstances, it may make an order varying these aspects of the award.

IX. Mediation

33. Is there a National Mediation Centre?

AMINZ serves as a national mediation centre in New Zealand, however other providers such as LEADR are also available.

34. Is mediation compulsory?

No, mediation is a voluntary form of dispute resolution in New Zealand. The one exception is employment and labour disputes, where mediation is compulsory under the Employment Relations Act 2000.

35. How is mediation conducted?

Mediation is an informal and non-adversarial form of dispute resolution in New Zealand. Unlike arbitration or litigation, the mediation process is not restricted by legal correctness or the normal rules of evidence, and the participating parties cannot have a decision imposed on them against their will.

An independent and impartial mediator will facilitate negotiation between the parties (and their lawyers, if present) to reach a constructive resolution to their dispute(s). The mediator will simply guide the process to help the sharing of information and to help identify and break down issues, as well as explore realistic options to bring about a solution to the dispute(s) between the parties so as to avoid undue delay and the costs of litigation.

If a dispute is resolved through mediation, a written agreement will usually be signed by the parties detailing the issues that were resolved at the mediation and the ultimate outcome.

36. What are the costs of mediation?

The costs of mediation will depend on the fee negotiated and agreed to with the relevant mediator before their appointment. These costs will usually be paid directly to the mediator. Where AMINZ is asked to nominate a mediator for the parties, the President of the AMINZ will do so for a fee of NZ\$250 plus Goods and Services Tax.

X. Settlement

37. What are the opportunities for settlement?

The parties to either an arbitration or a mediation can settle their dispute at any stage of the relevant process.

Where the parties settle their dispute during arbitration, the arbitral tribunal must terminate the arbitration, and, if the parties request it and the arbitral tribunal does not object, record the settlement in the form of an arbitral award on agreed terms.

Likewise, if the parties to a mediation agree to settle their dispute, the terms of the settlement may be recorded in writing and signed by the parties.

38. How is any settlement agreement enforced?

A settlement agreement reached during mediation will be enforceable on the ordinary principles of contract in New Zealand.

However, in the case of arbitration a settlement agreement between the parties can be recorded in the form of an arbitral award. In this situation the arbitral award will be recognised as binding, and upon written application to the High Court shall be enforced by entry as a judgment in the terms of that award. The party applying for the enforcement of such an award must supply the duly authenticated original award or a duly certified copy, and also if in writing the original arbitration agreement or a certified copy of it. If either the award or agreement is not recorded in English, the party applying must also supply a duly certified translation into English.

XI. The Role Of The Local Courts

39. What are the powers of the local courts?

The AA96 expressly limits the powers of the courts to intervene in matters that are subject to arbitration.

However, both the High Court and the district courts maintain their normal powers to award interim relief to a party that has agreed to arbitration. Such relief may include:

- (a) orders for the preservation, interim custody or sale of any goods which are the subject matter of the dispute;
- (b) an order securing the amount in dispute;
- (c) an order appointing a receiver;
- (d) any other orders to ensure that any award which may be made in the arbitration proceedings is not rendered ineffectual by the dissipation of assets by the other party; or
- (e) an interim injunction or other interim order.

An application by a party for such relief is not considered inconsistent with the arbitration process, especially as in some cases the relevant arbitral tribunal may not be established or be otherwise unable to respond to urgent interim requests for relief. The courts also have the power to grant a greater range of interim relief than an arbitral tribunal, for example making orders that affect third parties. However, the courts will generally be reluctant to state their views on the dispute or otherwise act in a way that may be seen as intruding on the arbitrator's jurisdiction unless necessary.

A court also has the power to refuse an application for the stay of court proceedings commenced by one of the parties to the arbitration where it finds that the agreement is "null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred".

Again, a court has the power to assist an arbitral tribunal with the taking of evidence where it has been requested to do so by the arbitral tribunal or a party with the consent of the arbitral tribunal. The High Court can make an order of subpoena or a district court can issue a witness summons to compel a witness to attend before an arbitral tribunal for the purpose of giving evidence or producing documents.

Similarly, the High Court or a district court may order any witness to submit to examination on oath before the arbitral tribunal, an officer of the court or any other person. The High Court and the district courts again retain their normal powers to make orders for such things as the discovery of documents, interrogatories, and the detention, preservation or inspection of any property or thing in issue in the arbitration.

Furthermore, both the High Court and the district courts have the power to grant on terms that they deem fit an extension of time for a party to bring arbitration proceedings where undue hardship would otherwise result. The courts again have the power to assist the arbitral tribunal to exercise its own power under the AA96 concerning the conduct of arbitration proceedings.

Other powers of the High Court include the power to appoint arbitrators upon application where the parties cannot agree and to decide the outcome of a challenge to an arbitrator. The High Court again has the power upon application to decide disputes regarding an arbitral tribunal's jurisdiction, the consolidation of multiple arbitration proceedings before a single arbitral tribunal or the termination of an arbitrator's mandate.

The High Court can similarly determine preliminary issues of law upon application provided that either the arbitral tribunal or every other party agrees to such an application. The High Court further has the power to grant leave to a party to apply to it for the determination of a question of law arising from any arbitral award, and to vary a costs award or allocation by an arbitral tribunal where it considers it to be unreasonable in all of the circumstances. It again has the power to refuse the recognition or enforcement of an arbitral award, where the requisite grounds for setting aside an award are established.

Philippines



I. Arbitration Legislation

1. What legislation governs arbitration?

The Republic Act No. 9285 or the Alternative Dispute Resolution Act 2004 (“ADR Law”) is the latest basic law on alternative dispute resolution including arbitration; the Republic Act 876 or the Arbitration Law (“R.A. No. 876”) was the old arbitration law which is still applicable to domestic arbitration as modified by the ADR Law; and Executive Order No. 1008 or the Construction Industry Arbitration Law (“E.O. 1008”), as amended by the ADR Law, applies to arbitration of construction disputes.

2. What is the basis of the arbitration legislation?

For international commercial arbitration, it is the UNCITRAL Model Law. For domestic commercial arbitration, it is R.A. No. 876 which is based on the US Federal Arbitration Act.

3. Does the legislation distinguish between international and domestic arbitration?

Yes. The ADR Law specifically provides that the UNCITRAL Model Law will govern international commercial arbitrations; R.A. No. 876, as amended, will govern domestic arbitrations, E.O. 1008, as amended, will govern arbitrations of construction disputes.

II. Arbitration Agreement

4. What are the requirements of an enforceable arbitration agreement?

Two or more persons or parties may submit to the arbitration of one or more arbitrators any controversy existing between them at the time of the submission and which may be the subject of an action, or the parties to any contract may in such contract agree to settle by arbitration a controversy thereafter arising between them. Such submission or contract

shall be valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract.¹

A contract to arbitrate a controversy thereafter arising between the parties, as well as a submission to arbitrate an existing controversy, shall be in writing and subscribed by the party sought to be charged or by their lawful agent.²

An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telexes, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claims and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause a part of the contract.³

III. National Arbitration Institute/Centre

5. Is there a National Arbitration Centre (“NAC”)?

Yes. The Philippine Dispute Resolution Center Inc. (“PDRCI”) and the Construction Industry Arbitration Commission (“CIAC”) for construction arbitration.

6. Does the NAC publish a set of procedural rules?

Yes. The PDRCI and the CIAC have published their respective sets of procedural rules.

7. Does the NAC publish a panel of recommended arbitrators?

Yes. The PDRCI and the CIAC have their respective panels of recommended arbitrators.

¹ Section 2, R.A. No. 876.

² Section 4, Id.

³ Article 7 (2), Chapter II, UNCITRAL Model Law.

8. Does the NAC publish a recommended arbitration clause?

Yes. The PDRCI publishes a recommended arbitration clause, as follows:

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the PDRCI Arbitration Rules as at present in force.

Note—Parties may wish to consider adding:

- (a) The appointing authority shall be ... (name of institution or person);
- (b) The number of arbitrators shall be ... (one or three);
- (c) The place of arbitration shall be ... (town or country);
- (d) The language(s) to be used in the arbitral proceedings shall be ... (languages)”⁴

The CIAC likewise publishes a recommended arbitration clause, as follows:

“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 under the Rules of Procedure Governing Construction Arbitration promulgated by the Construction Industry Arbitration Commission, pursuant to Executive Order 1008 (the Construction Industry Arbitration Law) as amended by R.A. 9285 or the ADR Act of 2004, by [indicate number: one or three] arbitrator(s) to be appointed in accordance with such Rules. The place of arbitration shall be [indicate place].”⁵

9. Does the NAC administer arbitrations?

Yes. The PDRCI and the CIAC administer arbitrations.

The key functions of the PDRCI are:

- (a) performing a vital clerk-of-court function in receiving and communicating pleadings and other papers from the parties to the arbitral tribunal or vice versa from one party to another;
- (b) monitoring the arbitral process;
- (c) acting as appointing authority;

⁴ Section 1, PDRCI Arbitration Rules.

⁵ Model Dispute Resolution Clauses, p. 76, CIAC Handbook on Construction Arbitration.

- (d) helping the parties fix the arbitrator's fees, and the manner of and time for payment;
- (e) making the necessary arrangements for the availability of hearing rooms and facilities to be provided during arbitration proceedings;
- (f) billing, collecting and receiving payments from parties for arbitrator's fees, administrative fees and expenses of arbitration, and releasing and paying such amounts as appropriate to the arbitrators as their fees and settling expenses of arbitration from deposits or payments made by the parties;
- (g) acting as an information centre to advise parties on such matters as the drafting of an arbitration agreement or adopting appropriate rules to govern the conduct of arbitration in order to achieve the objective of a speedy and fair resolution of disputes; and
- (h) performing such administrative functions as the arbitral tribunal may request in aid of arbitration.

The CIAC shall perform the following functions:

1. To formulate and adopt an arbitration program for the construction industry;
2. To enunciate policies and prescribe rules and procedures for construction arbitration;
3. To supervise the arbitration program, and exercise such authority related thereto as regards the appointment, replacement or challenging of arbitrators; and
4. To direct its officers and employees to perform such functions as may be assigned to them from time to time.”⁶

10. What are the NAC's costs?

The PDRCI's administrative fee ("AF") is as follows:⁷

Sum in Dispute	Minimum fee
Up to Php 1,000,000 (1m)	Php 10,000
Over 1m to 5m	Php 10,000 + 1% of amount in excess of 1m
Over 5m to 10m	Php 50,000+ 0.5% of amount in excess of 5m
Over 10m	Php 75,000 + 0.1% of amount in excess of 10m, in no case to exceed Php 100,000

⁶ Section 6, E.O. 1008.

⁷ PDRCI Schedule of Administrative Fees, PDRCI Arbitration Rules.

10. What are the NAC's costs? (cont'd)

The CIAC's fees are as follows:⁸

Sum in Dispute	Filing Fee	Administrative Fee
Less than Php 100,000	Php 3,600	Php 6,000
Php 100,000 to Php 1m	Php 3,600 + 0.36% in excess over Php 100,000	Php 6,000 + 0.24% of excess over Php 100,000
Php 1m to Php 10m	Php 6,840 + 0.12% of excess over Php 1m	Php 8,160 + 0.12% of excess over Php 1m
Php 10m to Php 50m	Php 17,640 + 0.06% of excess over Php 10m	Php 18,960 + 0.06% of excess over Php 10m
More than Php 50m	Php 41,640.00 + 0.03% of excess over Php 50m	Php 42,960 + 0.03% of excess over Php 50m

IV. Commencing Arbitration

11. How is arbitration commenced?

Arbitration under the PDRCI Arbitration Rules is commenced when the party initiating the recourse to arbitration ("claimant") gives to the other party ("respondent") a notice of arbitration.⁹

Under the CIAC Rules, any party to a construction contract wishing to initiate arbitration shall file its request for arbitration in the prescribed form and number of copies to the Secretariat of the CIAC. Arbitration is deemed commenced when the request for arbitration is filed with the CIAC.¹⁰

12. Can litigation proceedings be stayed in favour of arbitration?

Yes. A court before which an action is brought in a matter which is the subject matter of an arbitration agreement shall, if at least one party so requests not later than the pre-trial conference, or upon the request of both parties thereafter, refer the parties to arbitration

⁸ CIAC Table of Administrative Charges and Arbitrator's Fees, CIAC Handbook on Construction Arbitration.

⁹ Article 3, s1, PDRCI Arbitration Rules.

¹⁰ Sections 3.1 and 3.4, rule 3, Revised Rules of Procedure Governing Construction Arbitration ("CIAC Rules").

unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The court case, upon motion, shall be stayed or suspended provided the movant is not in default in proceeding to arbitration (ie the movant himself filed the case in violation of the arbitration agreement).¹¹

In the case of a construction dispute however, the court before which a construction dispute is filed shall, upon becoming aware not later than the pre-trial conference that the parties have entered into an arbitration agreement, dismiss the case and refer the parties to arbitration to be conducted by the CIAC, unless both parties, assisted by their respective Counsel, shall submit to the court a written agreement exclusively for the court, rather than the CIAC, to resolve the dispute.¹²

V. The Arbitral Tribunal

13. How is the tribunal appointed?

In international arbitration, the parties are free to agree on a procedure of appointing the arbitrator or arbitrators. They are likewise free to determine the number of arbitrators, failing such determination, the number of arbitrators shall be three.

Where the parties have agreed to submit their dispute to institutional arbitration rules, and unless they have agreed to a different procedure, they shall be deemed to have agreed to the procedure under such arbitration rules for the selection and appointment of arbitrators.¹³

In ad hoc arbitration, the appointment procedure agreed upon by the parties shall govern. In default thereof, appointment of an arbitrator shall be made by the National President of the Integrated Bar of the Philippines (“IBP”) or his duly authorised representative. If the National President of the IBP fails to make an appointment, the parties may seek interim relief from the courts.¹⁴

In construction arbitration, the CIAC shall appoint the arbitrator(s) based on the mode of arbitration agreed upon by the parties as specified in the arbitration clause of the contract or in the agreement to arbitrate. Where the parties have agreed that the dispute(s) shall be settled by a sole arbitrator, each party shall have the right to nominate three arbitrators. If

¹¹ Section 24, ADR Law; Section 7, R.A. No. 876.

¹² Section 39, ADR Law.

¹³ Section 26, *Id.*

¹⁴ *Id.*

there is a common nominee, the CIAC shall appoint him as sole arbitrator. In the absence of a common nominee or in cases where the common nominee is disqualified or not available, the CIAC may appoint a sole arbitrator or an arbitral tribunal. If the CIAC decides to appoint a sole arbitrator, it shall select the appointee who is not a nominee of one of the parties and who is not disqualified and is available for appointment.¹⁵

Where the parties agree that the dispute shall be settled by an arbitral tribunal, each party shall have the right to nominate six arbitrators from the list of CIAC-accredited arbitrators. If there is no common nominee, the CIAC shall choose and appoint, as members of the arbitral tribunal, one arbitrator from the claimant's nominees and another arbitrator from the respondent's nominees. The third arbitrator shall be selected by the two arbitrators first chosen within 15 days from acceptance of their appointment. The three arbitrators shall decide among themselves who will be the chairman. In case of failure to agree on the third member within such period, the CIAC shall, within 15 days thereafter, appoint the third member from its list of accredited arbitrators.¹⁶

14. Who is eligible for appointment?

In international arbitration, no person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.¹⁷

In domestic arbitration, any person appointed to serve as an arbitrator must be of legal age, in full enjoyment of his civil rights and knows how to read and write. No person appointed to serve as an arbitrator shall be related by blood or marriage within the sixth degree to either party to the controversy. No person shall serve as an arbitrator in any arbitration proceedings if he has or has had financial, fiduciary or other interest in the controversy or cause to be decided or in the result of the proceedings, or has any personal bias that might prejudice the right of any party to a fair and impartial award.¹⁸

In arbitration under the CIAC, the arbitrators shall be men of distinction in whom the business sector and the government can have confidence. They shall be technically qualified to resolve any construction dispute expeditiously and equitably. The arbitrators shall come from different professions. They may include engineers, architects, construction managers, engineering consultants, and businessmen familiar with the construction industry and lawyers who are experienced in construction disputes.¹⁹

¹⁵ Sections 9.1 and 9.2, CIAC Rules.

¹⁶ Section 9.3, CIAC Rules.

¹⁷ Article 11, UNCITRAL Model Law.

¹⁸ Section 10, R.A. No. 876.

¹⁹ Section 8.1, CIAC Rules.

Only CIAC-accredited arbitrators may be nominated by parties or by the first two arbitrators appointed as the third arbitrator of an arbitral tribunal and appointed by the CIAC as arbitrator. A replacement arbitrator shall likewise be a CIAC-accredited arbitrator. However, the CIAC may appoint to an arbitral tribunal an arbitrator who is not CIAC-accredited provided that the nominee (i) is the parties' common nominee; (ii) possesses the technical/legal competence to handle the construction dispute involved; and (iii) has signified his availability/acceptance of his possible appointment.²⁰

A foreign arbitrator not accredited by the CIAC may be appointed as a co-arbitrator or chairperson of an arbitral tribunal for a construction dispute under the following conditions:

- (a) the dispute is a construction dispute in which one party is an international party, ie one whose place of business is outside the Philippines. For this purpose, the term "international party" shall not include a domestic subsidiary of such international party or a co-venturer in a joint venture with a party which has its place of business in the Philippines; and
- (b) the foreign arbitrator to be appointed is not a national of the Philippines and is not of the same nationality as the international party in dispute.²¹

The foreign arbitrator must be nominated by the international party or is the common choice of the two CIAC-accredited arbitrators, one of whom was nominated by the international party. The nomination must be accompanied by a resume or biodata of the nominee relevant to qualifications as a construction arbitrator and a signed undertaking of the nominee to abide by CIAC arbitration rules and policies.²²

15. How is an appointment challenged?

An arbitrator may be challenged only for failure to meet the qualifications for arbitrators which may have arisen after the arbitration agreement or were unknown at the time of arbitration (ie the arbitrator is not of legal age or not in full enjoyment of his civil rights or does not know how to read and write or is related by blood or marriage within the sixth degree to either party to the controversy or has or has had financial, fiduciary or other interest in the controversy or in the result of the arbitration proceedings, or has any personal bias which might prejudice the right of any party to a fair and impartial award).²³

²⁰ Section 9.1.2, CIAC Rules.

²¹ Section 9.4, Id.

²² Section 9.4.1, Id.

²³ Article 12(b), UNCITRAL Model Law.

The challenge shall be made before the arbitrator(s). If they do not yield to the challenge, the challenging party may renew the challenge before the court of the province or city in which the challenged arbitrator, or any of them, if there be more than one, resides. While the challenging incident is discussed before the court, the hearing on arbitration shall be suspended, and it shall be continued immediately after the court has delivered an order on the challenging incident.²⁴

In arbitration under the CIAC, an arbitrator may be challenged by a party at any time after his appointment but before the arbitral award upon the following grounds:

- (a) relationship by blood or marriage within the sixth degree of either party to the controversy, or to Counsel within the fourth degree, computed according to the rules of civil law;
- (b) financial, fiduciary or other interest in the controversy;
- (c) partiality or bias; or
- (d) incompetence or professional misconduct.

A party may also request the inhibition of an arbitrator upon other just and valid reasons affecting independence, integrity, impartiality and interest.²⁵

16. How is the jurisdiction of the tribunal determined?

The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement or any condition precedent to the filing of a request for arbitration. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not of itself invalidate the arbitration clause.²⁶

For the CIAC to acquire jurisdiction, the parties to a dispute must be bound by an arbitration agreement in their contract or subsequently agree to submit the same to voluntary arbitration. A motion to dismiss based on lack of jurisdiction shall be resolved by the appointed arbitral tribunal. A party does not waive its right to challenge the jurisdiction of the CIAC by any of the following acts:

²⁴ Section 11, R.A. No. 876.

²⁵ Section 9.6, CIAC Rules.

²⁶ Article 16, chapter IV, UNCITRAL Model Law.

- (a) participating in the nomination process, including challenging the qualifications of a nominee;
- (b) praying for extension of time to file appropriate pleading/motion to dismiss;
- (c) opposing an application for interim relief;
- (d) filing of a motion to dismiss/suspend.²⁷

17. What are the duties of the tribunal?

The arbitral tribunal is under duty to faithfully and fairly hear and examine the matters in controversy and to make a just award according to the best of their ability and understanding.²⁸

18. What are the powers of the tribunal?

The arbitral tribunal shall have the power to require any person to attend a hearing as a witness. They shall have the power to subpoena witnesses and documents when the relevancy of the testimony and the materiality thereof has been demonstrated to the arbitrators. The arbitral tribunal may also require the retirement of any witness during the testimony of any other witness. The arbitral tribunal shall have the power at any time before rendering the award, without prejudice to the rights of any party, to petition the court to take measures to safeguard and/or conserve any matter that is the subject of the dispute in arbitration.²⁹

Unless otherwise agreed by the parties, the arbitral tribunal may grant interim measures of protection, including preliminary injunction, appointment of receivers, or detention, preservation and inspection of the property that is the subject of the dispute.³⁰

The arbitral tribunal may, upon the request of either or both parties or upon its own initiative, issue orders as necessary to attain the following objectives:

- (a) to prevent irreparable loss or injury;
- (b) to provide security for the performance of any obligation;
- (c) to produce or preserve any evidence; or
- (d) to compel any other appropriate act or omission.³¹

²⁷ Sections 2.3, 2.4 and 2.5, rule 2, CIAC Rules.

²⁸ Section 13, R.A. No. 876.

²⁹ Section 14, *Id.*

³⁰ Section 29, ADR Law.

³¹ Section 28, *Id.*

Such interim measures may include but shall not be limited to preliminary injunction directed against a party, appointment of receivers or detention, preservation and inspection of the property that is the subject of the dispute in arbitration. Either party may apply to the court for assistance in implementing or enforcing an interim measure ordered by an arbitral tribunal.³²

Under section 38 of the ADR Law, the provisions on interim or provisional relief (section 28) as well as interim measures of protection (section 29) are applicable to CIAC arbitration as well.

19. What are the liabilities of the tribunal?

The arbitral tribunal shall have the same civil liability for acts done in the performance of their duties as that of public officers, as provided in section 38 (1), chapter 9, book I of the Administrative Code of 1987 (ie upon a clear showing of bad faith, malice or gross negligence).³³

20. How are the costs of the tribunal fixed?

The costs of arbitration are determined by agreement between the arbitrators and the parties. In cases of institutional arbitration, the rules of the institution/arbitration provider shall govern.

VI. The Arbitration Procedure

21. What procedural rules govern the arbitration?

The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.³⁴ In the absence of such agreement, the rules of procedure as laid down under the ADR Law (for international commercial arbitration), R. A. No. 876 (for domestic arbitration) and E.O. 1008 (for construction arbitration) shall govern.

³² Section 29, *Id.*

³³ Section 5, ADR Law; s8.4, CIAC Rules.

³⁴ Article 19(1), UNCITRAL Model Law.

22. What evidential rules apply to the arbitration?

The parties may likewise agree on the evidential rules to be applied. Failing such agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.³⁵

Under the CIAC Rules, the parties may offer such evidence as they desire and shall produce such additional documents and witnesses as the arbitral tribunal may deem necessary for a clear understanding of the facts and issues to reach a judicious determination of the dispute(s). The arbitral tribunal shall act according to justice and equity and merits of the case, without regard to technicalities or legal forms and need not be bound by any technical rule of evidence. Evidence shall be taken in the presence of the arbitral tribunal and all of the parties, except where any of the parties is absent or has waived its right to be present.³⁶

23. What is the language of the arbitration?

The parties are free to agree on the language or languages to be used in the arbitration proceedings. Failing such agreement, the language to be used shall be English in international arbitration, and English or Filipino for domestic arbitration, unless the arbitral tribunal shall determine a different or another language or languages to be used in the proceedings. Such agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal. The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or as determined by the arbitral tribunal.³⁷

24. Who can appear as Counsel?

In international arbitration conducted in the Philippines, a party may be represented by any person of his choice provided that such representative, unless admitted to the practice of law in the Philippines, shall not be authorised to appear as Counsel in any Philippine court or any other quasi-judicial body, whether or not such appearance is in relation to the arbitration in which he appears.³⁸

³⁵ Article 19(2), *Id.*

³⁶ Section 13.5, Rule 13, CIAC Rules.

³⁷ Section 31, ADR Law.

³⁸ Section 22, *Id.*

VII. The Arbitral Award

25. What is the form of the award?

The arbitral award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitration proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated. The arbitral award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given. The arbitral award shall state its date and the place of arbitration and it shall be deemed to have been made at that place. After the arbitral award is made, a copy signed by the arbitrators, shall be delivered to each party.³⁹

Under the CIAC Rules, the final award shall be in writing and signed by the arbitral tribunal. A dissent from the decision of the majority or a portion thereof shall be in writing and signed by the dissenting member. The final award shall contain the issues involved, a brief statement and discussion of the facts, and the authority relied upon for the resolution or disposition of the issues.⁴⁰

26. What are the grounds for appeal against the award?

For international commercial arbitration, an arbitral award may be set aside by the Regional Trial Court only if:

- “(a) the party making the application furnishes proof that:
- i. a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the Philippines; or
 - ii. the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - iii. the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those

³⁹ Section 31, UNCITRAL Model Law; s20, R.A. No. 876.

⁴⁰ Section 16.2, rule 16, CIAC Rules.

- not so submitted, only the part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
- iv. the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the ADR Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with the ADR Act; or
- (b) the Court finds that:
- i. the subject-matter of the dispute is not capable of settlement by arbitration under the law of the Philippines; or
 - ii. the award is in conflict with the public policy of the Philippines.”⁴¹

For domestic arbitration, the arbitral award may be questioned, vacated or set aside by the appropriate court in accordance with the rules of procedure to be promulgated by the Supreme Court only on the following grounds:

- “(a) The arbitral award was procured by corruption, fraud or other undue means; or
- (b) There was evident partiality or corruption in the Arbitral Tribunal or any of its members; or
- (c) The arbitral tribunal was guilty of misconduct or any form of misbehavior that has materially prejudiced the rights of any party such as refusing to postpone the hearing upon sufficient cause shown or to hear evidence pertinent and material to the controversy; or
- (d) One or more of the arbitrators was disqualified to act as such and wilfully refrained from disclosing such disqualification; or
- (e) The arbitral tribunal exceeded its powers, or so imperfectly executed them, such that a complete, final and definite award upon the subject matter submitted to them was not made.”⁴²

Under the CIAC Rules, any of the parties may file a motion for correction of the final Award within 15 days from receipt thereof upon any of the following grounds:

- “a. an evident miscalculation of figures, a typographical or arithmetical error;

⁴¹ Article 34, chapter VII, UNCITRAL Model Law.

⁴² Section 41, ADR Law, s24, R.A. No. 876.

- b. an evident mistake in the description of any party, person, date, amount, thing or property referred to in the award;
- c. where the arbitrators have awarded upon a matter not submitted to them, not affecting the merits of the decision upon the matter submitted;
- d. where the award is imperfect in a matter of form not affecting the merits of the controversy.

The filing of the motion for correction shall interrupt the running of the period for appeal. A motion for correction upon grounds other than those mentioned in this section shall not interrupt the running of the period for appeal.⁴³

27. How is the award enforced?

The prevailing party may file a motion for an entry of judgment with the courts by including in its motion the original or verified copy of the award, the arbitration or submission agreement, and such papers as may be required by the rules of court to be promulgated by the Supreme Court. The judgment shall be docketed as if it were rendered in an action. The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions relating to, a judgment in an action; and it may be enforced as if it has been rendered in the court in which it is entered.⁴⁴

Under the CIAC Rules, as soon as a decision, order or final award has become executory, the arbitral tribunal shall, with the concurrence of the CIAC, motu proprio or on motion of the prevailing party issue a writ of execution requiring any sheriff or proper officer to execute such decision, order or final award.⁴⁵

28. How are foreign awards enforced?

The recognition and enforcement of foreign arbitral awards shall be filed with the appropriate Regional Trial Court in accordance with the rules of procedure to be promulgated by the Supreme Court. The party relying on the arbitral award or applying for its enforcement shall file with the court the original or authenticated copy of the award and the arbitration agreement. If the arbitral award or agreement is not made in any of the official languages, the party shall supply a duly certified translation thereof into any of such languages. The applicant shall establish that the country in which the foreign arbitral award was made is a party to the New York Convention.⁴⁶

⁴³ Rule 17, CIAC Rules; appeals from the CIAC to the Court of Appeals on questions of fact, questions of law or mixed questions of fact and law are governed by rule 43 of the Rules of Court.

⁴⁴ Section 28, R.A. No. 876.

⁴⁵ Section 18.5, Rule 18, CIAC Rules.

⁴⁶ Section 42, ADR Law.

29. What are the grounds for objecting against enforcement?

A party to foreign arbitration proceedings may oppose an application for recognition and enforcement of the arbitral award in accordance with the procedural rules to be promulgated by the Supreme Court only on those grounds enumerated under article V of the New York Convention. Any other grounds raised shall be disregarded by the Regional Trial Court.⁴⁷

In domestic arbitration, a party to domestic arbitration proceedings may question the arbitral award with the appropriate Regional Trial Court in accordance with the rules of procedure to be promulgated by the Supreme Court only on those grounds enumerated in R.A. No. 876. Any other ground raised against a domestic arbitral award shall be disregarded by that Regional Trial Court.⁴⁸

Under the CIAC Rules, execution may be stayed upon approval by the arbitral tribunal, with the concurrence of the CIAC, of a bond posted by the petitioner in an amount equal to the award, conditional upon the performance of the judgment of the appellate court in case it upholds the award in whole or in part. Such bond shall be posted within such period of time, which shall in no case be less than 15 days, as may be granted by the arbitral tribunal during the hearing on the motion for execution and the opposition thereto.⁴⁹

VIII. Interest And Costs

30. Is interest payable on the amount awarded?

The payment of interest on the amount awarded will depend on the provisions of the principal contract/agreement between the parties. In absence of such agreement, the interest payable shall be computed from the date the decision in the action to enforce the arbitral award filed with the court becomes final.⁵⁰

31. How are the costs of the arbitration determined?

The fees of the arbitrators shall be agreed upon by the parties and the arbitrators in writing prior to the arbitration. In default of agreement as to the amount and manner of payment

⁴⁷ Section 45, *Id.*

⁴⁸ Section 41, *Id.*

⁴⁹ Section 18.6, rule 18, CIAC Rules.

⁵⁰ Article 2209, Civil Code of the Philippines.

of the arbitrators' fees, such fees shall be determined in accordance with the applicable internal rules of the regular arbitration institution under whose rules the arbitration is conducted; or in ad hoc arbitration, the schedule of fees approved by the IBP, if any, or, in default thereof, a schedule of fees that may be approved by the Office for Alternative Dispute Resolution ("OADR").

In addition to the arbitrators' fees, the parties shall be responsible for the payment of the administrative fees of an arbitration institution administering an arbitration and the cost of the arbitration. The latter shall include, as appropriate, the fees of an expert appointed by the arbitral tribunal, the expenses for conducting a site inspection, the use of a room where arbitration proceedings shall be or have been conducted, and expenses for the recording and transcription of the arbitration proceedings.

The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:

- (a) the fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the arbitral tribunal itself;
- (b) the travel and other expenses incurred by the arbitrators;
- (c) the costs of expert advice and of other assistance required by the arbitral tribunal, such as site inspection and expenses for the recording and transcription of the arbitration proceedings;
- (d) the travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- (e) the costs for legal representation and assistance of the successful party if such costs were claimed during the arbitration proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable; and
- (f) any fees and expenses of the appointing authority.

Under the CIAC Rules, arbitration costs shall include filing and administrative fees, arbitrators' fees, Arbitrator's Development Fund ("ADF") charges, the fee and expenses of the expert, and other costs which may be imposed by the CIAC. The CIAC may fix the fees of the arbitral tribunal at a figure higher or lower than that which would result from the application of the table of fees if, in the exceptional circumstances of the case, it appears to be necessary.⁵¹

⁵¹ Rule 22, CIAC Rules.

32. Who pays the costs of the arbitration?

The costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

With respect to the costs of legal representation and assistance, the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

IX. Mediation

33. Is there a National Mediation Centre?

Yes. The Philippine Mediation Center (“PMC”) in cases of “court-annexed” (ie in civil cases where a court has already acquired jurisdiction) mediation; the National Center for Mediation (“NCM”) and the PDRCI in cases of voluntary mediation; and the CIAC in cases of construction mediation.

34. Is mediation compulsory?

No. But if the parties are willing to settle amicably the following cases, court-annexed mediation is possible:

- (a) all civil cases, settlements of estates and cases covered by the Rules on Summary Procedure, except those which by law may not be compromised;
- (b) cases cognisable by the Lupong Tagapamayapa under the Katarungang Pambarangay Law;
- (c) the civil aspect of BP 22 (Bouncing Checks Law) cases; and
- (d) the civil aspect of quasi-offences under Title 14 of the Revised Penal Code.⁵²

⁵² Supreme Court Circular on the Second Revised Guidelines for the Implementation of Mediation Proceedings, A.M. No. 01-10-5-SC-PHILJA, 16 October 2001.

35. How is mediation conducted?

In the case of a court-annexed mediation, the trial court, after determining the possibility of an amicable settlement or of a submission to alternative modes of dispute resolution, shall issue an order referring the case to a PMC unit for mediation and directing the parties to proceed immediately to that PMC unit. There shall be a PMC unit in courthouses or near the premises of the trial court for court-annexed mediation proceedings.

The supervisor of the PMC unit shall assist the parties select a mutually acceptable mediator from a list of duly accredited mediators and inform the parties about the fees, if any, and the mode of payment. If the parties cannot agree on a mediator, then the supervisor shall assign the mediator. The trial court shall immediately be notified of the name of the mediator, and shall thereafter confirm the selection/appointment of the mediator.

A Court-annexed mediation shall follow the following procedure:

- (a) The mediator shall be considered as an officer of the court.
- (b) A conference before the mediator shall first be held with both parties present. The mediator shall explain the mediation proceedings stressing the benefits of an early settlement of the dispute and shall attempt immediate settlement. If no settlement is reached at this conference, the mediator may, with the consent of both parties, hold separate caucuses with each party to enable the mediator to determine their respective real interests in the dispute. Thereafter, another joint conference may be held to consider various options proposed by the parties to the mediator to resolve the dispute.
- (c) The mediator shall not record the proceedings in any manner but he may take down personal notes to guide him.
- (d) The mediator shall submit to the trial court that referred the case to mediation a status report on the progress of the proceedings at the end of the mediation period.
- (e) The PMC shall not keep a file of mediation proceedings except the report of the mediator. All other records or documents that have been submitted by the parties shall be returned to them.
- (f) At the end of the 30-day period allowed by the trial court, if no settlement has been reached, the case must be returned to the trial court for further proceedings, unless the parties agree to continue the mediation further, in which case a last extension of 30-days may be granted by the trial court.⁵³

In voluntary mediation proceedings, the following stages shall be followed:

- (a) opening statement of the mediator;
- (b) individual narration by the parties;
- (c) exchange by the parties;
- (d) generation and evaluation of options;
- (e) closure.

The mediation shall be closed:

- i) by the execution of a settlement agreement by the parties;
- ii) by the withdrawal of a party from mediation; or
- iii) by the written declaration by the mediator that a further effort at mediation would not be helpful.

In case of mediation under the CIAC, a party may initiate the mediation by delivering a written request for mediation (“RFM”) to the other party. Such RFM shall contain a brief self-explanatory statement of the nature of the dispute, the amount in dispute (if any) and the relief and/or remedy sought. The RFM should also nominate a mediator or mediators, together with contact details and any other conditions of appointment of such mediator or mediators. A copy of the RFM shall be sent to the CIAC.⁵⁴

The party who receives the RFM shall notify the other party and the CIAC within five calendar days after receipt of the RFM if it consents to settle the dispute by mediation and if any of the mediators nominated by the initiating party is acceptable. If such mediator or mediators is/are not acceptable to the party who receives the RFM, the parties shall endeavour to reach agreement on the name of an acceptable mediator within another period of five calendar days. If the party who receives the RFM objects to the settlement of the dispute by mediation under the CIAC Mediation Rules or fails to notify the CIAC of its consent to mediate within the prescribed period, the party initiating the mediation shall be notified by the CIAC that the mediation cannot proceed.⁵⁵

Where the parties agree on a common mediator from the roster of CIAC-accredited mediators and the proposed mediator is willing to serve, and is not disqualified, they will notify the CIAC thereof and the CIAC shall appoint such mediator. The parties and the mediator shall sign the Agreement to Proceed with the Mediation. The mediation shall then proceed under the CIAC Mediation Rules.⁵⁶

⁵³ Supreme Court Circular A.M. No. 01-10-5-SC-PHILJA, 16 October 2001.

⁵⁴ Section 7, CIAC Mediation Rules.

⁵⁵ Section 8, *Id.*

⁵⁶ Section 9, *Id.*

36. What are the costs of mediation?

Mediation costs shall include the administrative charges of the mediation institution under which the parties have agreed to be bound, the mediator's fees, and associated expenses, if any.

In default of agreement of the parties as to the amount and manner of payment of the mediation costs and fees, the same shall be determined in accordance with the applicable internal rules of the mediation service providers under whose rules the mediation is conducted. In ad hoc mediation, the parties are free to make their own arrangement as to the mediation costs and fees; in default thereof, the schedule of costs and Fees approved by the OADR shall be followed.

For court-annexed mediation, the following are the mediation fees as provided for under A.M. No. 04-2-04-SC:

A. Trial Courts

Five hundred pesos (Php 500)

- upon the filing of a complaint or an answer with a mediatable permissive or compulsory counterclaim or cross-claim, complaint-in-intervention, third-party complaint, fourth-party complaint, etc. in civil cases; a petition, an opposition and a creditors' claim in special proceedings;
- upon the filing of a complaint/information for offences covered by the Katarungang Pambarangay Law; violation of BP 22; estafa; and libel cases where damages are sought;
- upon the filing of a complaint/information for quasi-offences under Title 14 of the Revised Penal Code;
- upon the filing of a notice of appeal with a Regional Trial Court;

One Thousand Pesos (Php 1,000)

- upon the filing of a notice of appeal with the Court of Appeals or the Sandiganbayan.

B. Court of Appeals, Sandiganbayan, and Court of Tax Appeals ("CTA")

One Thousand Pesos (Php 1,000)

- upon the filing of a mediatable case, petition, special civil action, a comment/answer to the petition or action and the appellee's brief;
- for appeals of decisions of the CTA Division to the CTA En Banc.

For voluntary mediation under the NCM, the proposed mediation fees to be charged per case are seven thousand pesos (Php 7,000) which include the administrative fees to cover communication and other logistics expenses. A separate mediator's fee will likewise be charged and this will basically depend on the skill level of the mediator.

For mediation under the CIAC Mediation Rules, each party, unless otherwise agreed, shall bear its own cost regardless of the outcome of the mediation. The expenses of witnesses for either side shall be paid by the party producing such witness. All other expenses of the mediation including the mediator's fees and other expenses of the mediator and representatives of the CIAC, the cost of any expert witness produced at the direct request of the mediator, the CIAC administrative fees and other related charges shall be borne equally by the parties, unless they agree otherwise.

Sum in dispute ("SID")	Arbitrator's fee	Maximum amount	Mediation fee	Maximum amount
1st Php 1m	2% of the SID	20,000	1% of the SID	10,000
Next 4m - 5m	20,000 + 1% in excess of 1m	60,000	10,000 + 0.50% in excess of 1m	30,000
Next 5m - 10m	60,000 + 0.75% in excess of 5m	97,500	40,000 + 0.375% in excess of 5m	48,750
Next 10m - 20m	97,500 + 0.50% in excess of 10m	147,500	65,000 + 0.25% in excess of 10m	73,750
Next 20m - 50m	147,500 + 0.20% in excess of 20m	207,500	90,000 + 0.10% in excess of 20m	103,750
Next 50m - 100m	207,500 + 0.10% in excess of 50m	257,500	120,000 + 0.05% in excess of 50m	128,750
Above 100m	257,500 + 0.05% in excess of 100m		145,000 + 0.025% in excess of 100m	

Breakdown: 10% filing fee; 30% administrative fee; and 60% mediator's fee

Payment schedule: 20% upon filing of request for mediation;

30% upon appointment of mediator; and

50% upon formulation of the settlement agreement or termination of the proceedings.

X. Settlement

37. What are the opportunities for settlement?

Parties may settle at any stage of the arbitration or mediation proceedings. Settlement should be addressed as soon as the issues in the dispute have been identified.

Under the CIAC Rules, the parties shall be free to settle the dispute(s) any time even if the same is under arbitration. In such case, the actual expenses incurred for arbitration shall be charged against the deposit. If the deposit is insufficient, the parties shall shoulder the balance equally.⁵⁷

38. How is any settlement agreement enforced?

If the parties settle their dispute(s) during the course of the arbitration, the parties may jointly either withdraw or submit their compromise agreement to the CIAC for the rendition of an award. The arbitral tribunal, upon their request, may set forth the agreed settlement as an arbitral award.⁵⁸

In CIAC mediation, a compromise agreement settled by mediation under the CIAC Mediation Rules shall be treated as an arbitral award if so expressly stipulated by the parties in the settlement agreement.⁵⁹

In mediation of other disputes (ie other than construction disputes cognisable by the CIAC) the parties, if they so desire, may deposit the settlement agreement with the appropriate Clerk of a Regional Trial Court of the place where one of the parties resides. Where there is a need to enforce the settlement agreement, a petition may be filed by any of the parties with the same court, in which case the court shall proceed summarily to hear the petition, in accordance with such rules of procedure as may be promulgated by the Supreme Court.⁶⁰

⁵⁷ Section 21.7, rule 21, CIAC rules.

⁵⁸ Section 16.4, rule 16, and section 21.7.1, rule 21, Id.

⁵⁹ Section 16.4.1, rule 16, CIAC Rules.

⁶⁰ Section 17(c), ADR Law.

XI. The Role Of The Local Courts

39. What are the powers of the local courts?

The following are the instances wherein courts may supervise or assist in arbitration:

(a) Referral to arbitration

A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting the Court first statement on the substance of the dispute, refer the parties to arbitration unless finds that the agreement is null and void, inoperative or incapable of being performed.⁶¹

(b) Appointment of arbitrator

In an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within 30-days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30-days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in the UNCITRAL Model Law. In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in the UNCITRAL Model Law.⁶²

(c) Challenge procedure

If a challenge under any procedure agreed upon by the parties or under the procedure provided for under the UNCITRAL Model Law is not successful, the challenging party may request, within 30-days after having received notice of the decision rejecting the challenge, the court or other authority specified in the UNCITRAL Model Law to decide on the challenge, whose decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitration proceedings and make an award.⁶³

⁶¹ Article 8, UNCITRAL Model Law.

⁶² Article 11, UNCITRAL Model Law.

⁶³ Article 13, Id.

(d) Jurisdiction of arbitral tribunal

The arbitral tribunal may rule on a plea that it does not have jurisdiction either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30-days after having received notice of that ruling, the court to decide the matter, whose decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitration proceedings and make an award.⁶⁴

(e) Setting aside of arbitral award

Recourse may be made to a court against an arbitral award by an application only on the grounds provided for under the UNCITRAL Model Law and within three months from the date on which the party making the application had received the award, or from the date on which that request had been disposed of by the arbitral tribunal, if a request had been made under article 33 of the UNCITRAL Model Law.⁶⁵

(f) Assistance in taking evidence

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.⁶⁶

(g) Recognition of arbitration agreement

A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.⁶⁷

(h) Recognition and enforcement of arbitral awards

An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of the UNCITRAL Model Law.⁶⁸

(i) Interim relief

It is not incompatible with an arbitration agreement for a party to request, before constitution of the arbitral tribunal, from a court an interim measure of protection

⁶⁴ Article 16, *Id.*

⁶⁵ Article 34, *Id.*

⁶⁶ Article 27, *Id.*

⁶⁷ Articles 8 & 9, *Id.*

⁶⁸ Articles 35 & 36, *Id.*

and for the court to grant such measure. After constitution of the arbitral tribunal and during arbitration proceedings, a request for an interim measure of protection, or modification thereof, may be made with the arbitral tribunal or, to the extent that the arbitral tribunal has no power to act or is unable to act effectively, the request may be made with the court. The arbitral tribunal is deemed constituted when the sole arbitrator or the third arbitrator, who has been nominated, has accepted the nomination and written communication of the said nomination and acceptance has been received by the party making the request.

The following rules on interim or provisional relief shall be observed:

- (i) Any party may request that provisional relief be granted against the adverse party.
- (ii) Such relief may be granted:
 - (A) to prevent irreparable loss or injury;
 - (B) to provide security for the performance of any obligation;
 - (C) to produce or preserve any evidence; or
 - (D) to compel any other appropriate act or omission.
- (iii) The order granting provisional relief may be conditional upon the provision of security or any act or omission specified in the order.
- (iv) Interim or provisional relief is requested by written application transmitted by reasonable means to the court or arbitral tribunal, as the case may be, and the party against whom the relief is sought, describing in appropriate detail the precise relief, the party against whom the relief is requested, the ground for the relief, and the evidence supporting the request.
- (v) The order shall be binding upon the parties.
- (vi) Either party may apply to the court for assistance in implementing or enforcing an interim measure ordered by an arbitral tribunal.
- (vii) A party who does not comply with the order shall be liable for all damages resulting from non-compliance, including all expenses and reasonable attorney's fees, paid in obtaining the order's judicial enforcement.⁶⁹

⁶⁹ Articles 28 and 29, ADR Law.

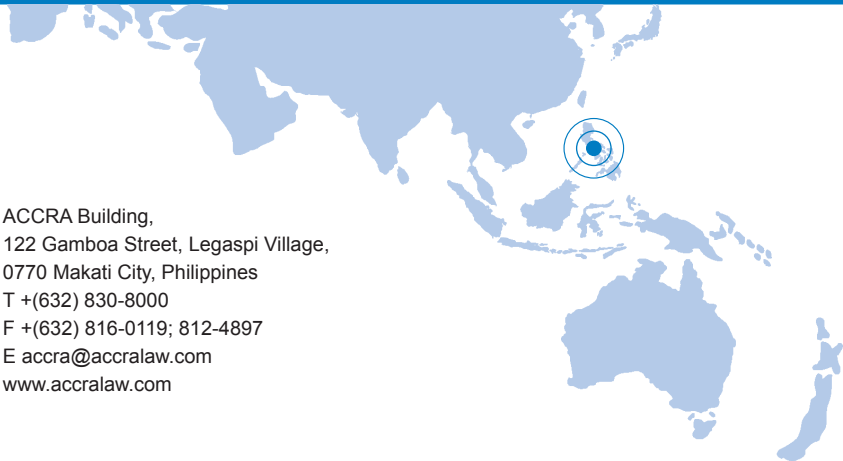


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PHILIPPINE DISPUTE RESOLUTION CENTER, INC. (PDRCI)

The Philippine Dispute Resolution Center, Inc. (PDRCI) is a non-stock, non-profit organization incorporated in 1996 out of the Arbitration Committee of the Philippine Chamber of Commerce and Industry for the purpose of promoting and encouraging the use of arbitration as an alternative mode of settling commercial transaction disputes and providing dispute resolution services to the business community. Its membership is composed of prominent lawyers, members of the judiciary, academicians, arbitrators, bankers, and businessmen.

PDRCI has broadened its scope of arbitration advocacy mission. It administers arbitration in specialized fields, such as maritime, banking, insurance, securities, and intellectual property disputes.

With the trade globalization, PDRCI has forged cooperation agreements with foreign arbitration centers such as the Korean Commercial Arbitration Board, the Indian Council of Arbitration, the Indonesian National Board of Arbitration, the Singapore International Arbitration Center, and the Hong Kong International Arbitration Centre. It has also networked with the various committees of the International Chamber of Commerce, among which is the International Court of Arbitration. PDRCI is also one of the founding members of the Asia Pacific Regional Arbitration Group which held its inaugural meeting last November 2, 1994 in Sydney, Australia.

Functions/Activities/Services

PDRCI offers the following disputes resolution services:

- administration of commercial arbitration and mediation;
- appointment of arbitrators and mediators;
- organizing seminars on commercial arbitration;
- providing training and accreditation;
- networking with various international arbitration centers;
- referral services; and
- information on arbitration agreements, rules and arbitration law and practice

In addition, PDRCI has a system for accreditation of arbitrators and mediators. It maintains a panel of local arbitrators and a panel of foreign arbitrators.

PDRCI has been actively involved in the information dissemination on legislative matters concerning arbitration, trade law and commerce.

10.

Singapore

I. Arbitration Legislation

1. What legislation governs arbitration?

International arbitrations are governed by the Singapore International Arbitration Act (Cap. 143A) (“IAA”) while domestic arbitrations are governed by the Arbitration Act (Cap 10). For the purposes of this Guide, all future references shall be to international arbitrations under the IAA unless specified otherwise.

2. What is the basis of the arbitration legislation?

The UNCITRAL Model Law (“the Model Law”).

3. Does the legislation distinguish between international and domestic arbitration?

Yes: see the answer to Question 1 above. Singapore is also a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) and has enacted the Arbitration (International Disputes Investment) Act (Cap. 11) to implement the same.

II. Arbitration Agreement

4. What are the requirements of an enforceable arbitration agreement?

An “arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or a separate agreement.

The arbitration agreement must be in writing. An agreement is in writing if it is contained in a document signed by the parties; or in an exchange of letters, telexes, telegrams or other means of telecommunication which provide a record of the agreement; or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Further, a reference in a bill of lading to a charterparty or some other document containing an arbitration clause shall constitute an arbitration agreement if the reference is such as to make that clause part of the bill of lading.

III. National Arbitration Institute/Centre

5. Is there a National Arbitration Centre (“NAC”)?

Yes. It is the Singapore International Arbitration Centre (“SIAC”).

6. Does the NAC publish a set of procedural rules?

Yes. There are two sets of rules: one for international arbitrations and the other for domestic arbitrations.

7. Does the NAC publish a panel of recommended arbitrators?

Yes. There is an International Panel and a Regional Panel.

8. Does the NAC publish a recommended arbitration clause?

Yes. It is as follows:

“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (“SIAC Rules”) for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The Tribunal shall consist of _____ arbitrator(s) to be appointed by the Chairman of the SIAC.

The language of the arbitration shall be _____.”

9. Does the NAC administer arbitrations?

Yes. The key functions of the SIAC are:

- appointment of arbitrators when they cannot agree on an appointment;
- management of the financial and other practical aspects of arbitration;
- facilitation of the smooth progress of arbitration.

10. What are the NAC's costs?

Administration fee for international cases (effective 1 September 2002)

Amount of Claim / Counterclaim (S\$)	Administration Fee (S\$)
Up to \$250,000	\$2,750 (minimum)
\$250,001 - \$1,000,000	\$2,750 + 0.30% of excess over \$250,000
\$1,000,001 - \$5,000,000	\$5,000 + 0.15% of excess over \$1,000,000
\$5,000,001 - \$10,000,000	\$11,000 + 0.06% of excess over \$5,000,000
\$10,000,001 and above	\$14,000 + 0.03% of excess over \$10,000,000
Maximum	\$25,000

The administration fee includes the following:

- appointment or confirmation of appointment of the arbitrator including screening for possible conflicts of interest, negotiating and fixing fees and terms of appointment;
- management of all the financial aspects of the arbitration, including the collection of deposits, the monitoring of time spent on the case, the processing of the arbitral tribunal's bills and generally keeping accounts between the parties and the arbitral tribunal;
- monitoring and supervising the progress of the case;
- performing all the duties and functions which the Chairman, the Registrar and other officers of the SIAC are required by the arbitration rules to perform (eg challenge and replacement of arbitrators, settling the costs of the arbitration etc, except the taxation of costs);
- scrutiny of the arbitral award;

- arranging the logistics, facilities and services for hearings, including hearing rooms, transcription of evidence and interpretation;
- attending to all other clerical and administrative services.

The administration fee does not include the following:

- fees and expenses of the arbitral tribunal;
- usage cost for and in connection with the hearing (eg hearing rooms and equipment, transcription and interpretation services, etc);
- the SIAC's out-of-pocket expenses.

IV. Commencing Arbitration

11. How is arbitration commenced?

Unless otherwise agreed by the parties, arbitration proceedings commence when a request for that dispute to be referred to arbitration is received by the respondent.

12. Can litigation proceedings be stayed in favour of arbitration?

Yes. Under the IAA, where any party to an arbitration agreement to which the IAA applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.

The court shall make an order, upon such terms or conditions as it may think fit, staying the court proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative and incapable of being performed.

V. The Arbitral Tribunal

13. How is the tribunal appointed?

Parties are free to agree the appointment of the arbitral tribunal. Failing such agreement:

- (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the parties shall by agreement appoint the third arbitrator. Where the parties fail to agree the appointment of the third arbitrator within 30 days of receipt of a request to do so by either party, the appointment shall be made, upon the request of a party, by the Chairman of the SIAC;
- (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon the request of a party, by the Chairman of the SIAC.

14. Who is eligible for appointment?

Anyone is eligible. No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties. That said, the Chairman or sole arbitrator will not usually be of the same nationality as either party to the arbitration.

15. How is an appointment challenged?

First, the parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions below.

Failing such agreement, a party who 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 referred to in article 12 (2) of the Model Law (which concern the impartiality and independence of the arbitrator), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

If a challenge under any procedure agreed upon by the parties or under the procedure outlined above is not successful, the challenging party may request, within 30 days after having received notice of the decision rejecting the challenge, the Singapore High Court to decide on the challenge, whose decision shall be subject to no appeal. While such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitration proceedings and make an award.

16. How is the jurisdiction of the tribunal determined?

The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not in itself invalidate the arbitration clause.

17. What are the duties of the tribunal?

The arbitral tribunal is under a duty to treat the parties equally and give each party a full opportunity to present its case.

18. What are the powers of the tribunal?

The arbitral tribunal shall have powers to make orders or give directions to any party for:

- (a) security for costs;
- (b) discovery of documents and interrogatories;
- (c) giving of evidence by affidavit;
- (d) the preservation, interim custody or sale of property which is or forms part of the subject matter of the dispute;
- (e) samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject matter of the dispute;
- (f) the preservation and interim custody of any evidence for the purposes of the proceedings;
- (g) securing the amount in dispute;
- (h) ensuring that any arbitral award which may be made in the proceedings is not rendered ineffectual by the dissipation of assets by a party; and
- (i) an interim injunction or any other interim measure.

An arbitral tribunal shall, unless the parties to an arbitration agreement have (whether in the arbitration agreement or in any other document in writing) agreed to the contrary, have the power to administer oaths to or take affirmations of the parties and witnesses and adopt, if it thinks fit, inquisitorial processes.

An arbitral tribunal may, in determining the dispute:

- (a) award any remedy or relief that could have been ordered by the Singapore High Court if the dispute had proceeded in that Court;
- (b) award interest (including interest on a compound basis) on the whole or any part of any sum which:
 - (i) is awarded to any party, for the whole or any part of the period up to the date of the arbitral award; or
 - (ii) is in issue in the arbitration proceedings but is paid before the date of the arbitral award, for the whole or any part of the period up to the date of payment.

19. What are the liabilities of the tribunal?

An arbitrator shall not be liable for:

- (a) negligence in respect of anything done or omitted to be done in the capacity of arbitrator; and
- (b) any mistake in law, fact or procedure made in the course of arbitration proceedings or in the making of an arbitral award.

20. How are the costs of the tribunal fixed?

The arbitrators will usually agree their hourly rates with the parties before accepting the appointments. Parties will also usually agree to bear the costs of the arbitral tribunal in equal shares.

VI. The Arbitration Procedure

21. What procedural rules govern the arbitration?

The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, for example by adopting the procedural rules of the SIAC.

Failing such agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate and determine the admissibility, relevance, materiality and weight of any evidence submitted in the arbitration.

22. What evidential rules apply to the arbitration?

The parties can agree on the evidential rules, for example by adopting the evidential rules of the International Bar Association.

23. What is the language of the arbitration?

The parties are free to agree on the language of the arbitration proceedings. Failing such agreement, the arbitral tribunal shall determine the language to be used. This agreement or determination shall apply to any written statement, hearing, award, decision or other communication by the arbitral tribunal.

24. Who can appear as Counsel

There are no restrictions on who can appear as Counsel.

VII. The Arbitral Award

25. What is the form of the award?

The arbitral award shall be in writing and shall be signed by the arbitral tribunal. In arbitration proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

The arbitral award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the arbitral award is an award on agreed terms.

The arbitral award shall state its date and the place of arbitration and it shall be deemed to have been made at that place for the purpose of enforcement under the New York Convention of 1958. After the arbitral award is made, a copy signed by the arbitrators shall be delivered to each party.

26. What are the grounds for appeal against the award?

An arbitral award may be set aside by the court only if:

- (a) the party making the application furnishes proof that:
 - (i) a party to the arbitration agreement was under some incapacity; or
 - (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, in the absence of any express governing law, under Singapore law; or
 - (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present its case; or
 - (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or determines matters beyond the scope of the submission to arbitration, in which instance decisions on matters not submitted to arbitration may be set aside; or
 - (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with Singapore law or the agreement of the parties, which agreement must be in accordance with Singapore law; or
- (b) the court finds that:
 - (i) the subject matter of the dispute is not capable of settlement by arbitration under Singapore law; or
 - (ii) the arbitral award is in conflict with the public policy of Singapore.

27. How is the award enforced?

All orders or directions made or given by an arbitral tribunal in the course of an arbitration shall, by leave of the Singapore High Court or a judge thereof, be enforceable in the same manner as if they were orders made by a court. Therefore, an arbitral award may, with the permission of the Singapore High Court, be enforced in the same manner as a court judgment or an order such that judgment is entered in the same terms as that award.

28. How are foreign awards enforced?

Subject to the IAA, a foreign arbitral award is enforced in Singapore in the same way as an arbitral award made in Singapore is enforced, by application to the Singapore High Court.

Any foreign arbitral award which is enforceable may be relied upon by way of defence, set-off or otherwise in any legal proceedings in Singapore.

29. What are the grounds for objecting against enforcement?

The Singapore High Court may refuse an application to enforce a foreign arbitral award if the party against whom enforcement is sought establishes that:

- (a) the party, under the law applicable to them, is under some incapacity at the time when the agreement was made;
- (b) the arbitration agreement is not valid under the law to which the parties have subjected it or, in the absence of any express governing law, under the law of the country where the arbitral award was made;
- (c) the party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case in the arbitration proceedings;
- (d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration or contains a decision on a matter beyond the scope of the submission to arbitration;
- (e) the composition of the arbitral tribunal or the procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place; or
- (f) the award has not yet become binding or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the arbitral award was made.

VIII. Interest And Costs

30. Is interest payable on the amount awarded?

Yes. Where an arbitral award directs a sum to be paid, that sum shall, unless that award otherwise directs, carry simple interest as from the date of the arbitral award and at the same rate as a judgment debt.

31. How are the costs of the arbitration determined?

Any costs directed by an arbitral award to be paid shall, unless that award otherwise directs, be taxable by the Registrar of the SIAC.

32. Who pays the costs of the arbitration?

Costs usually follow the event such that the unsuccessful party pays. The parties can agree at the outset that each party bears its own costs and that the costs of the arbitration (mainly the arbitral tribunal) are shared equally.

IX. Mediation

33. Is there a National Mediation Centre?

Yes. The Singapore Mediation Centre (www.mediation.com.sg).

34. Is mediation compulsory?

No.

35. How is mediation conducted?

Mediation is an informal and non-adversarial problem-solving process.

A mediator, who may be a respected and senior member of the legal or another profession, facilitates this process by helping the parties to identify issues, to negotiate constructively and to explore settlement alternatives.

The parties make their own decisions usually with the help of their lawyers. Therefore, they retain complete control over the outcome and do not run the risk of having an adverse decision imposed upon them by a judge or arbitrator.

36. What are the costs of mediation?

Generally, the mediation fee will be charged according to the following scale:

Quantum of claim	Administration Fee (S\$)
Up to \$250,000	\$900 per party per day or part thereof
Above \$250,001 up to \$1,000,000	\$1,800 per party per day or part thereof
Above \$1,000,000 up to \$5,000,000	\$2,400 per party per day or part thereof
Above \$5,000,000	\$2,400 per party per day or part thereof plus 0.05% of the quantum above \$5,000,000

X. Settlement

37. What are the opportunities for settlement?

Parties may settle at any stage of the arbitration proceedings. Settlement should be addressed as soon as the issues in dispute have been identified.

38. How is any settlement agreement enforced?

If the parties agree to settle their dispute, then such settlement may be recorded in a settlement agreement in the form of an arbitral award on agreed terms which shall be treated as an award on an arbitration agreement and may, by leave of the Singapore High Court, be enforced in the same manner as a court judgment.

XI. The Role Of The Local Courts

39. What are the powers of the local courts?

(a) Stay of court proceedings

The Singapore High Court may order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative and incapable of being performed.

Where a court makes a stay order, the court may, for the purpose of preserving the rights of the parties, make such interim or supplementary orders as it may think fit in relation to any property which is the subject of the dispute to which the order under that subsection relates.

(b) Powers of subpoena

The Singapore High Court may order a witness residing in Singapore and/or documents in that witness' possession to appear before the arbitral tribunal.

(c) Enforcement

An award on an arbitration agreement may, by leave of the Singapore High Court, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of that award.

Notwithstanding article 34(1) of the Model Law, the Singapore High Court may, in addition to the grounds set out in article 34(2) of the Model Law, set aside the award of the arbitral tribunal if:

- (i) the making of that award was induced or affected by fraud or corruption; or
- (ii) a breach of the rules of natural justice occurred in connection with the making of that award by which the rights of any party have been prejudiced.

Subject to the IAA, a foreign arbitral award may be enforced in a court either by action or in the same manner as an award of an arbitrator made in Singapore is enforceable under section 19 of the IAA.

The answers above have been prepared jointly with Singapore Counsel, Nicholas Narayanan of Nicholas & Co.



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The Singapore International Arbitration Centre (“SIAC”) is Asia’s leading international arbitral institution. We offer parties a neutral and independent forum to resolve disputes by arbitration and provide institutional support by way of a complete suite of services.

Since our establishment in 1991, the SIAC has administered over 900 cases involving parties from the Americas, Europe, Asia and other parts of the world. The SIAC Secretariat also offers the benefit of a multinational and multilingual staff which can help bridge any gaps in disputes involving parties from foreign countries.

The SIAC administers arbitrations that fall under its rules of arbitration, and where parties so agree and request, in cases under the UNCITRAL Arbitration Rules. In references submitted to the SIAC, we take oversight of the case ensuring that parties experience an expedient and cost-effective arbitral process.

In administering cases, SIAC undertakes the following:

- It helps parties to appoint the arbitrators where they are unable to agree
- It manages the financial accounts of each case, according to published transparent guidelines
- It performs the scrutiny of arbitral awards to ensure that each award complies with procedural form

Additionally, in ad-hoc arbitrations seated in Singapore, SIAC assists parties in the appointment of the arbitral tribunal where they are unable to agree. The Deputy Chairman of the SIAC is the designated appointing authority under the International Arbitration Act (Cap 143A) and the Arbitration Act (Cap 10) of the Statutes of the Republic of Singapore.

The SIAC maintains an accredited panel of over 250 arbitrators from all over the world, with broad-based expertise and multilingual capabilities. Admission to the SIAC panel is based on strict admission criteria, implemented to uphold the highest professional standards.

Arbitration at the SIAC is designed to be affordable to users. SIAC’s administration fees are among the lowest of the world’s major arbitration institutions and fees are pegged to the amount of the claim or counterclaim submitted by the parties.

Arbitration at the SIAC is also a speedy process. In the less complex cases, parties can look to the resolution of their dispute within approximately 18 months from the commencement of proceedings. SIAC’s arbitration rules also provide the guideline of 45 days from the close of hearing for the decision of the arbitrator to be issued.

The SIAC is located in historic City Hall building, in the civic heart of Singapore and within close proximity to law firms, hotels and other amenities. We provide hearing rooms at competitive rates, each of which has natural sunlight, as well as full logistical and clerical support for the arbitration hearing.

For more information on SIAC or arbitration in Singapore generally, please visit www.siac.org.sg or contact the SIAC Secretariat.



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Singapore Mediation Centre – where there are no losers, only winners

Looking for a swift and satisfactory resolution to your disputes? The Singapore Mediation Centre (SMC) is the ideal place to go to!

With a credible and distinguished panel of mediators and neutral, including retired Supreme Court Judges, Senior Counsel and leaders from different professions and industries, such as engineers, doctors and architects, you can be assured that your disputes will be settled quickly and amicably.

Handled by the best mediators

Each mediator has to undergo rigorous training at the SMC and pass a series of mandatory assessments before they are admitted as mediators. This ensures that every case that comes to SMC will be handled by the most experienced and competent people.

Excellent track record

Since its formation to spearhead the mediation movement in Singapore in August 1997, over 1,300 civil disputes of all types (eg. construction, banking, information technology, intellectual property, shipping) and involving different quantum of claims (up to multi-million dollar disputes) have been referred for mediation at the SMC. An impressive 75% of these have successfully reached amicable settlements with more than 90% of these cases settled within one day.

Highly rated services and training workshops

SMC's reputation as the premier training institution in the field of negotiation, mediation and conflict management is well established in

Singapore and the region. It has also conducted overseas workshops in Austria, Cambodia, Malaysia, Malta, Mexico, the Philippines and Thailand. These training workshops are very highly rated among its clients and other professional institutions and are always fully subscribed.

A leader in mediation

SMC's experience and leadership in this field is well recognized. It has not only advised and worked with foreign judiciaries, government ministries and bar associations, but has also been engaged to train their pioneer groups of third party neutrals and helped establish their first panel of mediators.

Set in the most conducive of cities

One of the safest, cleanest and most well-connected cities in the world, Singapore is the natural place to go to mediate your disputes. Boasting an English-speaking population and the best infrastructure in Asia, there is nowhere else in Asia that is as convenient and conducive for mediation.

Enjoy full services at SMC!

We provide:

- purpose-built conducive mediation chambers with break-out rooms
- arrangement of mediation sessions within one to two weeks (or within 24 hours for urgent cases)
- comprehensive administrative and secretarial support
- lunch and refreshments
- competitive mediation fees (from US\$565 per party per day)

South Korea

11.

I. Arbitration Legislation

1. What legislation governs arbitration?

The Korean Arbitration Act ("KAA").

2. What is the basis of the arbitration legislation?

The UNCITRAL Model Law.

3. Does the legislation distinguish between international and domestic arbitrations?

No. Both international and domestic arbitrations are governed by the KAA. However, the KAA only applies where Korea is specified as the place of arbitration in the arbitration agreement.

Separately, in private disputes arising from commercial transactions (or generally "commercial acts" as defined in the Commercial Code), the parties may resort to the Korean Commercial Arbitration Rules ("KCAB Rules") of the Korean Commercial Arbitration Board ("KCAB").

II. Arbitration Agreement

4. What are the requirements of an enforceable arbitration agreement?

The term "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of defined legal relationships, whether the relationships are contractual or not (article 3(b), KAA). An arbitration agreement can be validly entered into at any time and in any form, either as a separate agreement or as a clause included in the main contract. In order for an arbitration agreement to be effective, it must be in writing. Oral agreements to arbitrate are not valid (article 8, KAA).

III. National Arbitration Institute/Centre

5. Is there a National Arbitration Centre ("NAC")?

Yes. The national arbitration centre in Korea is the KCAB. The KCAB is the only institutional arbitration body in Korea and is frequently used by Korean companies for the resolution of large commercial disputes.

6. Does the NAC publish a set of procedural rules?

Yes. The KCAB Rules.

7. Does the NAC publish a panel of recommended arbitrators?

No. The KCAB has not published a panel of recommended arbitrators but has an internal list of arbitrators.

8. Does the NAC publish a recommended arbitration clause?

Yes. The recommended arbitration clause is as follows:

"All disputes, controversies, or differences which may arise between the parties out of, or in relation to, or in connection with this contract, or for the breach thereof, shall be finally settled by arbitration in Seoul, Korea in accordance with the Arbitration Rules of the Korean Commercial Arbitration Board and under the Laws of Korea. The award rendered by the arbitrator(s) shall be final and binding upon both parties concerned."

9. Does the NAC administer arbitrations?

Yes. The key functions of the KCAB are:

- appointment of arbitrators when they cannot agree on an appointment;
- management of the financial and other practical aspects of arbitration;
- facilitation of the smooth progress of arbitration.

10. What are the NAC's costs?

The costs of a KCAB arbitration are comprised of the fees, expenses and allowances.

- (a) Fees - The fees shall be categorised into the administrative fee and the hearing postponement fees; provided, however, that if the arbitral tribunal postpones the date of hearing on its own initiative, the hearing postponement fees will not be assessed independently.

- (i) Administrative fee:

Amount of Claim	Amount of Fee(s)
KRW 10,000,000 or less	2% space (minimum KRW 50,000)
Over KRW 10,000,000 to KRW 50,000,000 or less	KRW 200,000 plus 1.5% of excess over KRW 10,000,000
Over KRW 50,000,000 to KRW 100,000,000 or less	KRW 800,000 plus 1% of excess over KRW 50,000,000
Over KRW 100,000,000 to KRW 5,000,000,000 or less	KRW 1,300,000 plus 0.5% of excess over KRW 100,000,000
Over KRW 5,000,000,000 to KRW 10,000,000,000 or less	KRW 25,800,000 plus 0.25% of excess over KRW 5,000,000,000
Excess over KRW 10,000,000,000	KRW 38,300,000 plus 0.2% of excess over KRW 10,000,000,000
In case no express claim amount is stated	KRW 1,000,000

- (ii) Hearing postponement fees: KRW 100,000 per postponement.

- (b) Expenses - All the expenses required for an arbitration, including the expenses of the arbitrators and KCAB clerks, the expenses of any proofs produced, the expenses of witnesses or expert witnesses, the expenses of inspection, interpretation or translation, tape recording, stenographic recording, and all transcripts thereof, shall be deposited in advance by the party requesting such services.
- (c) Cost of the arbitrators - The claimant party shall make an advance payment for the cost of the arbitrators as fixed by the KCAB.

IV. Commencing Arbitration

11. How is arbitration commenced?

Unless otherwise agreed by the parties, the arbitration proceedings in respect of a particular dispute shall commence on the date when an arbitration request for that dispute is received by the respondent (article 22(a), KAA).

12. Can litigation proceedings be stayed in favour of arbitration?

A court before which an action that is the subject of an arbitration agreement is brought shall, when the respondent raises a plea for the existence of an arbitration agreement, reject the action. This includes even the situation where the agreement between the parties is found to be null and void, inoperative, or incapable of being performed. Besides, even if a court action has been brought, arbitration proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court (article 9(1) and (3), KAA).

V. The Arbitral Tribunal

13. How is the tribunal appointed?

Parties may directly appoint arbitrators according to their arbitration agreement. In commercial arbitrations subject to the KCAB Rules, if the arbitration agreement neither identifies particular arbitrators nor specifies the number or method of selection, the KCAB will determine whether a sole arbitrator or a panel of three arbitrators is appropriate. Then, the KCAB will provide the parties with a shortlist of 10 candidates. Next, the parties place numbers next to the names of such candidates based on their order of preference, and the KCAB designates the arbitrators from the list. The KAA requires that potential arbitrators disclose any potential conflicts of interest at the time they are approached.

14. Who is eligible for appointment?

Any domestic or foreign person who is fit to render a “virtuous judgment” in arbitration is eligible to serve as arbitrator, except those who are specifically disqualified by law.

Foreign arbitrators are available to the parties. When foreign parties are involved in the arbitration, the KCAB Rules provide that the proceedings should be conducted in both English and Korean. But, due to practical considerations and since foreign arbitrators are usually on the arbitral tribunal in such cases, the proceedings are normally conducted only in English when foreign parties are involved. Also, if the arbitration is between a Korean party and a foreign party, the chairperson of the arbitral tribunal will be appointed from a neutral third country.

15. How is an appointment challenged?

The parties are free to agree on a procedure for challenging an arbitrator. In the absence of such an agreement, a party who intends to challenge an arbitrator shall send a written statement of the reason for the challenge to the arbitral tribunal within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances or grounds for challenge. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. If a challenge is not successful, the challenging party may request the Korean court to decide on the challenge within 30-days after having received notice of the decision rejecting the challenge. In this case, the arbitral tribunal may, even if such a request is pending in court, continue the arbitration proceedings or make an arbitral award. The Court's decision on a challenge is not subject to appeal (article 14, KAA).

16. How is the jurisdiction of the tribunal determined?

The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence unless some reason justifies a later jurisdictional challenge.

17. What are the duties of the tribunal?

According to article 19 of the KAA, the arbitral tribunal should treat the parties equally in the arbitration proceedings and should give each party a full opportunity to present its case. In fact, it is generally understood that the arbitral tribunal is under a duty of due care, a duty of acting fairly and judicially, a duty of acting with due diligence and a duty of confidentiality.

18. What are the powers of the tribunal?

The two main powers of the arbitral tribunal are to conduct the arbitration proceedings and to make arbitral awards. Specifically, the arbitral tribunal has the power to, *inter alia*:

- (a) decide on a challenge;
- (b) rule on its own jurisdiction;
- (c) order any party to take interim measures;
- (d) determine the admissibility, relevance and weight of any evidence;
- (e) determine the place of arbitration if the parties fail to agree;
- (f) determine language or languages if the parties fail to agree;
- (g) decide whether to hold oral hearings or whether the proceedings shall be only conducted on the basis of documents or other materials;
- (h) terminate the proceedings;
- (i) appoint one or more experts to report to it on specific issues in its own discretion if the parties fail to agree; and
- (j) request from a competent court of Korea assistance in taking evidence.

19. What are the liabilities of the tribunal?

There are no special rules on the liabilities of the arbitral tribunal and we have not found any court precedent regarding this issue. However, the arbitral tribunal, in principle, may be liable for mistakes arising from gross negligence or intentional tort.

20. How are the costs of the tribunal fixed?

Under the KAA, the parties are free to decide the cost of the arbitral tribunal, as there is no provision on the cost of the arbitral tribunals. In commercial arbitrations subject to the KCAB Rules, the claimant party should make an advance payment for the cost of the arbitral tribunal, as fixed by the KCAB. The KCAB generally determines the cost of the arbitral tribunal based on the claim amount and complexity of the case. The calculation method for the cost of the arbitral tribunal has not been published. However, the cost of the arbitral tribunal fixed by the KCAB is relatively inexpensive. According to the KCAB, it ranges from KRW 700,000 to approximately KRW 20,000,000. Meanwhile, the parties can freely agree on higher costs for the arbitral tribunal than those the KCAB has determined.

VI. The Arbitration Procedure

21. What procedural rules govern the arbitration?

Subject to the mandatory provisions of the KAA, the parties may agree on the arbitration proceedings. If the arbitration agreement specifies the procedures for arbitration, these will generally be given effect. As the KCAB is the only arbitration institution in Korea, it is frequently selected by Korean parties. However, designation of the International Chamber of Commerce arbitration rules, for example, is also effective.

In the absence of such an agreement, the arbitral tribunal may, subject to the provisions of the KAA, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal shall include the power to determine the admissibility, relevance, and weight of any evidence. Given this, to the extent the arbitration agreement fails to specify procedures to be followed, the KCAB Rules will generally be applied. Korean law also permits ad hoc arbitration. The KCAB Rules contain detailed provisions with respect to administrative arrangements, scheduling of hearings and other procedural matters. In principle, the arbitral tribunal may vary the procedure as it deems necessary, but in any event it must afford full and equal opportunity to both parties for the presentation of their cases.

22. What evidential rules apply to the arbitration?

There are no mandatory evidential rules under the KAA. Therefore, the parties can agree on the rules of evidence. Each party may offer, and the arbitral tribunal may request, any evidence it sees fit. Each party may request any witness or expert witness to voluntarily appear at the hearings. All evidence submitted must be examined in the presence of all the arbitrator(s) and both parties. If a witness is unwilling to appear, the arbitral tribunal may file an application with a competent court which can assist by compelling the witness to appear and be examined by the court.

23. What is the language of the arbitration?

The parties shall be free to agree on the language or languages to be used in the arbitration proceedings. Failing such agreement, the arbitral tribunal shall determine such language or languages; otherwise the Korean language shall be used (article 23(a), KAA).

24. Who can appear as Counsel?

Under the KAA, there are no restrictions on who can appear as Counsel. However, in arbitration proceedings governed by the KCAB Rules, the arbitral tribunal has the right to reject representation when it deems it to be improper (article 7, KCAB Rules).

VII. The Arbitral Award

25. What is the form of the award?

The arbitral award shall be made in writing and signed by all the arbitrators. If a minority of the arbitrators decline to sign, the arbitral award will take effect on signature by the other arbitrators with the reason stated therein.

The arbitral award shall state the reasons upon which it is based; however, this shall not apply if the parties have agreed that no reasons are to be given, or the arbitral award is an award on agreed terms.

The arbitral award shall state its date and place of arbitration and, in this case, it shall be deemed to have been made on that date and at that place.

26. What are the grounds for appeal against the award?

Arbitral awards are generally final and binding, ie, not subject to appeal on substantive legal or factual grounds. However, the following procedures shall be followed if permissible grounds for appeal (as set out in (b) below) exist:

- (a) Recourse against an arbitral award may be made only by an application for revocation to a court.
- (b) An arbitral award may be revoked by the court only if:
 - (i) the party making the application furnishes proof that:
 - (A) a party to the arbitration agreement was under some incapacity under the law applicable to it; or the agreement is not valid under the law to which the parties have subjected that agreement or, failing any such designation of law, under the law of the Republic of Korea;
 - (B) a party making the application was not given proper notice of the appointment of the arbitrator or arbitrators or of the arbitration proceedings or was otherwise unable to present its case;
 - (C) the arbitral award has dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; provided that if the decisions on the matters submitted to arbitration can be separated from those not submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

- (D) the composition of the arbitral tribunal or the arbitration proceedings were not in accordance with the agreement of the parties, unless such agreement was in conflict with any mandatory provision of the KAA, or, failing such agreement, were not in accordance with the KAA; or
- (ii) the court finds on its own initiative that:
 - (A) the subject matter of the dispute is not capable of settlement by arbitration under the law of the Republic of Korea; or
 - (B) the arbitral award is in conflict with the good morals and other forms of social order of the Republic of Korea.
 - (c) An application for setting aside the arbitral award may not be made after three months have elapsed from the date on which the party making that application has received the duly authenticated copy of that award or the duly authenticated copy of a correction or interpretation or an additional award.
 - (d) After a final and conclusive judgment for recognition or enforcement of the arbitral award by a court of the Republic of Korea is rendered, an application for setting aside that award may not be made.

27. How is the award enforced?

Recognition or enforcement of an arbitral award must be confirmed by the judgment of a court.

The party applying for recognition or enforcement of an arbitral award must submit, if that award or the arbitration agreement is made in a foreign language, a duly certified translation into the Korean language along with:

- (a) the duly authenticated original award or a duly certified copy thereof; and
- (b) the original arbitration agreement or a duly certified copy thereof.

An arbitral award issued in Korea is enforceable in other jurisdictions that are signatories to the UN Convention on the Recognition and Enforcement of Foreign Arbitration Awards ("New York Convention") under the New York Convention's rules.

28. How are foreign awards enforced?

Regarding foreign arbitral awards, Korea is a signatory to the New York Convention, but with two reservations: (i) the award must be for a dispute of a commercial nature; and (ii) the country where the arbitration is conducted must also be a signatory to the New York Convention. Subject to these reservations, Korean courts will enforce foreign arbitral awards in accordance with the New York Convention. In effect, this means they are treated very similarly to domestic arbitral awards. Likewise, arbitral awards issued in Korea are expected to enjoy equivalent enforceability in other New York Convention signatory countries. Korean courts tend to be very neutral and enforcement-friendly in relation to foreign arbitral awards.

Arbitral awards issued in countries that are not signatories to the New York Convention, while often enforced, are subject to certain restrictions. Such awards will not be enforced if the issuing country does not reciprocally recognise awards issued in Korea. Nor will such awards be enforced if deemed to violate the good morals, social order or other public policy of Korea - a principle which is occasionally relied on in refusing enforcement of foreign awards from non-New York Convention signatory countries. In any case, parties seeking enforcement of non-Korean language awards in Korean courts are also required to furnish the court with a certified translation of the award.

29. What are the grounds for objecting against enforcement?

If a party fails to comply with an arbitral award rendered in Korea, the other party may petition a Korean court for an enforcement order. In turn, the non-complying party may apply to the court to decline enforcement of the award. In practice, however, such applications are rarely granted, and courts will only set aside arbitral awards under extraordinary circumstances, such as the invalidity of the arbitration agreement, illegality, fraud, and so on. Moreover, once an enforcement order from a court becomes final and conclusive, parties are thereafter barred from seeking to have the arbitral award set aside.

Additionally, enforcement of an arbitral award may be deferred pending an appeal. Grounds for appeal are listed in paragraph 26 above. However, the party that obtained the arbitral award may seek an order of provisional enforcement by filing a security deposit (in cash, bond or other permitted form) with the court guaranteeing the amount of the arbitral award and generally showing cause.

VIII. Interest And Costs

30. Is interest payable on the amount awarded?

Yes. Where an arbitral award directs a sum to be paid, that sum shall, unless such award otherwise directs and the parties otherwise agree, carry statutory interest (5%-6% per annum) from the date of default of the obligation to the date of full payment. However, higher statutory interest (up to 20% per annum) can be applied from the date of an arbitral award in the discretion of the arbitral tribunal.

31. How are the costs of the arbitration determined?

See paragraphs 10 and 20 above. In the case of a KCAB arbitration, the claimant must make an advance payment to the Secretariat for the arbitration costs at the time of requesting an arbitration. If the amount of advance payment is later deemed insufficient, the Secretariat may demand that the claimant make an additional payment. If the claimant fails to make an advance payment, or the respondent does not pay in lieu of the claimant, the arbitral tribunal may decide to terminate the proceedings. The Secretariat prepares an accounting statement of the advance payment when the hearing is closed and a balance statement when the arbitral award is made. After delivery of the arbitral award, enclosed with the balance statement, the Secretariat shall refund any balance to the parties concerned.

32. Who pays the costs of the arbitration?

Ultimately, the costs of arbitration shall be borne by the parties in accordance with the apportionment fixed in the arbitral award. By default, arbitration costs are to be borne equally by the parties unless the arbitral award assesses such costs of arbitration or any part thereof against any party specified in that award. Frequently, the losing party bears the cost of its own and the other parties' costs and fees in the arbitration.

IX. Mediation

33. Is there a National Mediation Centre?

No. There is no National Mediation Centre in Korea. However, the main bodies that offer mediation services are:

- the KCAB, which offers mediation services as well as arbitration services;
- the courts, which include conciliation proceedings as part of court proceedings;
- government-run dispute settlement committees, which sometimes resolve certain categories of non-commercial disputes, such as:
 - internet domain disputes;
 - media disputes; and
 - family disputes.

34. Is mediation compulsory?

No. In general, mediation is not compulsory. However, some kinds of disputes such as internet domain disputes, media disputes, construction disputes, etc must go to mediation before litigation or arbitration may be commenced. Mediation is also available at the request of both parties to the dispute.

35. How is mediation conducted?

Formal mediation will generally be conducted by third parties outside the judicial system. However, parties to a dispute, whether or not already engaged in litigation, may also apply to a court to undertake mediation. During litigation, the court may order the parties to submit their dispute to mediation, which the court may conduct itself.

36. What are the costs of mediation?

It depends on the mediation body. Usually, the mediation performed by national bodies, such as the courts, the Ministry of Information and Communication, and the Ministry of Construction and Transportation, is free.

X. Settlement

37. What are the opportunities for settlement?

Parties may settle at any stage of the arbitration proceedings.

38. How is any settlement agreement enforced?

If requested by the parties, the arbitral tribunal may record the settlement in the form of an arbitral award on agreed terms. Such arbitral award shall have the same effect as any other award on the merits of the case and can be enforced through the recognition or enforcement of an award by a court.

XI. The Role Of The Local Courts

39. What are the powers of the local courts?

The KAA designates the following powers to the Korean courts:

- (a) power to grant and enforce interim measures of protection, such as provisional attachment of assets or provisional injunction;
- (b) appointment of an arbitrator or arbitrators in the event that the parties cannot agree or the selection procedure is not followed properly;
- (c) hearing and reviewing decisions made by the constituted arbitral tribunal regarding challenges to an arbitrator's involvement;
- (d) review of decisions by the arbitral tribunal on its own jurisdictional authority;
- (e) review of decisions by the arbitral tribunal concerning a party's challenge of an expert;
- (f) assistance in the compulsory taking of evidence;
- (g) deposit of the original copy of the arbitral award;
- (h) revocation of an arbitral award; and
- (i) recognition or enforcement of an arbitral award.



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KCAB

- is the only authorized arbitral institution in Korea since 1966.
- covers every type of commercial disputes arising from construction, maritime, e-commerce, IP, IT, finance, contracts and etc.
- resolves more than 200 arbitration cases yearly.
- '05: 213 cases (Domestic: 160, International: 53)
- Panel of Arbitrators: 972 (Korean: 861, Foreigner: 111)

Newly established International Arbitration Rules

- fully incorporated the rules of the leading arbitral bodies worldwide such as ICC Rules to revitalize KCAB's international arbitration system.
- drastically modified the current Arbitrators' Fee Schedule
- The hourly rate ranges from US\$ 250 to US\$ 500.
- are expected to be a new tool for the KCAB to lead the arbitration culture in Asia.

Standard Arbitration Clause

"All disputes, controversies, or difference which may arise between the parties, out of or in relation to or in connection with this contract, or for the breach thereof, shall be finally settled by arbitration in Seoul, Korea, in accordance with the International Arbitration Rules of The Korean Commercial Arbitration Board and under the Law of Korea. The award rendered by the arbitrators(s) shall be final and binding upon both parties concerned."

Taiwan

12.

I. Arbitration Legislation

1. What legislation governs arbitration?

The Arbitration Law ("AL")

2. What is the basis of the arbitration legislation?

The UNCITRAL Model Law.

3. Does the legislation distinguish between international and domestic arbitrations?

No. The AL applies to both domestic and international arbitrations.

II. Arbitration Agreement

4. What are the requirements of an enforceable arbitration agreement?

An "arbitration agreement" is an agreement between the parties to submit to arbitration any dispute that has arisen or may arise in connection with a defined legal relationship between themselves. Arbitrable disputes are limited to those that are permitted by law to be amicably settled by the parties. An arbitration agreement may be in the form of an independent contract or an arbitration clause in a contract. If it is a clause in a contract, the validity of such clause should be determined separately from the rest of the contract.

An arbitration agreement must be in writing. Written documents, documentary instruments, correspondence, facsimiles, telegrams or any other similar types of communications between the parties that may evince the parties' mutual intention to arbitrate will be deemed to constitute an arbitration agreement.

III. National Arbitration Institute/Centre

5. Is there a National Arbitration Centre (“NAC”)?

According to the AL, arbitration institutions may be solely or jointly established by any professional or social organisation of any level. Arbitration institutions should be responsible for the registration of arbitrators, and the cancellation thereof, and for the handling of arbitration matters.

Currently, there are four national arbitration institutions. They are:

- Arbitration Association of the Republic of China ("AA"; established 1955);
- Taiwan Construction Arbitration Association ("TCAA"; established 2001);
- Chinese Construction Arbitration Association ("CCAA"; established 2002); and
- Employment Dispute Arbitration Association of the ROC ("EDAA"; established 2001).

6. Does the NAC publish a set of procedural rules?

The AA and the CCAA publish their own respective procedural rules.

7. Does the NAC publish a panel of recommended arbitrators?

All four NACs maintain their own panels of arbitrators. To register as an arbitrator, a person should have legal or other professional knowledge or experience, or a reputation for integrity and impartiality. However, arbitrators of a specific case are not limited to those registered with any NAC.

8. Does the NAC publish a recommended arbitration clause?

The AA publishes a recommended arbitration clause as follows:

"All disputes, controversies, differences or claims arising out of, relating to or connecting with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration referred to the Arbitration Association of the Republic of China in accordance with the Arbitration Law of the Republic of China and the Arbitration Rules of Chinese [sic] Arbitration Association, Taipei. The place of arbitration shall be in Taiwan. The award rendered by the Arbitrator(s) shall be final and binding upon both parties concerned."

9. Does the NAC administer arbitrations?

Yes. The key functions of the NACs are:

- Appointment of chair arbitrator or the sole arbitrator if the appointed arbitrators or the parties fail to reach an agreement.
- Appointment of an arbitrator for one party if such party fails to appoint an arbitrator upon notice.
- Administrative support to arbitration proceedings.

10. What are the NAC's costs?

The arbitration fee is set by the Rules on Arbitration Institutions, Mediation Procedure and Fees as jointly promulgated by the Executive Yuan (the administrative branch of the government) and the Judicial Yuan (the judicial branch of the government).

For arbitration regarding monetary disputes, in addition to the NT\$600 net cost for the forms and information for application, the arbitration fee shall be calculated according to the amount or value of the subject matter pursuant to the following standards:

- Where the amount or value of the subject matter is NT\$60,000 or less, the arbitration fee shall be NT\$3,000.
- Where the amount or value of the subject matter is greater than NT\$60,000 and up to NT\$600,000, the arbitration fee for the amount exceeding NT\$60,000 shall be 4%.
- Where the amount or value of the subject matter is greater than NT\$600,000 and up to NT\$1,200,000, the arbitration fee for the amount exceeding NT\$600,000 shall be 3%.
- Where the amount or value of the subject matter is greater than NT\$1,200,000 and up to NT\$2,400,000, the arbitration fee for the amount exceeding NT\$1,200,000 shall be 2%.

- Where the amount or value of the subject matter is greater than NT\$2,400,000 and up to NT\$4,800,000, the arbitration fee for the amount exceeding NT\$2,400,000 shall be 1.5%.
- Where the amount or value of the subject matter is greater than NT\$4,800,000 and up to NT\$9,600,000, the arbitration fee for the amount exceeding NT\$4,800,000 shall be 1%.
- Where the amount or value of the subject matter is greater than NT\$9,600,000, the arbitration fee for the amount exceeding NT\$9,600,000 shall be 0.5%.

For arbitration regarding non-monetary disputes, the arbitration fee shall be NT\$9,000. For a non-monetary dispute with a monetary claim appended, the arbitration fee shall be calculated separately.

The value of the arbitration subject matter shall be determined by the arbitral tribunal. In case the value of the arbitration subject matter cannot be determined, the value shall be deemed as NT\$60,000.

The arbitration fee does not include the following:

- expenses for making copies, translations, mail and telecommunications, delivery and publication in newspapers, and other necessary expenses related to the arbitration: these shall be calculated based on actual costs;
- attendance fees for witnesses: from NT\$600 up to NT\$1,200 each time, as determined by the arbitral tribunal;
- attendance fees for expert witnesses and interpreters: from NT\$900 up to NT\$1,800 each time, as determined by the arbitral tribunal;
- a lodge fee, in addition to the attendance fee, for an expert witness or an interpreter staying, due to inquiry or translation, for more than one day: from NT\$900 up to NT\$1,800, as determined by the arbitral tribunal;
- travelling and accommodation expenses for an arbitrator's evidence taking and the travelling and accommodation expenses for witnesses, expert witnesses and interpreters: an amount as determined in accordance with the standard established by the arbitration institution; or
- fees for expert witnesses: an amount as determined by the arbitral tribunal, at its discretion, subject to the complexity of the case.

IV. Commencing Arbitration

11. How is arbitration commenced?

A claimant should provide written notice to the respondent when the dispute is submitted to arbitration. Unless otherwise agreed by the parties, the arbitration proceedings commence on the date when the respondent receives the written notice.

12. Can litigation proceedings be stayed in favour of arbitration?

Yes. In the event that one of the parties to an arbitration agreement initiates a legal action, the court may, upon application by the other party, stay the legal action and order the plaintiff to submit to arbitration within a specified time period, unless the defendant proceeds to respond to the legal action. If the plaintiff fails to submit to arbitration within the specified time period, the court shall dismiss the legal action. If the plaintiff has submitted to arbitration, the legal action will be deemed to have been withdrawn at the time when an arbitral award is made.

V. The Arbitral Tribunal

13. How is the tribunal appointed?

Parties are at liberty to agree on the appointment of the arbitral tribunal or the method of appointment. In the absence of such agreement, each party shall appoint an arbitrator for itself. The two appointed arbitrators shall then agree on a third arbitrator to be the chair arbitrator. If a party fails to appoint an arbitrator on its part within 14 days of notice by the other party, the other party may apply to an arbitration institution or the court to make the appointment for the failing party. If the two appointed arbitrators fail to agree on the chair arbitrator within 30 days of their appointment, either party may apply to the court or, if the arbitration is to be administered by an arbitration institution, to the arbitration institution for the appointment of the chair arbitrator.

Where an arbitration is to be conducted by a sole arbitrator and the parties fail to agree on an arbitrator within 30 days upon the receipt of a written request to appoint by either party, the appointment shall be made by a court, or, if the arbitration is to be administered by an arbitration institution, by an arbitration institution upon the application of either party.

14. Who is eligible for appointment?

According to the AL, to act as an arbitrator a person must possess legal or other professional knowledge or experience, a reputation for integrity and impartiality, and any of the following qualifications:

- having served as a judge or public prosecutor;
- having practised for more than five years as a lawyer, accountant, architect, mechanic or in any other commerce-related profession;
- having acted as an arbitrator of a domestic or foreign arbitration institution;
- having taught as an assistant professor or higher post in a domestic or foreign university certified or recognised by the Ministry of Education; or
- being a specialist in a particular field or profession and having practised for more than five years.

A person falling into any of the following categories shall not be an arbitrator:

- having been convicted of a criminal offence for corruption or malfeasance;
- having been convicted of any offence other than those in the preceding category and sentenced to serve a prison term of one year or more;
- having been disfranchised;
- having been made bankrupt;
- having been interdicted; or
- being a minor.

15. How is an appointment challenged?

A party may challenge an arbitrator in any one of the following circumstances:

- where the arbitrator does not meet the qualifications agreed by the parties; or,
- where any of the following circumstances exists:
 - (a) the existence of any of the causes requiring an arbitrator to withdraw from the arbitration proceedings in accordance with article 32 of the Code of Civil Procedure, ie:
 - (i) where the arbitrator, or the arbitrator's spouse, former spouse or fiancée, is a party to the proceedings;

- (ii) where the arbitrator is or was either a blood relative within the eighth degree, or a relative by marriage within the fifth degree, to a party to the proceedings;
 - (iii) where the arbitrator, or the arbitrator's spouse, former spouse or fiancée is a co-obligee or co-obligor with, or an indemnitor to, a party to the proceedings;
 - (iv) where the arbitrator is or was the statutory agent of a party to the proceedings, or the head or member of the party's household;
 - (v) where the arbitrator is acting or did act as the advocate or assistant of a party to the proceedings;
 - (vi) where the arbitrator is likely to be a witness or expert witness in the proceedings;
 - (vii) where the arbitrator participated in making either the prior court decision or the arbitral award regarding the same dispute in the proceedings; or
- (b) the existence or history of an employment or agency relationship between the arbitrator and a party; or
 - (c) 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
 - (d) the existence of any other circumstances which raise any justifiable doubts as to the impartiality or independence of the arbitrator.

A party shall not challenge an arbitrator whom it has appointed unless the cause for the challenge arose after the appointment or the cause is only known after the appointment.

A party intending to challenge an arbitrator shall do so within 14 days of knowing the cause for challenge. In the event that the arbitral tribunal has not yet been constituted, the time period for challenge shall commence from the date that the arbitral tribunal is constituted. Such party shall submit a written application stating the reasons for the challenge to the arbitral tribunal. The arbitral tribunal shall make a decision within 10 days upon receipt of such application, unless the parties have agreed otherwise. An application to challenge a sole arbitrator shall be submitted to the court.

Where a party wishes to appeal a decision made by the arbitral tribunal, such party shall appeal to the court within 14 days of receiving the tribunal's decision. The court's decision is subject to no appeal.

An arbitrator shall withdraw from the office in the event that both parties challenge him.

16. How is the jurisdiction of the tribunal determined?

The arbitral tribunal may rule on its own jurisdiction. An objection raised by a party as to the jurisdiction of the arbitral tribunal shall be determined by the arbitral tribunal. However, a party may not object if it has submitted the statement of defence regarding the subject matter of the dispute.

17. What are the duties of the tribunal?

The arbitrator shall be independent, impartial and keep confidentiality in conducting the arbitration. An arbitrator involved in any of the following circumstances shall immediately disclose the details thereof to the parties:

- the existence of any of the causes requiring an arbitrator to withdraw from the arbitration proceedings in accordance with article 32 of the Code of Civil Procedure as detailed above;
- the existence or history of an employment or agency relationship between the arbitrator and a party;
- the existence or history of an employment or agency relationship between the arbitrator and an agent of a party or between the arbitrator and a key witness; or
- the existence of any other circumstance which may raise any justifiable doubt as to the impartiality or independence of the arbitrator.

The arbitral tribunal shall also ensure that each party has a full opportunity to present its case, and the arbitral tribunal shall conduct the necessary investigations of the claims by the parties. Unless otherwise agreed by the parties, the arbitration proceedings shall not be made public.

18. What are the powers of the tribunal?

Arbitration is considered as a private dispute settlement mechanism. The arbitral tribunal has no public powers in conducting the proceedings, except that its award will be considered as having the force of a final judgment. For example, though the arbitral tribunal may summon witnesses or expert witnesses to appear for questioning, it cannot compel them to do so. In the event that a witness fails to appear without justifiable reason, the arbitral tribunal may only apply for a court order compelling the witness to appear.

19. What are the liabilities of the tribunal?

There is no provision in the AL, and the jurisprudence has not yet been settled. It tends to be that, following the general principle of civil law, an arbitrator is liable for his wilful misconduct or negligence.

20. How are the costs of the tribunal fixed?

Certain percentage of the arbitration fee will be allocated to arbitrators by the administering arbitration association. The percentage is set by the Rules on Arbitration Institutions, Mediation Procedure and Fees. The arbitration fee and other fees and costs will be borne by the defeated party as determined in the arbitral award unless otherwise agreed by the parties.

VI. The Arbitration Procedure

21. What procedural rules govern the arbitration?

The parties may agree on the procedural rules governing the arbitration. In the absence of such agreement, the arbitral tribunal shall apply the AL. Where the AL is silent, the arbitral tribunal may apply the Code of Civil Procedure *mutatis mutandis* or other rules of procedure which it deems proper.

22. What evidential rules apply to the arbitration?

The AL is silent in this respect. It only specifies that the arbitral tribunal, if necessary, may request assistance from a court or other agencies in the conduct of the arbitration proceedings. The requested court may exercise its investigative powers in the same manner and to the same extent as permitted in a legal action. Based upon the degree of autonomy of the arbitration proceedings, the parties would be allowed to agree on evidential rules. Failing such agreement, the arbitral tribunal in practice applies the evidential rules of the Code of Civil Procedure, though in a more informal manner.

23. What is the language of the arbitration?

Parties to a dispute with an international nature may designate the language to be used in the arbitration proceedings. However, the arbitral tribunal or a party may request that any document relating to the arbitration be accompanied with a translation in another language. Interpreters shall be available under the direction of the arbitral tribunal in the event that a party or an arbitrator is not familiar with Mandarin.

24. Who can appear as Counsel?

The AL does not require any qualification of Counsel.

VII. The Arbitral Award

25. What is the form of the award?

The arbitral award shall be in writing and shall contain the following items:

- name and residence or domicile of the each party. For a party that is a corporate entity or another organisation or department, its name and office address;
- names and domiciles or residences of the statutory representative and arbitration agent, if any;
- names, nationalities and residences or domiciles of the interpreters, if any;
- the main text of the arbitral award;
- the facts and reasons for the arbitral award, unless the parties have agreed otherwise; and
- the date and situs of the arbitral award.

The original of the arbitral award shall be signed by the arbitrator(s) who deliberated on the award. If an arbitrator refuses to or cannot sign the arbitral award for any reason, the arbitrators who sign it shall state the reason for the missing signature(s).

26. What are the grounds for appeal against the award?

A party may apply to the court to set aside the arbitral award in any of the following circumstances:

- (a) The existence of any of the following circumstances:
 - (i) 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;
 - (ii) the reasons for the arbitral award were not stated, as required, unless the omission was implemented later on by the arbitral tribunal; or
 - (iii) the arbitral award directs a party to act contrary to the law.
- (b) The arbitration agreement is nullified, invalid or has yet to come into effect or has become invalid prior to the conclusion of the arbitration proceedings.
- (c) The arbitral tribunal fails to give a party an opportunity to present its case prior to the conclusion of the arbitration proceedings, or if a party is not lawfully represented in the arbitration proceedings.

- (d) The composition of the arbitral tribunal, or the arbitration proceedings are, contrary to the arbitration agreement or the law.
- (e) An arbitrator fails to fulfil the duty of disclosure prescribed in the AL and appears to be partial or has been challenged but continues to participate, provided that the challenge has not been dismissed by the court.
- (f) An arbitrator violates any duty in the arbitration and such violation carries criminal liability.
- (g) A party or any representative has committed a criminal offence in relation to the arbitration.
- (h) If any evidence or content of any translation upon which the arbitral award relies has been forged or fraudulently altered or contains any other misrepresentations.
- (i) If a judgment of a criminal or civil matter, or an administrative ruling, upon which the arbitral award relies has been reversed or materially altered by a subsequent judgment or administrative ruling.

The foregoing items (f) to (h) are limited to instances where final conviction has been rendered or the criminal proceeding may not be commenced or continue for reasons other than insufficient evidence. The foregoing item (d) concerning circumstances contravening the arbitration agreement and items (e) to (i) are limited to the extent sufficient to affect the arbitral award.

27. How is the award enforced?

The arbitral award shall be binding on the parties and have the same force as a final judgment of a court, but the arbitral award may not be enforceable unless a competent court has, upon application of the successful party, granted an enforcement order. However, the arbitral award may be enforced without having an enforcement order of the court if the parties so agree in writing and the arbitral award concerns any of the following subject matters:

- payment of a specified sum of money or certain amount of fungible things or valuable securities; or
- delivery of a specified movable property.

28. How are foreign awards enforced?

A foreign arbitral award is an arbitral award that is made outside the territory of the Republic of China, or reached pursuant to foreign laws within the territory of the Republic of China. A foreign arbitral award, after an application for recognition has been granted by the court, shall be enforceable.

29. What are the grounds for objecting against enforcement?

For a domestic arbitral award, the court shall reject an application for enforcement in any of the following circumstances:

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

For a foreign arbitral award, the court shall dismiss an application submitted by a party for the recognition of a foreign arbitral award if such award contains one of the following elements:

- where the recognition or enforcement of the arbitral award is contrary to the public order or good morals of the Republic of China; or
- where the dispute is not arbitrable under the laws of the Republic of China.

Further, the court may, at its discretion, dismiss an application for the recognition of a foreign arbitral award if the country where the arbitral award is made or whose laws govern the arbitral award does not recognise arbitral awards of the Republic of China.

In addition, if a foreign arbitral award concerns any of the following circumstances, the respondent may request the court to dismiss the application for recognition within 20 days from the date of receipt of the application:

- The arbitration agreement is invalid as a result of the incapacity of a party according to the law chosen by the parties to govern the arbitration agreement.
- The arbitration agreement is null and void according to the law chosen to govern the said agreement or, in the absence of the choice of law, the law of the country where the arbitral award was made.
- A party was not given proper notice of the appointment of an arbitrator or of any other matter required in the arbitration proceedings, or there was any other situation that gave rise to the lack of due process.
- The arbitral award is not relevant to the subject matter of the dispute covered by the arbitration agreement, or exceeds the scope of the arbitration agreement, unless the offending portion can be severed from and does not affect the remainder of the arbitral award.

- The composition of the arbitral tribunal or the arbitration procedure contravenes the arbitration agreement or, in the absence of an arbitration agreement, the law of the situs of arbitration.
- The arbitral award is not yet binding upon the parties, or has been suspended or revoked by a competent court.

VIII. Interest And Costs

30. Is interest payable on the amount awarded?

Yes. Upon request by the claimant, an arbitral award will indicate the interest rate and interest period.

31. How are the costs of the arbitration determined?

The arbitration fee and the other fees and costs indicated at questions 10 and above will be the costs of arbitration. The actual amount will be determined by the arbitral tribunal. However, the attorney's fee is not part of the costs of arbitration.

32. Who pays the costs of the arbitration?

The parties may agree who shall bear the costs of arbitration. Failing such agreement, the defeated party will bear the costs.

IX. Mediation

33. Is there a National Mediation Centre?

Most NACs have ancillary mediation centres.

34. Is mediation compulsory?

No. According to the AL, in the absence of any arbitration agreement, the parties may choose to submit their dispute to mediation, and jointly appoint a mediator to conduct the mediation. Upon the successful conclusion of the mediation between the parties, the mediator shall record the results of the mediation in a mediated agreement.

A mediated agreement has the same force and effect as that of a settlement agreement in arbitration proceedings, which in turn has the same force and effect as that of an arbitral award. However, the terms of the mediated agreement may be enforced only after the court has granted an application for enforcement.

35. How is mediation conducted?

The Rules on Arbitration Institutions, Mediation Procedure and Fees as jointly promulgated by the Executive Yuan and the Judicial Yuan set out the procedure for the mediation. The procedure is informal by nature, but to some extent similar to the arbitration procedure.

36. What are the costs of mediation?

For mediation regarding monetary disputes, the mediation fee shall be determined according to the amount or value of the subject matter pursuant to the following standards:

- (a) where the amount or value of the subject matter is NT\$600,000 or less, the mediation fee shall be NT\$3,000; and
- (b) where the amount or value of the subject matter is greater than NT\$600,000, the mediation fee for the amount exceeding NT\$600,000 shall be 0.5%.

For mediation regarding non-monetary disputes, the mediation fee shall be NT\$3,000. For a non-monetary dispute mediation with a monetary claim appended, the mediation fee shall be calculated separately. The value of the mediation subject matter shall be determined by the mediator(s). In case the value of the mediation subject matter cannot be determined, the value shall be deemed as NT\$60,000.

X. Settlement

37. What are the opportunities for settlement?

According to the AL, parties to the arbitration may settle their dispute prior to the making of an arbitral award. If the parties reach a settlement, the arbitral tribunal shall record the terms of settlement in a settlement agreement.

38. How is any settlement agreement enforced?

A settlement agreement reached in arbitration proceedings has the same force and effect as that of an arbitral award. However, the terms of the settlement agreement may be enforced only after the court has granted an application for enforcement.

XI. The Role Of The Local Courts

39. What are the powers of the local courts?

- **Appointment of arbitrator or chair arbitrator**

If a party fails to appoint an arbitrator on its part within 14 days of notice by the other party, the other party may apply to an arbitration institution or the court to make the appointment for the failing party. If the two appointed arbitrators fail to agree on the chair arbitrator within 30 days of their appointment, either party may apply to the court or, if the arbitration is to be administered by an arbitration institution, to the arbitration institution for the appointment of the chair arbitrator.

Where an arbitration is to be conducted by a sole arbitrator and the parties fail to agree on an arbitrator within 30 days of the receipt of a written request to appoint by either party, the appointment shall be made by a court or, if the arbitration is to be administered by an arbitration institution, by an arbitration institution upon the application of either party.

- **Replacement of arbitrator or chair arbitrator**

An arbitrator appointed by the agreement of the parties may be replaced by the parties if such arbitrator becomes unable to perform as a result of death or any other cause, or refuses to conduct the arbitration, or delays the performance of arbitration. In the event that the parties fail to agree upon a replacement, either party may apply to an arbitration institution or the court to appoint the replacement.

If an arbitrator appointed by one party becomes unable to perform as a result of any of the circumstances mentioned in the preceding paragraph, the other party may request the appointing party to appoint a replacement within 14 days after receipt of the request. When the requested party fails to do so within the time period, the requesting party may apply to an arbitration institution or the court to make the replacement.

If any one of the circumstances mentioned in the first paragraph occurs in respect of an arbitrator or arbitrators appointed by an arbitration institution or by the court, such arbitration institution or the court may appoint a replacement or replacements upon application by any party or by its own initiative. If any one of the circumstances mentioned in the first paragraph occurs in respect of the chair arbitrator, the court may appoint a replacement upon application by any party or by its own initiative.

- **Decision on challenge of arbitrators**

Where a party wishes to appeal a decision made by the arbitral tribunal regarding the challenge to an arbitrator, such party shall appeal to the court within 14 days of receiving the arbitral tribunal's decision. An application to challenge a sole arbitrator shall be submitted to the court.

- **Stay of court proceedings**

In the event that one of the parties to an arbitration agreement initiates a legal action, the court may, upon application by the other party, stay the legal action and order the plaintiff to submit to arbitration within a specified time period.

- **Powers of subpoena**

In the event that a witness fails to appear before the arbitral tribunal without justifiable reason, the arbitral tribunal may apply for a court order compelling the witness to appear.

- **Taking evidence as requested by the arbitral tribunal**

The arbitral tribunal, if necessary, may request assistance from a court in the conduct of the arbitration proceedings. The requested court may exercise its investigative powers in the same manner and to the same extent as permitted in a legal action.

- **Revocation of arbitral awards**

A party may apply to a court to set aside the arbitral award in specified circumstances.

- **Enforcement of arbitral awards**

A domestic award may not be enforceable unless a competent court has, upon application of a successful party, granted an enforcement order. A foreign arbitral award, after an application for recognition has been granted by the court, shall be enforceable.



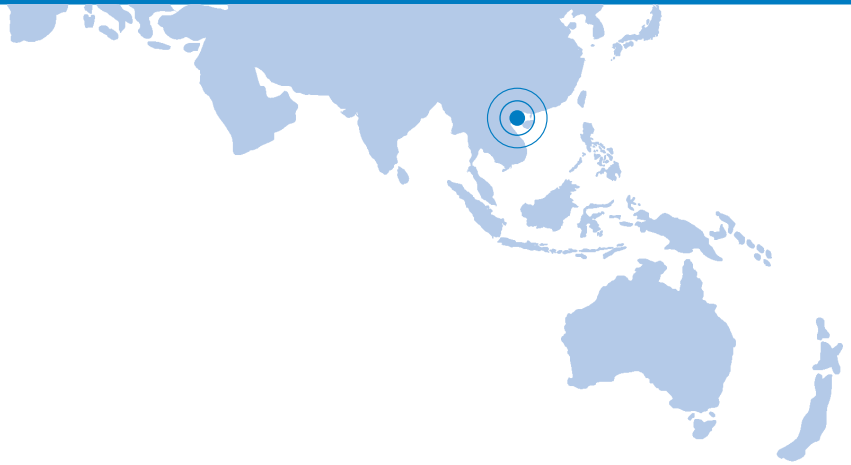
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Professionalism, efficiency, and dedication are the objectives for which FT strives. Since its establishment, FT has successfully developed with Taiwan's prosperous economic growth. What began as a litigation practice has evolved and expanded into our present diversified and internationalized full service law firm.

We provide legal services in relation to the following areas:

- Arbitration
- Banking, Securities & Finances
- Civil, Criminal and Administrative Litigation
- Competition
- Construction
- Consumer Protection
- Corporate
- Environment Protection
- Insurance
- Intellectual Property Rights
- International Investment
- International Trade
- Labour & Employment
- Maritime & Aviation
- Tax





THE ARBITRATION ASSOCIATION OF THE REPUBLIC OF CHINA

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The Association (also called Chinese Arbitration Association, Taipei) is a non-profit organization and approved by the Ministry of Interior in 1955. We provide services for administration of arbitration and mediation to resolve business disputes with fast, fair, cost-efficient, harmonious and confidential proceedings.

As the first arbitration association (since 1955) in Taiwan up to now, and with professional experience for decades, the Association provides unparalleled support and administrative services which include receiving registry and depository of filing arbitration and documents, appointing arbitrator, arrangement of hearing, providing facilities for hearing and detailing hearing proceedings by stenographers, etc. It is noteworthy that the Association enlists the most professional, skillful, and experienced arbitrators in Taiwan.

Streamlined hearing rooms are available in the Association with seats up to 50, 30, and 20 respectively, accommodation to the size of hearing. Comfortable deliberation rooms for arbitrators and the library are available for recess and study. The Association may also arrange suitable hearing location outside the Association as long as the parties require.

Services relating to arbitration can be instantly arranged and provided with; for example, consultations regarding arbitration and mediation, appointments of arbitrators, and free information of foreign arbitration institutions.

The Association also has a number of publications:

- Arbitration Quarterly
- Arbitration Cases Compilation
- Selections of Court Judgments and Rulings on Arbitration Issues
- Rapid Development of Commercial Arbitration in Taiwan
- Treaties on the ROC Arbitration Law
- Construction Arbitration Cases Compilation
- CAA Arbitration Journal
- The Arbitration Memoir between the Strait
- The Recognition and Enforcement of Foreign Arbitral Awards in the Republic of China

13.

Thailand

I. Arbitration Legislation

1. What legislation governs arbitration?

The Thai Arbitration Act B.E. 2545 (2002) ("TAA").

2. What is the basis of the arbitration legislation?

The UNCITRAL Model Law.

3. Does the legislation distinguish between international and domestic arbitrations?

No. TAA does not distinguish between international and domestic arbitrations.

II. Arbitration Agreement

4. What are the requirements of an enforceable arbitration agreement?

An "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

The arbitration agreement shall be in writing and signed by the parties. An arbitration clause constitutes an arbitration agreement if it is contained in an exchange between the parties by means of letters, facsimiles, telegrams, telexes, data interchanges with electronic signature or other means which provide a record of the agreements, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract evidenced in writing to any document containing an arbitration clause constitutes an arbitration agreement, provided that the reference is such as to make that clause part of the contract.

III. National Arbitration Institute/Centre

5. Is there a National Arbitration Centre (“NAC”)?

Yes. It is the Thai Arbitration Institute, Office of Judiciary (“TAI”).

6. Does the NAC publish a set of procedural rules?

Yes. The Arbitration Rules (“AR”).

7. Does the NAC publish a panel of recommended arbitrators?

Yes. The TAI publishes a panel of recommended arbitrators which is also available at www.adr.or.th.

8. Does the NAC publish a recommended arbitration clause?

Yes. It provides as follows:

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with 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 contract of the arbitration thereof shall be under the auspices of the Thai Arbitration Institute.”

9. Does the NAC administer arbitrations?

Yes. The key functions of the TAI are:

- management of the practical aspects of arbitration; and
- facilitation of the smooth progress of arbitration.

10. What are the NAC's costs?

Administration fee (effective 1 October 2005)

Amount of Claim	Sole arbitrator
No dispute amount	4,000 Baht/Session
Not exceeding 2,000,000 Baht	30,000 Baht
2,000,001 - 5,000,000 Baht	30,000 Baht+0.5% of amount exceeding 2 million
5,000,001 - 10,000,000 Baht	45,000 Baht +0.4% of amount exceeding 5 million
10,000,001 - 20,000,000 Baht	65,000 Baht +0.3% of amount exceeding 10 million
20,000,001 - 50,000,000 Baht	95,000 Baht +0.2% of amount exceeding 20 million
50,000,001 - 100,000,000 Baht	145,000 Baht +0.1% of amount exceeding 50 million
100,000,001 - 200,000,000 Baht	205,000 Baht +0.05% of amount exceeding 100 million
200,000,001 - 500,000,000 Baht	255,000 Baht +0.04% of amount exceeding 200 million
500,000,001 - 1,000,000,000 Baht	375,000 Baht +0.03% of amount exceeding 500 million
1,000,000,001 - 2,000,000,000 Baht	525,000 Baht +0.01% of amount exceeding 1,000 million
Exceeding 2,000,000,001 Baht	725,000 Baht +0.01% of amount exceeding 2,000 million

10. What are the NAC's costs? (cont'd)

Amount of Claim	More than one arbitrator
No dispute amount	20,000 Baht/Session
Not exceeding 2,000,000 Baht	60,000 Baht
2,000,000 - 5,000,000 Baht	60,000 Baht +1% of amount exceeding 2 million
5,000,001 - 10,000,000 Baht	90,000 Baht +0.8% of amount exceeding 5 million
10,000,001 - 20,000,000 Baht	130,000 Baht +0.6% of amount exceeding 10 million
20,000,001 - 50,000,000 Baht	190,000 Baht +0.4% of amount exceeding 20 million
50,000,001 - 100,000,000 Baht	310,000 Baht +0.2% of amount exceeding 50 million
100,000,001 - 200,000,000 Baht	410,000 Baht +0.1% of amount exceeding 100 million
200,000,001 - 500,000,000 Baht	510,000 Baht +0.08% of amount exceeding 200 million
500,000,001 - 1,000,000,000 Baht	750,000 Baht +0.06% of amount exceeding 500 million
1,000,000,001 - 2,000,000,000 Baht	1,050,000 Baht +0.04% of amount exceeding 1,000 million
2,000,000,001 Baht	1,450,000 Baht +0.02% of amount exceeding 2,000 million

IV. Commencing Arbitration

11. How is arbitration commenced?

Unless otherwise agreed by the parties, arbitration proceedings are commenced in one of the following circumstances:

- (1) when a party receives a letter from the other party requesting that the dispute be settled by arbitration;
- (2) when a party notifies the other party in writing to appoint an arbitrator or to approve the appointment of an arbitrator;
- (3) when a party sends a written notice of the disputed issues to the arbitral tribunal designated in the arbitration agreement;
- (4) when either party submits the dispute to an agreed arbitration institution established for settlement of disputes by arbitration as has been agreed upon.

12. Can litigation proceedings be stayed in favour of arbitration?

Yes. Subject to TAA, in a case where any party to the arbitration agreement commences any legal proceedings in court against the other party thereto in respect of any dispute which is the subject of that arbitration agreement, the party against whom the legal proceedings are commenced may file with the competent court, no later than the date of filing the statement of defence or within the period for filing the statement of defence in accordance with the law, a motion requesting the court to issue an order striking the case, so that the parties may proceed with the arbitration. Upon the court having completed the inquiry and finding that there are no grounds for rendering the arbitration agreement void or unenforceable or impossible to perform, the court shall issue an order striking the case.

V. The Arbitral Tribunal

13. How is the tribunal appointed?

In accordance with TAA, the arbitral tribunal shall be composed of an uneven number of arbitrators. If the parties have agreed on an even number, the arbitrators shall jointly appoint an additional arbitrator who shall act as the chairman of the arbitral tribunal.

Unless the parties agree otherwise, the procedure for appointment of the arbitral tribunal shall be as follows:

- (a) Where the arbitral tribunal is a sole arbitrator, if the parties are unable to agree on the arbitrator, either party may file a motion with the competent court requesting an appointment of the arbitrator.
- (b) Where the arbitral tribunal consists of more than one arbitrator, each party shall appoint an equal number of arbitrators; and the appointed arbitrators shall appoint an additional arbitrator. If either party fails to appoint the arbitrators within 30 days after receipt of the notification from the other party or if the party-appointed arbitrators are unable to jointly appoint the chairman of the arbitral tribunal within 30 days from the date of their appointment, either party may file a motion with the competent court requesting an order appointing the arbitrators or the chairman of the arbitral tribunal.

14. Who is eligible for appointment?

Anyone may be appointed as an arbitrator.

15. How is an appointment challenged?

Unless otherwise agreed by the parties, a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the appointment of the arbitrator or of the fact that there could be grounds to challenge an arbitrator, file a statement stating the grounds of the challenge with the arbitral tribunal. Unless the challenged arbitrator withdraws from being the arbitrator or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

16. How is the jurisdiction of the tribunal determined?

The arbitral tribunal may rule on its own jurisdiction, including the existence or validity of the arbitration agreement, the validity of the appointment of the arbitral tribunal, and issues of dispute falling within the scope of its authority. For that purpose, an arbitration clause, which forms part of a contract, shall be treated as an agreement independent of the main contract. A decision by the arbitral tribunal that the contract is null and void shall not affect the validity of the arbitration clause.

17. What are the duties of the tribunal?

The arbitral tribunal is under a duty to treat the parties equally and give each party a full opportunity to present its case, as well as to disclose any circumstances likely to give rise to justifiable doubt as to his impartiality or independence.

18. What are the powers of the tribunal?

Unless otherwise agreed by the parties or provided by TAA, the arbitral tribunal has the power to conduct any proceedings in any manner as it deems appropriate. The power of the arbitral tribunal includes the power to determine the admissibility and weight of the evidence.

19. What are the liabilities of the tribunal?

Subject to TAA, an arbitrator will not be liable for any civil liabilities on any act performed in the course of his duty as an arbitrator, unless it is performed wilfully or with gross negligence causing damage to either party.

Any arbitrator wrongfully demanding, accepting or agreeing to accept an asset or any other benefit for himself or anyone else for doing or omitting to do any act in his duties will be subjected to imprisonment or fine, or both.

20. How are the costs of the tribunal fixed?

Unless otherwise agreed by the parties, the remuneration of the arbitrators shall be in accordance with that stipulated in the award of the arbitral tribunal. In a case where remuneration has not been fixed in the arbitral award, any party or the arbitral tribunal may file a petition with the competent court for a ruling on the remunerations of the arbitrators as it deems appropriate.

VI. The Arbitration Procedure

21. What procedural rules govern the arbitration?

The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings: for example, by adopting the AR. In the absence of such agreement, the arbitral tribunal may conduct any proceedings in such manner as it deems appropriate and determine the admissibility and weight of the evidence.

22. What evidential rules apply to the arbitration?

The parties can agree on the evidential rules. The arbitral tribunal may decide the evidential rules or apply the provisions of the law of evidence under the Thai Civil Procedure Code to the arbitration proceedings.

23. What is the language of the arbitration?

The parties are free to agree on the language(s) to be utilised in the arbitration proceedings. Failing such agreement, the arbitral tribunal shall determine the language(s) to be used in the proceedings. This agreement or determination shall apply to any statement of claim, statement of defence, any written statement by a party, any hearing and any award, decision or other communication by or to the arbitral tribunal.

24. Who can appear as Counsel?

Pursuant to TAA, there are no restrictive provisions in connection with who can appear as Counsel for an arbitration process.

VII. The Arbitral Award

25. What is the form of the award?

The arbitral award shall be made in writing and signed by members of the arbitral tribunal. In arbitration proceedings with more than one arbitrator, the signatures of the majority shall suffice, provided that the reason for the omission of a signature is stated.

The arbitral award shall clearly state the reasons for making such decision. However, it shall not prescribe or decide on any matter falling beyond the scope of the arbitration agreement or on the relief sought by the parties. The arbitral award shall state the date and place of arbitration and shall be deemed to have been made at that place.

26. What are the grounds for appeal against the award?

The court may set aside the arbitral award in any of the following cases:

- (a) If the party filing the motion can furnish proof that:
 - (i) A party to the arbitration agreement was under some incapacity under the law applicable to that party;
 - (ii) the arbitration agreement is not binding under the law of the country agreed to by the parties or, in the absence of any indication thereon, under the law of Thailand;
 - (iii) the party making the application was not given proper advance notice of the appointment of the arbitral tribunal or of the arbitration proceedings or was otherwise unable to defend the case in the arbitration proceedings;

- (iv) the arbitral award deals with a dispute not within the scope of the arbitration agreement or contains a decision on a matter beyond the scope of the arbitration agreement; or
 - (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, unless otherwise agreed by the parties, in accordance with the TAA.
- (b) Where the court finds that:
- (i) the award deals with a dispute not capable of settlement by arbitration under Thai law; or
 - (ii) the recognition or enforcement of the arbitral award would be contrary to public policy.

27. How is the award enforced?

An arbitral award is recognised as binding on the parties, regardless of the country in which it was made. The arbitration award shall be enforced upon petition to the competent court.

28. How are foreign awards enforced?

In a case where an arbitral award was made in a foreign country, that award shall be enforced by the competent court only if it is subject to an international convention, treaty or agreement to which Thailand is a party and such award shall be applicable only to the extent that Thailand accedes to be bound by that convention, treaty or agreement.

29. What are the grounds for objecting against enforcement?

The court may refuse enforcement of the arbitral award, irrespective of the country in which it was made, if the person against whom the award will be enforced furnishes proof that:

- (a) the party to the arbitration agreement was under some incapacity under the law applicable to that party;
- (b) the arbitration agreement is not valid under the law to which the parties have subjected it or, in the absence of any express governing law, under the law of the country where the arbitral award was made;
- (c) the party making the application was not given proper advance notice of the appointment of the arbitral tribunal or of the arbitration proceedings or was otherwise unable to defend the case in the arbitration proceedings;

- (d) the award deals with a dispute falling within the arbitration agreement or contains a decision on a matter beyond the scope of the arbitration agreement;
- (e) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, if not otherwise agreed by the parties, in accordance with TAA; or
- (f) The arbitral award has not yet become binding, or has been set aside or suspended by a competent court or under the law of the country where it was made.

VIII. Interest And Costs

30. Is interest payable on the amount awarded?

Yes. The interest rate shall be in accordance with that stipulated in the award of the arbitral tribunal.

31. How are the costs of the arbitration determined?

The costs of the arbitration may be determined by considering the complexity of the case, the volume of relevant documentary evidence and the place where the arbitration is held.

32. Who pays the costs of the arbitration?

Normally, the unsuccessful party would pay the costs of the arbitration. Nevertheless, the parties may agree otherwise.

IX. Mediation

33. Is there a National Mediation Centre?

Yes. The Thai Mediation Centre (www.judiciary.go.th/adro/sub/mdc).

34. Is mediation compulsory?

No.

35. How is mediation conducted?

At the beginning of a civil case, the court would normally ask the parties whether they are interested in using a mediation process. If the parties are interested, the court would refer the case to the mediation centre to proceed with a mediation process. In such case, a mediator, normally a senior judge of that court, would facilitate this process by helping the parties to identify issues, to negotiate constructively and to explore settlement alternatives. However, the parties would make their own decisions usually with the assistance of their lawyers. In this process, the parties would retain complete control over the result.

36. What are the costs of mediation?

It is free of charge.

X. Settlement

37. What are the opportunities for settlement?

Although a settlement could be made at any time during the arbitration proceedings, the opportunity for settlement is to be made as soon as possible in order to minimise the costs in the future.

38. How is any settlement agreement enforced?

A settlement agreement in the form of an arbitral award can be enforced upon a petition to the court.

XI. The Role Of The Local Courts

39. What are the powers of the local courts?

A local court may give a judgment in accordance with the arbitral award. However, if the court is of the view that the award is contrary to the law, the court may issue an order refusing to give judgment.



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Thai Arbitration Institute (TAI) is the most active arbitration institute in Thailand. Throughout its fifteen year history, TAI has handled virtually all the high profile cases in Thailand. Currently the TAI is affiliated to the office of the Judiciary, which assures non-intervention policy and provides safeguard from any domestic political interference. Therefore, the parties can completely trust the impartiality of the institute, even though one of the parties to a dispute maybe a governmental agency.

From the beginning of the modern arbitration in Thailand, TAI'S experts have played an important role in the drafting of the Arbitration Act B.E. 2530, which is the main catalyst of development of Arbitration in Thailand. It can also be fairly said that the Arbitration Act B.E. 2545 (2002), which adopts the UNCITRAL Model Law, is also a product of experience that TAI has gained over the years. The initiative to raise the standard of Thai arbitration law came from TAI'S experts who also acted as drafters of the new law which has later been enacted by the Parliament.

TAI maintains a comprehensive roster of qualified and experienced experts in various fields, whom parties can appoint to be an arbitrator. The experts have a variety of backgrounds, for example, former judges, state attorneys, businesspersons, prominent attorneys, engineers, architects etc. Currently the roster is divided into 17 categories, such as construction, maritime, international trade etc.

TAI has recently undergone a comprehensive renovation and have new state of the art technology and facilities. With its new meeting rooms, TAI can handle more proceedings, and thereby speed up the process. Parties can now have the testimony of witnesses recorded in digital format, both video and audio, ready to be processed to facilitate arbitral tribunals.

Parties to an arbitral proceeding administered by TAI pay no institutional fee. The parties are responsible only for arbitrator's remuneration and other actual expenses in conducting arbitral proceedings, such as expenses for delivering documents, production of medium recording testimony, etc.

The Thai Arbitration Institute was established by the Ministry of Justice in 1990. The Thai Arbitration Institute holds a list of available arbitrators and provides education and training programs to raise the level of knowledge and expertise of those engaged as arbitrators or counsel for arbitration disputants.

Vietnam

14.

I. Arbitration Legislation

1. What legislation governs arbitration?

Ordinance No. 08-2003-PL-UBTVQH-11 on Commercial Arbitration issued by the Standing Committee of the National Assembly of the Socialist Republic of Vietnam on 25 February 2003 (“Ordinance”); the Code of Civil Procedures enacted by the National Assembly of the Socialist Republic of Vietnam on 25 February 2003 (“Code”); and sundry other laws that enable arbitration.

2. What is the basis of the arbitration legislation?

It would be misleading to suggest that the Ordinance follows any model law although some provisions are consistent with the UNCITRAL Model Law. Others are materially inconsistent.

3. Does the legislation distinguish between international and domestic arbitrations?

The legislation distinguishes (i) “foreign” arbitral awards from other arbitral awards; and (ii) disputes with foreign elements from other disputes:

“Dispute with a foreign element means a dispute arising from commercial activities in which one or more of the participating parties is a foreigner or foreign legal entity, or where the grounds for establishing, altering or terminating the relationship which is the subject of dispute arise abroad, or where assets relating to the dispute are located abroad.”

It is unclear whether in an arbitration under the Ordinance involving “a dispute with a foreign elements” results in “a foreign arbitral award”. The Ordinance provides:

“Article 49 Resolution of disputes with a foreign element by arbitration

1. As agreed between the parties, a dispute with a foreign element may be resolved by an arbitration tribunal held by an arbitration centre or by an arbitration tribunal established by the parties in accordance with the provisions of this Ordinance.
2. An arbitration tribunal held by an arbitration centre or an arbitration tribunal established by the parties may apply other procedural rules if the parties agree.
3. An arbitrator selected by the parties or appointed by a court may be an arbitrator either listed or not listed in the lists of arbitrators of the arbitration centres in Vietnam or may be a foreign arbitrator in accordance with the laws on arbitration of that country.

4. In the case where one party requests, or the parties request, a foreign court to appoint an arbitrator, a court competent to appoint an arbitrator means a court so determined in accordance with the laws of that country.
5. The parties shall have the right to agree on choice of law pursuant to clause 2 of article 7 of this Ordinance or on international commercial practice for the dispute resolution.
6. The parties shall have the right to agree on the venue for the dispute resolution to be in Vietnam or in a foreign country. If the parties fail to agree, the arbitration tribunal shall decide, but it must ensure convenience to the parties during the resolution.
7. The parties shall have the right to agree on the language to be used in arbitration proceedings. If they do not have such an agreement, the language to be used in the arbitration proceedings shall be Vietnamese.”

II. Arbitration Agreement

4. What are the requirements of an enforceable arbitration agreement?

The Ordinance provides:

“Article 9 Form of arbitration agreements

1. An arbitration agreement must be made in writing. An arbitration agreement in the form of a letter, telegram, telex, facsimile, electronic mail or any other written form which clearly shows the intention of the parties to resolve disputes by arbitration shall be deemed to be a written arbitration agreement.
2. An arbitration agreement may be an arbitration clause in a contract or it may be a separate agreement.

Article 10 Invalid arbitration agreements

An arbitration agreement shall be invalid in the following circumstances:

1. The dispute which arises does not belong to commercial activities as defined in clause 3 of article 2 of this Ordinance.
2. A signatory to the arbitration agreement lacks authority to enter into it pursuant to law.

3. One party to the arbitration agreement lacks full civil legal capacity.
4. The arbitration agreement fails to specify, or to specify clearly, the subjects of the dispute or the arbitration organization authorized to resolve disputes, and the parties have failed to enter into any supplementary agreement.
5. The arbitration agreement was not made in accordance with the provisions of article 9 of this Ordinance.
6. A party to the arbitration agreement was deceived or threatened, and requests that the arbitration agreement be declared invalid; the limitation period for requesting that an arbitration agreement be declared invalid shall be six months from the date of entering into it, but must be prior to the date on which an arbitration tribunal opens the initial hearing to resolve a dispute as stipulated in article 30 of this Ordinance.

Article 11 Relationship between arbitration clause and contract

An arbitration clause shall exist independently of the contract. Any modification, extension, termination or invalidity of a contract shall not affect the validity of the arbitration clause.”

III. National Arbitration Institute/Centre

5. Is there a National Arbitration Centre (“NAC”)?

Yes. The Vietnam International Arbitration Centre (“VIAC”).

6. Does the NAC publish a set of procedural rules?

Yes. The Rules of Arbitration of the VIAC (“VIAC Rules”).

7. Does the NAC publish a panel of recommended arbitrators?

It publishes a “List of Arbitrators”.

8. Does the NAC publish a recommended arbitration clause?

Yes:

“All disputes arising out of or in relation to this contract shall be finally settled by the Vietnam International Arbitration Centre at the Vietnam Chamber of Commerce and Industry in accordance with its Rules of Arbitration”

Other requirements may be added.

9. Does the NAC administer arbitrations?

Yes.

10. What are the NAC’s costs?

The VIAC website www.viac.org.vn provides (US\$= approx VND16,000):

“Schedule Of Arbitration Costs

Schedule of Arbitration Costs of the Vietnam International Arbitration Centre at the Vietnam Chamber of Commerce and Industry. (Effective as from 1 July 2004 - Applicable to Request for Arbitration and Counterclaim)

10. What are the NAC’s costs? (cont’d)

I. Domestic arbitration:

Unit: VND 1,000

Value in Dispute	Arbitration Costs
Up to 200,000	15,000
From 200,001 to 1,000,000	15,000 + 2.5% of amount over 200,000
From 1,000,001 to 3,000,000	35,000 + 0.75% of amount over 1,000,000
From 3,000,001 to 5,000,000	50,000 + 0.50% of amount over 3,000,000
From 5,000,001 to 10,000,000	60,000 + 0.40% of amount over 5,000,000
Over 10,000,001	80,000 + 0.30% of amount over 10,000,000

II. Arbitration involving a foreign element:

Unit: VND 1,000

Value in Dispute	Arbitration Costs
Up to 300,000	20,000
From 300,001 to 1,000,000	20,000 + 2.5% of amount over 300,000
From 1,000,001 to 3,000,000	37,500 + 1.75% of amount over 1,000,000
From 3,000,001 to 8,000,000	72,500 + 0.60% of amount over 3,000,000
From 8,000,001 to 20,000,000	102,500 + 0.50% of amount over 8,000,000
Over 20,000,001	162,500 + 0.40% of amount over 20,000,000

The amount fixed in accordance with the Scale in the above-mentioned Item 1 or 2 is intended to cover remuneration of arbitrator(s) and the Centre's administrative fees relevant to the resolution of the dispute. Upon submission of a Request for Arbitration and a Counterclaim, the parties shall pay this amount in full. This amount shall not include travel and accommodation expenses incurred by arbitrator(s) of the Arbitral Tribunal and a secretary of any hearing as well as other relevant costs. Such costs shall be calculated on the basis of actual expenses arising in practice. The payment and accounting of these costs are provided for in Article 33 of the Rules of Arbitration of the Vietnam International Arbitration Centre."

IV. Commencing Arbitration

11. How is arbitration commenced?

VIAC Rules, articles 5 and 7 provide:

"Article 5 Commencement of the Arbitral Proceedings

The arbitral proceedings shall commence on the date on which a Request for Arbitration made by the Claimant is received by the Centre.

Article 7 Request for Arbitration

1. A party wishing to have recourse to arbitration under the Rules shall submit its Request for Arbitration (the "Request") to the Centre.
2. The Request shall, inter alia, contain the following main information:
 - a. the date on which the Request is made;
 - b. the full names and addresses of both the Claimant and the Respondent;
 - c. a brief description of the nature and circumstances of the dispute;
 - d. legal ground(s) on which the claim(s) is/are based;
 - e. an indication of the value in dispute as well as other claims by the Claimant; and
 - f. the name of the arbitrator that the Claimant appoints from the List of Arbitrators or a request made by the Claimant to the Centre's President for appointment of an arbitrator on his behalf.

As for arbitration of a dispute involving a foreign element, the Claimant may appoint an arbitrator from or outside the List of Arbitrators. Where the arbitrator is appointed outside the List of Arbitrators, his/her full name and contact address shall be notified by the Claimant to the Centre. Where the Claimant requests the Centre's President to appoint an arbitrator, the President shall appoint anyone from the List of Arbitrators.

3. The Claimant shall submit, together with the Request, the original or a duly certified copy of the arbitration agreement, relevant documents and evidence, and a receipt proving the advance payment of arbitration costs.
4. The Request and documents annexed thereto shall be submitted in the number of copies specified by Article 3(1) of the Rules."

12. Can litigation proceedings be stayed in favour of arbitration?

Yes, this is compulsory: Resolution No. 05/2003/NQ-HDTP of the Judges' Council of the Supreme People's Court dated 31 July 2003.

V. The Arbitral Tribunal

13. How is the tribunal appointed?

See VIAC Rules, article 7 above and VIAC Rules, articles 8 and 9 below:

"Article 8 Constitution of an Arbitral Tribunal of Three (03) Arbitrators

1. Unless the parties agree otherwise, within five (05) days from the date of receipt of the Request and documents annexed thereto in accordance with Article 7 of the Rules, the Centre shall transmit the Respondent a copy thereof and the List of Arbitrators and make notification of the name of the arbitrator appointed by the Claimant or by the Centre's President.
2. Unless the parties agree otherwise, within thirty (30) days from the date of receipt of the Request and attached documents transmitted by the Centre, the Respondent shall appoint an arbitrator from the List of Arbitrators and notify the Centre thereof or request the Centre's President to appoint an arbitrator on his behalf. Where there are multiple Respondents, they shall, acting jointly, select an arbitrator from the List of Arbitrators and notify the Centre thereof or request the Centre's President to appoint an arbitrator on their behalf.

As for arbitration of a dispute involving a foreign element, the Respondent may appoint an arbitrator from or outside the List of Arbitrators or request the Centre's President to appoint an arbitrator on his behalf. Where there are multiple Respondents, they shall, acting jointly, select an arbitrator from or outside the List of Arbitrators and notify the Centre thereof or request the Centre's President to appoint an arbitrator on their behalf. Where the arbitrator is appointed outside the List of Arbitrators, his/her full name and contact address shall be notified by the Respondent to the Centre. Where the Respondent requests the Centre's President to appoint an arbitrator, the President shall appoint anyone from the List of Arbitrators.

3. Should the Respondent fail to appoint an arbitrator or fail to request the Centre's President to do so, within seven (07) days from the expiry date of the mentioned above thirty (30) day period, the Centre's President shall appoint an arbitrator from the List of Arbitrators on his behalf.
4. Within fifteen (15) days from the date when the two arbitrators are appointed by the parties or by the Centre's President, the two arbitrators shall appoint from the List of Arbitrators the third arbitrator to act as Chairperson of the Arbitral Tribunal. After the expiry of this fifteen (15) day period, should the two appointed arbitrators fail to choose the third arbitrator, the Centre's President, within seven (07) days from the expiry date, shall appoint an arbitrator from the List of Arbitrators to act as Chairperson of the Arbitral Tribunal and notify the parties thereof.

Article 9 Constitution of an Arbitral Tribunal of a Sole Arbitrator

1. If the parties agree that the dispute is to be decided by a sole arbitrator, within thirty (30) days from receipt of the Centre's request for appointment of an arbitrator, the parties shall, acting jointly, appoint a sole arbitrator from the List of Arbitrators and notify the Centre thereof or make a request to the Centre's President for appointment of a sole arbitrator.

As for arbitration of a dispute involving a foreign element, the parties may appoint an arbitrator from or outside the List of Arbitrators or request the Centre's President to appoint an arbitrator on their behalf. Where the arbitrator is appointed outside the List of Arbitrators, his/her full name and contact address shall be notified by the parties to the Centre. Where the parties request the Centre's President for appointment of an arbitrator, the President shall appoint anyone from the List of Arbitrators to act as the sole arbitrator.

2. Should the parties fail to jointly appoint a sole arbitrator, any party may request the Centre's President to appoint the sole arbitrator. Within fifteen (15) days from the date of receipt of such request, the Centre's President shall appoint an arbitrator from the List of Arbitrators to act as the sole arbitrator."

14. Who is eligible for appointment?

The Ordinance, Article 12 provides:

“Arbitrators

1. Any Vietnamese citizen who satisfies all of the following conditions may act as an arbitrator:
 - (a) Having full civil legal capacity;
 - (b) Having good ethics and being honest, impartial and objective;
 - (c) Having a university degree and at least five years’ work experience in the field of his or her studies.
2. Any person under administrative detention, currently being prosecuted for a criminal offence, or having been convicted and whose conviction has not yet been expiated shall be barred from acting as an arbitrator.
3. Judges, prosecutors, investigators, enforcement officers, and officials currently working in the people’s courts, the people’s procuracy, investigative bodies or enforcement bodies shall be barred from acting as arbitrators.”

Note that the Ordinance requires that arbitrators must be Vietnamese citizens unless the dispute involves foreign elements but that the VIAC may only appoint Vietnamese citizens to their panels.

15. How is an appointment challenged?

VIAC Rules, article 14 reflecting the Ordinance provides:

“**Article 14** Refusal of being Arbitrator(s) and Replacement of Arbitrator(s)

1. An arbitrator shall refuse to handle the dispute and the parties shall be entitled to request for replacement of any arbitrator in the following circumstances:
 - a. The arbitrator is a relative of a party or its representative;
 - b. The arbitrator has interest(s) in the dispute;
 - c. The arbitrator himself/herself becomes aware of his/her lack of independence, impartiality and objectivity or the parties have clear evidence that the arbitrator is not independent, impartial or objective in the proceedings.
2. If after choosing its own arbitrator, a party becomes aware that the chosen arbitrator falls into one of the circumstances provided for in paragraph 1 of this Article, it may request for replacement of the arbitrator.

3. An arbitrator's refusal to handle the dispute or a party's request for arbitrator replacement shall be filed with the Arbitral Tribunal before its Arbitral Award is rendered. Where the Arbitral Tribunal has not been constituted, such refusal or request shall be made to the Centre's President.
4. A refusal and replacement shall be decided by the remaining arbitrators of the Arbitral Tribunal. Should these arbitrators fail to do so, the Centre's President shall make a decision instead.

If two of the three arbitrators in an Arbitral Tribunal or a sole arbitrator makes a refusal or is requested for replacement, the Centre's President shall make a decision on the refusal and replacement.
5. During the arbitral proceedings, if an arbitrator becomes unable to perform his/her functions, the procedure for replacement of an arbitrator provided for in Article 7, 8 or 9 of the Rules shall apply.
6. The Arbitral Tribunal that has been reconstituted shall continue the proceedings. If necessary, the reconstituted Arbitral Tribunal, after consulting the parties, may review the matters presented at any previous hearings."

16. How is the jurisdiction of the VIAC tribunal determined?

VIAC Rules, article 21 reflecting the Ordinance provides:

"Article 21 Examination of the Arbitration Agreement and the Jurisdiction of the Arbitral Tribunal

1. Before the Arbitral Tribunal considers the merits of the dispute, if any party raises an issue that the Arbitral Tribunal does not have jurisdiction over the dispute or the arbitration agreement is non-existent or invalid, the Arbitral Tribunal shall consider the issue and make a decision to that effect in the presence of the parties, unless the parties agree otherwise. If the party raising the issue, after being duly summoned, fails to appear without valid excuse, such issue shall be deemed to be withdrawn. The Arbitral Tribunal shall continue the proceedings.
2. If any party is not satisfied with the Decision made by the Arbitral Tribunal as provided for in the paragraph 1 of this Article, within five (05) days from the date of receipt of such Decision, the party may request the Provincial Court where the Arbitral Tribunal issued the Decision to review such Decision. The requesting party shall notify the Arbitral Tribunal thereof; meanwhile, the Arbitral Tribunal shall continue the proceedings.

3. Where the competent Court determines that the Arbitral Tribunal has no jurisdiction over the dispute or the arbitration agreement is non-existent or invalid, the Arbitral Tribunal shall suspend the arbitral proceedings after receiving the Court's Decision."

17. What are the duties of the tribunal?

To conduct and decide the case in accordance with the VIAC Rules, but not to provide interim relief. Only the courts can do that.

18. What are the powers of the tribunal?

See answer to question 17.

19. What are the liabilities of the tribunal?

The arbitration legislation is silent save to charge the Ministry of Justice with: "Inspection and resolution of complaints; discovering and dealing with breaches of the law on arbitration".

20. How are the costs of the tribunal fixed?

See the answer to question 10.

VI. The Arbitration Procedure

21. What procedural rules govern the arbitration?

What the parties decide consistent with the rules in the Ordinance which in turn are mirrored in the VIAC Rules.

22. What evidential rules apply to the arbitration?

VIAC Rules, articles 15 and 16 reflecting the Ordinance provide:

"Article 15 Studying the File and Establishing the Facts of the Case

1. Once being chosen or appointed, an arbitrator shall study the file and be entitled to verify the facts of the case, as he or she deems necessary.

2. The Arbitral Tribunal may meet the parties to hear their opinions. At the request of a party or the parties or of its own motion, the Arbitral Tribunal may decide to hear the third person(s) in the presence of the parties or after duly notifying them thereof.

Article 16 Taking Evidence

1. The parties shall produce evidence to support their claims or defence. The Arbitral Tribunal may require the parties to provide additional evidence relevant to the dispute and may itself gather evidence.
2. The Arbitral Tribunal may, at the request of a party or both parties, decide to appoint one or more experts and notify the parties thereof. Any requesting party shall deposit an advance payment for experts' fees; where the parties jointly make such request, the advance payment for experts' fees shall be shared by the parties."

23. What is the language of the arbitration?

VIAC Rules, article 18 reflecting the Ordinance provides:

“Article 18 Language of the Arbitration

The language of the arbitration shall be Vietnamese.

As for arbitration of a dispute involving a foreign element, the parties are free to agree on the language to be used in the arbitral proceedings. In the absence of any agreement by the parties to that effect, the language shall be Vietnamese. The parties may require the Centre to provide interpreter(s) and shall pay fees thereof.”

24. Who can appear as Counsel?

Anyone, but under the heading “representative”.

VII. The Arbitral Award

25. What is the form of the award?

VIAC Rules, article 28 reflecting the Ordinance provides:

“Article 28 The Arbitral Award

1. The Arbitral Award shall, inter alia, contain the following main information:
 - a. The date and place where the Arbitral Award is made;
 - b. The full name of the Centre;

- c. The full names and addresses of the Claimant and the Respondent;
 - d. The full name(s) of the arbitrators or the sole arbitrator;
 - e. A summary of the Request for Arbitration and a brief description of the nature of the dispute;
 - f. Reasoning for the Arbitral Award;
 - g. Decisions on the merits of the dispute, the arbitration costs and other expenses;
 - h. The duration and deadline for implementation of the Arbitral Award; and
 - i. Signature(s) of the arbitrators or the sole arbitrator.
2. Where an arbitrator fails to sign the Arbitral Award for any reason, the Chairperson of the Arbitral Tribunal shall record this matter in the Arbitral Award and state reasons thereof.
 3. The parties may request the Arbitral Tribunal not to reflect in the Arbitral Award the disputed issues and reasoning for the Arbitral Award.”

26. What are the grounds for appeal against the award?

The Ordinance, articles 50 to 56 provide:

“Article 50 Right to apply for arbitral award to be set aside

Within a time-limit of thirty (30) days from the date of receipt of an arbitral award, a party which disagrees with the arbitral award shall have the right to file an application with the provincial court in the place where the arbitration tribunal issued the arbitral award requesting that the arbitral award be set aside.

If an application is filed out of time due to an event of force majeure, the duration of the event of force majeure shall be excluded when calculating the time-limit for requesting that the arbitral award be set aside.

Article 51 Application for arbitral award to be set aside

1. An application for an arbitral award to be set aside shall contain the following basic particulars:
 - (a) Date on which the application is drawn;
 - (b) Name and address of the party applying for the arbitral award to be set aside;
 - (c) Reasons for the application for the arbitral award to be set aside.

2. The following documents shall be enclosed with the application:
 - (a) Original or validly certified copy of the arbitral award;
 - (b) Original or validly certified copy of the arbitration agreement.
3. Enclosures in a foreign language must be translated into Vietnamese and the translations must be validly certified.

Article 52 Acceptance of jurisdiction over application

1. Upon receipt of all documents stipulated in article 51 of this Ordinance, the court shall immediately notify the applicant to pay the fees.

The court shall accept jurisdiction as from the date of payment of the fees by the applicant.
2. The court shall have the right to require the applicant to explain any unclear particulars in the application for the arbitral award to be set aside.

Article 53 Consideration by court of application for arbitral award to be set aside

1. After a court has accepted jurisdiction over an application for an arbitral award to be set aside, the court shall notify the arbitration centre or the arbitration tribunal established by the parties, the parties to the dispute, and the procuracy at the same level. In the case of dispute resolution held by an arbitration centre, the arbitration centre shall transfer the file to the court within a time-limit of seven working days from the date of receipt of the notice from the court.
2. Within a time-limit of thirty (30) days from the date of acceptance of jurisdiction by the court, the chief judge of the court shall appoint a trial council consisting of three judges, one of whom shall act as the presiding judge, and shall open a court hearing to consider the application for the arbitral award to be set aside.

Seven working days prior to the court hearing, the court shall transfer the file to the procuracy at the same level.
3. The court hearing shall take place in the presence of the parties to the dispute, their lawyers (if any), and a prosecutor of the procuracy at the same level. If one of the parties making the application requests the court to hear it in the absence of such party, or if a party which has been validly summonsed to attend the hearing fails to attend without a legitimate reason or leaves the hearing without the consent of the trial council, the trial council may continue to deal with the application for the arbitral award to be set aside.
4. In considering the application, the trial council shall not reconsider the contents of the dispute but shall only inspect the documents stipulated in article 51 of this Ordinance and compare the arbitral award with the provisions in article 54 of this Ordinance in order to issue its decision.

5. After the trial council has considered the application and enclosures, heard the evidence (if any) and the opinions of the persons summonsed and of the prosecutor, the trial council shall discuss the application and issue a decision on the basis of the majority principle.

A trial council shall have the right to issue a decision setting aside or not setting aside the award; and to stay consideration of the application if the applicant withdraws the application for the arbitral award to be set aside or fails to attend without a legitimate reason after having been summonsed to attend or leaves the hearing without the consent of the trial council.

Within a time-limit of fifteen (15) days from the date of issuance of a decision by the trial council, it shall forward a copy of the decision to the parties, to the arbitration centre or to the arbitration tribunal established by the parties, and to the procuracy at the same level.

6. If the trial council sets aside an award, the parties shall have the right to bring such dispute before a court for resolution, unless otherwise agreed by the parties.
7. If the trial council does not set aside the award, the arbitral award shall be enforced in accordance with the provisions in article 57 of this Ordinance.

Article 54 Grounds for setting aside arbitral award

A court shall issue a decision setting aside an arbitral award if the applicant proves that the arbitration tribunal issued the arbitral award in one of the following circumstances:

1. There was no arbitration agreement.
2. The arbitration agreement was invalid pursuant to article 10 of this Ordinance.
3. The composition of the arbitration tribunal was, or the arbitration proceedings were, inconsistent with the agreement of the parties pursuant to the provisions of this Ordinance.
4. The dispute was outside the jurisdiction of the arbitration tribunal. If only part of an arbitral award is outside the jurisdiction of the arbitration tribunal, that part shall be set aside.
5. The applicant proves that during the dispute resolution an arbitrator breached the obligations of an arbitrator stipulated in clause 2 of article 13 of this Ordinance.
6. The arbitral award is contrary to the public interest of the Socialist Republic of Vietnam.

Article 55 Appeal or protest against court decision

1. Within a time-limit of fifteen (15) days from the date of issuance of a decision by the court pursuant to article 53 of this Ordinance, the parties shall have the right

to appeal, and the procuracy at the same level or the people's supreme procuracy shall have the right to protest, against the decision of the court. The time-limit shall be fifteen (15) days for a protest by the procuracy at the same level, and thirty (30) days for a protest by the people's supreme procuracy, from the date of issuance of the decision of the court.

A notice of appeal or a decision raising a protest must specify the grounds of the appeal or protest and the relief sought¹. A notice of appeal or a decision raising a protest shall be forwarded to the court which issued the decision. After the court receives the notice of appeal, the court shall immediately notify the appellant to pay fees for the appeal.

2. If any party was not present at the hearing of the court of first instance, the time for lodging an appeal stipulated in clause 1 of this article shall be calculated as from the date of delivery of a copy of the decision to such party; if an appeal is lodged out of time due to an event of force majeure, the time-limit shall be calculated from the date on which the event of force majeure ends.

Within a time-limit of fifteen (15) days from the date of receipt by the court of a decision raising a protest or a notice of appeal, where the appellant has paid the fees for the appeal, the court which issued the decision shall transfer the file to the people's supreme court.

Article 56 Consideration of appeal or protest

1. Within a time-limit of thirty (30) days from the date of receipt of an appeal file or a decision raising a protest, the people's supreme court shall hold a hearing to consider and make a decision. If it is necessary to require the appellant or protestor to provide explanation of the particulars of appeal or protest, the time-limit for holding a hearing may be extended but shall not exceed sixty (60) days from the date of receipt of the appeal file or protest.

Seven (07) working days prior to the hearing, the court shall transfer the file to the procuracy at the same level.
2. The composition of the council to hear the appeal or protest shall consist of three (03) judges, one (01) of whom shall be appointed by the people's supreme court to act as presiding judge.

¹ Phillips Fox Note: The literal translation is "requests".

The court hearing shall take place in the presence of the parties to the dispute, their lawyers (if any), and a prosecutor of the procuracy at the same level.

If the respondent requests the court to hear the appeal in the absence of the respondent or, having been validly summonsed to attend the hearing, fails to attend without a legitimate reason or leaves the hearing without the consent of the trial council, the trial council may continue to hear the appeal.

After the trial council has considered the notice of appeal or the decision raising a protest and enclosures, heard the evidence (if any) and the opinions of the persons summonsed and of the prosecutor, the trial council shall discuss and issue a decision on the basis of the majority principle.

A trial council shall have the right to uphold, or to alter a part or the whole of, the decision of the court of first instance; or to stay the consideration of the appeal if the procuracy withdraws the decision raising the protest, or the applicant withdraws the appeal or fails to attend without a legitimate reason after having been validly summonsed to attend or leaves the hearing without the consent of the trial council.

The decision of the people's supreme court shall be final and enforceable."

27. How is the award enforced?

The Ordinance provides:

"Article 57 Enforcement of awards

1. If any party has failed to carry out voluntarily an arbitral award thirty (30) days after the date of expiry of the time-limit for its execution, and that same party has not applied for setting aside pursuant to article 50 of this Ordinance, the arbitral award creditor shall have the right to apply to the provincial judgment enforcement body in the area where the award debtor has its office or residence or assets to enforce the award.
2. If any party has applied to the court for the arbitral award to be set aside, the award shall be enforced as from the date of effectiveness of the decision of the court not to set aside the arbitral award.
3. The provisions of the law on enforcement of civil judgments shall apply to the order, procedures and time-limits for enforcement of arbitral awards."

28. How are foreign awards enforced?

Vietnam has signed the New York Convention with the usual reservation that it only applies to “commercial” matters. In the first attempted enforcement which was in a construction case the court held such a dispute was not commercial, taking a very narrow view of “commercial” as being limited to sales of goods and services as defined in the then Commercial Law. Recent domestic law has widened the definition of “commercial” so it is to be hoped that the much derided refusal to apply the New York Convention will not be repeated.

29. What are the grounds for objecting against enforcement?

See answer to article 26.

VIII. Interest And Costs

30. Is interest payable on the amount awarded?

The Ordinance and VIAC Rules are silent in relation to interest.

31. How are the costs of the arbitration determined?

VIAC Rules articles 32 and 33 reflecting the Ordinance provide:

“Article 32 The Arbitration Costs

The arbitration costs includes:

1. The remuneration of the arbitrator(s);
2. The Centre’s administrative fees;
3. The travel, accommodation and other expenses incurred by the Arbitral Tribunal and the secretary of the hearing;
4. Any reasonable and necessary expenses for experts and other assistance provided at the request of the Arbitral Tribunal.

Article 33 Advance Payment for Arbitration Costs

1. While submitting a Request for Arbitration, the Claimant shall pay in advance an amount sufficient to cover the costs referred to in paragraphs 1 and 2 of Article 32 of the Rules, unless the parties agree otherwise. This amount is calculated on the basis of the value in dispute in accordance with the Schedule of Arbitration Costs annexed to the Rules. If no value in dispute is included in the Request for Arbitration, the Centre shall fix the advance amount for arbitration costs. In all circumstances, the Request shall not be accepted for hearing, unless the full advance amount for costs is paid.
2. While submitting a Counterclaim, the Respondent shall pay in advance the full amount for arbitration costs, unless the parties agree otherwise. If the amount is not fully paid, the Counterclaim shall not be accepted for hearing.
3. The costs specified in paragraphs 3 and 4 of Article 32 of the Rules shall be paid upon the constitution of the Arbitral Tribunal. The Centre shall, after consultation with the Arbitral Tribunal, make an estimated amount to cover the costs that may arise during the arbitral proceedings and notify the parties thereof. Within fifteen (15) days from the date of receipt of such notification from the Centre, the Claimant shall pay the amount in full, unless the parties agree otherwise. When the amount is not fully paid, the Centre may direct the Arbitral Tribunal to suspend its work and set another time limit of no more than fifteen (15) days for the Claimant to make the payment. Upon the expiry of this time limit the Request for Arbitration shall be considered as withdrawn if the payment has not been fulfilled.
4. In the event of adjournment of a hearing that brings additional expenses, the Centre shall make an estimate of the additional amount to cover the costs for each adjournment and request the parties to pay in advance the amount in accordance with the preceding paragraphs.
5. The accounting and settlement of the costs shall be done by the Centre and notified to the parties and the Arbitral Tribunal before an Arbitral Award is made. If the paid advance amount is more than the actual costs and expenses, the unexpended balance shall be returned by the Centre to the parties. If the actual costs and expenses exceed the paid advance amount, the parties shall pay the excess amount.”

32. Who pays the costs of the arbitration?

VIAC Rules, article 34 reflecting the Ordinance provides:

“**Article 34** Decision as to the Arbitration Costs and Relevant Costs

Unless the parties agree otherwise, the Arbitral Tribunal shall, in its final Arbitral Award, decide which of the parties shall bear the arbitration costs and other relevant costs or in what proportion the costs shall be borne by the parties.”

IX. Mediation

33. Is there a National Mediation Centre?

No.

34. Is mediation compulsory?

No.

35. How is mediation conducted?

Not applicable.

36. What are the costs of mediation?

Not applicable.

X. Settlement

37. What are the opportunities for settlement?

VIAC Rules, article 24 reflecting the Ordinance provides:

“Article 24 Settlement of the Dispute

1. During the course of the arbitral proceedings, the parties may negotiate with each other to settle the dispute. If a settlement of the dispute is reached, the Arbitral Tribunal may, upon the request of the parties, make a Decision on Suspension of the Arbitral Proceedings. If the settlement is reached when the Arbitral Tribunal has not been constituted, the Centre’s President shall make such Decision instead.
2. The parties may request the Arbitral Tribunal to conduct an amiable settlement between them. If a settlement of the dispute is reached, the Arbitral Tribunal shall make a Minutes on Settlement and a Decision on Recognition of the Settlement. The Minutes on Settlement shall be signed by the parties and the arbitrator(s) of the Arbitral Tribunal. The Decision on Recognition of the Settlement shall be final and enforced in accordance with Article 31 of the Rules.”

38. How is any settlement agreement enforced?

As an award.

XI. The Role Of The Local Courts

39. What are the powers of the local courts?

See the answer to question 26 and article 33 of the Ordinance:

“Article 33 Right to request application of injunctive relief

If, during the course of dispute resolution by an arbitration tribunal, the lawful rights and interests of parties are infringed or are in danger of being directly infringed, the parties shall have the right to apply to the provincial court in the place where the arbitration tribunal accepted jurisdiction over the dispute to take one or a number of the following measures of injunctive relief:

1. To preserve evidence when it is being destroyed or is in danger of being destroyed;
2. To attach assets in dispute;
3. To prohibit disposal of assets in dispute;
4. To prohibit any change in the status quo of assets in dispute;
5. To attach and freeze assets in the location where they are held;
6. To freeze bank accounts.”

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Notes/Newsletters

Drafting An Effective Arbitration Clause and Arbitration Agreement

These are some of the points you should consider when drafting an arbitration clause and/or arbitration agreement:

1. Administered or ad hoc Arbitration?

An administered arbitration is one which is conducted under the auspices of an international arbitral institution, e.g. the Singapore International Arbitration Centre (“SIAC”), which, inter alia, sets the arbitrators’ fees, facilitates the exchange and dissemination of pleadings, enforces procedural deadlines and reviews the arbitral award. An ad hoc arbitration is one which is administered by the Tribunal. There is, of course, an additional cost incurred by appointing an administering institution, but this cost is usually recovered in the savings resulting from the efficient administration of the arbitration.

2. Method of Selection and Number of Arbitrators

Parties should decide on and specify in the arbitration clause or arbitration agreement how many arbitrators should sit on the arbitral tribunal (one or three). If parties fail to do so, then the applicable arbitration law will usually determine the number of arbitrators and the default appointing authority. The institutional rules (if agreed between the parties) may also provide for a default appointing authority (usually the institution’s Chairman) if the parties cannot agree on the appointment of the sole or third arbitrator.

The advantages of appointing a sole arbitrator are costs (because only one arbitrator’s fees are incurred), speed (because there is no consultation with co-arbitrators) and availability (because the availability of only one arbitrator is required). The disadvantages are that the arbitrator may not have the legal and/or technical expertise to address all the issues in dispute and, as such, may over-rely on expert evidence or submissions from Counsel.

A two-man Tribunal is not appropriate as the risks of deadlock are significant. If a two-man Tribunal is specified by the arbitration clause then the parties should appoint an Umpire at the earliest opportunity.

A three-man Tribunal is most common in international arbitrations, particularly if the amounts in dispute are significant or the issues are diverse or complex. A three-man Tribunal allows the parties to appoint arbitrators of various legal, technical and cultural experience who will deliver a sound award that can be enforced quickly. That said, the cost of three arbitrators can be high and should be weighed against the amounts in dispute. Also, accommodating the busy schedules of these arbitrators, Counsel and the parties can lead to some issues being determined at the final hearing rather than by way of a preliminary adjudication.

3. Place of the Arbitration

The place or “seat” of the arbitration determines the arbitration law governing the arbitration procedure. The UNCITRAL Model Law has been adopted by many countries in drafting arbitration legislation. Parties should select a place where the local courts will enforce the arbitration agreement and not unduly interfere with the arbitral process. Singapore, Hong Kong and London are “pro-arbitration” jurisdictions. Singapore is regarded as the cheapest of these venues in which to arbitrate given the lower hourly rates of legal counsel and infrastructure costs (hotels, meeting rooms, etc.).

4. Arbitration Rules

The parties should determine the arbitration rules which, in addition to the arbitration law of the seat of the arbitration, will govern the arbitration procedure. Arbitrations administered by an arbitration institution will often adopt the arbitration rules of that institution. Ad hoc arbitrations will often adopt the UNCITRAL Arbitration Rules.

5. Language of the Arbitration

The arbitration legislation of some countries provides that the arbitration should be conducted in the national language of that country unless the parties make express provision as to the language of the arbitration. Even in the absence of such legislation, express provision should be made in any event and particularly if parties and/or their respective witnesses speak different languages. Agreeing on a common language will resolve logistical and procedural difficulties and determine what, if any, translation services will be required at the hearing.

Sample Arbitration Clause

Most international arbitral institutions recommend sample dispute resolution clauses for parties to adopt which refer the dispute to arbitration. For example, the SIAC recommends that in drawing up international contracts, parties should include the arbitration clause at Appendix 1.

Sample Arbitration Agreement

Where a dispute has arisen which parties wish to resolve through arbitration, parties may consider using the sample arbitration agreement at Appendix 2.

Legal Advice

Please note that legal advice should be sought when adopting the sample arbitration agreement or clause such that the sample arbitration agreement or clause can be tailored to the particular facts at issue.

APPENDIX 1

SAMPLE ARBITRATION CLAUSE

“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (“SIAC Rules”) for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The Tribunal shall consist of _____ [State an odd number. Either state one, or state three] arbitrator(s) to be appointed by [e.g. the Chairman of the SIAC].

The language of the arbitration shall be _____.”¹

¹ Please see the SIAC’s website at <http://www.siac.org.sg> for more information

APPENDIX 2

SAMPLE ARBITRATION AGREEMENT

"This Agreement is made on [Date]

BETWEEN

[Name and address of Party A] ("Claimant") and all its predecessors, successors, and/or assigns (including without limitation any administrator, receiver, trustee, liquidator (provisional or otherwise) or equivalent appointees if relevant under insolvency law;

AND

[Name and address of Party B] ("Respondent") and all its predecessors, successors, and/or assigns (including without limitation any administrator, receiver, trustee, liquidator (provisional or otherwise) or equivalent appointees if relevant under insolvency law

(collectively, the "Parties" and each, a "Party").

WHEREAS

[State brief facts of the dispute]. The Parties wish to resolve the Dispute by arbitration.

IT IS AGREED as follows:

Procedural Rules of the Arbitration

1. The Arbitration will be conducted in accordance with [state which Rules, for example, the Arbitration Rules of the United Nations Commission on International Trade Law ("the UNCITRAL Rules")] save insofar as such rules are varied by the terms of this agreement.

Governing Law of the Arbitration

2. The governing law of the Arbitration will be [state which Governing Law, for example, the Singapore International Arbitration Act (Cap 143A)] as amended from time to time.

The Appointment of the Tribunal

3. The Tribunal shall comprise three arbitrators. Each party shall appoint one arbitrator who will then appoint the Chairman. If the arbitrators cannot agree the appointment of the Chairman, then the Chairman shall be appointed by [state name of appointing authority, for example, the Chairman of the Singapore International Arbitration Centre.]
4. In the event of the death or resignation of any arbitrator during the course of the panel proceedings, in default of agreement between the parties, a replacement arbitrator shall be appointed by [state name of appointing authority, for example, the Chairman of the Singapore International Arbitration Centre.]

The Seat of the Arbitration

5. The seat of the arbitration shall be [state name of country].

The Language of the Arbitration

6. The language of the arbitration shall be [state preferred language of the arbitration].

Confidentiality

7. Save as specifically provided in this Agreement, no information concerning this Agreement or the Arbitration may be unilaterally disclosed by any Party to a third party unless required to do so under any applicable law or by any competent governmental or statutory authority or pursuant to the rules or regulations of any relevant regulatory, administrative or supervisory body (including, without limitation, any relevant stock exchange or securities regulator).

Signed by [Name of Party A]
on this [Date]

Signed by [Name of Party B]
on this [Date]"